



**Jabavu Village Limited v Credit Bank Limited & another (Commercial Case E427 of 2023)
[2025] KEHC 355 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E427 OF 2023
A MABEYA, J
JANUARY 27, 2025**

BETWEEN

JABAVU VILLAGE LIMITED PLAINTIFF

AND

CREDIT BANK LIMITED & ANOTHER DEFENDANT

RULING

1. The defendant's application dated 19/9/2024 sought to set aside the orders of injunction issued on 29/7/2024. The application was brought under the Order 45 rules 1 and 2, Order 51 rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3 of the Civil Procedure Act. It was supported by the affidavit of Francis Ngaruiya sworn in even date.
2. The grounds and the depositions in support of the application were that, the plaintiff was dishonest in the application dated 5/9/2024 and is also guilty of non-disclosure of material facts. That the plaintiff is not the registered owner of Land parcel No Nairobi /Block 31/219. That the property is also subject to a legal charge registered in favour of Upper Hill Towers Ltd which is also the registered owner and the chargor.
3. That the plaintiff was the principal borrower as per the letter of credit dated 3/3/2022 granting the plaintiff USD 5,273,332.22 for refinancing an existing credit facility and the First Legal Charge was registered over the subject land. The defendant contended that the chargor was the right party to file the application against the statutory sale.
4. It further contended that the plaintiff did not satisfy the grounds for injunction. That the defendant had requisite notices under the Land Act giving the 90 days statutory notice and 40 days' Notice to sell. The property was valued and a further 45day Redemption Notice was issued pursuant to Rule



- 15 of the Auctioneers Rules. All these notices were produced and are on record. That there was no response from the chargor.
5. That the plaintiff misrepresented and deceived the Court in paragraph 2 of the supporting affidavit by stating that the land was registered in its name and Hassan Pharmaceuticals Ltd.
 6. The plaintiff opposed the application stating that the application and pleadings in the matter were served on the defendant. That the further affidavit had disclosed who the registered owner of the property was. That the delay in bringing the application was inexcusable and was proof of the defendant's bad faith.
 7. That the application was been brought after 1 year and the defendant was privy to the facts in contention and ought to have raised the objection on material non-disclosure at the earliest. That the balance of convenience tilts in favour of the plaintiff who seeks to enforce valid orders of the Court.
 8. Parties submitted orally which submissions have been considered. The defendant relied on the case of Eldoret Concrete -Vs- Balozi (2021) eklr and urged that the injunction be discharged. The plaintiff submitted that the application had been brought after an inordinate delay.
 9. I have considered the parties' contestations and submissions. Order 40 Rule 7 Civil Procedure Rules, 2010 provides that: -

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
 10. From the record, the plaintiff came to Court on 8/9/2023 ex-parte and was ordered to effect service upon the defendant. The return date was fixed for 12/9/2023. On the said 12/9/2023, Mr. Mutunga appeared for the plaintiff and told the Court that he had served the application upon the defendant. The Court directed that the application be responded to within 14 days for further directions on 3/10/2023.
 11. On 27/7/2024, the defendant did not appear. Mr. Mutunga informed the Court that the defendant had been served but had not responded to the application. The Court therefore allowed the application as being unopposed. The Court then directed that the parties appear before the deputy registrar on 20/8/2024 for pre-trials.
 12. I have considered the grounds that have been raised for the setting aside the lawful orders made on 29/7/2024. Most of the contestations were on the merit or otherwise of the injunction application. On the part of this Court, the issue is whether a case has been made for setting aside the injunction application.
 13. The defendant alleges that there was material non-disclosure. That the plaintiff is not the registered owner of the charged property. The plaintiff deny that it misled the Court but admits that it is not the registered owner of the charged property.
 14. In Kenya Electricity Transmission Company Limited –Vs- Kibotu Limited [2019] Eklr, it was held that: -

“The fundamental principles of non-disclosure of material facts that an applicant must adhere to are as follows: -

 - a) The applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge.



- b) The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
 - c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
 - d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the Judge in the application.
 - e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
 - f) Finally, it is not every omission that the injunction will be automatically discharged”.
15. Notably, statutory power of sale is a legal process and the practice of courts is that it should not be interfered with to assist a defaulter. The financial ramifications on the chargee outweigh the chargor’s interest especially where it is proved that the borrower and/or the chargor has defaulted and does not have any proposal or is not able to deposit the amount in court.
16. It cannot be disputed that the proper party to challenge a lender’s statutory power of sale, is the Chargor. The Chargor is the registered owner of the property that the Lender threatens to dispose off. In that regard, a third party cannot purport to speak for the owner of the property.
17. To the extent that the plaintiff is not the registered proprietor of the charged property, I do not think it has any locus to challenge the defendant’s attempted exercise of statutory power of sale. The injunction order was made in error and cannot stand. The proper party to challenge the defendant’s statutory power of sale is not in Court.
18. Accordingly, the application dated 19/9/2024 is meritorious and is hereby allowed as prayed with costs. It is so ordered.

SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

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

F. GIKONYO

JUDGE

