



Afrikana Holdings Limited & another v Diamond Trust Bank & another (Civil Suit E329 of 2024) [2025] KEHC 458 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E329 OF 2024
JWW MONG'ARE, J
JANUARY 27, 2025**

BETWEEN

AFRIKANA HOLDINGS LIMITED 1ST PLAINTIFF

RICHARD MWONGELA NDUBAI 2ND PLAINTIFF

AND

DIAMOND TRUST BANK 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

RULING

1. What is before this Honourable Court is a Notice of Motion Application dated 7th June 2024 by the Plaintiffs brought under Certificate of Urgency and filed under Section 3A of the *Civil Procedure Act* and order 40 (1),(a), 4 of the Civil Procedure Rules seeking the following orders:-
 1. Spent
 2. Spent
 3. Spent
 4. That a temporary injunction be issued to restrain the Respondents either by themselves their agents, servants, employees, representatives and assigns from selling the subject property being L.R. Noonkopir Trading Centre/378, Kitengela.
 5. Spent
 6. THAT costs of this Application be provided for.



7. That the Honourable Court be pleased to grant any other orders it deems fit in the circumstances.
2. The Application is supported by the grounds set out on its face and the supporting affidavit of RICHARD MWONGELA NDUBAI sworn on 7th June 2024. It is opposed and the Respondents have filed a replying affidavit sworn on 18th July 202 by FAITH NDONGA, the Legal Manager in the Debt Recovery Department of the 1st Respondent.
3. Pursuant to directions issued by this court, the parties herein filed their written submissions which I have considered.

Analysis and Determination:-

4. It is the Plaintiffs case that they, on 3rd June 2024, learned of the intended auction of the suit property through a newspaper advert carried in the Daily Nation Newspaper of their property being L.R. Noonkopir Trading Centre/378, Kitengela belonging to the 1st Plaintiff and also known as Sandalwood Hotel and Resorts. The Plaintiffs argue that at all material time they have never obtained a loan from the Defendants and neither have they ever consented to a charge of the said property to secure any loans from the 1st Defendant.
5. They therefore argue that the intended sale of their property is illegal and therefore irregular. The Plaintiffs argue that the property held by 1st Defendant itself was irregularly charged by a pseudo company that was illegally created using its names but with a different company registration number and upon discovery it protested to the Companies Registry for its correction. The Plaintiff further argues that the intended sale by public auction will greatly prejudice it as it never benefitted nor sought to be granted the loan by the 1st Defendant.
6. The Defendant in opposing the application argues that the 1st Plaintiff was advanced a loan for Kshs. 30,000,000/= sometimes in 2009 and offered its title being Noonkopir Trading Centre/378 and that a first legal charge over the said property was registered to secure the borrowing on 25th February 2010. Subsequently and at the behest of the borrower the said facilities were renewed and or extended on several instance between 2011 and 2021. The Defendant argues that the 1st Plaintiff furnished the Bank with the requisite Board resolutions authorizing the borrower and the Bank went ahead to provide the financial facilities. Between the time the loan was advanced in 2010 upto the year 2023 the loan facilities were properly serviced.
7. The Defendant argues that when the facility fell into arrears it proceeded to issue the requisite statutory demands in accordance with the law and the first of such notices was issued on 24th August 2023 demanding the repayment of arrears of Kshs. 9,092,191.42/=. To date the unpaid loan stands at Kshs. 15,853,004/= as the borrower has refused and or failed to regularize the account. It is the position of the Defendants that the 1st Plaintiff is a stranger to these proceedings as he is neither the borrower nor registered as owner of the suit property. The Defendant urges the court to find that the Plaintiffs have approached the court for an equitable relief with unclean hands. The Defendant prayed to be allowed to exercise its statutory power of sale under the charge created over the suit property.
8. Order 40 Rule 1 of the Civil Procedure Rules provides as follows:-

“ 1. Cases in which temporary injunction may be granted [Order 40, rule 1]

Where in any suit it is proved by affidavit or otherwise—(a)that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by



any party to the suit, or wrongfully sold in execution of a decree; or(b)that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

9. The premises upon which a court must consider before granting an order off injunction are well settled in law by the decision in the Locus Classica case of Giella Vs. Cassman Brown & Co., Ltd. [1973] E.A. 358 where a party seeking for injunctive relief ought to satisfy the court that it is deserving of the orders sought by demonstrating that it has a prima facie case with a probability of success and that it will suffer irreparable injury in which it would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience.
10. These conditions are to be applied as separate, distinct and as logical hurdles which the Plaintiff is expected to surmount sequentially which means that if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration by the court. (see *Nguruman Limited v Jan Bonde Nielsen& 2 others* [2013] KECA 347 (KLR).
11. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) explained as follows:-

“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.”
12. A closer look at the pleadings reveal that the Plaintiffs in bringing this case and obtaining exparte orders intimidated to the court there was a company registered at the company’s registry with similar names that used the title to obtain the loan from the Defendants to which they were not parties. The Plaintiffs argue that they never benefited from any loan from the Defendant and that its is a stranger to the demands by the 1st Defendant.
13. I have carefully considered this allegation which seems to suggest that there was a criminal element in the processing of this loan for which the suit property was used to secure. Fraud is a serious crime that cannot be taken lightly. Fraud is a serious offence which must be taken with the seriousness it deserves. In defining what fraud The Black’s Law Dictionary, 2nd Ed. states:-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.”
14. It is my understanding that indeed if the Plaintiff’s title was fraudulently charged without its consent some criminal investigations would have been initiated and the culprits charged with criminal charges. The Plaintiffs allege fraud but I have found no evidence that there was any involvement of report done



to the Directorate of Criminal investigation to establish how the title was charged and investigate the element of fraudulent use of the title to secure the loan.

15. I have also not seen demonstrated by evidence what the Plaintiffs did from between 2010 and 2024 when the property was charged to the Bank to recover their title.
16. The flip side is that what can be gleaned from the response filed by the Bank is that the charge over the subject property was properly created and registered and that the loan was properly serviced over the period and revised and renewed regularly with applications by the borrower until 2023 when default set in. I see from the attached documents that the Bank issued the proper statutory notices as envisioned by law and did indeed give the borrowers adequate time to regularize the loan before resulting to exercising its power of sale under the charge.
17. I have therefore carefully considered the arguments by the parties and I am not persuaded that the Plaintiffs have set out a prima facie case as envisioned by the Mrao case(supra) to warrant this court interfere with the Banks statutory power of sale and restrain it from proceeding to recover its loan. The court of appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [2013] KECA 347 (KLR) (supra) has stated that once the court finds that a prima facie case has not been established, a court need not consider the two elements necessary for a grant an order of injunction as set out by the Giella case(supra). These elements are to be considered sequentially. Having found that the Plaintiffs have not established a prima facie case, the court will consider whether or not damages would be a sufficient remedy for the Plaintiffs claim or in whose favour the balance of probability tilts. The Application therefore fails.
18. The upshot therefore of my findings is that the Plaintiffs application dated 7th June 2024 is without merit. The same is hereby dismissed with costs to the Defendant and the exparte orders issued by the court are vacated forthwith. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Atukunda for the Plaintiff/Applicant

Ms. Kavata holding brief for Mr. Janjo for the Defendant/Respondent.

Amos- Court Assistant

