



Kiu Construction Limited & 2 others v Credit Bank Plc & another (Commercial Case E397 of 2023) [2024] KEHC 7673 (KLR) (Commercial and Tax) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E397 OF 2023**

PM MULWA, J

JUNE 27, 2024

BETWEEN

KIU CONSTRUCTION LIMITED 1ST PLAINTIFF

JOHN FRANCIS KARIUKI THEURI 2ND PLAINTIFF

JULIA WAGUTHI KARIUKI 3RD PLAINTIFF

AND

CREDIT BANK PLC 1ST DEFENDANT

REGENT AUCTIONEERS (K) LIMITED 2ND DEFENDANT

RULING

1. Before the court are two applications both filed by the plaintiffs herein, dated 28th August 2023 and 4th September 2023 respectively.
2. Both applications were filed pursuant to Order 40 rules 1 and 21 of the Civil Procedure Rules, Sections 3, 3A and 63 of the *Civil Procedure Act* and Sections 103 and 104 of the *Land Act*. In the first application the plaintiff prayed, inter alia for the following orders:
 - i). Temporary injunction, pending determination of this suit, restraining the 1st defendant and/ or its agents from selling, offering for sale, advertising or dealing in any manner with the plaintiff's properties and motor vehicles known as: Title No. Ruiru/Kiu Block 3/2680, Title No.Nairobi/Block 126/574 & 576 and vehicles registration numbers KBP 079Q, KBS 666Z, KHMA 609B, KCG 869F, KHMA 536J, ZE 9497, KHMA 075J, KBS 672Z, KBT 814H, KCP 843P, KCP 435W and KCP 577Y.



- ii). Pending determination of this suit, to direct the 1st defendant and/or its agents to render a true account of the 1st plaintiff's loan account(s).
3. The grounds of the application were that on 8th August 2023, the 1st defendant issued a notice to the 2nd and 3rd plaintiffs under section 90 of the Land Act demanding a sum of Kshs. 73,431,651.06 and in default auction of the plaintiff's properties to ensue. The plaintiffs contended that the notices were defective and in breach of the law as there was no evidence of default by the 1st plaintiff.
4. The plaintiffs stated that despite the 1st plaintiff repaying a substantial sum of Kshs. 89,000,000 to the 1st defendant, the latter still demanded a further sum of Kshs. 74,000,000 which is unconscionable, that it has a lucrative contract with Kenya Airports Authority for a consideration of Kshs.216,000,000 from which any loan amount due to the 1st defendant would be settled.
5. It was averred that the 1st plaintiff's vehicles were proclaimed by the 2nd defendant on 18th July 2023 and motor vehicles KCP 577Y and KBP 079Q have been repossessed, thereby frustrating the plaintiffs' performance of their contractual obligation to Kenya Airports Authority as the vehicles formed the plaintiff's tools of trade in implementation of the contract aforesaid.
6. The plaintiffs argued that they have disclosed a prima facie case with a probability of success and stand to suffer irreparable damage if the orders sought are not granted and unless accounts are taken, they would not know the state of the 1st defendant's claim against the plaintiffs and vice versa.
7. In ardent opposition, the 1st respondent filed a replying affidavit sworn on 3rd August 2023 by Wainaina Francis Ngaruiya, its head of legal.
8. Mr. Ngaruiya averred that facilities were extended by the 1st defendant to the plaintiffs and the said facilities were subject to monthly interest at the rate of 13% p.a. calculated on daily balances and debited monthly and a default interest at the rate of 13% p.a. on any amount in arrears.
9. It was averred that the plaintiffs defaulted in loan repayments and as of 16th June 2023, the total outstanding loan balance inclusive of interest was Kshs. 86,289,090.15, which amount was accruing monthly and default interest.
10. That due to the continued non-payment of the loan balance, the 1st defendant issued demand notices to the 1st plaintiff dated 10th May 2023 and 16th June 2023. However, the plaintiff did not act on the notices which led the 1st defendant to instruct the 2nd defendant to repossess the motor vehicles and initiate the exercise of its statutory power of sale over the charged properties.
11. The 1st defendant argued that the plaintiffs were aware of the loan arrears and have not denied being indebted. That the only ground disputed is the loan interest amounts, which is not a basis for granting injunction orders.

Analysis and determination:

12. This is an interlocutory injunction application. In the well-known case of *Giella v Cassman Brown* [1973] EA 358 the principles to be considered before granting an interim injunction are: (i) The applicant must prove a prima facie case with a probability of success (ii) The applicant must illustrate that he will suffer irreparable loss and damage if the injunction is not granted, and (iii) If the court is in doubt, it will determine the matter on a balance of convenience.



13. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others - Civil Appeal No 39 Of 2002* a prima facie case was described to be:

“...in civil cases it 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.”

14. In this case, the plaintiffs submitted that they have established a prima facie case as they have never defaulted to repay the loan hence the statutory notices issued by the 1st defendant are defective and in breach of the law. Further that the said notices have been issued maliciously and in bad faith with the ill motive of frustrating the 1st plaintiff in implementation of its contractual obligations to Kenya Airports Authority.

15. The record indicates that the plaintiffs were granted by the 1st respondent a revolving inter-available loan facility of Kshs. 85,000,000 for contract financing, invoice/certificate discounting and letters of credit. The facility was to be utilized to undertake a contract awarded by Kenya Ports Authority for the rehabilitation of the Nanyuki Airstrip. The facility was secured by 3 parcels of land and log books of various vehicles among other securities. This is evidenced by the letter of offer marked ‘WF-5’ in the 1st defendant’s replying affidavit.

16. The plaintiffs alleged that they did not default in repayment of the loans but provided no proof of making payments towards it.

17. On the contrary, the default by the plaintiffs is evidenced by the various letters sent by them to the 1st defendant requesting for a renewal and/or extension of the facilities to enable them complete the Nanyuki Airstrip project and then channel the proceeds to the 1st defendant. In good faith, the 1st respondent extended the facilities through various letters of extension. The letters of request and extension are annexed to the 1st defendant’s replying affidavit and marked as ‘WFN-18’ and ‘WFN-19’.

18. From the pleadings and the submissions, it is evident that the plaintiffs are in default of loan repayments and that the 1st defendant is now seeking to realise the properties used as security to recover the outstanding amounts. The 1st defendant therefore was justified to issue the statutory notice of sale and proclamation notices.

19. As pronounced by the Court in the *Mrao* case (*supra*), there has to be a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.

20. It is my considered view that the plaintiffs have not illustrated to this court that their rights have been infringed so as to call for an explanation by the defendant. On this basis therefore, I find that the plaintiffs have not established a prima facie case.

21. The conditions set out in *Giella* (*supra*) are sequential. Since the plaintiffs have failed to establish a prima facie case there is no need to consider the other limbs before granting the interim injunction. This was the holding of the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR thus:

“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.” (emphasis added).

22. The upshot of the above is that the first application lacks merit and is dismissed.



23. In the second application dated 4th September 2023, the plaintiffs prayed for a temporary injunction, pending determination of this suit, to bar the 1st respondent and/or its agent from selling or dealing in any manner with the plaintiffs' motor vehicles registration numbers KBP 079Q and KCP 577Y.
24. This prayer is identical to prayer no. 5 in the first application, which the court has found to lack merit. The matter in issue in the 2nd application was already in issue in the first application and thus violated the principle of sub judice. The 2nd application was, from the onset, bad in law, incompetent and an abuse of the court process and is equally dismissed.

Disposition

25. The two applications, being Notice of Motions dated 28 August 2023 and 4th September 2023 respectively, are dismissed with costs to the defendants.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JUNE 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Wekesa for Plaintiff/Applicants

Mr. Mugisha for Defendant/Respondents

Court Assistant: Carlos

