



**Wairagu v National Bank of Kenya (Environment & Land Case  
E007 of 2024) [2024] KEELC 6043 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6043 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E007 OF 2024  
BN OLAO, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**JAMES KURIA WAIRAGU ..... APPLICANT**

**AND**

**NATIONAL BANK OF KENYA ..... RESPONDENT**

**RULING**

1. In the case of Mrao Ltd -v- First American Bank Of Kenya Ltd & 2 Others C.a. Civil Appeal No 39 Of 2002 [2003 Eklr, 125] Kwach JA while considering an application by a Mortgagor for a temporary injunction to restrain a sale of mortgaged property stated the following:

“In recent times, a tendency has developed in the Superior Court of treating applications by a mortgagor for a temporary injunction to restrain a mortgage from exercising his statutory power of sale just like any application for injunction in an ordinary suit. The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury’s Laws Of England Vol 32 (4<sup>th</sup> Edition) paragraph 725”.

The Judge then went on to cite the said paragraph 75 which reads:

“When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”



In the case of Francis J.k. Ichatha –v- Housing Finance Company Of Kenya Ltd C.a. Civil Application [On NO 58 of 2005](#) [2005 eKLR], the Court of Appeal had this to say on the same issue:

“The Applicant recognized in the plaint that the dispute was of ‘mathematical nature’. Thus, this is truly a dispute on the accounts. The existence of such a dispute is not a valid ground for restraining the Respondent from exercising its statutory power of sale. See *Shah -v- Devji* 1965 E.a 91.”

In The Case Of Priscilla Krobought Grant -v- Kenya Commercial Finance Company Ltd & 20 Others C.a. Civil Appeal No 227 of 1995, the Court having cited several other cases including *Bharmal Kanji Shah & Another -v- Shah Debar Devji* 1965 Ea 91 As Well As Halsbury’s Laws Of England 4<sup>th</sup> Edition; went on to state the following:

“Finally, it will bear repetition, we think, if we were to state that a Court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”

This Court will be guided by the above precedents among others in determining the Notice of Motion by James Kuria Wairagu (the Applicant) dated 9<sup>th</sup> April 2024 and which is the subject of this ruling.

2. The Applicant moved to this Court vide a plaint dated 9<sup>th</sup> April 2024 in which he sought judgment against the National Bank Of Kenya (the Respondent) in the following terms:
  1. An order of injunction restraining the Respondent from auctioning, advertising for sale and/or in any way dealing with the Applicant’s property namely Bukhayo/Bugengi/3422, 3423 and 8316 until they advertise it at its current market value of Ksh.100 million and/or a joint valuation exercise is undertaken by a reputable valuer agreed upon by both parties and/or until both parties carry out their different valuation exercises by reputable valuers for determination by the Court.”
  2. The Applicant’s further claim in the alternative is for a declaratory order allowing the Applicant to sell the property to a third party at the current market value and pay the Respondents in full.
  3. Costs.
  4. Any other or further relief this Honourable Court deems fit and just to grant.
3. The basis of the Applicant’s suit is that he took various loan facilities from the Respondent which were later consolidated to secure a maximum of Kshs.26,300,000 on the security of the land parcels Bukhayo/Bugengi/3422, 3423 and 8316 (the suit properties) but later reneged on its undertaking to grant him another Local Purchase Order (L.P.O) and over-draft facilities yet he was credit worthy. This frustrated the Applicant and impeded his business and so he got a buyer who agreed to purchase the land parcels NO BUKHAYO/BUGENGI/3422 and 3423 at Kshs.100 million against the loan which then stood at Kshs.11,913,111.85 as at 7<sup>th</sup> July 2022. The Applicant undertook to have the entire Kshs.100 million deposited in his account with the Respondent who however failed to give an undertaking to the intended purchaser. By the time the Respondent gave the undertaking on 13<sup>th</sup> July 2022, the intended purchaser had left and invested elsewhere. The Respondent has now served him with a Notification of Sale dated 15<sup>th</sup> February 2023 which the Auctioneers have now scheduled for 12<sup>th</sup> April 2024 (the Applicant is currently enjoying an ex parte temporary order of injunction issued by this Court on 11<sup>th</sup> April 2024). That although the Applicant’s property is valued at over Kshs.100



million, the Respondent's Notification of sale indicates that it is to be sold at Kshs.25 million which is not only a gross undervaluation but will also financially frustrate and punish the Applicant and render him a pauper thus necessitating this suit.

4. Simultaneously with his plaint, the Applicant filed the aforesaid Notice of Motion which is founded under the provisions of Article 159 of *the Constitution*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Orders 41 and 51 of the Civil Procedure Rules. By that application, he seeks the following remedies:
  1. Spent
  2. Spent
  3. That this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent, it's agents, assignees, servants and/or anyone acting on their instructions or directions from attaching, auctioning and/or advertising for sale of the Applicant's property namely land parcels NO BUKHAYO/BUGENGI/3422, 3423 and 8316 pending the hearing and final determination of this suit.
  4. That costs of this application be provided for.
5. The application is premised on Article 159 of *the Constitution*, Sections 1, 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 41 Rule 1, 2, 3, 4 and 7 and Order 51 of the Civil Procedure Rules. It is grounded on the grounds set out therein and supported by the Applicant's affidavit dated 9<sup>th</sup> April 2024.
6. The gravamen of the application is that although the Applicant has been servicing the loan despite the challenges he is now facing, the Respondent who gave him a loan facility on the security of the suit property has notified him of the intention to sell the same. To avert the said sale, the Applicant looked for a buyer one Mr Hans Robert who offered to purchase the same at Kshs.100 million. The Respondent agreed to that arrangement but delayed in giving an undertaking to have the said sum deposited in the Applicant's account to offset the loan and by the time they did so, the intended purchaser had already left the country. The Respondent intends to auction the suit property at the paltry sum of Kshs.33 million being the open market value or Kshs.25,425,000 being the forced value as against the market value of Kshs.100 million yet the loan sum stands at Kshs.13,836,712.12. That if the orders sought are not granted, the Applicant will suffer irreparable loss. Further, that the Respondent is being bought by the Kenya Commercial Bank which in turn plans to sell it to a Nigerian Bank called Access Bank. Instead of the suit properties being auctioned at an undervalued and throw away price, he should be allowed to sell them to a third party and re-pay the loan with the Respondent.
7. The following documents are annexed to the application:
  1. Copy of a letter dated 7<sup>th</sup> Jul 2022 addressed to the Respondent by Dr Hans Robert expressing an interest to purchase the land parcels NO BUKHAYO/BUGENGI/3422 and 3423 at Kshs.100 million.
  2. Copy of a letter dated 7<sup>th</sup> July 2022 addressed to the Respondent by the Applicant informing it that he has found a purchaser for the land parcels NO BUKHAYO/BUGENGI/3422 and 3423.
  3. A letter dated 13<sup>th</sup> July 2022 addressed to Dr Hans Robert by the Respondent.
  4. Copy of 45 days Redemption Notice dated 5<sup>th</sup> February 2024 issued to the Applicant by Colinet Auctioneers.



5. Notification of sale dated 15<sup>th</sup> February 2024 and issued by Colinet Auctioneers.
6. Schedule of the suit properties.
7. Copy of article in the Business Daily to the effect that the Kenya Commercial Bank is in the process of selling the Respondent.
8. The application is opposed and Ezra Omari the Respondent's Regional Sales Executive has sworn a replying affidavit dated 2<sup>nd</sup> May 2024 in which he has deponed, inter alia, that the application is incompetent, scandalous, frivolous, vexatious, an abuse of the process of the Court and does not satisfy the conditions set out in the case of Giella –v- Cassman Brown & Co. Ltd 1973 E.A. 358. That the Applicant was granted banking facilities totaling Kshs.12,313,192 secured by various legal charges over the suit properties. The Applicant has remained in default of the monthly repayment which as at 2<sup>nd</sup> April 2019 stood in the sum of Kshs.776,220.19 and that notwithstanding a demand letter, the Applicant failed and neglected to settle the outstanding debt which as at 23<sup>rd</sup> August 2021 stood at Kshs.11,297,050.55 and continues to attract default interest. On 11<sup>th</sup> March 2021, a 90 days Statutory Notice was issued of the Respondent's intention to sell the suit properties by public auction on 14<sup>th</sup> June 2021. The Applicant however failed to redeem the suit properties and instead filed Busia Chief Magistrate's Court Civil Case No E97 of 2021 seeking an order of temporary injunction to stop the auction and stating that he had been un-able to service the loan because his business had been affected by the COVID-19 pandemic. His application was however dismissed by the Magistrate and he withdrew the suit on 8<sup>th</sup> November 2023.
9. That the current application filed upon revival of the recovery process is on the ground that the Respondent has failed to advance him over-draft facilities or give him another L.P.O. That the Respondent does not deal in L.P.Os and in any revert, the Applicant does not qualify for further over-draft facilities since he is already in default. The Respondent had nothing to do with the Applicant's failure to sell the suit properties to recover the outstanding debt since it's work was only to consent to the sale which it did vide the letter dated 13<sup>th</sup> July 2022 as requested by the Applicant. The Applicant is seeking the discretionary powers of this Honourable Court with un-clean hands by being dishonest regarding the reasons why he has not been able to settle his debt with the Respondent and the application should be declined. That the Respondent complied with the Provisions of the Land Act by conducting a pre-auction valuation report on the suit properties and it is erroneous for the Applicant to allege that the same are being sold at a throw away price and since the debt is admitted, the injunctive orders sought should not be granted.
10. The following documents are annexed to the replying affidavit:
  1. Copies of the legal charges on the suit properties.
  2. Statutory Notice dated 11<sup>th</sup> March 2021.
  3. Copy of plaint and Notice of Motion filed in Busia Chief Magistrate's Court Civil Case No E97 of 2021.
  4. Copy of the valuation report on the suit properties.
11. In response to the Respondent's replying affidavit, the Applicant filed a Supplementary Affidavit dated 4<sup>th</sup> June 2024 in which he deponed that his main contention is that the Respondent wants to auction the suit properties at throw away prices since the valuation report has devalued the suit properties at prices lower than what they were in 2017 yet land appreciates.



12. The application has been canvassed by way of written submissions. The same have been filed both by Mr Onsongo instructed by the firm of Wycliffe Obwoye Onsongo & Co. Advocates for the Applicant and by Mr Bogonko instructed by the firm of Bogonko, Otanga & Co. Advocates for the Respondent.
13. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
14. Before I delve into the merits or otherwise of the application, I must first consider whether or not it is infact res judicata. This is because, in his replying affidavit at paragraphs 9 and 11, the Respondent's Regional Sales Executive Ezra Omari has suggested that this application was infact canvassed and dismissed by the Magistrate's Court Busia in Civil Case NO E97 of 2021 which suit was then withdrawn before this suit was filed in this Court. The said Ezra Omari has deponed as follows in the aforementioned paragraphs:
  - 9) "That upon failure by the Applicant to redeem the security properties herein, the Respondent advertised the security properties for sale by public auction consequent upon which the Applicant filed Busia CC NO. E97 of 2021 together with an application seeking orders of temporary injunction to stop the auction then staged by the Bank. Attached hereto are copies of plaint and notice of motion dated 22/7/2021 marked – 3".
  - 11) "That the Applicant after his application for injunctive orders were finally dismissed by the trial Magistrate decided to withdraw the suit with half costs to the Respondent on 18/11/2023".

However, although the Respondent filed as among it's documents the plaint filed by the Applicant in Busia Chief Magistrate's Court Civil Case NO E97 of 2021 together with a Notice of Motion dated 22<sup>nd</sup> Jul 2021 seeking an order of temporary injunction similar to the application the subject of this ruling, no copy of ruling delivered by the trial magistrate in the subordinate Court has been annexed to the Replying affidavit.

15. The doctrine of res judicata is provided for under Section 7 of the Civil Procedure Rules in the following terms:
  - 7: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Res judicata applies both to suits and applications. This legal position was stated in the case of *Mburu Kinyua -v- Gachini Tuti* 1978 KLR 69 and also reiterated in the case of *Uhuru Highway Development Ltd -v- Central Bank Of Kenya & Others* 1996 Eklr C.a. *Civil Appeal No 36 of 1996* as follows:

"There must be an end to interlocutory applications as much as there ought to be an end to litigation."

Having averred that a similar application had been determined by the subordinate Court, the Respondent had a duty to prove that allegation and the easiest way of doing so was to avail the ruling in which that application was canvassed. That was not done. In the circumstances, this Court is not in a position to determine whether indeed the plea of res judicata has been properly invoked in these proceedings. I therefore decline to up-hold that plea. This Court must therefore consider the application.



16. The principles that guide a Court in considering an application for temporary injunction were settled in the case of *Giella -v- Cassman Brown & Company Ltd* (supra) where the Court stated that, firstly, the Applicant must show a prima facie case with a probability of success. Secondly, a temporary injunction will not normally be granted unless the Applicant can demonstrate that he will otherwise suffer irreparable loss that cannot otherwise be compensated by an award of damages. Thirdly, if in doubt, the Court will determine the application on the balance of convenience.
17. As to what amounts to a prima facie case, the Court defined it in the case of *Mrao Ltd -v- First American Bank Of Kenya Ltd* (supra) in the following terms:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is not in dispute that the Applicant is in arrears in the repayment of his debt to the Respondent. He cannot therefore satisfy the ground of prima facie case given those circumstances. A defaulting party cannot rely on his own default to persuade the Court to exercise its discretion in his favour. In the case of *Alghussein Establishment -v- Ection College* 1991 1 All E.R. 267, it was held that:

“A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligation.”

The Applicant’s grievance as is clear both from his plaint and his Notice of Motion is that the Respondent intends to sell the suit properties at an under-value. However, as is now clear from the case of *Mrao Ltd -v- First American Bank Ltd & Others* (supra).

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.” Emphasis mine.

As per paragraph 8 of the replying affidavit by Ezra Omari, the Applicant “has failed to and or neglected to redeem his secured outstanding debt which now stands at Kshs.11,297,050.55 as at 23/8/2021 and the same continues to attract default interest until the date of payment in full.” Although the Applicant filed a supplementary affidavit dated 4<sup>th</sup> June 2024, it is clear that his indebtedness to the Respondent in the stated sum is not in dispute. However, no offer has been made to pay the due sum or any portion thereof as stated in the case of *Mrao Ltd -v- First American Bank Ltd* (supra).

18. The Court of Appeal in the case of *Nguruman Ltd -v- Jan Bonde Nielsen & 2 Others C.a. Civil Appeal No 77 of 2012* [2014 eKLR] went on to add that in considering such an application:

“... the Court must further be satisfied that the injury the Respondent will suffer in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted however strong the Applicant’s claim may appear



at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

It is clear from the above that the Applicant being the party in default, he has been unable to surmount the hurdle of proving the existence of a prima facie case. In view of that, this Court need not consider the issues of irreparable injury or balance of convenience. And even if the Court were to consider the issue of irreparable injury, it has not been suggested that the Respondent is not capable of compensating him in the value of the suit properties including his own valuation of Kshs.100 million even if it is being sold. Certainly whatever institution intends to purchase the Respondent will bear the burden of meeting it’s obligations to third parties should it come to that.

19. The remedy sought by the Applicant is an equitable relief. He was required to approach the Court with clean hands. Having not met his part of the bargain, the Applicant is not deserving of the order of temporary injunction as was stated by the Court of Appeal in the case of David Kamau Gakuru -v- National Industrial Credit Bank Ltd C.a. Civil Appeal No 84 of 2001 [2002] eKLR.
20. Finally, in the case of Films Rover International Ltd -v- Cannon Films Sale Ltd 1986 3 All E.R 772 it was held that:

“A fundamental principle to be considered is that the Court should take whichever cause appears to carry the lower risk of injustice if it should turn out to have been wrong.”

Again, the Applicant is not only in debt which continues to attract interest but further, there is nothing to show that there are any prospects of him settling the same after the prospective purchaser of the suit properties left. It will be a great injustice to injunct the Respondent from exercising it’s power of sale in the circumstances of this case where it is clear that the Applicant is guilty of conduct which does not meet the approval of a Court of equity the remedy sought being an equitable one.

21. The up-shot of all the above is that having considered the Notice of Motion dated 9<sup>th</sup> August 2024, I hereby make the following disposal orders:
  1. The application is devoid of merit and is accordingly dismissed.
  2. Costs shall be in the cause.

**BOAZ N. OLAO**

**JUDGE**

**24<sup>TH</sup> SEPTEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2024.**

