Almond Resorts Limited & 3 others v Equity Bank (Civil Suit E003 of 2024) [2024] KEHC 15985 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15985 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL SUIT E003 OF 2024

JN ONYIEGO, J

DECEMBER 18, 2024

BETWEEN

ALMOND RESORTS LIMITED ..... 1ST PLAINTIFF

MOHAMED MAHAT KUNOW ..... 2ND PLAINTIFF

ABDI AZIZ MAHAT KUNOW ..... 3RD PLAINTIFF

DUBATI ALI ..... 4TH PLAINTIFF

AND

EQUITY BANK ..... DEFENDANT

RULING

1. Through a notice of motion dated 07-10-2024 brought pursuant to Order 40 rule 1 and 2 of the civil procedure rules 2010, Sections 3A and 63 of the *civil procedure Act* 2010, chapter 21 of the laws of Kenya and, Section 52 and 53 of the transfer of property Act, the applicants sought for orders as hereunder;

    a. Spent

    b. A temporary injunction do issue restraining, the defendant, whether by itself, its agents, servants and or employees from advertising, for sale, selling, taking possession, occupying, alienating, disposing, transferring or in any other way whatsoever interfering with all that property known as Title Number Garissa Municipality/block 11/530 pending the interpartes hearing of this application

    c. A temporary injunction do issue restraining, the defendant, whether by itself, its agents, servants and or employees from advertising, for sale, selling, taking possession, occupying, alienating, disposing, transferring or in any other way whatsoever interfering with all that

property known as Title Number Garissa Municipality/block 11/530 pending the interpartes hearing of this suit.

d. Costs of this application be borne by the respondents.

2. The application is based on the particulars set out on the face of it and further supported by the content contained in the affidavit sworn on 07-10-2024 by one Mohamed Mahat Kuno the director of the 1st plaintiff and also the 2nd plaintiff herein. It was deponed that the 2nd, 3rd and 4th plaintiffs are the registered proprietors of plot number Garissa Municipality/Block 11/530. He averred that sometime on 11-06-2011, the defendant advanced a loan of Kes 138,400,000 to the 1st plaintiff. That kes 100,000,000 out of the said amount was to pay off the 1st plaintiff's facility at 1st community bank and to be utilized in refurbishing the 1st plaintiff's hotel and the balance of kes 38,400,000 to purchase plot number 1149/12/XXIV making total of kes 138,400,000.

3. Tendered as security for the said loan was plot number Garissa Municipality/block 11/530 leading to execution of the charge on 30-06-2011. That it was a term of the charge document that first Kes100,000,000/= was to be repaid within a period of 7 years in 84 instalments of Kes 1,819,197/= each. It was further a term of the contract that the loan amount was to attract a fixed interest rate of 13% per annum calculated on daily balances. He averred that the defendant was not supposed to vary interest at any one time without seeking approval of the cabinet secretary finance pursuant to section 44 of the *banking Act*.

4. It was deposed that contrary to the contract agreement, the defendant went a head and varied interest rates without first seeking the cabinet secretary's approval. He deposed that pursuant to section 90 of the lands Act, the statutory power of sale only accrues after a chargee serves a chargor 90 days demand notice, followed by a valid 90 days statutory notice, followed by 60 days notice from the chargee upon the expiry of statutory notice a foresaid, followed by 40 days notice before the right to sell the charged property accrues.

5. It was deponed that the 2nd -4th defendants being guarantors of the said loan were never served with any demand notice pursuant to Sections 90 and 96 of the lands Act. That the 45 days notice by auctioneers and the redemption notices were not served.

6. He deponed that the 4th defendant having died, his estate was not served with any demand notice. That the only notice the defendant has ever issued is a letter dated 05-07-2024 served upon the 2nd plaintiff seeking Kes 53,902,883 without notifying the 1st plaintiff of any breaches to be rectified.

7. That without issuing all the requisite notices, the defendant's auctioneers m/s Antique sent the deponent an sms informing him of the intended auction of the charged property on 27-09-2024. He deposed that the 1st defendant has paid a total of Kes 294,354,276 out of a loan facility of Kes 138,400,000/=. That under the duplum rules a loan can not attract an interest exceeding double the loan advanced. According to him, the 1st plaintiff has paid the loan in excess of Kes 17,554,276/= of the amount due pursuant to the Duplum rule hence amount of loan is outstanding.

8. That despite holding meetings with the defendant's managers who promised to reconcile their figures, no action was taken to harmonize the amount paid. He attached a valuation report of the property which showed the current property value is kes 850 million.

9. In response, the respondent filed a replying affidavit sworn on 28-10-2024 by George Mabeya the defendants' senior manager legal services who averred that sometime in September 2017, the 1st plaintiff approached the defendant for a loan facility of kes 125, 000,000/= (facility 1) and an overdraft of Kes 5,000,000/=(facility2). That for facility 1, the credit evaluation fee of 1% for the defendant's services of

kes 1,250,000/= and exercise duty of 10% would apply1. For facility 2, credit facility of 1% amounting to kes 200,000 and 10 % amounting to Kes 20,000/= exercise duty would apply. He averred that both facilities were to be guaranteed by the 2nd -4th defendants using an existing further legal charge of plot number Garissa municipality /block 11/530 registered in the name of the 2nd -4th defendants for a sum of Kes 138,400,000/=.

10. That by the year 2022 the 1st plaintiff's loan fell into arrears of kes 58,858,246 recovery of which is subject to the terms of the letter of offer dated 24-01-2017. He deposed that the said amount was subject to recovery after issuing necessary notices. That by a notice letter dated 12-10-2022 the bank issued 90 days statutory notice demanding payment of outstanding arrears kes 7,452,715 which was required to regularize the outstanding arrears. That having refused to honour the demand, the bank issued a 40 days statutory notice dated 09-03-2023 notifying the plaintiffs of the intention to sell the charged property to recover kes 15,792,366 together with the total outstanding loan at kes 60,668,500.

11. That on 23-06-24, the bank gave Antiques Auctioneers instructions to advertise for sell the said property and recover the amount due. Subsequently, the auctioneers issued 45 days notice of redemption and a notice of sale to recover kes 52,476,909/= in compliance with the auctioneer's rules 1997. He averred that sometime November 2023 the bank instructed the Trancountry valuers instructions to value the property which they did and valued the property at 273,000,000/=.

12. It was deponed that the defendant has complied with all the necessary conditions before the sale of the subject property in compliance with section 90(1)(2) and (3)(e) of the *land Act*. That the application has been filed a bit too late and it does not meet the criteria set out in the Giella vs Casman Brown. It was further deposed that the application has been filed in bad faith

13. Parties filed submissions in support of their respective positions. The applicants through the firm of Kosgey filed their submissions dated 06-11-2024 reiterating the content of their affidavit in support of the application. It was contended that the alleged statutory notice of sale and the auctioneer's 45 days notice of redemption were not served upon one of the guarantors one Omar through their proper addresses provided in the letter of offer. That the 1st plaintiff has paid the loan in excess of kes 17,554,276 after repaying the loan amount at kes 294,354,276/= an amount that is far in excess of the loaned amount contrary to the duplum rules under section 44 of the *banking Act*. Further, it was contended that the defendants have undervalued the charged property at kes 273,000,000/= when the actual value is at Kshs 850,000,000/= contrary to Section 97 of the *land Act* which requires a forced sale valuation to avoid fraudulent undervaluation of the property. Reliance was placed in that regard to the case of Palmy company limited vs Consolidated Bank of Kenya Limited Nairobi HCCC 527 of 2013(2014) eKLR.

14. Counsel contended that it was the duty of the chargee to show that there was compliance with the statutory notice of sale. In that regard, the court was referred to the case of Nyagilo Ochieng & another vs Fanuel Ochieng & 2 others (1995-1998)2EA at page 264. That there was no proof of service upon the 2nd, 3rd and 4th plaintiffs. That the procedures laid out in realizing loan recovery as laid out under the *land Act* and in the case of Beatrice Atieno Onyango vs Housing Finance LTD & 3 others (2020) eKLR was not followed.

15. On their part, the respondents filed their submissions through the firm of KRK Advocates LLP dated 18-11-2024 thus adopting the averments contained in the replying affidavit. Principally, it was contended that the plaintiffs had failed to establish a primafacie case as established in the case of Mrao ltd vs American Bank of Kenya ltd 2 others (2003) KLR 125 where the court held that for a primafacie case to exist, there must be proof that there existed a right that has been infringed upon. Counsel contended that necessary notices were served through the plaintiffs' address provided in the letter of

offer. Counsel made reference to the specific notices and the date of their service. Learned counsel, relied on the holding in the case of Beatrice Atieno Onyango(supra) where the court upheld service of notices through registered post as sufficient proof of service.

16. On the question whether the applicants have paid the loan more than double the borrowed amount, counsel contended that the total amount borrowed was kes 268,400,000/= hence that a mount cannot be kes 294,354,276/= as claimed by the applicants. It was counsel's submission that a court can not stop sale of the charged property merely on account of a dispute over the outstanding amount or simply because the charge has commenced a redemption process unless the disputed amount is deposited in court. In that respect, the court was once again referred to the case of Mrao (supra).

17. Regarding the undervaluation of the property, it was contended that there was no proof. Further, it was argued that a party alleging undervaluation can seek compensation.

18. Regarding whether the balance of convenience tilts in favour of the defendant, counsel contended that the plaintiffs borrowed a total of kes 268,400,000/= exclusive of interest, yet fails to disclose that fact. That having stated that they have repaid Kshs 294, 354,276/=, they cannot claim to have settled the full amount and even in excess.

19. I have considered the application herein, response thereof and rival submissions by both parties. The only issue that germinate for determination is whether the applicants have met the threshold for grant of an injunction. In the celebrated case of Giella vs Casman Brown & Co. Ltd [1973] 358. Spry VP, speaking for that court, stated as follows at page 360:-

> " The conditions for grant of an interlocutory injunction are now, I think, 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. Similarly, in the case of Mrao vs First American Bank of Kenya Ltd & 2 others (supra) the court discussed what a prima facie case entails as hereunder: -

> " 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 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. More recently in the case of Nguruman Limited vs Jan Bonde Nelsen & 2 others (C. A. No.77 of 2012), [2014] eKLR the Court of Appeal had similar sentiments when it said:-

> " We reiterate 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 merit 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. Whereas grant of an injunction is a matter of discretion by the trial court, the same discretion must be exercised judiciously and not capriciously nor whimsically. It should not be issued as a matter of course but upon proof of an arguable case with a probability of success. In the absence of proof of probability of success, the applicant should prove that he is likely to suffer irreparable damage that can not be compensated monetarily or on a balance of convenience, the scales of justice tilts in his favour.

23. Before this court are five major allegations made by the plaintiffs; Firstly, is the claim that a 90 days statutory demand notice sale was not issued; secondly, that the 40 days sale notice was not issued; thirdly, the auctioneers' 45 days redemption notice was not issued; the property has been undervalued by the respondents and lastly; they have been charged more that double the amount borrowed without the minister for finance' approval pursuant to section 44 of the *banking Act*.

24. Did the respondents serve the mandatory statutory notice of sale under Section 90(1) of the *Land Act*? The said notice does provide as follows;

> " 90. Remedies of a chargee
>
> (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;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may—

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to—

(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

(5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section.

25. According to the applicant there was no notice served under Section 90(1) above. However, the respondent said that they served. They attached a copy of the statutory notice under the said provision(annexture-4) addressed to the plaintiffs. They attached postal certificate showing that parcel was received by signing (see annexture-5). The notice was addressed to Mohamed Mahat, Abdaziz and Dubat Ali. The applicants argued that one Omar was not served being one of the guarantors. From the notice, Omar was copied the notice. However, Omar has not sued nor is he a party in this case.

26. From the letter of offer dated 07-06-2011, applicants' annexure, the address used to effect service of the notice is similar. I have no doubt service of the said notice was effected through the postal address provided.

27. Equally, and in similar manner, the respondent attached the 40 days notice as provided under section 96(2) (3) of the *land Act* which provides;

> " 96. Chargee's power of sale
>
> (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that 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."

28. Perusal of annexture 6 of the replying affidavit is clear that statutory notice under section 96 of the *Land Act* was served and postal certificate executed as proof of service. Similarly, the respondent did attach auctioneers 45 days' notice together with postal certificate of service (annexture 7 of the replying affidavit). I have no doubt, the requisite notices for sale were properly effected.

29. The next question is whether the loan has been fully repaid. According to the applicants the only loan acquired was kes 138, 400,000/= out of which they have repaid over 294,354,276/=. This was the loan advanced on 11-06-2011 in two batches of 100,000,000/= and 38,400,000/=. They did not mention further legal charges advancing 125,000,000/= and another overdraft of 5000,000/= making a total of 268,400,000/=. From the letters of offer attached, and the further charge instrument of September 2017. With this facts, the applicants have not controverted the same in their supplementary affidavit. In that respect, this court is not satisfied that they have repaid the loan more than double.

30. As regards excessive interest charged without the approval of the minister for finance, that is a matter of evidence as the same is not ascertainable from the pleadings so far attached.

31. Concerning the value of the property, the respondents valued the property at kes 273, 000,000/= while the applicants valued it at kes 850,000,000/=. However, the applicants in their supplementary affidavit at para.11 attached a valuation report dated 14-02-2017 in which the respondents had valued the same property at kes 360,000,000/=. Taking into account the rate of inflation since 2017, the property must have appreciated. On that ground, I do agree with the applicants that the property might be under undervalued or overvalued. For those reasons there is reasonable apprehension that if the sale goes ahead, the property might be sold at a lower price than the actual price.

32. Once a property is sold at a throw price, it is not possible to get it back or recover damages. In that case, there is need to have a mutually agreed valuer to come up with amore acceptable valuation on both sides. There was no explanation given why the value has dropped from 360,000,000/= to 273,000,000/=. However, where there is a dispute over the value of the property, that cannot on its own perse stop the sale. In that respect, the applicant will have to deposit in court the full a mount claimed or part of it as a sign of commitment to repay the loan. See Mrao(supra).

33. As to whether justice tilts in favour of the applicants, I say yes but on condition that, they deposit close to half of the alleged outstanding amount within 30 days pending hearing and determination of the main suit. For avoidance of doubt, the sale herein is stayed pending hearing and determination of the

main suit on condition that; the plaintiffs deposit a sum of kes 30,000,000/= in an interest earning joint account held by the advocates of both parties. In default, execution to proceed as scheduled.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE