Stansha Limited v Cooperative Bank of Kenya Limited & another (Commercial Case E399 of 2024) [2025] KEHC 748 (KLR) (Commercial and Tax) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E399 OF 2024

BM MUSYOKI, J

JANUARY 31, 2025

BETWEEN

STANSHA LIMITED ..... PLAINTIFF

AND

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

WESTMINSTER COMMERCIAL AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. By a notice of motion dated 19-07-2024 which was contemporaneously filed with this suit, the plaintiff seeks the following orders against the defendants

    a. Spent.

    b. Spent.

    c. Spent.

    d. This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd defendants/respondents herein by themselves, their servants, agents, proxies and/or persons exercising authority from them from selling or in any way disposing and/or dealing with property LR No. 3734/635 (converted to Nairobi/Block 13/250) pending hearing and determination of this suit.

    e. Costs of this application be provided for.

2. The motion is supported by affidavit of the plaintiff's director one Sharon Gathoni sworn on 19th July 2024. The deponent has averred in the said affidavit that the plaintiff is the registered owner of the property known as LR number 3734/635 (converted to Nairobi/Block 13/250) (hereinafter

referred to as 'the suit property') which it charged to the 1st defendant in return for a performance bond and advance payment guarantee of Kshs 70,938,095.70 in favour of Athi Water Works Development Agency (AWWDA). She adds that AWWDA unilaterally and without any legal justification terminated the contract between it and the plaintiff which was the subject of the performance bond and advance payment guarantee and proceeded to recall the said bond and guarantee.

3. According to the plaintiff, it instituted High Court civil case no E420 of 2019 against AWWDA in which the court sent the parties for arbitration and the arbitration was finalized in its favour where the plaintiff was awarded Kshs 410,410,971.00 plus costs and interest. The plaintiff avers that it secured orders of status quo in civil suit number E420 of 2019 which were served upon AWWDA and the 1st defendant herein despite of which, AWWDA instructed the 1st defendant to effect the performance bond and advance payment guarantee with the result that the 1st defendant paid AWWDA a sum of Kshs 212,814,286.70 which translated to a liability on the plaintiff and crippled it financially.

4. It is the plaintiff's case that after the recall of the guarantee and bond, it held several meetings with the 1st defendant to discuss payments but the 1st defendant frustrated the efforts of settlement by charging interest on the amount it paid AWWDA. Nevertheless, the meetings yielded into an understanding which was reduced into writing in a letter dated 19-07-2024 whose terms the plaintiff complied with. It avers that in the said understanding, the parties were to await conclusion of adoption of arbitration award after the plaintiff paid Kshs 500,000.00 by close of business on 19-07-2024 which it had done.

5. The plaintiff has alleged further that it came to know of the advertisement of the sale of the suit property on 16th July 2024 when they were holding a meeting with the defendant. The deponent adds that when the plaintiff later approached the 1st defendant, it refused to grant it audience. The plaintiff avers that none of its directors was ever served with a statutory notice as required under the Lands Act and the *Auctioneers Act*. It further avers that the suit property is matrimonial home of one of its directors and unless the orders prayed in the application are granted, it stands to suffer irreparable loss that cannot be compensated by way of damages.

6. The application has been opposed by the 1st defendant whose legal officer one Kennedy Odhiambo Otiato swore a replying affidavit dated 26th July 2024. According to the deponent of the said affidavit, the application is not merited as the 1st defendant has complied with all statutory requirements under the *Land Act*. He has given the chronology of their actions from the time the performance bond and guarantee were issued until this suit was filed.

7. The said legal officer tells the court that the plaintiff approached the 1st defendant for a performance bond (hereinafter referred to as 'the bond') of Kshs 70,900,000.00, mortgage facility of Kshs 20,000,000.00, advance payment guarantee (hereinafter referred to as 'the guarantee') of Kshs 141,800,000.00, asset finance of Kshs 37,000,000.00 and the insurance premium finance of Kshs 1,000,000.00. All these combined facilities were secured by personal guarantee of the plaintiff's directors, all income from the plaintiff's contract with AWWDA and first charge on the suit property. On strength of this, the 1st defendant issued the bond and the guarantee in favour of AWWDA. A charge over the suit property was thus registered as one of the securities for the above facilities.

8. Subsequently, AWWDA by a letter dated 13th November 2019, terminated the contract between it and the plaintiff and notified the 1st defendant of its intention to recall the bond and the guarantee. On 27th December 2019 the 1st defendant was served with a demand notice recalling the bond and guarantee and as such it had to comply by settling the same at Kshs 212,814,286.70 which the 1st defendant then debited against the plaintiff's account.

9. Following the settlement of the bond and guarantee, the plaintiff and the1st defendant entered into an addendum arrangements as contained in the 1st defendant's letter dated 19th March 2020, in which the plaintiff acknowledged the settlement of the called up guarantee and bond and the parties agreed on terms of settlement notably that the called up guarantee and bond sum paid to AWWDA and overdrawn on the plaintiff's account would be converted to a term loan of approximately 218,000,000.00 with interest. According to the deponent, the plaintiff agreed and committed to this arrangement and undertook to pay vide its letter dated 9th June 2020.

10. Parties continued to engage with promises of settling the amount which culminated to another agreement vide a letter of offer dated 22nd September 2020 where the plaintiff's liabilities were restructured on terms notably with legal charge over the suit property continuing to exist among other securities. Despite the restructuring, the plaintiff fell into a habit of defaulting which led to accepted arrears. According to this deponent, as at 24th July 2024, the plaintiff's liability to the bank was Kshs 475,805,259.00.

11. It is stated further that the plaintiff was issued with a three months' notice to settle all accrued arrears vide letter dated 17th August 2023 which was followed by a valuation exercise by the 1st defendant's appointed valuers. The plaintiff did not safeguard his right of redemption within the three months period following which the 1st defendant issued a statutory forty days' notice pursuant to Section 96 of the Lands Act. This notice prompted the plaintiff to respond to the 1st defendant through letters in which it acknowledged the debt and receipt of the notices. The plaintiff did not pay even after this acknowledgement which made the 1st defendant to instruct the 2nd defendant to realise the security by giving forty-five days' redemption notice dated 15th May 2024. This latter notice was respondent to by another promise by the plaintiff vide its letter dated 20th May 2024.

12. It is contested that the plaintiff's letter dated 19th July 2024 fell short of the agreement between the parties and the 1st defendant's expectations as per its letter dated 12th June 2024. Because of this, the 1st defendant proceeded to advertise the suit property for sale. The deponent finally denies that the 1st defendant was served with any court order in the Hccc number E420 of 2019 to which it was not a party.

13. The conditions on which an application for a temporary injunction may be granted are well settled. The plaintiff must establish that they have a prima fascie case with a probability of success and in addition convince the court that unless the application is granted, they stand to suffer loss which cannot be compensated by an award of damages. If the court is in doubt on the first two conditions, it will decide the application on a balance of convenience. The first two conditions must be established conjunctively meaning that if the applicant falls short of one, the application will fail unless the court find itself in doubt.

14. The parties filed their submissions which I have carefully gone through. In its submissions dated 14th October 2024, the plaintiff argues that it has prima fascie case with probability of success because: the 1st defendant did not adhere to the mandatory statutory procedure in the exercise of its power of sale; the recalling of the bond and guarantee was against court order in Hccc number E420 of 2024 and therefore the accrual of the loan was based on illegality; there is an application for adoption of an arbitration award between the plaintiff and AWWDA the same being this court's arbitration cause number E004 of 2024 and the 1st defendant should have waited for its determination before seeking to exercise its statutory power of sale and that the valuation of the property is wrong.

15. The 1st defendant has submitted that it complied with all statutory requirements, obligations and procedures before advertising the suit property for sale. It also argues that the settlement of the bond

and guarantee in favour of AWWDA was lawful and the correspondences and notices produced are enough proof that the plaintiff owed the amount it sought to recover through realisation of the charged security. It is the 1st defendant's submissions that the plaintiff has not made out a prima fascie case with a probability of success.

16. It is not disputed that the plaintiff offered the suit property as security for the bond and guarantee and other facilities advanced to it. The plaintiff has argued that it was not served with statutory demand as the address used in sending the same which was P.o. Box 45096-00100 Nairobi belonged to its former director Stanley Muthama whereas its current CR12 shows its address as 63XX5-00200. The charge documents and the several letters of offer have P.o. Box 45XX6-00100 Nairobi as the plaintiff's address. There is no evidence to show that the plaintiff informed the 1st defendant of change of its address.

17. The plaintiff has not denied and it has actually deponed that it has been having meetings with the 1st defendant after it started falling into default. There are letters exchanged between the plaintiff and the defendant which show that the plaintiff engaged the 1st defendant in efforts to have the liability restructured. Some of these correspondences are dated as late as May and June 2024. For instance, there is one dated 20th May 2024 authored by the plaintiff which refers to a meeting between the parties. At the last paragraph of page two of the said letter, the plaintiff acknowledges that it is aware of its obligations and default and commits to rectify. In the plaintiff's own affidavit, there are annexed letters from the 1st defendant making reference to statutory demand and redemption notices served earlier. Specifically, there is a letter from the 1st defendant dated 28-11-2024 which speak and makes reference to the notice of redemption and reminds the plaintiff that it had 34 days remaining. I can say the same for all other correspondences between the parties. If there were no statutory notices served upon the plaintiff, why was it so desperate in seeking to have demands on payments delayed in anticipation of the outcome of arbitration clause number E004 of 2024?

18. It is my inevitable finding that the plaintiff was served with redemption notice, statutory notice and notification of sale as provided under Section 96 of the Lands Act. The 1st defendant has given clear chronology of how the notices were served upon the plaintiff which I find have not been sufficiently contested or challenged. Where a chargee has not complied with statutory requirements for it to exercise its statutory power of sale, the courts would not hesitate to grant an application for injunction. In Said Almed vs. Mannasseh Benga & Another [2019] eKLR, the court held that:

> " Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it.'

The opposite of the above is also applicable. That is, where the chargee has complied with the statutory dictates in its efforts to exercise its statutory power of sale, the courts should be hesitant in granting orders of injunction. In this case, I am convinced that the 1st defendant had complied with the statutory requirements.

19. The other argument put forth by the plaintiff in attempt to establish a prima fascie case is the allegations that the settlement of the bond and guarantee which gave rise to the liability of Kshs 212,814,286.70 was done unlawfully and against and in violation of the court order in Hccc number E420 of 2019. I have seen the orders the plaintiff has exhibited which directed that the status quo be maintained. I found the plaintiff being economical with the information regarding the said case as the court would not understand what the status quo was since no pleadings or more informative document were

exhibited. The defendant has also not helped the court as it said very little about the case. Due to this, I decided to cross-check the status and details of the case from the court's case tracking system.

20. I have noted from the court system that the said Hccc number E420 of 2019 was dismissed by Honourable Justice D.S. Majanja (may his soul rest in peace) on 17-05-2023. In dismissing it, the Honourable Judge stated that the matter was filed as an application for interim measure of protection pending arbitration and since the plaintiff had not made or taken any further proceedings in it, the suit had no useful purpose. I also noted that the plaintiff at some point in that suit made an application to cite senior officers of the defendant herein and AWWDA for contempt of court arguing that the bond and guarantee were settled in violation of a court order which is the same argument it is advancing in this matter. In dismissing application, the Judge held as follows;

> " The order of status quo did not mention the Performance Bond and Guarantee and even if the status quo was in relation to Performance Bond and Guarantee, they lapsed on 26th December 2019. The letter calling the Performance Bond and Guarantee was issued and delivered by the defendant on 27th December 2019 after the order had lapsed. It was the only act the defendant was required to do in order to liquidate the Guarantee and Performance Bond hence the defendant could not be in contempt of the order of status quo which had already lapsed.'

21. In view of the above finding in the said case, the plaintiff's argument that the guarantee and bond were recalled and settled in violation of a court order is moot and cannot form the basis of a prima facsie case.

22. The plaintiff claims that arbitration cause number E004 of 2024 had a bearing on its settlement of the liabilities and was urging that the suit property should not be sold until the cause was completed. Again, I have made cross reference to this cause and established that in a ruling dated 18-11-2024, the Honourable Justice A.A. Visram adopted the arbitration award and closed the court file. Similarly, that hinge the plaintiff wants to keep holding his fortunes to establish a prima fascie case is broken and unrepairable.

23. In my final analysis on this point, it is my considered view that the plaintiff has failed to establish a prima fascie case with a probability of success. This is more informed by the fact that one of the prayers in the plaint seeks a declaration that the 1st defendant ought to wait for the determination of HCCOMMAERB number E004 of 2024 which I have already stated has been finalised and file closed.

24. I have stated earlier that the condition for prima fascie case must move conjunctively with that of irreparable damages. Now that the plaintiff has failed to establish a prima fascie case, even if I were to find that the plaintiff stands to suffer loss which cannot be compensated by an award of damages, this application would still fail. In Nguruman Limited v Jan Bonde Nielsen, Herman Philipus Steyn Also Known as Hermannus Phillipus Steyn & Hedda Steyn (2014) KECA 606 (KLR), the Court of Appeal held as follows;

> " 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.'

25. That notwithstanding, I have after going through the affidavits been unable to see what irreparable damages the plaintiff would stand to suffer. The only claim on this limb is that the property is a matrimonial home of the deponent of the supporting affidavit who is a director of the plaintiff. It has been held that the fact that a charged property is a matrimonial home of the chargor is not a ground to grant an injunction. In Joseph Gitahi Gachau & Beatrice Wangechi Gitahi v Pioneer Holdings (A) Limited, Pioneer Assurance Co. Ltd & Evelyn Waleghwa Ng'ang'a (2009) KECA 201 (KLR), it was held that;

> " But we would like to point out that couples such as the one now before us must realise that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all and sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however great, per se, would operate against the exercise of statutory power of sale by the mortgagee.'

26. I do not think that I have to consider the balance of convenience. This condition is relevant only where the court is in doubt about the first two principles. I am not in doubt on whether or not there is a prima fascie case with a probability of success and I have already held that I am not convinced that the plaintiff will suffer loss which cannot be compensated by an award of damages. The debt is admitted and the only remedy thereto is settlement of the same. There cannot be irreparable damages arising from one settling due and true debts.

27. In conclusion, I find no merit in the application dated 19th July 2024 and I proceed to dismiss it 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. Momanyi for the plaintiff and Miss Muraguri for the 1st defendant.