



**George Otieno Otwal t/a Asembo Soko Limited v NCBA Bank Limited & another
(Commercial Case E001 of 2024) [2025] KEHC 1274 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
COMMERCIAL CASE E001 OF 2024
DK KEMEL, J
FEBRUARY 28, 2025**

BETWEEN

GEORGE OTIENO OTWAL T/A ASEMO SOKO LIMITED PLAINTIFF

AND

NCBA BANK LIMITED 1ST DEFENDANT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS 2ND DEFENDANT

RULING

1. Before this Court is an application brought vide a Notice of Motion dated 13/05/2024 seeking principally an order of injunction to restrain the Defendants whether by themselves, their servants and/or agents from selling whether by private treaty or public auction, transferring or conveyancing or in whatever way interfering with the Plaintiff's proprietary interest in land parcels known as LR Numbers South Gem/Ndori/1640, South Gem/Ndori/1710, West Asembo/Nyagoko/2153, West Asembo/Nyagoko/2154, Kisumu/Kogony/3471, Kisumu/Kogony/3199, Kisumu/Kogony/6362, Kisumu/Kogony/6827, Kisumu/Korando/3976 pending determination of the suit herein. It also seeks for costs.
2. The said application is supported by the grounds set out on the face thereof as well as the supporting affidavit and a further affidavit sworn on 13/5/2024 and 3/2/2025 by the Applicant herein. The Plaintiff's gravamen is inter alia; that the Applicant's business was messed up after the County Government commenced evictions and demolitions of buildings; that the Applicant stayed out of business for eleven months as all his hardware goods were destroyed during the eviction and demolitions; that his parcels of land have been illegally advertised for sale by public auction despite his request to the 1st Defendant to restructure the loan; that he is willing to start liquidating the loan repayment by monthly payments of Kshs 100, 0000/=; that the notification or public auction notices were never served upon the Applicant; that the 1st Defendant has varied the rate of interest without notice the Applicant; that no proper statutory notices were served upon the Applicant; that



- the Defendants are out to sell the Applicant's properties without setting a reserve price; that the Applicant and his family stand to suffer irreparable damage if the injunction is not granted as some of the properties include matrimonial and residential premises housing his family; that the Applicant's suit has a prima facie case with high chances of success
3. The 1st Defendant opposed the application vide a replying affidavit sworn by Jackson Nyaga on 2/8/2024 who averred inter alia; that the Plaintiff had been advanced a sum of Kshs 109, 500, 000/ which was secured by the Plaintiff's several parcels of land enumerated in the plaint; that the Plaintiff failed to abide by the terms of the agreement as he fell into arrears; that the 1st Defendant commenced recovery processes; that the 1st Defendant met all the requisite conditions while issuing the notices and advertising the securities for sale by public auction; that the Plaintiff has not disputed the indebtedness to the 1st Defendant; that the application is an abuse of the court process and should be dismissed with costs.
 4. The application was canvassed by way of written submissions. Both parties duly complied.
 5. In his submissions, the Applicant averred that he is the registered owner of all the land parcels listed in the application, which were used to secure loans advanced to the Applicant by the 1st Respondent. It was submitted that subject to the terms of the loan agreement, the Applicant was to repay the facilities in various intervals. However, shortly after he had started serving the loans, his business, Asembo Soko Limited, whose income was servicing the loans, suffered loss of business through demolitions carried out by the County Government of Kisumu, which paralyzed the operations. That due to the said loss of business, the Applicant wrote to the 1st Respondent and had a meeting with its officials in February 2024 requesting for a restructure the loan repayment, but his request went unresponded to.
 6. The Applicant submitted that due to the demolitions, he was financially crippled and fell into arrears but he has since revived his business and is ready to continue repaying the loans based on new terms as the parties may agree.
 7. The Applicant submitted that unless the said order of injunction is granted, he will suffer irreparable loss and damage. Reliance was placed in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR.
 8. Finally, it was submitted that the Applicant has met the requisite threshold for grant an injunction order pending determination of the suit herein.
 9. On the part of the 1st Respondent, it is submitted that the dispute before the court emanates from the failure by the Applicant/Plaintiff to adhere to the Contractual terms between him and the 1st Defendant/Respondent. It was submitted that the Applicant requested and was advanced a financial facility of Ksh 109,500,000/= which was secured by the land parcels as demonstrated in the replying affidavit by the 1st Respondent sworn by Jackson Nyaga dated 2nd August 2024. It was submitted that the Applicant did not adhere to the terms of the loan agreement thereby falling into arrears which warranted the 1st Defendant to take action in a bid to recover the loan and thus initiated the process of exercising its statutory powers of sale. That this exercise of its statutory power of sale is what brought the Applicant to court to stave the eventual disposal of the properties.
 10. The 1st Respondent submitted that the Applicant did not dispute the indebtedness but instead, he argued that he was not served with the relevant statutory notices, that the interest charged was exorbitant, and that valuations were not done on the properties.
 11. Finally, it was submitted that the application lacks merit and it should be dismissed with costs to the 1st Respondent/Defendant.



12. I have considered the application, affidavits and the rival submissions. The issue for determination is whether the Applicant has satisfied the requisite conditions for the grant of an order of injunction pending determination of the main suit herein.
13. The issue junctions are found in Order 40 Rules 1 and 2 of the Civil Procedure Rules, which provides as follows:

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

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.

[Order 40, rule 2.] Injunction to restrain breach of contract or other injury.

2.
 - (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

14. In *Giella v Cassman Brown & Co Ltd*, (1973) E.A 385, at page 360 where Spry J. set out the conditions for the grant of an interlocutory injunction as follows: -

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”



15. As to what entails a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR pondered:

“So what is a prima facie case? I would say that in civil cases it is a case in 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.

...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is a standard which is higher than an arguable case.”

16. It is noted that the Plaintiff herein does not dispute that fact that he entered into a loan agreement with the 1st Defendant and that he has defaulted on the loan repayment and that he has blamed the County Government of Kisumu for carrying out evictions and demolitions which has severely affected his business. He has also claimed that the 1st Defendant did not serve him or his company with the requisite statutory notices and thus now seeks for an order of injunction against the Defendants pending the determination of the suit. Upon perusal of the averments by the Plaintiff and 1st Defendant, it is clear that the issue in contention relates to the service of the statutory notices upon the Plaintiff herein. The relevant law dealing with the same is found in Section 90 of the *Land Act* which provides that –

1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
2. The notice required by subsection (1) shall adequately inform the recipient of the following matters –
 - a. the nature and extent of the default by the chargor;
 - b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - d. the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section by the procedures provided for in this sub-part; and
 - e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
3. If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may –
 - a. sue the chargor for any money due and owing under the charge;



- b. appoint a receiver of the income of the charged land;
- c. lease the charged land, or if the charge is of a lease, sublease the land;
- d. enter into possession of the charged land; or
- e. sell the charged land; ...

17. It is evident from the above provisions that the 90-days' notice provided for under Section 90 of the [Land Act](#) ought to be issued to the chargor. The Court of Appeal in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auctioneers [2017] KECA 79 (KLR) in considering the operation of the notice under Section 90 of the [Land Act](#) held that even while so doing, it is to be remembered that under section 90 aforesaid, the operation of the statutory notice is triggered by service of the same upon the mortgagor.
18. In this case, the defendant did not dispute that the said notice was only issued to the 1st plaintiff, who was the borrower and not the chargor, instead, it stated that the chargor and the borrower share the same postal address, thus the chargor, the 1st plaintiff herein, must have received the said notice. The plaintiffs asserted that since the notice under Section 90 of the [Land Act](#) was not served upon the chargor, any other statutory notices whether or not served to the plaintiffs were of no legal effect. The Court of Appeal in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auctioneers (supra), addressed itself on this issue and held that –
- “In this case, the material before court lends credence to the possibility or likelihood that the procedure might have been flouted. This is because, the statutory notice under Section 90 of the [Land Act](#) becomes operational upon service of the same upon the mortgagor and as long as doubt on that aspect persists, then the matter calls for interrogation of the evidence and the same can only be done at trial. In the interim, the same attracts the issuance of injunctive orders and the judge cannot be faulted for holding as much.”
19. Based on the holding in the above case, this Court finds that the plaintiffs herein have established a prima facie case with a probability of success but only in so far as non-service of the 90 days' statutory notice to the chargor is concerned. This is the triable issue to be determined at the trial and hence there is a prima facie case shown by the Plaintiff to warrant the grant of the temporary order of injunction at this stage of the proceedings.
20. On the issue of whether damages can be an adequate remedy, and if the plaintiffs will suffer irreparable loss, it must be noted that having demonstrated that they have a prima facie case with a probability of success, in the event that the instant application is disallowed, the suit properties will be sold yet there was non-compliance with Section 90 of the [Land Act](#), prior to the 1st Defendant exercising its statutory power of sale over the suit properties.
21. In the said circumstances, the balance of convenience tilts in favour of the plaintiffs for the grant of an order of injunction pending determination of the suit.
22. However, it is not disputed that the plaintiffs owe the defendant a substantial amount of money which remains unpaid. The plaintiffs sought to be given time to rectify the defect. Due to the said fact, and non-service of the 90 days' statutory notice to the chargor, the order that commends itself to me is to grant a temporary injunction for a limited period within which to conclude the hearing of the main suit failing which the order of injunction will stand discharged. There is evidence that the delay to



conclude this matter has greatly prejudiced the 1st Defendant whose monies are yet to be repaid by the Plaintiff herein.

23. In view of the foregoing observations, it is my finding that the Plaintiff's application dated 13/5/2024 is allowed in terms of prayer No.3 thereof. The Plaintiff is ordered to ensure that the suit herein is concluded within ninety (90) days from the date hereof failing which the orders of injunction shall stand discharged. The costs of the application shall abide the outcome of the suit.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 28TH DAY OF FEBRUARY 2025.

D. KEMEI

JUDGE

In the presence of:

Ms. Omondi for Odeny.....for Plaintiff

Miruka for Odiyo..... for 1st Defendant

N/a for 2nd Defendant

Ogendo..... Court Assistant

