



**Pirbhai Jivanjee and Company Limited & 2 others v National Bank of Kenya
(Civil Suit 10 of 2022) [2024] KEHC 10294 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 10294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 10 OF 2022
F WANGARI, J
FEBRUARY 23, 2024**

BETWEEN

**PIRBHAI JIVANJEE AND COMPANY LIMITED 1ST PLAINTIFF
VANTAGE ROAD TRASPORTERS LIMITED 2ND PLAINTIFF
MODERN COAST BUILDERS AND CONTRACTORS LIMITED 3RD
PLAINTIFF**

AND

NATIONAL BANK OF KENYA DEFENDANT

RULING

1. By the Application dated 16th December 2022, the Plaintiff sought the following reliefs:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Pending the hearing and determination of this suit an order of injunction be and is hereby issued restraining the Defendant whether by itself, its employees, successors, servants and/or agents or otherwise assigns and or any person whatsoever advertising for sale, selling, disposing, alienating or in any manner whatsoever interfering with the Plaintiff's proprietorship, occupation and use of the properties known as Title Numbers Mombasa/block/xii/parcel 2 and Mombasa/block/XII/4 located within Makupa Area of Mombasa CBD.
 - e. An Order be issued for taking accounts of all the monies received by the Defendant in settlement of the 3rd Plaintiff's Loan Account.
 - f. Costs of this Application be borne by the Defendant/Respondent.



2. The Application is based on the grounds stated in the Application, as well as the Supporting Affidavit of Haroon Shahid Butt sworn on 16th December 2022 which materially stated inter alia as follows:
 - i. The 1st and 2nd Plaintiffs are the legal owners of the suit property.
 - ii. Sometimes on 26th August 2013, the Defendant advanced to the 3rd Plaintiff a series of overdraft facilities totaling kshs 324,000,000/= secured by a charge over the suit premises.
 - iii. The 3rd Plaintiff has since serviced the loan to the tune of kshs 500,000,000/= in loan and interest.
 - iv. The 3rd Defendant defaulted due to Covid effects on the economy and the Defendant issued the 90 days Statutory Notice of Sale on 23rd August 2021 for a sum of kshs 16,009,311.00 within 90 days.
 - v. The 3rd Plaintiff subsequently paid kshs 54,592,600/- in full and final settlement of loan arrears on 22nd December 2021.
 - vi. The Defendant acknowledged the payment and conforms that the statutory notice and 40 days notices were settled.
 - vii. Any subsequent notices and attempts to realize the security were thus irregular and illegal.
 - viii. The Defendant had not issued any statutory notices following the negotiated consensus that rendered the initial notices inoperative.
 - ix. The amount claimed was excessive, exaggerated and unfair and did not constitute the true arrears, if any.
3. The Respondent filed a 279-page Replying Affidavit Document sworn by one Morris S. Tiema on 18th January 2023 substantially contending inter alia that:
 - i. The 3rd Plaintiff was advanced overdraft facilities amounting to approximately kshs 324,000,000/=.
 - ii. Personal guarantees were also granted as part of the security for the loan.
 - iii. There was also a fixed floating charge for kshs 327,000,000/= secured by a debenture.
 - iv. The 3rd Plaintiff defaulted in repaying the loan leading to an outstanding kshs 92,425,156.80 as at 22nd August 2021.
 - v. The Defendant thus issued statutory notices in accordance with the law.
 - vi. A valuation report was done that advised open market value for Mombasa/block/XII/Parcel 2 at kshs 179,500,000/- and Mombasa/block/XII/4 at kshs 226,000,000/-.
 - vii. The Plaintiffs were clearly in default.

The Plaintiff's Written Submissions

4. The Plaintiff filed written submissions in support of the Application. It was submitted that by agreement of the parties, the payments made on 22nd December 2021 were in respect of the notice dated 23rd November 2021 which exhausted the statutory notices and rendered the notices spent.



5. Reliance was placed on *Halsburty's Laws of England*, 4th Edition that a charge may be restrained from exercising the power of sale if the mortgagor or chargor pays the amount claimed.
6. Counsel also relied inter alia on the cases of *Beatrice Atieno Onyango v Housing Fiance Corporation & 3 Others* (2020) eKLR, *Albert Mario Cordeiro & Another v Vishram Shamji* (2015) eKLR and *David Ngugi Ngaari v Kenya Commercial Bank* (2015) eKLR to canvass the point that where there was no statutory notices, the chargee could not realize the secured property.
7. It was also submitted that the Defendant was estopped from turning back to realize the security after the negotiations had crystalized. They cited *John Mburu v Consolidated Bank of Kenya* (2018) eKLR.
8. Counsel relied *inter alia* on the case of *Giella v Cassman Brown* (1973) E.A 358 and *Nguruman Limited v John Bonde Nielsen & 2 Others* (2014) eKLR to submit that the Plaintiff has established a *prima facie* case with probability of success. It was submitted that the Plaintiff would demonstrate at the hearing that kshs 54,592,600 was negotiated and settled and the notices were thus inoperative.
9. On irreparable loss, it was submitted on behalf of the Applicants that the Applicants stood to suffer irreparable damage should the auction and sale of the suit premises proceed. Therefore, counsel submitted that if an injunction is not granted, the Defendant will proceed to sell the property at an under value much to the detriment if the Plaintiffs.
10. On the balance of convenience, it was submitted that the inconvenience caused to the Applicant would be greater than to the Defendant because the Plaintiffs will suffer irreparable damage when the property is sold and becomes irredeemable. Counsel cited *American Cyanide Co. Ltd v Ethicon Ltd* (1975) ALL ER 504.

Defendant's Submissions

11. It was submitted on behalf of the Defendant that the statutory notices were proper and operative as they were not waived. The counsel submitted that the Plaintiff had not established a *prima facie* case.
12. On irreparable damages, it was submitted for the Defendant that the Applicants had not demonstrated that they would not suffer any damages that cannot be remedied by way of damages.
13. In totality, the Defendant reiterated the Replying Affidavit and submitted that the Plaintiff had not satisfied the mandatory conditions for the granting of an injunction as sought. Reliance was heavily placed on the case of *Giella v Cassman Brown* (1973) E.A 358 and *Nguruman Limited v John Bonde Nielsen & 2 Others* (2014) eKLR.

Analysis

14. The Court has considered the Notice of Motion Application, Responses thereto and the submissions and authorities filed in support and opposition to the Application.
15. The singular issue that presents for this Court's determination is whether the Applicant has fulfilled the legal threshold for the grant of a temporary injunction pending the hearing and determination of the suit.
16. This court will be keen to draw border lines between the issues that would go to full trail and the issues necessary to establish the conditions for the grant of a temporary injunction. The Plaintiff submitted heavily on the extent of the loan repayments. This is an area the court will proceed with care to avoid delving into the accounts that are subject to evidence at the full trial.



17. The law that governs Applications for injunction is premised under Order 40 Rule 1 of the [Civil Procedure Rules 2010](#) which provides 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.
18. The principles were laid down in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 where the court held that in order to qualify for an injunction;
- (i) First the applicant must show a prima facie case with a probability of success.
 - (ii) Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
 - (iii) Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
19. It is disputed that the advanced loan amount is outstanding and is due for payment. Whereas the Plaintiff's case is that the intended sale of the suit property is unlawful and the Defendant is estopped from claiming any arrears. On the other hand, the Defendant maintains that the statutory notices are proper since there is outstanding loan arrears.
20. Largely, these contested matters are of the nature to warrant a meritorious hearing to enable the court explore and analyze the available evidence and testimonies to arrive at a founded conclusion.
21. What is clear from the Application is that the Plaintiffs' apprehension of danger is premised on the fact that if the intended sale is not stopped, the Defendant will sell the suit property which will be unavailable and irredeemable should the court find, after hearing the main suit, in favor of the Plaintiffs.
22. The amounts claimed and disputed are colossal. There is also a dispute as to the validity of the notices. Whereas the Plaintiffs has prayed for accounts, I do not think the court can order for accounts at this stage without delving unnecessarily into the issues of the main suit. Therefore, the issues raised by the Plaintiff cannot be said to be trivial. They are substantial and raise a *prima facie* case.
23. On the second limb of irreparable damage, this case brings out an important contractual principle that security pledged to a financial institution or bank stands the risk of being sold and the intended sale is within the contemplation of the parties to the loan agreement.
24. In other words, the sale of property by the mortgagee cannot lead to irreparable loss since it is the contractual arrangement or intention of the parties, and expressly provided for in the loan agreement or mortgage deed.



25. The Applicant does not dispute service of the statutory notice. I note that what is disputed is whether the statutory notice is valid. It raises a question of whether there are arrears and whether fresh notices ought to have been issued.
26. I find that if the suit premises were to be sold before the determination of the suit, the weighty issues that lie for determination will not be available and the Plaintiff will risk the danger of losing the suit property with chances that the same will not be available should the suit be decided in the Plaintiffs' favour. As for the Defendant, the loss will not be insurmountable since the Defendant will still claim its dues, at a current value, and with interest.
27. Faced with similar issues in the case of *William Kanyi Hezekiah v Equity Bank Ltd & another* [2017] eKLR, I am persuaded by the reasoning of the Court as follows:
- “Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established and what the court can do is to cause the ascertainment of the right value for forced sale of the property.”
28. In determining where the balance of convenience lies, considering the facts of this case in totality, I find that the balance of convenience tilts in favour of the Applicant.
29. In view of the above analysis and findings, the conclusion becomes irresistible that the Applicant's Notice of Motion dated 16th December 2022 is merited.

Determination

30. In the upshot, I allow the Plaintiffs' Application as follows:
- i. Pending the hearing and determination of the main suit, an Order of Injunction is hereby issued restraining the Defendant whether by itself, its employees, successors, servants and/or agents or otherwise assigns and or any person whatsoever advertising for sale, selling, disposing, alienating or in any manner whatsoever interfering with the Plaintiff's proprietorship, occupation and use of the properties known as Title Numbers Mombasa/block/xii/parcel 2 and Mombasa/block/XII/4 located within Makupa Area of Mombasa CBD.
 - ii. Costs shall abide the outcome of the main suit.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 23RD DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of;

Angwara Advocate for the Applicant

Nyamache Advocate h/b for Ngaine Advocate for the Respondent

Barile, Court Assistant

