



Gulf African Bank Limited v Elite Intelligent Transport Systems Limited (Civil Case E265 of 2023) [2024] KEHC 2433 (KLR) (Civ) (26 January 2024) (Ruling)

Neutral citation: [2024] KEHC 2433 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL CASE E265 OF 2023
MN MWANGI, J
JANUARY 26, 2024

BETWEEN

GULF AFRICAN BANK LIMITED PLAINTIFF

AND

ELITE INTELLIGENT TRANSPORT SYSTEMS LIMITED DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion dated 20th August, 2021 brought under Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Rule 14 of the *Civil Procedure Rules* (sic). It seeks the following orders -
 - i. Spent;
 - ii. Pending the inter-partes hearing and final determination of this suit, the defendant be and is hereby ordered to grant the plaintiff, its agents or servants and prospective buyers unrestricted access to property Land Reference Number 1160/339 (Original Number 1160/178/3) together with the developments made thereon for purposes of viewing and inspection;
 - iii. Pending the inter-partes hearing and final determination of this suit, this Honourable Court be pleased to restrain the defendant, its agents and/or servants from interfering with the plaintiff's statutory power of sale over property Land Reference Number 1160/339 (Original Number 1160/178/3);
 - iv. The Officer Commanding Karen Police Station be directed to enforce this order; and
 - v. The defendant do bear the costs of this application.



2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 9th June, 2023 by Lawi Sato, the plaintiff's Legal Officer.
3. In summary, the grounds are that the plaintiff advanced the sum of Ksh.250,000,000/- on the terms and conditions contained in facility letters dated 29th January 2018, 22nd May 2018, 29th August 2018, 25th September 2018, 17th July, 2019 and 12th March 2020. The defendant executed the charge dated 14th March, 2018 over property L.R. Number 1160/339 to secure an aggregate principal sum of Ksh. 133,000,000/- plus profit, costs and other expenses. It is alleged that the defendant defaulted in payment of the said facilities causing the plaintiff to issue statutory notices so that it could lawfully exercise its statutory power of sale.
4. To prevent the sale, the defendant filed HCCC No. E240 of 2020 - Elite Intelligent Transport Systems Ltd v Gulf African Bank Limited & another, which was settled by consent of the parties, through a consent order to the effect that the defendant had to sell the charged property or any part of it by 1st October, 2021, failing which the plaintiff was at liberty to sell the said property. It was stated that despite numerous follow ups by the plaintiff, the defendant failed to comply. The defendant then filed HCCC No. E133 of 2022 - Elite Intelligent Transport Systems Limited v Gulf African Bank Limited & another, seeking an injunction to prevent the sale of the charged properties on the basis that the plaintiff had approved the sale of portions of the charged properties and that third parties had entered into sale agreements, which the Court declined. Thereafter, the defendant withdrew the suit.
5. The plaintiff contends that although its statutory power of sale has accrued, the defendant has frustrated its efforts to exercise it by denying the plaintiff's agents, servants and prospective purchasers access to the suit premises. That an earlier Valuation Report by COG Consultants Limited and a later Valuation Report dated 22nd March, 2022 by Acumen Valuers, appointed to conduct valuation of the charged property in anticipation of the sale, were generated based on road-side inspection. The plaintiff stated that Garam Investments Auctioneers who were instructed to sell the charged property by public auction, as well as prospective purchasers were denied access to the suit premises. That prospective buyers were threatened with prolonged Court cases if they opted to purchase.
6. The plaintiff contends that the defendant's actions amount to interference with its statutory power of sale and a breach of obligation under clauses 4.1.3 and 6.3.1 of the charge, and that the defendant's continued occupation of the suit premises continues to hinder its realization of the charged property and exercise of its statutory power of sale, thereby exposing it to substantial prejudice, inconvenience and losses.
7. It is against the above background that the plaintiff instituted the by way of an Originating Summons dated 9th June, 2023 seeking unrestricted access to the charged property or in the alternative eviction of the defendant from the charged property. The plaintiff asserts that it is in the interest of justice for its Originating Summons (OS) to be allowed as prayed so that prospective purchasers are given the opportunity to view the property before the auction to enable it attract the best prices.
8. In opposition, the defendant filed a replying affidavit sworn on 4th September, 2023 by Patrick Kibaiya, the defendant's director. The deponent deposed that neither him nor the defendant had interfered with the plaintiff's exercise of its statutory power of sale. That since 3rd February, 2023, the defendant has been cooperating and has been engaged in negotiations for sale of parts of the charged properties with the plaintiff's Officers, Lawi Sato and Amina Bashir. Further, that the defendant shared a draft sale agreement between it and Sharon Atieno Odongo for sale of a plot from the charged property for Kshs. 20 Million and the said Lawi Sato commented on the proposed conditions. The defendant indicated that as per the Court's directions in the case of Jane Wangari Gakure v Gulf African Bank



- Ltd and Elite Intelligent Transport Systems Ltd ELCC E385/2022, the purchaser, Jane Gakure, paid a deposit of Kshs. 2,400,000/- to the plaintiff.
9. The defendant's deponent refuted the claim that Garam Investments Auctioneers were denied access, and contended that the plaintiff did not issue the defendant with a notice of intention to view the charged property. The deponent also denied having threatened prospective purchasers with prolonged Court cases.
 10. In addition to the replying affidavit, the defendant also filed a Notice of Preliminary Objection (PO) dated 19th June, 2023, on the grounds that-
 - i. This Honourable Court lacks the requisite jurisdiction to hear and determine this matter in light of the dictate of the law at Article 162(2)(b) of *the Constitution* of Kenya, 2010, and Sections 13(1) and (2) of the *Environment and Land Court Act*, No. 19 of 2011, Laws of Kenya;
 - ii. This Honourable Court, to wit the 'High Court' is not clothed with the jurisdiction to hear and determine disputes relating to the occupation of land;
 - iii. The dominant issue in the suit is the eviction of the defendant, and its servants, who are in occupation of the land reference No. 1160/339 (Original Number 1160/178/3) ("suit property") as evident in the Originating Summons;
 - iv. The orders sought by the plaintiff relate to the occupation of, and eviction of persons on the suit property, which are a preserve of the Environment and Land Court;
 - v. Eviction of the defendant can only accrue upon the lapse of its right of redemption of the property, and upon the plaintiff following the due procedure for the eviction of persons in occupation of private land.
 11. The application was canvassed by way of written submissions which were highlighted on 27th September, 2023. The plaintiff's Counsel filed written submissions dated 3rd July, 2023 and 25th September, 2023, whereas the defendant filed written submissions dated 4th September, 2023.
 12. Mr. Ogunde, learned Counsel for the plaintiff urged this Court to allow the application. He submitted that there is no dispute that the plaintiff's power of sale has accrued but what needs to be determined is whether the defendant frustrated the plaintiff from effecting the Court order. He referred to the supporting affidavit in which the deponent states that when the Auctioneer took potential bidders, he was denied access to the property. Counsel expressed the view that since the defendant states in its replying affidavit that it has not denied the plaintiff access, then the only issue is how access should be worked out.
 13. Mr. Makau, learned Counsel for the defendant argued that the Originating Summons and the application should be struck out because eviction is a preserve for the Environment and Land Court. He relied on the decision in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR, to the effect that issues touching on the provisions of Article 162 of *the Constitution* fall under the jurisdiction of the ELC. He also relied on the decision in *Bank of Africa Kenya Limited v John Ndung'u Gachara* [2022] eKLR, which states that the ELC is not barred from dealing with disputes arising from sale by charges, which the ELC equated to a sale by a private individual. He also cited the case of *Moi Education Centre Co. Ltd v. William Musembi & 16 others* [2017] eKLR, that a Court order is a prerequisite for evicting individuals and eviction is a preserve of the ELC. Counsel referred to *Spaceler Co. Ltd & 3 Others v. (C I) Simeon Lempassy Olada (No.233842) (OCS, Moiben) & 7 others* [2021] eKLR, that due process has to be followed in eviction, as it involves forceful removal of the defendant.



14. Mr. Ogunde argued that by the defendant seeking the assistance of the Court, it should not be regarded as stalling due process. He stated that the defendant has been cooperative with the plaintiff, including sending to the plaintiff its sale agreements for approval. That the defendant stated that it should be given notice of when the property is to be viewed or valued, since the property is at the high end location of Karen.
15. In a rejoinder, Mr. Ogunde stated that the plaintiff is not averse to giving notice to the defendant when Valuers and prospective buyers are being taken to the suit property. He relied on the decision in *TSS Investments Limited & another v NIC Bank Limited* [2019] eKLR, where the Court of Appeal stated that where the dominant issue relates to enforcement of security by a lender, the High Court has jurisdiction.

Analysis And Determination.

16. I have considered the application and the Preliminary Objection filed, the rival affidavits, the written and oral submissions by Counsel for the parties. The issues that arise for determination are—
 - i. Whether this Court has jurisdiction to hear and determine the suit (Originating Summons) and the application dated 9th June, 2023;
 - ii. If the question of whether or not the defendant's right of redemption has lapsed is beyond the scope of a valid preliminary objection; and
 - iii. Whether the plaintiff has met the requisite threshold for the grant of the interim orders sought in the application.
17. On the first issue, the defendant's position is that the Court lacks the requisite jurisdiction to hear and determine this matter in light of Article 162(2)(b) of *the Constitution* of Kenya and Sections 13(1) and (2) of the *Environment and Land Court Act*. Article 162(2)(b) of *the Constitution* of Kenya reads as follows—
 - “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a)
 - (b) the environment and the use and occupation of, and title to, land.”
18. Section 13(1) and (2) of the *Environment and Land Court Act*, provides that:
 - “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land”.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;



- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”

19. In *TSS Investments Limited & another v NIC Bank Limited* [2019] eKLR, the Court of Appeal stated thus-

“18. Our view on the issue of jurisdiction is that the matter was rightly transferred to the High Court since the substantive dispute was about creation of security over land, which does not constitute land use, as provided in Article 162(2) of *the Constitution* and does not therefore fall under the jurisdiction of the Environment and Land Court. This Court pronounced itself on a similar issue in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others* (supra). The Court held, inter alia:

“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.”

20. The facts of this matter are that the defendant borrowed money from the plaintiff and offered the charged property as security. The defendant defaulted and the plaintiff’s statutory power of sale accrued. The substantive issue is with respect to interference of the plaintiff’s exercise of its statutory power of sale and grant of access to the charged property. It is my finding that the objection on jurisdiction fails for lack of merit.

21. I now turn to the second issue which emanates from ground No. 5 of the Preliminary Objection. The plaintiff submitted that the question of whether the defendant’s right of redemption has lapsed is beyond the scope of a valid Preliminary Objection as it requires the Court to examine and test the facts and evidence. Its view is that this question shall only arise when canvassing the Originating Summons. The defendant on the other hand equates the orders sought by the plaintiff to eviction orders and contends that its eviction can only accrue upon the lapse of its right of redemption of the property, and upon the plaintiff following the due procedure for the eviction of persons in occupation of private land.

22. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1996] E.A 696, cited by the plaintiff, the Court stated the following in describing what a Preliminary Objection is-

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts



pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

23. Guided by the above decision, it is my finding that the objection raised on the ground that eviction can only accrue upon the lapse of the defendant’s right of redemption of the property is not a pure point of law which can dispose of the suit at this preliminary stage. Consequently, the Notice of Preliminary Objection is dismissed with costs.
24. The final issue is whether the plaintiff has met the requisite threshold for the grant of the interim orders sought in the application. The plaintiff submitted that it has demonstrated that it has a prima facie case since its statutory power of sale has accrued and that is not disputed. The plaintiff also submitted that unless the orders sought are granted, it will not be able to realize its security as the prospective purchasers will not be able to inspect the charged property in order to submit their bids.
25. Moreover, interest on the defendant’s outstanding debt continues to accrue and if the plaintiff is unable to realize its security within a reasonable timeline, the security offered will no longer be adequate. The plaintiff urged that it stands to suffer great loss and will not have any other recourse against the defendant. As to balance of convenience, the plaintiff argued that it tilts in its favour as the defendant has shown its unwillingness to service the outstanding amount and to abide by the terms and conditions of the security documents.
26. On its part, the defendant posited that the plaintiff has not met the threshold for the grant of an injunction and that there are no special circumstances to warrant the grant of a mandatory injunction. It stated that the grant of unrestricted access is not a simple and summary act which can be easily remedied. The defendant’s deponent added that the balance of convenience tilts in the defendant’s favour since the charged property is a matrimonial property. The defendant maintained that its right of redemption is yet to be extinguished as the Auctioneer’s hammer is yet to fall.
27. The principles to be considered in determining whether to grant an injunction were laid out in the case of *Giella v Cassman Brown & Co Ltd* [1973] 1 EA 358 as follows-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”
28. In the instant matter, I am satisfied that the plaintiff has shown a prima facie case with a probability of success as the defendant does not dispute the debt or the issuance of the requisite statutory notices. Although the defendant disputes that its equity of redemption has not been extinguished, I note that through a ruling dated 20th November, 2020, in *Elite Intelligent Transport Systems Limited v Gulf Africa Bank Limited & another* [2020] eKLR, the Court declined to grant injunctive orders to the defendant to restrain the plaintiff from realizing the charged property. The plaintiff herein deposed that the defendant withdrew the substantive suit. The said statement was not controverted by the defendant.
29. The plaintiff blames the defendant for denying its appointed valuers and prospective purchasers access to the suit premises. On the other hand, the defendant states that it was not given prior notice of the intended visits. The defendant claims that it is engaged in negotiations with prospective purchasers and that the plaintiff is aware of, and is involved in the process. I note that a considerable period of



time has elapsed since the ruling of 20th November, 2020, was delivered, but the statutory sale of the charged property is yet to be concluded.

30. It is with this in mind that I am inclined to find that the plaintiff stands to suffer irreparable harm as the defendant's outstanding debt continues to accrue and if the plaintiff is unable to realize its security in reasonable time, the security offered will no longer be adequate. For this reason, it is my finding that the balance of convenience tilts in favour of the plaintiff. The defendant's deponent cannot be heard to say that the charged property is a matrimonial home when he was alive to the fact when the said property was offered as security for the loan facilities, it became a commodity for sale.
31. The upshot is that the application dated 20th August, 2021 is merited. It is hereby allowed as prayed. Costs are awarded to the plaintiff/applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JANUARY, 2024.

Ruling delivered through Microsoft Teams Online

Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Odera h/b for Mr. P. Ogunde for the plaintiff/applicant

No appearance for the defendant/applicant

Ms. B. Wokabi – Court Assistant.

