Kariuki v Letshego Kenya Limited; County Government of Laikipia (Interested Party) (Civil Case E006 of 2022) [2025] KEHC 5131 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5131 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL CASE E006 OF 2022

AK NDUNG'U, J

APRIL 30, 2025

BETWEEN

THOMAS M. KARIUKI ..... PLAINTIFF

AND

LETSHEGO KENYA LIMITED ..... DEFENDANT

AND

COUNTY GOVERNMENT OF LAIKIPIA ..... INTERESTED PARTY

RULING

1. This ruling resolves the application vide an amended notice of motion dated 16/05/2023 and brought under Section1A, 1B and 100 of the *Civil Procedure Act*, Order 8, 40 and 51 of the Civil Procedure Rules and all other enabling provisions of the law. The orders sought are as follows;

    i. Spent

    ii. Spent

    iii. That this honourable court do issue a temporary injunction restraining the Defendant, its agents and auctioneers (Antique Auctioneers Agencies) from selling by public auction the Plaintiff's parcels of land Title No. Laikipia Daiga Umande Block 111/136 Muramati and title No. Laikipia Daiga Umande Block 111/138 Muramati (herein referred as the suit properties) pending the hearing and determination of this application and suit.

    iv. That the Defendant be ordered to hold in abeyance any recovery of loan arrears against the Plaintiff to enable the National Land Commission to acquire the said parcels of land for the benefit of the public in county government of Laikipia.

v. That the interested party be ordered to expedite the compulsory acquisition process and to compensate the Plaintiff promptly.

vi. That the Applicant be granted leave to amend his pleadings by producing a valuation report done by Leo Realtors Limited dated 05/05/2023.

vii. Cost be provided for.

2. The application is grounded on the grounds on the face thereof and is supported by an affidavit of Thomas M. Kariuki, the Plaintiff herein. He deposed that he is the owner of the suit properties and in 2019, he obtained a loan facility from the Defendant using the titles of the suit properties as security. He was able to repay the loan periodically but when the covid-19 pandemic hit, his businesses were worst affected since his agricultural produce could not reach destinations owing to lock down hence he was unable to pay the agreed instalments. That he has since paid over Kshs.1,400,000/- as loan repayment. That in January, 2021, he was informed by the county government of Laikipia that the former county council encroached on his land and constructed a dam and a borehole which occupied 2.339 hectares of the suit properties and could not continue with his agricultural activities since he was informed not to. That he pursued the issue of compulsory acquisition so as to enable him repay the loan.

3. He deposed that he was unable to use the suit properties for agricultural use hence the delay in servicing the loans and he requested the Defendant through his advocate to hold in abeyance any action as they await acquisition by the Interested Party. That he was served with a 3 month notice of sale dated 08/06/2021 and was shocked to be served with a 45 days redemption notice which he received on 27/10/2022. That the 3 month notice expired and if the Defendants wish to proceed with execution, they should have served him with a new 3 month statutory notice. That the Defendant should be patient and allow the acquisition to end. Further, the Defendant did not carry out a recent valuation and he has a legal right to redeem his property as such, proper procedures must be complied before selling the security. That according to the redemption notice, the defendant is demanding Kshs.4,806,982/- which is not the correct arrears since he has made several payments which the Defendant has not accounted for. That a valuation carried out by the Defendant on 31/05/2019 valued the land at Kshs.11,500,000/- without the encroached land hence the value of land is more than the demanded arrears of Kshs.4,806,982/-.

4. That it is in the best interest that they wait allocation of funds from Laikipia County to acquire the encroached land which shall enable him repay the Defendant's loan and redeem the section that is not encroached. That a temporary injunction should be granted to enable the parties discuss the terms of compulsory acquisition since there is a real danger of the Defendant losing a chance of recovering the loan arrears since the land will be encumbered and attract no bidders due to encroachment. That he shall suffer irreparable damages if the injunction is not issued since he stands to lose his land in a public auction yet the land could have benefited the parties herein. That he has proved a prima facie case which is arguable since the suit properties are under the interest of the parties herein. That the balance of convenience tilt in his favour since the county government has offered to acquire the suit properties to benefit the people of Laikipia and in doing so, he shall be in a position to repay the loan. That there is need to preserve the subject matter since public rights override private needs.

5. In response, the Defendant filed a replying affidavit dated 16/12/2022 sworn by Pesian Ketere, Defendant's recoveries Lead. It was deposed that a loan facility of Kshs.4,300,000/- was advanced to the Plaintiff and a legal charge was registered over the suit properties on 02/07/2019 in favour of the Defendant. That soon after the disbursement of the funds, he started defaulting which prompted the Defendant to issue him with a demand letter dated 10/01/2020. The loan was restructured and even after restructure, he continued defaulting on his monthly loan repayments. A 90 days statutory notice

of sale was issued to the Plaintiff and his guarantors on 08/06/2021 and having failed to adhere to the terms of the notice, a 40 days statutory notice was issued on 23/09/2021. A valuation was done by Advent valuers Ltd on 30/01/2022 who valued the suit property at Kshs. 9,450,000/- being the market price and Kshs.7,100,000/- being the forced sale value. On 03/10/2022, Antique auctioneers issued a 45 redemption notice to the Plaintiff and on 28/11/2022 the property was advertised on daily nation newspaper.

6. That as at 03/10/2022, the Plaintiff owed the Defendant a sum of Kshs.4,806,982.12 being the outstanding loan facility which continue to accrue interest and penalties. That the Defendant is advised that it has a right to exercise its power of sale pursuant to section 90(3) (e) and 96(1) of the *Land Act* and has complied with section 90(1), 96(2), 97(1) and (2) and section 98(2) of the *Land Act*. He deposed that the Plaintiff was granted sufficient time to redeem his loan account which he has failed to occasioning immense financial loss to the Defendant and his allegation that the suit properties are in the process of compulsory acquisition is not substantiated with evidence. That he acknowledged that his loan account is in arrears hence he has approached this court with unclean hands as he has failed to pay the outstanding loan facility and his application is intended to circumvent the Defendant's recovery process of the outstanding loan. That having fulfilled its obligations under the *Land Act*, it is only fair and just that it be allowed to proceed and dispose of the suit properties.

7. There was no response by the interested party.

8. The application was canvassed by way of written submissions. The Plaintiff's counsel in his submissions reiterated the averments contained in the supporting affidavit and submitted that the statutory notice issued to sell his land by way of public auction is fatally defective and illegal as he was not served; the valuation done by the Defendant was done over three years ago so the Defendant should have conducted a recent valuation; no statutory notice of sale was issued in the proper manner; the Defendant has not exhausted alternative remedies as in this case, there is a clear compulsory acquisition which has already commenced; that the 3 month notice as provided under section 90 of the *Land Act* was not served and that the equity of redemption is being clogged by the Defendant proceeding with sale knowing that the interested party has already began the process of compulsory acquisition which after acquisition, the bank shall be paid in full.

9. He submitted that as per the Defendant's valuation, it was well aware that the suit properties had been encroached by the Interested Party and that negotiations for possible compensation were ongoing as such, the Defendant should wait for the acquisition to conclude. That under Section 79(5) of the *Land Act*, the charge was never registered as a document hence it cannot be enforced or relied upon by the chargee. That he had managed to pay Kshs.1,409,605/- and should be allowed time to clear the loan and as such, he has come to court with clean hands since the delay in paying the loan has been occasioned by the encroachment of the land by the Interested Party. He requested for patience until the compulsory acquisition is completed.

10. In rejoinder, the Defendant's counsel submitted that the conditions for granting an interlocutory injunctions are that the applicant must show a prima facie case with a probability of success or if that the injunction is not granted, the applicant will suffer irreparable harm that cannot be compensated by an award of damages and if in doubt, the court shall decide the application on a balance of convenience as was enunciated in Giella v Cassman Brown & Co Ltd (1973) EA 358. As to whether the Plaintiff has made a prima facie case with a probability of success, he submitted that the Plaintiff was bound by the terms and clauses of the offer letter, loan agreement, offer letter for restructure of the loan and the charge instrument he executed including the clause providing for the exercise of the Defendant's statutory power of sale. That by failing to repay the loan as and when it fell due, he breached the contractual terms hence the Defendant has a right to exercise its statutory power of sale over the suit

property in order to recover the outstanding loan amount due pursuant to Section 90(3) (e) and 96(1) of the *Land Act*.

11. He maintained that the Defendant fully complied with the provisions of the *Land Act* by issuing a 3 month statutory notice, a 40 days statutory notice, auctioneers issued a 45 days redemption notice and notification of sale and advertised the property on daily nation Newspaper which notices the Plaintiff confirmed in his supporting affidavit to have received. That the Plaintiff was well aware and confident that the suit property will be held as the Defendant's security for repayment of the loan facility which he had not denied owing to the Defendant. That the Plaintiff stated in his affidavit that the amount demanded is not the correct arrears as the several payments he made was not accounted for but it was held in Palmy Company Limited v Consolidated Bank of Kenya Limited (2019) eKLR that a conflict on the amount owing is not a bar to the exercise of the statutory power of sale. Therefore, the Plaintiff has not made a prima facie case with a probability of success.

12. As to whether damages are adequate, he submitted that the Plaintiff will not suffer any loss that cannot be compensated by an award of damages and that if he is successful after determination of the suit, the Defendant is liquid enough to pay any damages incurred being a financial institution. Reliance was placed on the case of Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR where the court quoted Nguruman Limited v Jan Bonde Nielsen & 2 others, Civil Appeal No. 77 of 2012 that if damages recoverable is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted. That while charging the properties, he knew that the suit properties became a commodity for sale and there is no commodity for sale to which a value cannot be attached as was observed in Joseph Kariuki Kinyuigwa v Mwananchi Credit Limited & Mary Rita Wanjiku t/a Mistan Auctioneers [2019] eKLR among other cases.

13. On the balance of convenience, he submitted that the Defendant is losing a lot of money due to non-repayment of the loan facility, money which would have been spent to provide financial needs to other Kenyans. That his allegation that the property is now a public land and in the process of being compulsorily acquired is unsubstantiated and is intended to hoodwink this court. That the property was valued hence the Defendant will not sell the same at a throw away price. Thus, the balance of convenience tilts in favour of the Defendant.

14. I have considered the Plaintiff's application, the response by the Defendant and their rival submissions.

15. The Plaintiff's application seeks to stop the Defendant from exercising its power of sale over the suit properties on account that the Interested Party intends to compulsorily acquire the properties since the Interested Party has constructed a dam and a borehole that serves the community on the suit properties. He averred in his application that negotiations are ongoing hence the Defendant should be patient until when the properties are compulsorily acquired to enable him repay the loan. He has also raised other issues like disputing the amount owed to the Defendant and that the correct procedure was not followed by the Defendant in that the charge was not registered, that the 3 month statutory notice was not served and that the Defendant did not conduct a valuation of the suit properties.

16. It is not in dispute that the applicant took a loan facility with the Defendant and offered the suit properties as security. He has not denied that he defaulted in repayment and therefore he is in arrears. He stated that he was unable to service the loan due to the fact that his agricultural business was affected by lockdown due to covid-19. Further, due to encroachment on his properties by the Interested Party, he has not been able to continue with his agricultural venture on the suit properties.

17. The Plaintiff averred that he obtained the loan facility from the Defendant in the year 2019. The Defendant stated that soon after the loan was disbursed, the Plaintiff started defaulting in payment of the monthly instalments which prompted the Defendant to serve him with a demand notice

dated 10/01/2020 but the loan was restructured with consent of both parties. After the loan was restructured, a demand letter dated 26/04/2021 was sent by registered mail. A 3 month notice through registered mail dated 08/06/2021 was sent to the Plaintiff and a 40 days notice to sell dated 23/09/2021 was also sent by registered mail. The Defendant caused the properties to be valued and a valuation report dated 30/06/2022 was filed. After this, a 45 days redemption notice by Antique Auctions dated 11/10/2022 and notification of sale dated the same date was issued and the properties were advertised for sale on the daily nation gazette notice dated 28/11/2022.

18. The Plaintiff in his supporting affidavit confirmed receiving the notices though in his submissions he claimed that the 3 month statutory notice was not served which is contrary to his averment in his supporting affidavit.

19. The Defendant attached search for the two properties showing that a charge was registered against the two properties which is contrary to the Plaintiff's averments that the charge was not registered.

20. It is trite law that in an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

    (a) establish his case only at a prima facie level,

    (b) demonstrate irreparable injury if a temporary injunction is not granted, and

    (c) shows the balance of convenience is in his favour.

21. This was enunciated in the celebrated case of Giella v Cassman Brown & Company Limited [1973] E A 358. The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR) discussed in length the triple requirements as highlighted above and held as follows;

> "These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. 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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted. On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable

where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. Recently, this court in Mrao Ltd. v First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:

"In civil cases, a prima facie case 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 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 but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed. In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available."

22. The question therefore is, has the Plaintiff established a prima facie case, has he demonstrated that he will suffer irreparable damages which the Defendant cannot compensate by way of damages.

23. As was held in the Nguruman Ltd case (supra), the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

24. The Plaintiff in his supporting affidavit averred that a temporary injunction should issue to enable the Defendant, The County Government and himself to discuss the terms of compulsory acquisition so that all the parties benefit. He avers that if the injunction is not issued he shall suffer irreparable damages of losing his land (sic) in a public auction yet the land could have benefited all the 3 parties herein. That he has proved a prima facie case which is arguable since the suit properties are under the interest of the parties herein. That the balance of convenience tilt in his favour since the county government has offered to acquire the suit properties to benefit the people of Laikipia and in doing so, he shall be in a position to repay the loan. That there is need to preserve the subject matter since public rights override private needs.

25. He attached a Letter from the county department of infrastructure, land, housing, energy and physical planning addressed to him dated 05/04/2022 stating that compulsory acquisition is the only option and that the issue has been communicated to the National Land Commission. Further, that there is no current budget for compensation but will be included in the next financial year.

26. This is a letter dated three years ago. There is no indication whether there are negotiations in progress or how far the county has reached in quest to compulsorily acquire the suit properties. The Defendant's rights cannot be held in abeyance waiting for compulsory acquisition to be completed. Further, the Plaintiff has not been servicing the loan at all this time. I am of the considered view that the Applicant has not established a prima facie case against the Defendant. The Defendant is not privy to the dealings between the Applicant and the County Government and dragging the Defendant onto the same is not tenable.

27. As to whether the Applicant shall suffer irreparable damages, the Defendant submitted that it is a financial institution hence it cannot be said that they cannot compensate the Plaintiff if he succeeds in the main suit. The court in Kitur v Standard Chartered Bank & 2 others (2002) 1KLR x opined as follows:

> " It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits."

28. He further claimed that the amount the Defendant is demanding, Kshs.4,806,982/- is not the correct arrears since he has made several payments which the Defendant has not accounted for. That he has since paid over Kshs.1,400,000/- as loan repayment. In Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR) KWACH JA stated as follows;

> " The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-
>
> "725When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

29. As regards the balance of convenience, it is my view that the same tilts in favour of refusing the injunction. The plaintiff is not servicing the loan. The defendant continues being denied their monies. The solution to the impasse that the Applicant clings on is an alleged compulsory acquisition of the land which process is uncertain and beyond his control.

30. In the end, I must reach the unhesistating conclusion that the application before court is completely without merit. The same is dismissed with costs to the Defendant/Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL2025.

A.K. NDUNG'U

JUDGE