Mbith v Cooperative Bank of Kenya Limited & another (Commercial Case E132 of 2024) [2025] KEHC 716 (KLR) (Commercial and Tax) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 716 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E132 OF 2024

BM MUSYOKI, J

JANUARY 31, 2025

BETWEEN

DANIEL MUNYAO MBITH ..... PLAINTIFF

AND

THE COOPERATIVE BANK OF KENYA LIMITED ..... 1ST DEFENDANT

GARTH DAY YEAR AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's application dated March 13, 2024 which prays that;
    1. Spent.
    2. Spent.
    3. Spent.
    4. Pending hearing and determination of this suit, a temporary order of injunction do issue restraining the 1st and 2nd defendants/respondents whether by themselves, their employees, servants and all such persons acting on their behalf from selling whether by public auction or private treaty, transferring, letting, charging, alienating or otherwise howsoever interfering with the plaintiff's/applicant's land parcel known as LR 74/321, Kivuli court, off Kiambu Road, Nairobi County measuring about 0.2 Ha or 0.494 acres.
    5. The costs of this application be provided for.
2. The application is supported by the plaintiff's affidavit sworn on 13th March 2024. It is deponed that the plaintiff is the registered owner of LR 74/321 (hereinafter referred to as 'the suit property'). He stated that on or about 2017, he applied and was advanced loan by the 1st defendant which was secured

by a charge over the suit property. The plaintiff states further that, he started and continued paying the installments of the loan as agreed but subsequently fell into financial challenges and as a result defaulted in paying the loan. Matters were not helped by the breakout of the Covid-19 pandemic. He admits that he has been unable to repay the loan and as a result the 1st defendant served him with a statutory demand as well as the 45 days redemption notice.

3. The plaintiff has averred further that the 1st defendant has instructed the 2nd defendant to advertise and sell the suit property and the intended sale was slated to be held on 20th March 2024. The record shows that the intended sale was stopped by an order of this court issued on 18th March 2024. He now pleads with the court for an order of injunction to allow him sell the suit property by private treaty and use the proceeds to repay the loan arguing that he has identified a willing buyer who is to buy the property at the market value. He adds that if the property is sold by public auction, he stands to suffer irreparable damages as it is likely to be sold at its forced sale value and still leave him in debt yet it is an asset he had acquired with his life savings.

4. The 1st defendant has opposed the application through a replying affidavit sworn by Duncan Matisero on 4th April 2024. Duncan who describes himself as the legal manager at the 1st defendant avers that on 5th March 2013, the plaintiff applied and was granted mortgage facility by the 1st defendant which was secured by a charge over the suit property. A further facility of Kshs 2,401,000.00 was advanced to the plaintiff which was secured by a further charge on the suit property vide charge instrument dated 27th November 2013. The plaintiff made sporadic payments and had by 4th April 2024 accumulated arrears of Kshs 25,643,599.17. The bank had complied with the statutory requirements for realisation of the suit property which the plaintiff had willingly charged to the 1st defendant. The deponent avers that the plaintiff has failed to demonstrate any efforts he had made to dispose the property by private treaty. The 1st defendant has exhibited the charge and further charge instruments, the letters of offer, plaintiff's statement of account, the statutory demand notice, notice of redemption and notification of sale and valuation report dated 25-02-2024. The deponent adds that the plaintiff has not paid any installment since 2020 and as such, the 1st defendant cannot be prevented from exercising its statutory power of sale.

5. The application was disposed of by way of written submissions. I have read the application, its supporting affidavit, the replying affidavit, the plaintiff's submissions dated 4-011-2024 and the 1st defendant's submissions dated 29-10-2024. This is an application for temporary injunction pending hearing and determination of the suit and in order to succeed in getting the orders sought, the plaintiff must establish that he has a prima fascie case with a probability of success and that unless the application is granted, he is likely to suffer loss which cannot be adequately compensated by an award of damages. The court will have to be convinced that these two elements exist before it considers whether or not to grant the order of injunction and if it finds itself in a middle ground where it is in doubt, the court will consider the application on the basis of balance of convenience.

6. The plaintiff does not deny that he obtained a loan from the 1st defendant which he secured by charging his property and that he has defaulted in the payments. He has not stated how much he has so far paid neither has he complained that the statement of account exhibited by the 1st defendant as exhibit 'DM-6' is not reflective of the true status of the loan. The plaintiff has also admitted that he was served with a statutory demand, redemption notice and a statutory notice of sale. In view of these admissions, it is indisputable that the 1st defendant's right to exercise its statutory power of sale has crystalised.

7. The only contention by the plaintiff is that the properly is likely to be sold at its forced sale value and as a result he will be subjected to loss as it will still be open to the 1st defendant to demand more from him yet he would have lost is life savings. It is my opinion that for a party to establish a prima fascie

case, there must be a demonstration of a violation of a recognizable right of the plaintiff or a breach of the law or contractual obligation by the defendants. In this case, the plaintiff has not shown any contractual obligation which the defendants have breached. I am also at pains to identify any violation of the plaintiff's right.

8. Going by the averments of the parties, the 1st defendant complied with all statutory obligations and processes as provided for in Sections 90 to 96 of the *Lands Act*. Where a party charges their property, they enter into a binding contract where they agree that, in the event they default in payment of the loan, the chargee would be at liberty to exercise its statutory power of sale within the confines of the law and in that regard, they will be surrendering their proprietary rights over the charged property.

9. The plaintiff has not exhibited the charge and the further charge but has not denied the copies exhibited by the 1st defendant as its annexures DM-2 and DM-3. In fact, in his averments, the plaintiff has confirmed having charged the suit property for Kshs 20,000,000.00. The remedies of a chargee upon default by the chargor are provided for in Section 90 of the *Lands Act* and one of the remedies is the right is to sale the charged property under Section 90(3)(e). The defendant has deponed that the plaintiff has been in default since 2020. I have looked at the statement of account produced by the 1st defendant which the plaintiff has not challenged. It shows that the last recovery of the loan was on 11-07-2023 for Kshs 494,996.09 at which time the loan stood at Kshs 23.026,555.50. Shortly before then, it is shown by a notice exhibited as annexure DM-6 that as at 30-05-2023, the plaintiff was in arrears of Kshs 3,549,245.89. It is notable that the monthly repayment installment was Kshs 263,952.94. Simple calculation would show that if no payments were done after 11-07-2023 to date, the arrears are enormous. The plaintiff has not given this court any breakdown of payments. In any event, he does not deny being in arrears neither does he challenge any of the many notices given by the 1st defendant.

10. In view of the above, it is clear to this court that the plaintiff has not approached the seat of justice with clean hands. It is trite that whoever comes to equity must not only come with clean hands but must also do equity. It is my finding that the plaintiff has fallen short of the two principles of equity. The plaintiff has not shown willingness to resume payments of the loan safe for his allegations that he has identified a buyer for the property willing to buy the property at its market value. I agree with the 1st defendant that there is no demonstration that such efforts have been initiated. The general statement that the plaintiff has identified a buyer is not enough to show that he had made any efforts to sell the property.

11. The plaintiff has also claimed that the property is at the risk of being sold at value lower than its market and true value. The law recognises that sale of property under the statutory power of sale may fetch price lower than the market value and that is why Section 97(1) of the *Lands Act* puts an obligation on the chargee to exercise duty of care to the chargors and guarantors to obtain the best price reasonably obtainable at the time of sale. The 1st defendant has exhibited a valuation report which shows that the property has a forced value of at Kshs 31,800,000.00. The plaintiff has not challenged this valuation report and has not exhibited a different version of valuation of the property. The fact that the chargee may disposes the suit property below its current market value is not a reason to justify issuing of an order of injunction.

12. Other than the prayer for permanent injunction, the plaintiff has in his plaint asked this court to order that the property be valued by an independent valuer to ascertain its current market value and that he be allowed to sell the property under private treaty to offset the loan balances, arrears and interest. The plaintiff is at liberty to instruct a valuer of his choice and use the report to challenge the valuation by the 1st defendant. This however, in my opinion does not justify granting of orders especially going by the conduct of the plaintiff in relation to repayments of the loan.

13. All the above leads me to conclude that the plaintiff has failed to demonstrate that he has a prima fascie case with a probability of success. This alone is enough for this court to disallow the application. The Court of Appeal held in *Nguruman Limited v Jan Bonde Nielsen, Herman Philius Steyn Also known as Hermannus Phillipus Steyn & Hedda Steyn* (2014) KECA 606 (KLR) that failure to establish a prima fascie case would be enough ground for the court to deny an order of injunction. The Court held that;

> " If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, 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. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

14. I would have ended this ruling there but just in case I am wrong on the issue of prima fascie case, I am not persuaded that the plaintiff is likely to suffer loss which is not capable of being adequately compensated by an award of damages. The suit property has been valued and the valuation report is not sufficiently contested. The remedy which would be available to the plaintiff in the event the property is found to have been wrongly sold is compensation to the tune of the value of the property. The plaintiff has not shown that the 1st defendant is not capable of paying the damages which may be awarded to him. I take judicial notice that the 1st defendant is a sound, reputable and liquid bank of good standing. The 1st defendant is in my view in a position to compensate the plaintiff in the event he is successful after full hearing of this case.

15. I am in agreement with observation by Honourable Justice J. Mativo (as he then was) in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd, Chairman Verification Committee for Gathuthi Tea Factory Directors Elected & Chairman, Dispute Resolution Committee for Gathuthi Tea Factory Ltd* (2016) KEHC 7263 (KLR) thus;

> " In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured."

16. Having found that the plaintiff has failed to establish the first two conditions for grant of orders of injunction which should run conjunctively, I do not have to consider the limb of balance of convenience.

17. The upshot of the above is that, I find no merit in the plaintiff's application dated March 13, 2024 and the same is hereby dismissed with costs to the 1st defendant.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Haggai for Mr. Lusiola for the plaintiff and Miss Muraguri for the plaintiff.