



REPUBLIC OF KENYA



Alliance Logistics K Ltd & another v Equity Bank Limited (Commercial Case E002 of 2023) [2024] KEHC 1487 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E002 OF 2023
MS SHARIFF, J
FEBRUARY 15, 2024**

BETWEEN

ALLIANCE LOGISTICS K LTD 1ST PLAINTIFF

LEONARD OTIENO OJUKA 2ND PLAINTIFF

AND

EQUITY BANK LIMITED DEFENDANT

RULING

1. The Application before court is the one dated 27th March 2023 in which the Plaintiffs/Applicants are seeking the following orders.
 - i) Spent
 - ii) Spent
 - iii) That pending hearing and determination of this suit, a temporary interim order of injunction be issued restraining the Defendant, their agents, employees, servants or whoever is acting and/or claiming through them from selling and or auctioning the suit parcel of land known as Kisumu/kombura/4228.
 - iv) That pending hearing and determination of this suit, the loan facility be reopened and the Applicants be allowed to continue with the previously agreed monthly repayments and or the repayment terms therein be varied to allow the Applicants to pay up the due amount plus interest secured through the charge on Kisumu/kombura/4228.
 - v) That an order be issued that a joint independent valuation be undertaken on the suit property Kisumu/kombura/ 4228 to ascertain its current market value before any sale is conducted.
 - vi) That costs of the application be provided for.



2. The application is grounded on the facts;
 - a) That the suit land belonging to the 2nd Applicant was used to secure a loan of Kshs.40,000,000/= from the Defendant.
 - b) That the loan was used to build a hotel on the suit property known as Grand Forty Hotel.
 - c) That at the onset of the Covid-19 pandemic business was greatly affected hampering the Applicant's ability to service the Kshs.630,144/= monthly instalment.
 - d) That the Defendant advertised the suit property for sale at an undervalued price of Kshs.24,750,000/=.
 - e) That loan arrears of Kshs.4,868,750.56/= have been cleared.
 - f) That the action of advertising the parcel of land was unlawful and illegal for want of procedure.
3. Attached to the application is a supporting affidavit sworn by Leonard Otieno Ojuka the 2nd Applicant and the 1st Applicant's director, in which he depones that, he has been religiously making monthly loan repayments but had been greatly hampered by the Covid-19 pandemic, which information was well within the Respondent's knowledge.
4. He further depones that despite frantic efforts at engaging the Defendant on restructuring of the loan they are still adamant in proceeding with the sale.
5. It is his contention that the defendant did not serve them with the notification of sale hence the process of advertisement and sale is illegal.
6. Via directions taken on 13/6/2023 both parties agreed to have the application canvassed by way of written submissions.

B. Submissions:

B(i). Applicants' Submissions

7. In their submissions the Applicants outlined the following issues for determination;
 - i) Whether the facility should be reopened
 - ii) Whether a joint independent valuation should be undertaken on the suit property Kisumu/kombura/4228.
 - iii) Whether the Applicants have satisfied the threshold for the grant of injunction.
8. On the first issue he submitted that Sections 105 and 106 of the Land Act empowered courts to re-open a charge. The Applicant urged this court to consider that the subject matter is matrimonial property. He called this court's attention to the case of SNR v Remu Microfinance Bank Limited & 3 others [2021] eKLR where the court held that in reopening a charge a court has to consider factors such as age, gender, health of the chargor, financial status, interest rates, risks involved and the importance of not undermining the competence of reputable charges.
9. On the strength of their religious payment of monthly instalments, clearance of loan arrears and the fact that the loan period had not lapsed he urged this court to reopen the charge and allow continuance of repayments.



10. With respect to joint valuation the Applicant submitted that Rule 10 of the *Auctioneers rules 1997* allows a debtor to apply to court for an independent valuation. In support of this contention reliance was placed on the case of *Levi House Construction and Engineering Ltd v ABCBank & another* [2021] eKLR where the court acknowledged that cogent evidence of prima facie undervaluation was a major reason for ordering independent valuation.
11. Additionally he relied on the case of *Zum Zum Investments Limited v Habib Bank Limited* (2014) eKLR where it was stated that an independent valuation takes into consideration the prevailing factors on the ground, which if overlooked may result in the property being sold at a lesser value.
12. He urged the court to order for independent valuation as it was inconceivable how the notification of sale could provide a value of Kshs.24,750,000/= yet the Respondent's own report indicated a market value of Kshs.64,000,000 as at July 2022.
13. With regard to the third issue it was their contention that they had met the threshold for grant of injunctive orders as stipulated in the case of *Giella Cassman v Brown*. As for whether they had a prima facie case their answer was in the affirmative. They contended that the 3-month notice fell afoul of Section 90 (1) of the *Land Act* which stipulates that it must be served on the chargor. They placed reliance on the case of *Caleb Kositany & another v Industrial And Commercial Development Corporation & another* [2004] eKLR where it was held that a statutory notice must not only be served on the borrower but also on the chargor.
14. In further support of a prima facie case the Applicants contended that an indication of a different property value in the notification of sale from that in the valuation report was a glaring irregularity.
15. In respect of their likelihood to suffer irreparable harm it was the Applicants' submission that they had constructed a hotel on the property which if sold would result in a deep sentimental loss, incapable of monetary compensation.
16. With regard to the balance of convenience they averred that it should shift in their favour given that the Respondent had acted in contravention of Section 90 (1) of the *Land Act* and Rule 15 of the *Auctioneers Rules 1997*. Additionally, they averred that the suit property had been undervalued.

B(ii). Respondent's Response and Submissions

17. In response to the application the Respondent filed a replying affidavit dated 19th April 2023 sworn by Malack Kerimu a credit manager at the Respondent bank. He deponed that the bank advanced a loan of Kshs 40,000,000/= to the 1st Applicant for construction of a hotel on the suit property. The facility he stated was secured by a personal guarantee of the 2nd Applicant supported by the title to the land.
18. He averred that the 1st Applicant's directors poorly conducted the loan facility resulting in it falling into arrears. He further contended that despite a restructuring of the loan at the Applicants' behest they still persisted in their default necessitating a 3-month statutory notice for payment of Kshs.2,662,110.56 in arrears.
19. The credit manager averred that the 1st Applicant ignored the 3month notice forcing the Respondent to issue a 40 days' notice of sale which equally elicited no response from the Applicants.
20. It is this in action, the Respondent averred that informed the decision to issue a redemption notice together with a notification of sale. This action he stated at last elicited a response from the 2nd



- Applicant who via a letter dated 29th July 2022 undertook to clear the outstanding arrears of Kshs 4,963,670/= within 4 weeks.
21. Despite these concessions the credit manager stated that the 1st Applicant still failed to pay thereby forcing them to resume the sale of the property. It is his contention that the 1st Applicant's loan is outstanding at Kshs.44,065,390 which necessitates a sale of the property in order to recover the amount.
 22. In closing he deponed that the Respondent had followed due process and the application was only aimed at frustrating their loan recovery efforts.
 23. In their submissions dated 20th August 2023 the Respondent outlined the following issues for determination.
 - i) Whether the Plaintiff has met the conditions for grant of temporary injunction.
 - ii) Whether the Plaintiff has met the conditions for reopening of the charge/loan facility.
 - iii) Whether there is need for a joint valuation before any sale.
 24. On the first issue the Respondent submitted that the Applicant had not met the threshold for grant of temporary injunction as stipulated in the cases of *Giella v Cassman Brown* and *Nguruman ltd v Jan Bonde Nielsen & 2 others*.
 25. On whether the Applicants had a prima facie case It was the Respondent's contention that the Applicants had persisted in their default hence they didn't have a prima case with a probability of success. It was their submission that on the 22nd of May 2020 they restructured the loan at the Applicants' request granting a 12-month moratorium. Additionally, they averred that despite undertaking to clear the arrears via a letter dated 29th July 2022 the Applicants still failed to do so. It was the Respondent's submission that despite bending over backwards to accommodate the Applicants they still persisted in their default.
 26. Moreover, the Respondent submitted that despite service of all the notices the Applicants still failed to redeem the property and instead resorted to filing suit. The Respondent urged this court to find that in the case of clear default an injunction should not be granted. It placed reliance on the case of *Mrao Limited v First American Bank of Kenya ltd* [2003] KLR 125
 27. As for whether the Applicants will suffer irreparable damage incapable of monetary compensation it was the Respondent's contention that nothing could be further from the truth. The Respondent averred that the value of the property was ascertainable as evidenced by the valuation report on record. Furthermore, the Applicants had acceded to the fact that all money obligations secured by the charge would become payable by demand as per clause 9 of the charge. In closing the Respondent stated that they were a reputable financial institution capable of paying any damages that may be suffered by the Applicant.
 28. In respect of the balance of convenience the Respondent submitted that it should shift in favour of realization of the loan. This they said was because the Applicants had defaulted on the restructuring agreement and the promise to pay the arrears.
 29. Turning to the second issue on whether the Plaintiff had met the conditions for reopening the charge the Respondent submitted that it was an attempt to rewrite the contract after the Applicants had blatantly disregarded the initial one. It was the Respondent's contention that going by the Applicants' conduct it was highly likely that they would default even if the charge was reopened.



30. Additionally, the Respondent contended that the Applicants had not provided any valid reasons warranting reopening of the charge. The Respondent urged the court to disregard the assertion that the property was matrimonial, as that could not be a reason for default. Reliance was placed on the case of *Wilstone Mdindi Mwauganga v Kenya women microfinance bank plc* [2022] eKLR in which Onyiengo J.N stated that courts should not let defaulters escape liability on the pretext that matrimonial property cannot be sold, as this would mean that banks will have to close shop.
31. In furtherance of their position the Respondent averred that there was nothing irregular about the previous charge to warrant its reopening.
32. In respect of whether there was need for a joint valuation before any sale it was the Respondent's contention there was no need for that as they had attached a report dated 26th July 2022 from a qualified firm. Furthermore, it was its contention that the Applicants had neither impugned the qualifications of the valuers nor attached a contrary report. The Respondent urged the court to dismiss the application with costs.

C. Analysis and Determination

33. Having considered the application, affidavits and submissions the following issues crystallize for determination.
 - i. Whether the Applicants have met threshold for grant of injunction.
 - ii. Whether the loan facility should be reopened.
 - iii. Whether there is need for joint independent valuation.

C (i)(a) Whether the Applicants have met the threshold for grant of injunction.

34. The applicants are seeking an injunction against the sale of Kisumu/kombura/4228 pending hearing and determination of this suit. He avers that the process of sale was irregular, he had developed a sentimental attachment to the property incapable of monetary compensation and the property had been grossly undervalued. The Respondent on its part avers that applicant was a notorious defaulter; it had followed due process in realization of the loan, and it is a huge financial institution capable of compensating any loss incurred by the Applicants.
35. On issuance of temporary injunctions, the celebrated case of *Giella v Cassman Brown* is instructive. It behoves the applicant to prove that they have a prima facie case with high chances of success, that they are likely to suffer irreparable harm incapable of monetary compensation and that the balance of convenience tilts in their favour.
36. In support of a prima facie case the Applicants aver that there was no service of the notification of sale. On its part the Respondent averred that the notice was served as evidenced by the certificate of postage. The Applicants in their written submissions have not in anyway refuted this certificate of postage. Furthermore, the Applicants were aware of the Respondent's intention to redeem the loan. I say so because the second applicant sent a letter promising to pay the outstanding arrears on 29/7/2022.
37. There is no indication that the Applicants made good the remainder of the arrears as he had promised not to mention the monthly instalments.
38. In view of the Applicants' persistent default I find that they have failed to establish a prima facie case.



C(i)(b) Irreparable loss and damage

39. Turning to the issue of suffering irreparable damage the Applicants urged that they had developed a sentimental attachment to the property. The Respondent on its part avers that the value of the property is ascertainable. I agree with the Respondent the value of the property can be ascertained. Additionally, the Applicants have not controverted the fact that the Respondent is a financial institution capable of compensating any loss suffered. In view of the foregoing the Applicants have failed to prove irreparable damage.

C(i)(c)

40. The balance of convenience obviously tilts in favour of the Respondent.

C(ii) Whether the loan should be reopened

41. In seeking to have the loan reopened the Applicants place reliance on section 105 and 106 of the Land Act. They aver that the property is matrimonial. The Respondent on its part avers that the Applicants have not provided sufficient reason to warrant reopening of the charge. They aver that if matrimonial property would be the only reason for reopening of charges then banks would go bankrupt.

42. In reopening a charge the court is guided by section 106 (2) of the Land Act which provides that:-

- “2. In re-opening the charge, the court may;
 - a. direct that the charge shall have effect subject to modifications that the court shall order;
 - b. require the chargee to repay the whole or part of any sum paid under the charge or any related or collateral agreement by the charger or any guarantor or other person who assumed an obligation under the charge whether it was paid to the chargee or any other person;
 - c. require the chargee to pay any compensation to the charger which the court shall think fit; or
 - d. direct the chargee, being a corporate body to cease acting in a discriminatory manner with respect to the granting or charges.
- 3) In considering whether to exercise the powers conferred on it by this section, the court shall have regard to-
 - a) the age, gender, experience, understanding of commercial transaction, and health of the charger at the time when the charge was created, if the charger is an individual;
 - b) the financial standing and resources of the charger relative to those of the chargee at the time of the creation of the charge;
 - c) the degree to which, at the time of the creation of the charge, the charger was under financial pressure and the nature of that pressure;



- d) the interest prevailing at the time of the creation of the charge and during the continuation of the charge and the relationship of those interest rates to the interest rate applying from time to time in the charge;
- e) the degree of risk accepted by the chargee, having regard to the value of the charged land and the financial standing and other resources of the charger;
- f) the importance of not undermining the confidence of reputable charges in the market for charges; and
- g) any other factors the court considers relevant.”

43. The reason that the suit property is matrimonial property is not plausible. First while charging the property it was within the applicant’s knowledge that it was matrimonial. Additionally, the Applicants knew of the risks of default. In the case of *Maltex Commercial Supplies Limited & Another v Euro Bank Limited* H.C.C.C. No.82 of 2006 the court held that any property whether it is matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured.

44. I therefore find that the Applicants have not met the threshold for reopening of the charge.

C(iii) Whether there is need for a joint valuation

45. It was the applicant’s contention that the suit property was valued at around 60 million. The valuation report by CMT realtors shows that the market value of the property is Kshs 64 million. The Applicants have not provided any basis for their estimation. If they thought the property was grossly undervalued, they should have filed a separate valuation report to counter that of the Respondent. In any case this court having found that most of the prayers are unproven I do find that the joint valuation will serve no purpose.

46. The upshot of the foregoing is that the application lacks merit and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF FEBRUARY, 2024

MWANAISHA. S. SHARIFF

JUDGE

