



**Noor & 4 others v Premier Bank Limited & another (Commercial Case E527 of 2023)  
[2024] KEHC 1542 (KLR) (Commercial and Tax) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E527 OF 2023  
PM MULWA, J  
FEBRUARY 22, 2024**

**BETWEEN**

**MAHAT MOHAMUD NOOR ..... 1<sup>ST</sup> PLAINTIFF  
YUSUF ADEN MOHAMED ..... 2<sup>ND</sup> PLAINTIFF  
WAKO GALGALO ODHA ..... 3<sup>RD</sup> PLAINTIFF  
RICHARD MATERE LUSWETI ..... 4<sup>TH</sup> PLAINTIFF  
GVR INFRA PROJECTS LIMITED ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**PREMIER BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT  
NEXTGEN AUCTIONEERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs/applicants filed a Notice of Motion application dated 31<sup>st</sup> October 2023 pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 40 Rules 1 & 2 of the *Civil Procedure Rules*, 2010 seeking the following orders -
  - i. Spent;
  - ii. Spent;
  - iii. That pending the hearing and determination of this suit, the Honourable Court be pleased to grant a temporary injunction restraining the respondents whether by themselves, their servants, agents or any person claiming through or under them from entering, selling, taking over, advertising for sale, offering for sale or in any matter whatsoever interfering with those



properties known as Land Reference Number 209/ 22172 (IR. 204301), Land Reference Number 209/ 21799, Apartment B1 on Land Reference Number 2/668 and Apartment Number 103, 1<sup>st</sup> Floor erected on Land Reference Number 2/714.

- iv. That costs of this application be provided for.
2. The application is premised on the grounds on the face of the motion and supported by affidavits sworn by Mohamud Mahat Noor, the 1<sup>st</sup> plaintiff herein and a Director of the 5<sup>th</sup> plaintiff on 31<sup>st</sup> October 2023 and 16<sup>th</sup> January 2024. In opposition thereto, the defendants/respondents filed a replying affidavit sworn by Claris Ajwang Ogombo, the 1<sup>st</sup> defendant's/respondent's Legal Manager.
3. The plaintiffs' case is that vide a letter of offer dated 6<sup>th</sup> June 2022 they were advanced financial facilities to the tune of Kshs. 538,500,000/= by First Community Bank, the 1<sup>st</sup> defendant's predecessor. The said facilities were secured by the various charges over the suite properties registered in favour of the 1<sup>st</sup> defendant and cash cover of USD 224,231.00 translating to Kshs. 33,724,342.40 held by the Chargee. The plaintiffs averred that they have been regularly servicing the said facility and has so far made substantial payments of the loan amount advanced to them but despite numerous requests, the 1<sup>st</sup> defendant has declined to issue them a comprehensive statement of account. They contended that they are apprehensive that the 1<sup>st</sup> respondent did not undertake proper reconciliation of the plaintiffs' loan accounts so as to ascertain their indebtedness or otherwise during the acquisition process of First Community Bank.
4. The plaintiffs asserted that they were shocked when the 2<sup>nd</sup> defendant advertised in the Daily Nation newspaper of 26<sup>th</sup> October 2023 a public auction of the charged properties to be held on 9<sup>th</sup> November 2023. They stated that the 1<sup>st</sup> defendant's exercise of its statutory power of sale has not yet crystalized in light of the fact that they were never served with the relevant statutory notices as required by law. They further stated that the 1<sup>st</sup> defendant has since been accompanying potential buyers to the suit properties thus causing disturbance to the occupants of the said premises which means that it is ready to take over and sell the suit properties in an unprocedural manner.
5. The defendants in response thereto averred that the 1<sup>st</sup> plaintiff has no authority to act for the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> plaintiffs as he has not produced a copy of any written authority from the said plaintiffs authorizing him to act on their behalf. For this reason, all averments contained in the supporting affidavit sworn on 31<sup>st</sup> October 2023 only relate to the 1<sup>st</sup> & 5<sup>th</sup> plaintiffs hence any orders emanating from this Court as a result of the application herein cannot apply to them. The 1<sup>st</sup> defendant asserted that sometime in the year 2020, the 1<sup>st</sup> plaintiff in his capacity as the sole owner and Director of the 5<sup>th</sup> plaintiff approached the 1<sup>st</sup> defendant with a view of securing a financial facility in the sum of USD. 4,684,000/= . Thereafter, a facility agreement was executed on 6<sup>th</sup> June 2022 and a subsequent variation to the said facility agreement dated 21<sup>st</sup> June 2022 which was meant to prolong the repayment period of the loan advanced to the 5<sup>th</sup> plaintiff.
6. It stated that it was agreed between the parties in the facility agreement that the loan of USD. 4,684,000/= was for a term of twelve (12) months and secured by various charges over the suit properties registered in favour of the 1<sup>st</sup> defendant, cash cover of USD. 224,231/= (an amount that the 5<sup>th</sup> plaintiff Company has never remitted to the 1<sup>st</sup> defendant to date.), and several joint deeds of guarantee for USD. 4,700,000/= duly executed by the 1<sup>st</sup> plaintiff. It further stated that upon drawdown of the loan, the 5<sup>th</sup> plaintiff company paid the 1<sup>st</sup> installment of USD. 110,876.05 and thereafter defaulted on the remainder of its payments thus its loan account fell into arrears and the 1<sup>st</sup> defendant was left with no other option but to realize the securities that had secured the loan. The 1<sup>st</sup> defendant asserted that on 16<sup>th</sup> February 2023, it issued a 90-days' notice to the plaintiffs. That since the



- 5<sup>th</sup> plaintiff did not regularize its loan account after issuance of the aforesaid notice, after the lapse of the 90-days the 1<sup>st</sup> defendant issued the plaintiffs with a 40-days' statutory notice dated 24<sup>th</sup> May 2023. Failure to comply with the 40-days' notice prompted the 1<sup>st</sup> defendant to instruct the 2<sup>nd</sup> defendant to issue the plaintiffs with a 14-days' Notice of Sale and thereafter auction the securities held.
7. The 1<sup>st</sup> defendant asserted that upon service of the aforementioned statutory notices, the 3<sup>rd</sup> plaintiff through his Advocates Messrs. Ndeda & Company Advocates wrote a letter dated 5<sup>th</sup> September 2023 to the 1<sup>st</sup> defendant acknowledging receipt of the said notices. It averred that upon undertaking lengthy negotiations with the 1<sup>st</sup> plaintiff, they executed a Settlement Agreement on 15<sup>th</sup> September 2023 where it was agreed inter alia that; "...the debtor confirms that as at 31<sup>st</sup> August 2023 it is indebted to the Bank in the sum of USD. 4,867,614.43 which amount remains unpaid to-date and continues to accrue interest; the debtor undertakes to settle the outstanding amount; and in the event of default, this agreement stands as repudiated, the entire outstanding sum inclusive of all penalties and legal costs shall become automatically due and the Bank shall be at liberty to pursue recovery through legal means, including but not limited to, auctioning the secured properties, without necessity of issuing Statutory Notices. The debtor herein expressly waives its right to be issued with Statutory Notices in the event of default." However, the 5<sup>th</sup> plaintiff defaulted in its obligations and the defendant had no option but to proceed with the sale of the secured properties.
  8. In rejoinder, the plaintiffs averred that the cash cover of USD 224,231.00 which was one of the securities for the financial facility advanced to the plaintiffs never left the plaintiff's account. Therefore, the 1<sup>st</sup> defendant having access to the said account should shed light on what happened to it.
  9. The instant application was canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Ondieki A. Advocates on 22<sup>nd</sup> January 2024 whereas the defendants' submissions were filed on 16<sup>th</sup> January 2024 by the law firm of Igeria & Ngugi Advocates.
  10. Mr. Ondieki, learned counsel for the plaintiffs referred to the provisions of Sections 90(1) & (2) and 96 (1) & (2) of the Land Act and submitted that a chargee is required to give the chargor a notice of not less than two months and a further 40 days' notice if the chargor continues to remain in default before exercising its statutory power of sale. He further submitted that in this case, the 1<sup>st</sup> defendant's statutory power of sale had not accrued since the plaintiffs were never served with the requisite statutory documents.
  11. He relied on the decisions in the case of Paul Gitonga Wanjau v Gatbuthis Tea Factor Company Ltd & 2 others [2016] eKLR and that of Amir Suleiman v Amboseli Resort Limited [2004] eKLR and contended that there is a lower risk in granting orders of temporary injunction than not granting them before this case can be heard and determined. In submitting that the suit properties might be in danger of being dealt in the manner set out in the application in the event an order of temporary injunction is not granted by this Court, learned counsel referred to the case of Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR.
  12. Mr. Njoroge, learned counsel for the defendants cited the provisions of Order 1 Rule 13 of the Civil Procedure Rules 2010 and the Court of Appeal case of Research International East Africa Limited v Julius Arisi & 213 Others [2007] eKLR and submitted that the 1<sup>st</sup> plaintiff having failed to file any written authority from the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> plaintiffs authorizing him to plead or act on their behalf in this matter, the averments contained in the supporting affidavit sworn on 31<sup>st</sup> October 2023 relate only to the 1<sup>st</sup> & 5<sup>th</sup> plaintiffs.
  13. He relied on the case of Giella v Cassman Brown [1973] EA 358 which sets out the conditions for the grant of an interlocutory injunction and the case of Mrao v First American Bank of Kenya Limited



§ 2 Others [2003] KLR 125 where the court defined what constitutes a *prima facie* case and further submitted that the plaintiffs have failed to demonstrate that they have a genuine and arguable case or a right which has apparently been infringed by the defendants. Learned counsel contended that the plaintiffs have not adduced any evidence in support of the averment that they were diligently servicing their loan. On the contrary, the 1<sup>st</sup> defendant has tendered evidence showing the loan account statement of the 5<sup>th</sup> plaintiff in the form of a repayment schedule. The above notwithstanding, the plaintiffs have not denied being indebted to the 1<sup>st</sup> defendant since they defaulted in their obligations to repay the loan. For this reason, the Mr. Njoroge asserted that the plaintiffs have failed to establish a *prima facie* case with a probability of success.

14. On whether the plaintiffs stand to suffer irreparable loss in the event the instant application is disallowed, learned counsel submitted that since the nature of the loss the plaintiff stands to suffer is financial in nature the same is easily calculable. He relied on the case of Joseph Kipkorir Cheruiyot & another v Equity Bank (K) Limited & another [2017] eKLR and stated that in any event the 1<sup>st</sup> defendant is a financial institution thus it will be in a position to compensate the plaintiffs in the unlikely event that the main suit is determined in their favour. Mr. Njoroge further relied on the case of National Bank of Kenya Ltd v Isaac A. Ogettab [1999] eKLR and submitted that the balance of convenience tilts in favour of the defendants because the loan facilities are obtained from bank deposits from the public and as such the money ultimately belongs to the public and not the bank. This means that in the event the plaintiffs fail to pay the USD. 4,684,000 loan advanced to it by the bank, the loss is borne by the public.

### **Analysis and Determination**

15. Upon consideration of the instant application, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the defendants and the written submissions by counsel for parties, the issues that arise for determination are:
  - i. Whether failure to attach authority authorizing the deponent of the plaintiffs' affidavit to swear affidavits on their behalf is fatal; and
  - ii. Whether the plaintiffs have made out a case to warrant grant of an order for temporary injunction.

### **Whether failure to attach authority authorizing the deponent of the plaintiffs' affidavit to swear affidavits on their behalf is fatal.**

16. The 1<sup>st</sup> plaintiff averred at paragraph 1 of the affidavit in support of the application herein that he has authority of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> plaintiffs to swear affidavits on their behalf. However, he only annexed a copy of the 5<sup>th</sup> plaintiff's authority authorizing him to act and sign any court process on its behalf in this matter. The 1<sup>st</sup> plaintiff has not produced a copy of the authority issued to him by the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> plaintiffs authorizing him to swear the said affidavit on their behalf instead he avers at paragraph 2 of his supplementary affidavit that he has authority of the 5<sup>th</sup> plaintiff to swear the said affidavit on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> plaintiffs.
17. Order 1 Rule 13 of the Civil Procedure Rules, 2010 states that: -
  1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.



2. The authority shall be in writing signed by the party giving it and shall be filed in the case.
18. The defendants asserted that in the absence of a copy of a written authority from the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> plaintiffs authorizing him to act on their behalf, all averments contained in the supporting affidavit sworn on 31<sup>st</sup> October 2023 only relate to the 1<sup>st</sup> & 5<sup>th</sup> plaintiffs hence any orders emanating from this Court as a result of the application herein cannot apply to them. In the case of *Abdulla Abshir & 38 Others v Yasmin Farah Mohamed* [2015] eKLR the Court when confronted with a similar situation held that –
- “From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding.”
19. The Court further held that –
- “On the other hand, in paragraph 1 of the supporting affidavit the 1<sup>st</sup> applicant states that he is authorized by the rest of the applicants to swear the affidavit on their behalf. Whilst there is no requirement in applications that authority to swear affidavits be in writing or be filed, I think that there having been no original authority signed and filed as relates the suit, that averment is not adequate and is of no consequence. It cannot save the position of the rest of the 37 applicants who never swore any affidavit in support of the application. Accordingly, their application is hereby struck out.”
20. It is noteworthy that the 1<sup>st</sup> plaintiff has not produced a copy of the authority issued to him by the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> plaintiffs authorizing him to swear the said affidavit on their behalf. He only produced a copy of the 5<sup>th</sup> plaintiff's authority. Consequently, this Court finds that failure to file the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> plaintiffs' authority is fatal. As a result, the instant application with respect to the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> plaintiffs is a nullity in the absence of a supporting affidavit sworn by them and thus no orders can be granted in their favour.

### **Whether the plaintiffs have made out a case to warrant grant of an order for temporary injunction**

21. Temporary injunctions are provided for under Order 40 Rule 1 of the *Civil Procedure*, 2010 which states that -
- “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.”



22. The test for granting an interlocutory injunction was considered in the case of *American Cyanamid Co. v Ethicom Limited* [1975] AER 504 where three elements were noted to be of great importance namely:
- i. There must be a serious/fair issue to be tried,
  - ii. Damages are not an adequate remedy, and
  - iii. The balance of convenience lies in favour of granting or refusing the application.”
23. The Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, considered what constitutes a prima case and held that -
- “So, what is a *prima facie* case” I would say that in civil cases it is a case in which on the material presented... 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 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.”
24. The plaintiffs’ application is anchored on the fact that they were not issued with the requisite statutory notices before the suit properties were advertised and scheduled for sale by public auction. The plaintiffs claim that they have been diligently servicing the financial facility advanced to them by the 1<sup>st</sup> defendant ever since the money was disbursed into their account. Furthermore, they have made several requests to the 1<sup>st</sup> defendant to be supplied with a statement of the 5<sup>th</sup> plaintiff’s loan account but the same has never been supplied. The defendant on the hand averred that the plaintiffs only repaid the first installment and thereafter defaulted on the remainder of its payments thus the 5<sup>th</sup> plaintiff’s loan account fell into arrears.
25. I am inclined to agree with Counsel for the defendants that in as much as the plaintiffs aver that they have been servicing the financial facility advanced to the 5<sup>th</sup> plaintiff diligently, they have not adduced any evidence in support of this averment. On the contrary they have annexed to their supporting affidavit a copy of the 5<sup>th</sup> plaintiff’s loan account statement which shows that as at 23<sup>rd</sup> November, 2022, the said account had a negative balance of USD. 4,867,614.43. This, coupled with the settlement agreement executed between the 5<sup>th</sup> plaintiff and the 1<sup>st</sup> defendant wherein it was agreed that as at 31<sup>st</sup> August 2023 the 5<sup>th</sup> plaintiff was indebted to the 1<sup>st</sup> defendant in the sum of USD. 4,867,614.43 gives credence to the 1<sup>st</sup> defendant’s assertion that the 5<sup>th</sup> plaintiff defaulted in its loan repayment obligations of the financial facility advanced to it by the 1<sup>st</sup> defendant causing its loan account to run into arrears.
26. The plaintiffs averred that before the 1<sup>st</sup> defendant chose to exercise its statutory power of sale, it did not serve them with the requisite statutory notices as required by law. It is now settled law that a chargor’s right of redemption is only extinguished upon service of the 90- & 40-days notices pursuant to Sections 90 & 96 of the *Land Act*, and the 45 days redemption notice pursuant to Rule 15 of the *Auctioneer’s Rules* 1997. The 1<sup>st</sup> defendant has annexed to its replying affidavit a copy of a statutory notice pursuant to the provisions of Section 90 & 96 of the *Land Act*, 2012 dated 16<sup>th</sup> February 2023 addressed to the plaintiffs and sent to them by registered post, a copy of a 40 days’ notification of sale pursuant to the provisions of Section 90 & 96 of the *Land Act*, 2012 dated 24<sup>th</sup> May 2023 addressed to the plaintiffs and also sent to them by registered post.



27. In a bid to prove service of the aforesaid documents, the 1<sup>st</sup> defendant has also annexed copies of list of registered postal packets, registered and ordinary parcels posted by First Community Bank, the 1<sup>st</sup> defendant's predecessor, as stated by the 1<sup>st</sup> and 5<sup>th</sup> plaintiff in their affidavit in support of the instant application. It is however noteworthy that the 1<sup>st</sup> defendant has not demonstrated service of the 45 days redemption notice to the plaintiffs as contemplated under Rule 15 of the Auctioneer's Rules, 1997. For this reason, I find that the plaintiffs have established a *prima facie* case with probability of success as their right of redemption of the suit properties has not yet been extinguished.
28. On whether the plaintiffs stand to suffer irreparable damage that cannot be adequately compensated by an award in damages in the event the instant application is disallowed, I am persuaded that this is the case. This is because, as explained hereinabove, the 5<sup>th</sup> plaintiff is indebted to the 1<sup>st</sup> defendant in the sum of USD. 4,867,614.43 as of 31<sup>st</sup> August 2023. However, despite the fact that the 1<sup>st</sup> defendant served the plaintiffs with the notices contemplated under Section 90 & 96 of the Land Act, it did not serve them with the 45 days redemption notice contemplated under Rule 15 of the Auctioneer's Rules, 1997. This means that the plaintiffs right of redemption has not yet been extinguished.
29. The issue of balance of convenience does not arise since the Court is not in doubt. Nevertheless, based on the foregoing, the balance of convenience tilts in favour of the plaintiffs in light of non-compliance with the provisions of Rule 15 of the Auctioneer's Rules 1997.

### **Disposition**

30. The upshot is that the application dated 31<sup>st</sup> October, 2023 is merited. However, having found that the 5<sup>th</sup> plaintiff is truly indebted to the 1<sup>st</sup> defendant, I make the following orders: -
- i. Pending the hearing and determination of this suit, a temporary injunction is issued restraining the defendants whether by themselves, their servants, agents or any person claiming through or under them from entering, selling, taking over, advertising for sale, offering for sale or in any manner whatsoever interfering with those properties known as Land Reference Number 209/22172 (IR 204301), Land Reference Number 209/21799, Apartment B1 on Land Reference Number 2/668 and Apartment Number 103, 1<sup>st</sup> Floor erected on Land Reference Number 2/714;
  - ii. The order for temporary injunction is limited to the time the defendants shall comply with the provisions of Rule 15 of the Auctioneer Rules 1997; and
  - iii. Each party to bear its own costs.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**P. MULWA**

**JUDGE**

In the presence of:-

Ms. Nduva h/b for Mr. Ondieki for Plaintiffs/Applicants

Mr. Njoroge Defendant/Respondent

Court Assistant: Carlos

