



REPUBLIC OF KENYA



**Gichuhi & another v Progressive Credit Limited & another (Civil Suit
E03 of 2023) [2024] KEHC 10176 (KLR) (26 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 10176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT E03 OF 2023
DO CHEPKWONY, J
JUNE 26, 2024**

BETWEEN

GRACE WANGUI GICHUHI 1ST APPLICANT

WILSON GICHUHI KIMANI 2ND APPLICANT

AND

PROGRESSIVE CREDIT LIMITED 1ST RESPONDENT

RISING SUN AUCTIONEERS 2ND RESPONDENT

RULING

1. By way of background, the Applicants (hereinafter referred to as ‘the Borrowers’) applied and were granted a loan facility of Kshs. 5,000,000/= by the 1st Respondent (hereinafter referred to as the Lender) which was charged on the property known as Dagoretti/Thogoto/1817 (hereinafter referred to as the suit property). It is the Borrower’s case that the Lender instructed the 2nd Respondent (hereinafter referred to as ‘the Auctioneer’) who served the Borrowers with the Notification of Sale dated 20th June, 2023 informing them of the sale of the suit property through public auction which was to be held on 31st August, 2023.
2. This prompted the Borrowers to move to this court with the Notice of Motion application dated 20th September, 2023 filed pursuant to Section 1A, 1B,3 and 3A, all of the [Civil Procedure Act](#), Order 40 Rule 1 of the [Civil Procedure Rules](#) and Section 90(2) of the [Land Act](#) seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. That an Interlocutory injunction be granted restraining the 1st and 2nd Respondents either by themselves, agents, workers and or employees from trespassing, auctioning, advertising,



wasting, damaging, sale, removal and or disposition of Dagoretti/Thogoto/1817 being a residential property within Kiambu County pending the hearing and determination of the main suit by this Honourable court.

- d. Spent.
3. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Grace Wangui Gichuhi, the 1st Applicant sworn on 20th September, 2023 wherein she confirms being the legal registered owner of Land Title Dagoretti/Thogoto/1817. According to the Borrowers they took a loan facility of Kshs. 5,000,000.00 and charged the property to the 1st Respondent. That they have been servicing the loan as required to date. However, despite several requests the lenders have refused and or ignored to issue the loan balances and statements to enable her clear the loan. It is the 1st Applicant's case that they were shocked to be served with a Notification for Sale dated 20th June, 2023 indicating that the property was to be sold by public auction and yet neither was. They argue that they were not served with any demand notices, the intended auction was not advertised in any newspaper as required nor any Notices served on them making the intended auction was unlawful and illegal and therefore it would be in the interest of justice that the application is allowed as prayed.
4. In response, the Lender filed Replying Affidavit sworn by Christine Mikal Ayoti as its Legal Officer on 28th November, 2023 wherein it states that the Borrowers applied and were issued with a loan facility of Kshs Five Million (Kshs. 5,000,000/=) through a letter of offer dated 30th May, 2021 which was to be repaid in thirty-six (36) monthly instalments payable on the 30th day of every month at a flat interest rate of 4% of the principal amount per month which was secured by a charge on the suit property as per clause 6.
5. The Lender holds that the Borrowers defaulted in loan repayments and it sent six (6) demand notices on diverse dates requiring them to clear their dues but they were ignored. That the lender then proceeded to issue various statutory notices through postage and began the process of recovering the suit property in strict compliance with the law. The Lender goes to state that the Auctioneer issued the required notices and advertised the auction in newspaper on 3rd October, 2023. The lender has disputed the claim by the Borrowers that it refused to issue them with loan statements but has stated the same are issued on request. It holds that the Borrowers failed to attach documentary evidence to support their claims which is an indication of falsehoods and pray that the application should be dismissed with costs.
6. On 16th November, 2023, parties were directed to dispose of the application by way of written submissions whereby the Borrowers filed theirs dated 29th December, 2023 and the Lenders are dated 29th November, 2023.

Determination

7. Upon reading through the parties respective affidavit and submissions, this court finds that the main issues for determination are:
 - a. Whether there exist valid charges and outstanding loan balances.
 - b. Whether the Applicant has satisfied the requirement for the grant of temporary interlocutory injunction.
 - c. Who bears costs of the application?
8. On the first issue on whether there exist a valid charge and outstanding loan balance, I have read through the annexures attached by either party, more particularly the Loan Agreement dated 30th



May, 2021 and confirm that the suit property Title No. Dagoretti/Thogoto/1817 belonging to 1st Respondent was used as security for a loan facility of Kshs. 5,000,000.00. This has not been disputed by either party it has not also been categorically defined that there is an outstanding loan balance which according to the Applicant, it has not been established by failure to be availed loan. Statements by the Respondent, a claim the Respondent has refuted.

9. What is in dispute is whether the 1st Applicant is being deserving of being granted an order of temporary injunction as prayed.
10. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal in Nairobi relied on the principles established in the locus classicus *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and held 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) allay 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.”

11. On whether the Applicant has shown a prima facie case with a probability by success, the part of departure in the case of *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 where the Court of Appeal considered what constitutes a prima facie case and held that:

“In civil cases, a *prima facie* 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”

12. In this case, the court has been called upon to determine whether the rights of the Borrowers have been infringed by the Lender and the Auctioneer so as to establish whether the Borrowers have demonstrated a prima facie case. There is no dispute that the Lender extended a loan facility of Kshs. 5,000,000.00 to the Borrowers who used Land Title Deed No. Dagoretti/Thogoto/1817, as security and no contest has been raised by the Borrower/Applicant on default in repayment of the facility. The contention by the Borrower/Applicant is with regard to failure to be served with requisite Notices on the advertisement of the intended Auction by the Lender and Auctioneer (Respondents). According to the Borrower/Applicant, they were never served with any notices and never was the intended auction advertised in the daily newspaper.
13. Having read through the Replying Affidavit of the Lender, alongside the annexures attached thereto, it is worth noting that there is a seven (7) days -Demand Notice dated 15th October, 2021 which was issued to the Borrowers over arrears of Kshs. 250,000/= and another demand letter dated 22nd October, 2021 over a sum of Kshs. 5,435,479/=. The Lender also issued a demand notice dated 2nd June, 2022 and another dated 10th June 2022. Thereafter, the Lender issued a three (3) months Statutory Notice dated 7th July, 2022 to the Borrowers by ‘registered mail’ followed by a forty (40) days’ notice dated 22nd



October, 2022 which was also sent by way of ‘registered mail’. The Certificate of postage for 25th July, 2022 and 25th October, 2022 were duly attached as evidence under items No. 18 and 19 of the said Replying Affidavit, being postage receipts CMA-13(a)-CMA-13(b) and CMA-12(c) and signature to acknowledgement of receipt by the 2nd Applicant.

14. From these annexures, it is clear that the Lender has proved service of the requisite Notices. Therefore, the burden of proof then shifts to the Borrowers to prove that they did not receive the said notices that were sent through the registered post. In the case of Mbsa High Court Civil, Commercial & Admiralty Division Case No. 31 of 2013 *Fredrick A. Makumbi v Kenya Commercial Bank Limited* relying on the case of *Maithya v Housing Finance Corporation of Kenya* HCCC No. 1129 of 2002, the court had the following to say on the burden of proof:

“It is the Plaintiff who alleged that he was not served with the Statutory Notice. Once the Defendant provided evidence of that service the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that “he who asserts must prove.” See the book of Principles of Evidence by Alan Taylor 2nd Edition. The onus was on the Plaintiff to prove non-service of the Plaintiff. In view of the fact that the Plaintiff failed to prove the same the Plaintiff has failed to satisfy that burden. It is obvious that the Plaintiff could have obtained information from the Post Master General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on prima facie basis do so.”

15. In this instant case, it is not that the Borrowers have not provided any evidence to show that they were not served with the requisite statutory notices. It is not enough to simply state that they were not served. They ought to have gone a step further and either prove that the registered Postal address of 105 Kikuyu was either not their registered address or that it was changed, but this was not done. It is worth noting that in the offer letter, the same postal address was used as this was the address the Borrowers provided in the handwritten Business application form. Therefore, the borrower has failed to discharge the burden of proof in respect of service of requisite notices.
16. On the issue of Whether the Auctioneers followed due procedure in advertising the intended Auction, this court has noted that in a letter dated 20th June, 2023, the Lender instructed the Auctioneers through Letters of Instructions to repossess and advertise for sale by public auction the suit property and they proceeded to issue a forty five (45) days Redemption Notice and a Notification of Sale, both dated 23rd June, 2023 which documents are indicated to have been signed by one Wilson Gichuhi Kimani, one of the Borrowers on 23rd June, 2023. It is again worth noting that the Borrowers have not been disputed since the documents and under paragraph 4 of the Supporting Affidavit the Borrowers confirmed the said service.
17. The Auctioneer then proceeded and issued the advertisement for the auction of the suit property on the Standard Newspaper of 14th August, 2023, which was slated for 31st August, 2023. There was another Advertisement in a Newspaper which was not legible to show the date which showed the auction was slated for 18th October, 2023, a clear demonstration that the Auctioneers followed the statutorily provided for legal procedures.
18. Having so established, the court finds that the Lender and the Auctioneers have proved their compliance with all the requisite procedures and confirmed that there is an existing debt. On their part, the Borrowers have not shown that they have repaid the loan amount or that they were not served or notified by the Respondents if the intention to reposes and sell the suit property.
19. It therefore follows that the Borrowers have not satisfied the court that they have a prima facie case and the court need not to address the other two conditions. The court is guided by the Court of Appeal



decision in the case of *Kenya Commercial Finance Co. Ltd -v- Afraba Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya v David Kitu & Another* (2014) eKLR where it was observed as follows: -

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

20. In the end, the court finds that the Notice of Motion application dated 20th September, 2023 lacks merit and is hereby dismissed with costs with the orders that:

- a. The interim injunctive orders are hereby discharged.
- b. Mention on 29th July, 2024 before the Deputy Registrar for purposes of pre- trial conference.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 26TH DAY OF JUNE, 2024.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Munene for both Defendant/Respondents

Court Assistant – Martin

