



Armytex International Security Services Limited & another v Equity Bank (K) Limited & another (Civil Case E088 of 2023) [2024] KEHC 10305 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 10305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E088 OF 2023
F WANGARI, J
APRIL 26, 2024**

BETWEEN

**ARMYTEX INTERNATIONAL SECURITY SERVICES LIMITED 1ST
PLAINTIFF**

LINET AWINO AWUOR MAENDE 2ND PLAINTIFF

AND

EQUITY BANK (K) LIMITED 1ST DEFENDANT

MAKURI AUCTIONEERS 2ND DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 17th November, 2023 which sought for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this suit, the honorable court do issue an order of temporary injunction restraining the defendants from proceeding with the public auction slated for 20th November, 2023 as against the plaintiff/applicant herein as indicated in the Notification for sale dated 18th September, 2023 to restrain them and their agents from attaching, auctioning and /or selling the plaintiff's land known as LR.No. Mainland North/ Section 1/19128 –Utange, L.r No. Mainland North/Section 1/21559 and L.r No. Mainland North/ Section 1/122289.
 - d. That this honorable court be pleased to make such orders it may deem fit, just, fair, reasonable and appropriate in the circumstances in order for the ends of justice to meet.



- e. That the costs of this application be borne by the Defendant/Respondent.
2. The application was strenuously opposed. The 1st Respondent filed a detailed replying affidavit dated 19th December, 2023. It was sworn by the Respondent's credit manager.
3. Among the issues raised in the affidavit was the applicant had defaulted in the repayments of her loan and as per the letter of offer the failure to repay a single instalment when it fell due meant the entire loan then became due. That the plaintiff never pointed out any inaccuracies in the statements of account sent regularly. That the grounds set out by the plaintiff do not provide a basis for grant of the orders sought.
4. Directions were taken that the application be canvassed by way of written submissions wherein all parties complied by filing submissions and citing authorities in support of their respective rival positions. I am grateful to Counsel on their compliance as the submissions filed will aid the court in arriving at a just decision either way.

Analysis and Determination

5. I have considered the application, responses, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination
 - a. Whether the Applicant has made out a case for grant of orders of injunction;
 - b. If the answer to (a) above is in the affirmative, what orders should issue?
 - c. Who bears the costs of the application?
6. Turning to the substance of the application, the facts are not greatly in dispute. The applicant contends that it had taken several loan facilities from the 1st respondent and due to economic downtime, she was unable to repay the loans as required. That some of the loans for instance; that sometime in February, 2021 the 1st plaintiff and the 1st defendant entered into a 4th agreement for a credit facility of Kshs.14,5690,000/- for purchase of property subdivision number 22289 (Original 1489/19) of section 1 Mainland North which was to be repaid in 84 months.
7. That due to economic downtime, the applicant struggled to repay the loan and the amount outstanding drastically increased and it now stands at Kshs.16,492,810 yet the arrears are Kshs.3,052,292. The applicant contends that the loan expiry date is 15th July, 2028.
8. That should the auction proceed the applicant will lose its properties and yet it has already liquidated most of the loan granted to it.
9. This being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

“...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) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

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..." (Emphasis added)

10. While considering the above principles, I take caution that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002*).
11. However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.
12. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity.
13. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.
14. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.¹
15. So has the Applicant established prima facie case? In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, prima facie case was defined as follows: - "...In civil cases a prima facie

¹ See *JM v SMK & 4 Others* [2022] eKLR



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...”

16. In their application, the Applicants aver that the amount sought by the Respondent was erroneous as they had substantially re-paid the loan. That their failure to re-pay the loan as required was occasioned by economic downtime.
17. The applicants had wilfully restructured their loan and entered into a new agreement. They had however failed to make repayments as had been agreed and the entire sum fell due.
18. The applicants do not deny the existence of the loan amount but submit that they can liquidate given a time frame. The 1st respondent on their part submit that the applicants failed to establish a prima facie case as they argue that they can only be asked to repay the instalments due but not the entire amount yet the loan restructuring agreement is clear that once there is a default the entire sum becomes due.
19. The applicants argue that there were hard economic times during the period of the subsistence of the loan. The 1st respondent had advanced several loans to the applicants and the same were even restructured to allow for an extended period of repayment. The applicant failed to repay.
20. Economic hardship I agree is not a ground for issuance of injunctive orders. The rights of the lender and those of the borrower must be balanced. The applicants ought to have exercised good faith by making repayments but nothing has been shown to that effect. There was lack of goodwill on the applicant's part.
21. I therefore find that the applicants failed to establish that they have prima facie case to warrant the issuance of orders sought.
22. As held in Nguruman (supra), having found that the applicants have not established a prima facie case, I am duty bound to consider the second facet, that is, irreparable injury. The Court of Appeal in the above case expressed itself thus: -

“...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.” (Emphasis added)

23. The Applicant while acknowledging that they have a duty to repay the loan, that they stand to suffer irreparable damage that cannot be compensated by way of damages. That they are at the verge of losing all their properties should the orders sought not be granted. That being a service industry, they will suffer an injustice as most of its employees will be rendered jobless. In Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR, Warsame, J (as he then was) held as follows: -

“...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction...”



24. The applicants were duty bound to repay the loans as per the agreement and they are well aware of the said duty. They had their loan restructured and they knew what was expected of them. They have not shown what irreparable damage they will suffer save for making general statements that their service industry stands to close.
25. On the third limb, that is, balance of convenience, the same tilts in favour of the respondent. As noted above, the rights of both the lender and the borrower must be balanced. In as much as the applicant states that they went through hard economic times, they ought to have demonstrated their willingness to pay. In *Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another* [2019] eKLR, balance of convenience was defined as follows: -
- “...the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed...”
26. Putting all the facts into perspective, I note that the balance of convenience does not tilt in favour of the plaintiff.
27. I therefore find no merit for the orders sought.
28. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. Having considered the fact that this is an interlocutory application, it would be onerous to award costs to any party at this stage. Therefore, I direct that there shall be no order as to costs.

Determination

29. Based on the above discourse, I make the following orders: -
- a. The application dated 17th November, 2023 is lacks merit and is dismissed.
 - b. Parties encouraged to resolve the issue on payment of arrears and outstanding loan.
 - c. There shall be no order as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024

F. WANGARI

JUDGE

In the presence of;

Kongere Advocate for the 1st Defendant

N/A by the Applicant

Barile, Court Assistant

