



Bakari (Suing as the Administrator of the Estate of Zuhura Salim Ali, Deceased) v Gulf African Bank Limited & 2 others (Civil Appeal E047 of 2022) [2023] KEHC 2493 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E047 OF 2022
OA SEWE, J
MARCH 24, 2023**

BETWEEN

FATUMA MOHAMED BAKARI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ZUHURA SALIM ALI, DECEASED) APPELLANT

AND

GULF AFRICAN BANK LIMITED 1ST RESPONDENT

GARAM INVESTMENT AUCTIONEERS 2ND RESPONDENT

DISTRICT/COUNTY LAND REGISTRAR, MOMBASA 3RD RESPONDENT

RULING

1. The Notice of Motion dated 9th May 2022 was filed by the appellant on 11th May 2022 under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya, as well as Order 42 Rule 6(1) Order 51 Rules 1 and Rule 3 of the [Civil Procedure Rules](#), 2010, for the following orders:
 - a. Spent.
 - b. Spent.
 - c. That the Court be pleased to issue an order of temporary injunction restraining the respondents by themselves, their servants, agents, assigns, employees, workmen or otherwise howsoever from selling by public auction or private treaty, offering for sale advertising for sale, attaching, entering into, registering any transfer or instrument transferring or in any other manner whatsoever interfering with all that piece or parcel of land known as Title Number Mombasa/Block XII/294 and the buildings and/or improvements standing thereon pending the hearing and determination of this appeal.
 - e. That the costs of the application be in the cause.



2. The application was premised on the grounds that the property known as Title Number Mombasa/Block XII/294 (hereinafter, “the suit property”) is registered in the appellant’s name, and has been so registered since 8th September 2015. She further averred that the debtor, Fatia Mbulwa Salim, who used the property as security for a facility, died on 10th April 2016; a fact well known both to the 1st respondent and its managers. She added that, at least two of the 1st respondent’s officers, namely, Athman Mpepo and Athman Nassor attended the burial of the borrower.
3. The appellant further averred that neither the borrower nor the chargor was served with the requisite statutory notices as the same were purportedly served after the demise of both the chargor and the borrower. She accordingly posited that said notices were invalid and of no legal consequence. She complained that the manner in which the 1st and 2nd respondents are dealing with the suit property is illegal, and that they might proceed and sell the suit property and thereupon present documents of transfer to the 3rd respondents; in which event the estate of the appellant’s deceased mother, and all the beneficiaries of her estate would suffer irreparable loss and damage which cannot be compensated by an award of damages.
4. The application was premised on the affidavit of the appellant, sworn on 9th May 2022. She averred that she is the biological daughter of the deceased, Zuhura Salim Ali, and the legal representative of her estate, having been issued with a Limited Grant Ad Litem, to enable her file this suit. She further deposed that the deceased was the registered owner of the suit property; and that by a Letter of Offer dated 30th September 2015, the 1st respondent offered to advance the sum of Kshs. 4,000,000/= by way of its Murahaba Finance Facility to Fatia Mbulwa Salim; which facility was secured by a legal charge over the suit property.
5. At paragraph 4 of the Supporting Affidavit, the appellant averred that it was the responsibility of the 1st respondent to ensure the facility was repaid by the principal debtor before her demise on 10th April 2016. She exhibited the Certificate of Death for the borrower, Fatia Mbulwa Salim as well as the Certificate of Death for her mother, Zuhura Salim Ali also died shortly thereafter on 25th April 2016. The documents were marked Annexure “FMB 5”. Thus, it was the contention of the appellant that any attempt by the 1st respondent to realize its statutory power of sale was flawed ab initio in so far as the statutory notices are alleged to have been served on the deceased persons aforementioned posthumously.
6. On behalf of the 1st respondent, a Replying Affidavit was sworn by its Senior Legal Officer, Mr. Lawi Sato, to the effect that whenever an injunction is issued for non-service of statutory notices, it is to last until fresh statutory notices are served. Hence, he averred that, even assuming that the statutory notices issued in this case are invalid, there would still be no basis to issue any injunction to last beyond the time needed to issue fresh statutory notices. Mr. Sato further averred that the approach and attitude taken by the appellant shows that she is not interested in exercising the equity of redemption, but is rather intent on never repaying the loan which is well and truly due and owing to the 1st respondent.
7. At paragraph 9 of the Replying Affidavit, Mr. Sato averred that the issue of service of statutory notices is not arguable given the specific facts of this case; particularly the fact that, vide a letter dated 30th September 2019, the appellant made a proposal to repay the loan. A copy of the letter is annexed to that affidavit as Annexure LS-1. Thus, he posited that the appeal will not be rendered nugatory if the injunction is refused, nor will the appellant suffer irreparable injury. He added that, in the circumstances of this case, it would be wholly unjust to issue an injunction pending appeal because:
 - a. the default commenced in July 2018 and remains to date.



- b. The appellant personally promised to settle the debt but has failed to do so to date.
 - c. The loan continues to grow thus the beneficiaries of the chargor's and the borrower's estates will see their inheritance diminished further.
8. The application was canvassed by way of written submissions, pursuant to the directions given herein on 15th May 2022. Accordingly, learned counsel for the appellant, Mr. Tindika, filed his written submissions on 27th June 2022 in which he proposed the following issues for determination:
- a. Whether the mandatory statutory notices were served upon the chargor;
 - b. Whether the 1st respondent's statutory power of sale had arisen;
 - c. Whether the appellant has satisfied the requisite conditions for the grant of a temporary injunction; and,
 - d. The failure by the learned magistrate to address the issue of temporary injunction.
9. Accordingly, Mr. Tindika made reference to the provisions of Section 96 of the *Land Act* to shore up his argument that, since the borrower died on 25th May 2017, any statutory notice purported to have been served thereafter is invalid. He relied on *Ragui v Barclays Bank of Kenya Limited* [2001] 1 KLR 647 in which Hon. Ringera, J. (as he then was) held:
- “A statutory notice addressed to a deceased person is invalid and has no effect. In this case the statutory notice ought to have been served upon the administrators of the estate.”
10. On whether the 1st respondent's statutory power of sale had arisen, Mr. Tindika was of the view that no proof was availed by the 1st respondent to demonstrate that the notices were duly served; and therefore that the statutory power of sale is yet to arise. In the premises, he urged the Court to find that the appellant has made out a good case for the grant of a temporary injunction pending appeal on the basis of the principles set out in *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] eKLR and *Said Ahmed v Manasseh Denga & Another* [2019] eKLR.
11. Lastly, it was the submission of Mr. Tindika that the learned magistrate failed to make a pronouncement on the prayer for injunction, on the ground that it was spent. He added that this was a grave misdirection as the prayer was central to the application itself and had been addressed by both parties. Counsel cited *Hellen Gathoni Mbutia & Another v Nelson Wachira Murage* [2016] eKLR for the proposition that it was imperative for the lower court to pronounce itself on the issues as framed for determination by the parties, failure to which the ensuing determination would be a nullity. He consequently urged that the application dated 9th May 2022 be allowed and orders granted as prayed.
12. On behalf of the 1st respondent, written submissions were filed by Mr. Kongere on 27th June 2022. He proposed the following issues for determination:
- a. Whether the appeal is arguable;
 - b. Whether the appeal will be rendered nugatory absent an injunction; and,
 - c. Whether the injunction would inflict greater hardship if granted.
13. Mr. Kongere pointed out that the lower court's decision was hinged on the appellant's letter dated 30th September 2019 by which she assured the 1st respondent, after the impugned statutory notices were issued, that members of the families of the deceased borrower and chargor were making arrangements to rectify the default and offered to repay the debt by instalments of Kshs. 25,000/=; which offer



- was accepted by the 1st respondent. Mr. Kongere relied on *Asaph Gathungu Muti v Kenya Finance Corporation & Another* [2004] eKLR in urging the Court to find that the appellant is, in the circumstances, estopped from going back on her word.
14. It was further the submission of Mr. Kongere that, even if the appeal ultimately succeeds, the most the Court could do is to order the issuance of fresh notices. He therefore doubted that the appeal will be rendered nugatory if the injunction is refused. He cited *National Bank of Kenya Limited v Shimmers Plaza Limited* [2009] eKLR; *John Mwashigadi Mwakisha v Housing Finance Co. Ltd* [2020] eKLR and *Mohamed Abubakar v Benjamin Sila t/a Legacy Auctioneers Services & 3 Others* [2022] eKLR.
 15. On whether the injunction would inflict greater hardship if granted, Mr. Kongere pointed out that the debt has been outstanding since July 2018; and that as of 19th October 2021, the amount due was Kshs. 2,666,755.41 and continues to accrue interest and default charges. In the meantime, the appellant does not propose to pay anything. He urged the Court to uphold the maxim that he who comes to equity must come with clean hands and dismiss the application.
 16. I have given consideration to the application, the averments set out in the parties' respective affidavits and their annexures. I have likewise perused the Memorandum of Appeal dated 30th March 2022 as well as the written submissions filed herein by learned counsel for the parties. The brief background facts are that this is an interlocutory appeal from the ruling and orders of the lower court in Mombasa CMCC No. E043 of 2021 (Hon. C.N. Ndegwa, SPM) delivered on 1st March 2022. The appellant had filed an application for injunction before the lower court which was dismissed; and being dissatisfied with the decision, the appellant filed the instant appeal, contending, inter alia, that the learned magistrate erred in law and in fact in wholly disregarding the prayer for temporary injunction.
 17. Accordingly, the appellant concomitantly filed the instant motion seeking temporary injunction pending appeal. Indeed, Order 42 Rule 6(6) of the *Civil Procedure Rules* recognizes that:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
 18. I note that Mr. Tindika proposed for determination issues that belong to the appeal itself, such as whether the 1st respondent's statutory power of sale had arisen; and the failure by the learned magistrate to address the issue of temporary injunction. In my view, those are issues that will fall for determination in the appeal itself. Similarly, the question as to whether or not the appellant is estopped from going back on the representations made by her in the letter dated 30th September 2019 is at the heart of the appeal; and therefore is not a proper subject for consideration in the instant application. For now, the single issue that arises for determination, is whether the appellant has satisfied the requisite conditions for the grant of a temporary injunction pending appeal.
 19. The requisite conditions for the grant of a temporary injunction were aptly discussed in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 thus:

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, 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."

20. In the premises, the first question to pose is whether the appellant has established a prima facie case. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 a prima facie case was defined thus:

"A prima facie case in a civil application includes but not confined to a genuine and arguable case. 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 as to call for an explanation or rebuttal from the latter."

21. It is trite that, in considering whether or not a prima facie case has been made out, the Court is not required to go into an exhaustive evaluation of the merits of the plaintiff's case. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal held that:

"... in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

22. The appellant's application is hinged on the ground that, the requisite statutory notices are alleged to have been served on the chargor and the borrower yet by the date of alleged service those two individuals were deceased. The appellant exhibited the Certificates of Death in respect of the chargor as well as the borrower; and they show that the two individuals died on 25th April 2017 and 10th April 2016, respectively. There appears to be no dispute that the requisite statutory notices were served after the death of the chargor and the borrower. Indeed, the averments by the appellant in this regard at paragraphs 5, 6 and 7 of the Supporting Affidavit did not elicit any rebuttal from the 1st respondent. In the premises, I am satisfied that a prima facie case has been made out by the appellant, for Section 90 of the *Land Act*, provides that:

- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters--
 - (a) the nature and extent of the default by the chargor;
 - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;



- (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
- (3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--
- (a) sue the chargor for any money due and owing under the charge;
 - (b) appoint a receiver of the income of the charged land;
 - (c) lease the charged land, or if the charge is of a lease, sublease the land;
 - (d) enter into possession of the charged land; or
 - (e) sell the charged land.

23. Similarly, Section 96 of the *Land Act* requires that:

- (1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.
- (2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

24. Upon service of the notices, the chargee would still be required to ensure that the Redemption Notice provided for in Rule 15 of the Auctioneers Rules and a notification of sale as well as a current valuation is obtained before advertising a charged property for sale. There being no indication that all these steps were taken by the 1st respondent, there is merit in the application. In particular, it is the appellant's argument that following the demise of the chargor, the 1st respondent ought to have served the statutory notices on the chargor's legal representative. This proposition is in line with the position taken by Hon. Ringera, J. (as he then was) in *Ragui v Barclays Bank of Kenya Limited (supra)*, with which I concur, that:

“A statutory notice addressed to a deceased person is invalid and has no effect. In this case the statutory notice ought to have been served upon the administrators of the estate.”

25. Accordingly, I am satisfied that a prima facie case has been made out by the appellant in connection with the service of the statutory notices. As to whether the appellant stands to suffer irreparable loss, it is now well settled that where there is breach of the law, an applicant cannot be compelled to accept



damages as recompense. In *Kanorero River Farm Ltd and 3 others v National Bank of Kenya Ltd* [2002] 2 KLR 207 for instance, Hon. Ringera, J. (as he then was) held as follows:

“I would for those reasons alone accede to the Plaintiff’s prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”

26. In the same vein, Hon. Warsame, J. (as he then was) in the case of *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR held as follows:

“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute 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.”

27. The same position was reiterated in *Sbarok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation* [2008] eKLR thus:

“I am satisfied a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also *Olympic Sports House Limited v School Equipment Centre Limited* [2012] eKLR)

28. As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in *Charter House Investments Ltd v Simon K. Sang and Others*, Civil Appeal No. 315 of 2004, is instructive. The Court of Appeal held that:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.

29. In this respect, courts have opted for the path that leads to the lower rather than the higher risk of injustice, in line with the case of *Suleiman v Amboseli Resort Ltd* (2004) 2 KLR 589 in which Hon. Ojwang Ag. J (as he then was) quoted the following words of Justice Hoffmann in the English case of *Films Rover International vs. Cannon Film Sales Ltd* (1986) 3 All ER 772:

“The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the ‘wrong’ decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ ...”



30. In the instant matter, the path leading to the lower risk of injustice would be grant the appellant temporary injunction as prayed.
31. I have also gone a step further and considered the issues proposed by Mr. Kongere, namely, whether the appeal is arguable and whether, unless injunction is granted as prayed, the appeal will be rendered nugatory. In the light of my findings herein above, and taking into account the decision of the lower court and the grounds of appeal relied on by the appellant, I am satisfied that the appeal is arguable and that it will be rendered nugatory unless the orders sought are granted.
32. While it is true that where the court is inclined to grant an interlocutory injunction restraining a chargee from exercising its statutory power of sale solely on the ground that the chargee has not issued a valid notice, the injunction should be limited in duration until such time as the chargee shall give a fresh statutory notice, in this instance, the matter is complicated by the fact that both the borrower and the chargee are deceased. Indeed, in *National Bank of Kenya Limited v Simmers Plaza Limited* (supra) that Mr. Kongere relied on, the Court of Appeal underscored the fact the duration of an order of injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. In the circumstances hereof, where both the borrower and the chargor are deceased, the justice of the case requires that the respondents be given an opportunity to first prosecute their appeal to its logical conclusion before sale of the charged property.
33. In the result, I find merit in the appellant's application dated 9th May 2022. The same is hereby allowed and orders granted as hereunder:
- a. That a temporary injunction be and is hereby issued restraining the respondents by themselves, their servants, agents, assigns, employees, workmen or otherwise howsoever from selling by public auction or private treaty, offering for sale advertising for sale, attaching, entering into, registering any transfer or instrument transferring or in any other manner whatsoever interfering with all that piece or parcel of land known as Title Number Mombasa/Block XII/294 and the buildings and/or improvements standing thereon pending the hearing and determination of this appeal.
 - b. That the costs of the application be costs in the appeal.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MARCH 2023

OLGA SEWE

JUDGE

