



REPUBLIC OF KENYA



KENYA LAW
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**Mageu v SMEP Microfinance Bank & 2 others (Civil Case
1 of 2023) [2024] KEHC 366 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL CASE 1 OF 2023
LW GITARI, J
JANUARY 25, 2024**

BETWEEN

DAVID G. MAGEU APPLICANT

AND

SMEP MICROFINANCE BANK 1ST RESPONDENT

VIEWLINE AUCTIONEERS 2ND RESPONDENT

JOHN GITHINJI MBUI 3RD RESPONDENT

RULING

1. Before this Court is the Notice of Motion application dated 9th November, 2022 and filed on November 10, 2022. The Application seeks for the following orders:
 - i. That the application be heard exparte in the first instance and be certified urgent hence service be dispensed with as against the defendants/respondents.
 - ii. That pending interpartes hearing of the application the court issues an interim order of injunction restraining the respondents whether by themselves, agents, workers, auctioneers from advertising/selling for money recovery on that parcel title no. Kathwana/845 measuring 14.71 Ha pending the hearing and determination of the application inter partes or till further orders of this court.
 - iii. That pending the hearing and determination of the main suit in the attached plaint dated 9/11/2022 an order of temporary injunction be issued restraining the 1st and 2nd Respondents, its agents, auctioneers, from advertising, selling by way of public auction or private treaty Title No. Kathwana/845.



- iv. That the Honourable court be pleased to give order for the respondent to issue bank statements of any account held by the 3rd Respondent at first instance pending hearing of the application interparte.
 - v. That the costs of this application be provided for.
2. The Application is premised on the following grounds:-
1. That the land title Kathwana/845 initially belonged to the applicant's father Peter Mageu Mwindu but he later followed on the adjudication process and got the title registered in his name.
 2. That the 3rd respondent and the applicant used to be friends and in the year 2018 he approached the applicant and told him that he had a business idea and that he had approached SMEP Microfinance Bank for a loan of Ksh.2,100,000/-.
 3. That the loan offer provided that the loan was to be guaranteed by 2 titles. One title Title Kathwana/845 belonging to the applicant and title Inoi/Thaita/1763 belonging to the 3rd respondent.
 4. That after conducting a search to land title LR Inoi/Thaita/1763, belonging to the 3rd respondent the applicant realized that the 1st respondent never charged the 3rd respondent's title as agreed per the loan offer.
 5. That the 1st respondent has now threatened to dispose title No. Kathwana/845 only hence treating the applicant as the principal debtor.
 6. That if the court does not grant the orders herein sought then the applicant stands to lose suit land Kathwana/845.
 7. That the 1st & 2nd respondents have threatened to dispose the applicant's title without doing a proper forced valuation yet his title is valued at around Ksh.70,000,000.

It is supported by the affidavit sworn by the Applicant on November 9, 2022.

3. The Applicant deposes that the land parcel no. Kathwana/845 (hereinafter the "suit land") initially belonged to his father, one Peter Mageu Mwindu, but was later registered in the name of the Applicant. That the Applicant and the 3rd Respondent used to be friends in 2018 when the 3rd Respondent approached the Applicant and told him that he had a business idea and that the 3rd Respondent had approached the 1st Respondent Bank for a loan of KShs. 2,100,000/=.
4. That the Applicant and the 3rd Respondent then visited the Embu offices of the 1st Respondent where they were presented with a loan offer which provided that the loan was to be guaranteed by two titles. That the first title was the suit land which belongs to the Applicant and the second title was Inoi/Thaita/1763 belonging to the 3rd Respondent.
5. That on 8th July, 2020, the Applicant received a letter from the 1st Respondent Bank demanding him to repay the said loan which had been defaulted. That in the said letter, the 1st Respondent bank threatened to dispose of the two aforementioned parcels of land.
6. The Applicant further deposes that after conducting a search, he found that the 1st Respondent never charged the 3rd Respondent's title as agreed in the loan offer and that only the title of the suit land had been charged.



7. It is thus the Applicant's contention that the failure by the 1st Respondent to charge the title of the 3rd Respondent's land as per the loan agreement was illegal and that the Applicant stands to the title to the suit land, unless the orders sought herein are granted. He proceeded to give the particulars of the alleged fraud and misrepresentation against the 1st and 3rd Respondents at paragraph 17 of his affidavit in support of the application.

Response

8. The 3rd Respondent responded to the Application vide the Replying Affidavit which he swore on 26th January, 2023. In essence, the 3rd Respondent does not oppose the Application. He conceded that the Applicant is the sole legal registered owner of the suit agreement stating that the Applicant agreed to have the certificate of title over the suit property charged as security for a loan facility that the 1st Respondent was offering. Subsequently, the 1st Respondent issued the 3rd Respondent with a credit facility of Kshs. 2,100,000/= which was to be paid within three years and with an interest of Kshs. 84,584/= per month.
9. The 3rd Respondent contends that he was committed to paying the loan facility and did so until March 2020 when the country was hit by the Covid-19 pandemic which he claims affected his business to the point that made it difficult for him to repay the loan amount as agreed. The 3rd Respondent further contends that in May 2020, he wrote a letter to the manager of the Embu branch of the 1st Respondent explaining his predicament and proposing a loan restructure where he would be paying Kshs. 50,000/= per month until such time that his business resumed profitable operations. That the 1st Respondent was hesitant to agree with the 3rd Respondent's proposal for a loan restructure and that as a result the 3rd Respondent approached ABSA bank to refinance his loan with the 1st Respondent.
10. The 3rd Respondent claims that ABSA Bank then agreed to buy out the loan at which point the 1st Respondent wrote to the 3rd Respondent indicating to him that he did not have any arrears as at April 2020. That upon seeing the letter from ABSA bank, the 1st Respondent agreed to the 3rd Respondent's proposal on restructuring of the loan and consequently, the 3rd Respondent started remitting Kshs. 50,000/= per month to the 1st Respondent. Further, that the restructure also had an undertaking that the 1st Respondent would stop the penalties and accruing interest although the 3rd Respondent claims that the 1st Respondent refused to reduce this undertaking into writing.
11. The 3rd Respondent thus claims that it came as a shock when the 1st Respondent sent the Applicant a notice of sale through the 2nd Respondent to dispose of the suit land which was used as collateral.
12. On its part, the 1st Respondent opposed the application vide the Replying Affidavit sworn on 24th March, 2023 by Ruth Njuguna, the legal officer of the 1st Respondent. It is deposed on behalf of the 1st Respondent that the present application is an afterthought brought in bad faith and with a clear intention of impeding the 1st Respondent's right of statutory power of sale. That the Applicant and the 3rd Respondent, trading in a partnership in the name and style of Matokeo Animal Feeds, approached the 1st Respondent for a loan of Kshs. 2,100,000/=. The 1st Respondent consequently communicated the terms and conditions of the proposed loan to the Applicant and the 3rd Respondent vide a letter of offer dated 05/09/2018 and they agreed to the same upon which the 1st Respondent approved the loan.
13. It is the 1st Respondent's case that all the relevant parties to the said transaction, including the spouse of the charger, were well aware of the terms and conditions of the transaction as well as the possible risks and outcomes in the event of default by the borrower and they agreed to be bound by the terms



and conditions contained therein. Further, that in the year 2020, the Applicant and the 3rd Respondent breached the terms and conditions of the loan agreement by defaulting in remitting the agreed upon monthly payment and that consequently, notices were issued to the 3rd Respondent but the same did not elicit any response from either the Applicant or the 3rd Respondent. The 1st Respondent thus claims that this turn out of events set in motion the legal process of repossession and the 1st Respondent instructed the 2nd Respondent to deal with the task of repossession in accordance's to its lawful statutory power of sale over the suit property. The 1st Respondent thus prays for the present application to be dismissed.

The Submissions

The Applicant's Submissions

14. It is the Applicant's submission that the title to the suit property was charged fraudulently and contrary to the loan agreement. That the 1st and 3rd Respondents made the Applicant believe that the 3rd Respondent's title over L.R. No. Inoi/Thaita/1763 would also be charged alongside the suit property yet the said property had already been charged at Co-operative Bank for a loan amounting to Kshs. 500,000/=.
15. The Applicant maintains that the 1st Respondent, having established that the 3rd Respondent's title had an encumbrance, ignored this fact and misrepresented it to the Applicant that the 3rd Respondent's title would also be charged. The Applicant thus claims misrepresentation on the part of the Respondents and has submitted that he has a genuine and arguable case of fraud that justifies the granting of the interim orders sought pending trial. Further, that the Applicant and his relatives stand to suffer irreparable harm if the suit land is disposed of. In addition, the Applicant claims that since the 3rd Respondent has not responded to the allegation of fraud, the application is therefore unopposed. As such, the Applicant prays that the application dated 9th November, 2022 be allowed as prayed and the interim orders sustained pending the hearing of the main suit.

The 1st Respondent's Submissions

16. It was submitted on behalf of the 1st Respondent that the Applicant has failed to establish the existence of a prima facie case for the reason that the Applicant and the 3rd Respondent are indebted to the 1st Respondent and that the 1st Respondent's right of statutory power of accrued when the Applicant and the 3rd Respondent failed to honour the terms and conditions of the loan agreement between the parties herein as well as ignored and/or refused to make good the numerous demand notices served on them.
17. On whether the Applicant stands to suffer irreparable loss, it was submitted on behalf of the 1st Respondent that the Applicant voluntarily and freely offered the suit land to secure the loan and was therefore aware of its implications including the sale of the same should there be a default in the payments. That as such, the Applicant has not demonstrated that he will suffer irreparable harm whatsoever if the 1st Respondent exercises its right of statutory sale. That in any case, should the Applicant suffer nay damages as a result of the exercise of the 1st Respondent's statutory power of sale that has accrued, the loss can be atoned for by way of damages since it can be quantified from the value of the property.



The 3rd Respondent's Submissions

18. On behalf of the 3rd Respondent, it was submitted by his counsel on record that the actions by the 1st Respondent are aimed at frustrating the buy off loan with another bank aimed to facilitate the continued accrual of exorbitant interest rates to maliciously punish and exhort the 3rd Respondent. That as such, the contract entered into between the Applicant, the 1st Respondent, and the 3rd Respondent amounts to an unconscionable contract and as such, the 3rd Respondent does not oppose the Application by the Applicant to the extent that the 1st Respondent should supply the bank statements of accounts from 2018 to ascertain the correct amount owed thereof.

Issue for Determination

19. Prayers no. 1, 2 and 4 sought in the Application are already spent. The substantive issue that remains for determination by this Court is whether the interim injunctive order sought under prayer no. 3 of the Application should be granted.

Analysis

20. The Applicant is seeking for an order for a temporary injunction against the 1st and 2nd Respondents herein restraining them or their agents from advertising, selling by way of public auction or private treaty of land parcel no. Kathwana/845.
21. Order 40 rule 1 and 2 of the [Civil Procedure Rules](#) provide as follows:
- “ 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.
- 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.”

22. The conditions for granting of an interlocutory injunction are now well settled. In *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at pg 360, it was stated 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. (*EA Industries v Trufoods*, [1972] EA 420.)”

23. The 3rd Respondent was at all material times indebted to the 1st Respondent under a loan/financial facility secured by a legal charge over L.R. No. Kathwana/845 which is owned by the Applicant. The loan agreement in question was between the 1st Respondent and the 3rd Respondent. From the evidence on record, the 3rd Respondent is not the registered owner of the suit property in question. It is apparent that the 3rd Respondent is the principal debtor while the Applicant is not only the legal and registered owner of the suit land but also the guarantor.
24. The 1st Applicant appointed the 2nd Respondent to dispose of the suit property by way of public auction as the 3rd Respondent had defaulted in the repayment of the loan that was advanced to him. On the other hand, the Applicant claims that the loan agreement was entered into based on fraud and misrepresentation on facts. On the basis of these facts, it is my view that since the Applicant has a proprietary interest in the suit property and intends to challenge the actions of the 1st and 2nd Respondent with respect to the suit land; he has made out a prima facie case with probabilities of success.
25. In addition, from the valuation report that the Applicant has been submitted before this court, the suit land measures approximately 14.17Ha and is valued at Kshs. 70,000,000/=. The amount that the 1st Respondent is claiming from the 3rd Respondent is alleged to be in the tune of Kshs. 2,823,193.97/=. In my view, the Applicant has also demonstrated that he stands to suffer irreparable loss if the injunctive orders sought are not granted.

Conclusion

26. In the circumstances, there is no doubt in my mind that the injunctive order sought under prayer no. 3 of present application has met the requirements set out in *Giella v Cassman Brown (supra)*. In other words, the application for an injunction is merited.
1. I order that there shall be an order of injunction as prayed in prayer 3 of the application
 2. The respondent to issue bank statements as prayed in prayer No. (4).
 3. Costs to the applicant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF JANUARY 2024.

L.W. GITARI

JUDGE

