



REPUBLIC OF KENYA



KENYA LAW
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Kabogo & another v KCB Bank Kenya Limited & another (Commercial Case E006 of 2023) [2024] KEHC 6343 (KLR) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE E006 OF 2023**

A MSHILA, J

MAY 31, 2024

BETWEEN

JOHN NGUGI KABOGO 1ST PLAINTIFF

DORIS NAMAYI ORIKO 2ND PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

**BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERING
SERVICE 2ND DEFENDANT**

RULING

1. Before court is an application by way of Notice of Motion dated 11th October, 2023 and brought under Section 90(1) and (2), 96(2) and Section 104 (1)(b), (2) (b) and (c) of the [Land Act](#), 2012, Rule 15 of the Auctioneers Rules 1997, Section 56(1) of the [Consumer Protection Act](#), Section 3 and 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and Order 40 Rule 1 (a) and (b), Rule 10(1) (a) of the Civil Procedure Rules 2010 and all the other enabling provisions of the law. The Applicants sought for orders THAT:-
 - a. Spent
 - b. This Honourable Court do issue an order directed to the 1st Respondents to be summoned to explain the actions they have taken since the orders were issued on 22nd May, 2023 and show cause why they should not be held in contempt of court and be fined.
 - c. This Honourable court do issue an order directed to the 2nd Respondents to be summoned to explain the actions they have taken since the orders were issued on 22nd May 2023 and show cause why they should not be held in contempt of court and be committed to civil jail.



- d. Pending the hearing of this Application inter partes, a temporary injunction do issue restraining the Respondents by themselves, their proxies, servants, agents or otherwise whomsoever from selling, advertising for sale and/or alienating and/or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty the parcels of the property comprise of LR No.19094/38 Five Star Meadows Kiambu registered in the name of the 1st Plaintiff/Applicant.
 - e. Spent
 - f. Pending the hearing and final determination of the suit, an injunction do issue restraining the Respondents by themselves, their proxies, servants, agents or otherwise whomsoever from selling, advertising for sale and/or alienating and/or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty the property comprised of LR No. 19094/38 Five Star Meadows Kiambu registered in the name of the 1st Plaintiff/ Applicant.
 - g. An order be issued restraining the Respondents from foreclosing on the suit property by relying on the 45 days redemption Notice and Notifications of Sale dated the 16th March 2023 and Notice dated 26th September, 2023 and/or any other notices allegedly served upon the Plaintiffs/Applicants until this Application is heard and determined.
2. The application is based on the grounds that the 1st Respondent has disregarded the interim orders of the court issued on 22nd May, 2023 granting a temporary injunction by instructing the 2nd Respondent who has served notice of sale by public auction. The same being advertised in the daily newspaper.
 3. The application is supported by the affidavit of John Ngugi Kabogo. he deposed that he is the registered proprietor of property comprised Villa No. 70 on LR. NO. 19094/38 Five Star Meadows. That the 1st Respondent advanced Kshs. 30 Million to the 1st Applicant being 80% of the purchase value of the property and he contributed Kshs. 7,500,000/= being 20% of the purchase price. That on 20/3/2023 the 2nd Respondent served the Applicants with notifications of sale by public auction and the same was advertised for sale on 23/5/2023. He deposed that vide his application dated 19/5/2023, interim orders were granted on 22/5/2023 nevertheless the 1st Respondent has issued Notifications of Sale of the intended sale unless he pays Kshs. 71,990,392.20 as at 19/09/2023. The Respondents were said to have disregarded the court orders issued on 22/5/2023 as such they should be held in contempt. The Notifications of Sale dated 26/09/2023 were said to be illegal. He contended that there exists the danger of undervaluing by the Respondents while the Applicants agent valued the same at Kshs. 40 Million. The 1st Respondent was accused of failing to furnish the Applicants with a true statement of accounts which amounts to clogging their right of redemption and that the statements rendered were marred with errors according to the audit report conducted by Audit Focus Advisory. The court was urged to grant the orders sought as failure to the Applicants shall suffer irreparable loss and injury.
 4. JUSTUS WAMBUA the Recoveries Manager of the 1st Respondent swore the Replying Affidavit dated 25th October, 2023. He denied that the 1st Respondent was in contempt of any court order. He averred that the 1st Applicant had been advanced two loans of 40 Million and 30 Million. That the loan for Kshs. 30 Million was secured by a Charge over Villa 70 on LR. NO. 19094/38 Five Star Meadows. That the 1st Respondent erroneously exercised its statutory power of sale in relation to the villa erected on LR. NO. 19094/38 Five Star Meadows instead of LR. NO. 4894/218 but upon realising the same, the 2nd Respondent was instructed to overturn the sale. The extension of the ex-parte orders was said to be a miscarriage of justice as the afore-mentioned orders lapsed automatically when the 1st Plaintiff failed to seek an extension on 15/7/2023 as such the orders extended on 17/10/2023 were done on



material non-disclosure as such the 1st Respondent cannot be held in contempt. That the court was misled that service had been effected. That there exists a similar application dated 19th May, 2023 as such the instant application is an abuse of the court. Statement of accounts were said to have been furnished and no errors were pointed out by the 1st Applicant. The interest rate charge was said to be well within the law. The valuation report by the 1st Applicant was said to be an exaggeration. The balance of convenience was said to tilt in favour of the 1st Respondent as the Applicants should not seek to frustrate the recovery of the debt by realizing the security offered.

5. The parties were directed to canvass the application by filing and exchanging written submissions.

Applicant's Submissions

6. The Applicant submits that the 1st Respondent acted deliberately against the valid court order issued on 22nd May, 2022 by instructing the 2nd Respondent to advertise the suit properties for sale by public auction. Reliance was placed in the case of *Oilfield Movers Ltd vs Zahara Oil & Gas Limited* (2020) eKLR. The Respondents were said to have been aware of the orders made on 22/5/2023 as they were served on 17/10/2023 as such are in contempt of the court. The interim orders were not set aside and the same had not lapsed as one year has not lapsed. It was submitted that the respondent should be punished for contempt of court. Reliance was placed in the case of *Econet Wireless Kenya Limited vs Minister For Information and Communication of Kenya Authority* (2005) eKLR. The court was urged to hold the respondents in contempt and punish the respondents.

Respondents' Submissions

7. The Respondents submitted that there is no valid order on which contempt can be founded as the orders issued on 22/5/2023 lapsed for failure of extension. That the extension done on 17/10/2023 was based on non-disclosure that the orders had already lapsed by operation of law as such the orders should be discharged. Reliance was placed on the case of *Ochola Kamili Holding Limited vs Guardian Bank Limited* (2018) eKLR. It was submitted that ex parte orders may be granted only once for not more than 14 days and should only be extended with the consent of the parties or by the order of the court and for 14 days. The Respondents submitted that the Plaintiffs have not placed before court any evidence to prove that they were never served with the court directions of 16/10/2023 causing the court to extend the interim orders on 17/10/2023 ex parte and due to misrepresentation. Reliance was placed in the case of *Patrick Omondi Opiyo T/A Dallas Pub vs Shaban Keah & another* (2018) eKLR. The court was urged to set aside the said orders obtained through material non-disclosure. The court was urged to dismiss the applicant's application for the 1st Respondent to exercise its statutory power of sale that has crystallized.

Issues For Determination

8. After reading the application and supporting affidavit this court has framed the following issues for determination;
 - i. Whether the Respondents should be held in contempt of court orders made on 22/05/2023;
 - ii. Whether the application seeking a temporary injunction order pending the hearing and final determination of the suit is merited.



Analysis

Whether the Respondents should be held in contempt of court orders made on 22/05/2023;

9. Upon perusal of the court record indeed reflects that the 1st Plaintiff obtained injunctive orders on 22/05/2023 and the matter was listed on 31/05/2023 for directions for hearing inter-partes; on this date that is 31/05/2023 both parties failed to appear and the matter was stood over to 15/06/2023; counsels for the parties were in attendance on 15/06/2023 when the Respondent raised a Preliminary Objection and the Plaintiff/Applicant was directed to file a Supplementary Affidavit and the matter was set down for further directions on 29/06/2023; the matter was mentioned on 29/06/2023 before the Deputy Registrar as the Judge was away on official duties and a mention date given for 24/10/2023; in between this date the Applicants filed an application for contempt and on 16/10/2023 were directed to serve the Respondents and it was listed for directions on the 17/10/2023 and it was on this date that the request for the extension of the interim order was made.
10. This court has noted that pursuant to the above chronology of events on the 31/05/2023 there was no extension of the interim injunctive orders made on 22/05/2023; none was also sought on either the 15/06/2023 or the 29/06/2023; the extension was sought and granted on 17/10/2023 which was nearly five (5) months thereafter;
11. The applicable law is found under the provisions of Order 40 Rule 4(2) of the Civil Procedure Rules which provides that an ex parte injunction may be granted only once for not more than fourteen (14) days and shall not be extended thereafter except once by consent of the parties or by the order of the court and for a period not exceeding fourteen (14) days. Reference is made to the case of DPP vs Justus Kathenge & 2 others [2016] eKLR.
12. It has been also established that by the 15/06/2023 which was the next mention date the interim orders had since lapsed as provided by the law and also due to effluxion of time; further it has been demonstrated that that on the 17/10/2023 when the extension was sought this extension was done on material non-disclosure that the orders were still in existence and that service had been effected upon the Respondents; thus the court was misled into extending these ex-parte interim orders that had since lapsed;
13. This court notes that Notifications of Sale was dated 26/09/2023 and this court has found as a matter of fact that the ex-parte interim orders had lapsed by the 15/06/2023 and were only extended on 17/10/2023 as such going by the dates the 1st Respondent cannot be held in contempt.

Whether the application seeking a temporary injunction order pending the hearing and final determination of the suit is merited.

14. In any event extension of or granting of injunctive orders is not a right of a party but an equitable remedy that is available to a deserving party and at the courts discretion;
15. In determining this issue, it is pertinent to state the law and principles on granting temporary injunctions. The law on granting of a temporary injunction is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules.



16. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -
- “Firstly, 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.”
17. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicom Limited* (1975) 1 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,
 - iii. The balance of convenience lies in favour of granting or refusing the application.
18. The case of *Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others* (supra) defined prima facie as follows:
- “A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.
19. It was the Applicant's case that the Respondent should not purport to hold the 1st Plaintiff liable for debt where the statement of accounts rendered are faulty and the valuation done illegal as it under values the market value of the security; therefore the Respondents cannot purport to exercise a non-existent statutory power of sale over the charged property.
20. The Applicants case is based on an accusation that the Respondents have failed to furnish the Applicants with a true statement of accounts; that the statements rendered were marred with errors which amounts to clogging their right of redemption; Based on the evidence placed before this court it is not disputed that there is default in the repayment of the loan or that the requisite notices for the exercise of the statutory power of sale were not duly served on the Applicants; The Applicants are contractually bound by the Charge to service the loan facility and the Respondent has a right to realize the security if the Applicant is in default; if there had been any irregularity in the notices then this would have been a basis for establishing a prima facie case with probability of success.
21. Having failed to establish the first principle, this court is bound by the Court of Appeal guidelines that the principles must be sequential; the next principle being whether the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated be an award of damages. An injury is irreparable where there is no standard by which the amount of damage can be measured with reasonable accuracy; In this instance the concept irreparable harm would have protected the prima facie case from being rendered nugatory had it been established. There is also the aspect that the Applicants having offered the properties to secure a loan facility by that very action the properties become a commodity for sale; and it is trite law that there is no commodity for sale that cannot be compensated adequately by damages.



22. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience; this balance tilts in favour of the Respondents.
23. The upshot of the above is that the Court is not satisfied that from the material placed before it that this a suitable case for this court to exercise its discretion as the Applicants are found not to be deserving of the orders sought;

Findings And Determination

24. For those reasons this court makes the following findings and determination;
 - i. This court finds no substance in the application for contempt of the court orders made on 22/05/2023;
 - ii. This court finds that this is not a suitable case for it to grant the temporary injunctive orders.
 - iii. The application is accordingly found to be devoid of merit in its entirety and it is hereby dismissed with costs to the Respondents.
 - iv. This matter to be mentioned on 19/06/2024 before the Deputy Registrar for Pre-trial Conference.

Orders accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 31ST DAY OF MAY, 2024

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Kirui - for the Applicants

Mohamed Garat - for the Defendant/Respondents

