Daniel & another v KCB Bank Kenya Limited (Commercial Case E005 of 2024) [2024] KEHC 8245 (KLR) (25 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8245 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E005 OF 2024

DKN MAGARE, J

JUNE 25, 2024

BETWEEN

PETER MWARA DANIEL ..... 1ST PLAINTIFF

NANCY NYAMBURA MWARA T/A DANCA TRADERS ..... 2ND PLAINTIFF

AND

KCB BANK KENYA LIMITED ..... DEFENDANT

RULING

1. This is a ruling in respect of an application for injunction dated 23/1/2024. The Application is strenuously opposed by the defendant. Parties proceeded by way of written submissions. I reserved the ruling for today.

2. As a way of background, on 24/1/2024, the Plaintiffs/Applicant filed suit stating that on 15/10/2007 they were granted a mortgage facility over land Parcel No. MN/III/18378/Mtwapa and the plaintiff/applicant operated Account No. xx 147. The mortgage was paid with the total sum of Ksh. 55,642,884.01 inclusive of bank charges.

3. According to the Applicants, an overpayment stood at Ksh. 1,808,050.16 as at 18/5/2023. They stated that the defendant has charged interest and punitive, oppressive and unconscionable charges. By a letter dated 1/12/2023 a sum of Ksh. 38,134,975 was alleged to be due and demanded by the auctioneers. They stated that this amount is not due at all. Several particulars of breach of contract including fraud and padding the account with nonexistent arrears. Several declarations are sought in the plaint. In the Application under certificate of urgency the Plaintiffs sought the following orders:

    a. Spent.

    b. That pending the hearing and determination of the Plaintiffs' application interpartes an order of temporary injunction do issue against the defendant restraining them whether by

themselves, their servants and/or agents and assigns from interfering with the plaintiffs' quiet possession, alienating, selling, offering for sale, transferring, disposing, using, charging, mortgaging, developing or in any way disposing all that property known as LR. No. 18378/23 Mtwapa.

c. That pending the hearing and determination of this suit an injunction do issue against the defendant restraining them whether by themselves, their servants and/or assigns from interfering with the Plaintiffs' quiet possession, alienating, selling, offering for sale, transferring, disposing, using, charging, mortgaging, developing or in any way disposing all that property known as LR. No. 18378/23 Mtwapa.

4. The application was supported by an affidavit of the 1st Applicant dated 23/1/2024. Annexed to the report is a letter of offer dated 10/9/2007 with approved loan of 24,000,000/= payable in 810 monthly instalments for a period of 10 years. There is a summary indicating:-

a. Ksh.29,983,720/- as loan.

b. Bank charges – 24,414,394.65/-

c. Interest – 96,174,133.21/-

d. Repayments – 57,951,321.16/-

5. A demand was made in 2017. There was annexed to the affidavit a valuation for the suit land showing the current market value of the suit land is Ksh.181,500,000/= as per the report dated 21/11/2023 signed by Emphantus W Rugethe (MISK).

6. The default is said to have occurred way back in 31/1/2010 when penalties were applied. It is over 14 years later, that the bank continues to apply interest and penalties. The court will not now deal with the time bar aspect.

7. The question before the court is whether the loan given out of Ksh. 24,000,000/= as per the letter of offer can have interests and charges all amounting to 96 million. After paying 57,000,000/=, there is still a balance of 38,000,000/=.

8. The defendant entered appearance on 31/1/2024. They filed defence dated 15/2/2024. In the defence they state that the forced sale value is Ksh.69,000,000/= while market value is Ksh.96,000,000/=. They stated that the loan continues to accrue interest and the valuation was done pursuant to Section 97(1)&(2) of the *Land Act*.

9. The defendant stated that they issued two notices pursuant to Section 90(1),(2),(3e) of the *Land Act* 2012 and 96(1)(2) and (3) of the *Land Act* 2012. It was their case that default interest was 3% over and above 14% interest. They state that the plaintiff added a loan of Ksh. 2,000,000/= to top of the previous facility and brought the loan to 30,000,000/=.

10. The instalments were enhanced to Ksh. 435,190 per month. In all these, the defence missed crucial aspects that is:-

a. Dates of happening of the events and notices indicated.

b. Dates of default.

c. Repayment post notice being issued.

11. The defendant filed a 93-page replying affidavit sworn by Ms. Nancy Gaitho. She stated that she had custody of the then institution Savings and Lona Ltd, which was amalgamated on 25/9/2009.

12. The bank later acquired loans and other liabilities on 30/12/2015. What the bank is saying was that from 2009 to 2015, the loan was in arrears and was never claimed. This is a period of 7 years. Nothing happened until 2024, a period of 9 years later or 16 years since fault occurred. This was a loan whose life was for 10 years, that is by 2017. Nothing was done till 7 years after the period of 10 years lapsed.

13. The dispute here is not on the amount due. It is whether there is a debt due. Why will a bank wait for 16 years before claiming loan arrears? Is the interest, especially penalty interest lawful after a long delay of 16 years? In other words, is this not a stale claim? The courts cannot relieve a party of their own deals. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of *Fina Bank Limited v Spares & Industries Limited (Civil Appeal No 51 of 2000*) (unreported):
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> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

14. It is the Respondent who gave a 10 year limit on the contract. It was not enforced within the period of a reasonable time thereafter. Can interest applied over 16 years be said to be contractual?

Submissions

15. It was the Applicant's case that they were at all material times customers of the Respondent bank through its mortgage arm, Savings and Loan and were granted a series of loans starting from 15th October, 2007 to 22nd March, 2008 that aggregated to a sum of Kshs.29,983,720.00, secured firstly through a first charge and 2 subsequent further charges over the suit property being LR. No.18378/23 Mtwapa. They operated a loan account number 327-1309xxxxxx/MG 0829xxxxxx for that purpose and have fully paid their loan and that they are entitled to redeem the charged property.

16. They stated that throughout the lending period from the date of 1st draw-down, they have fairly serviced the loan facilities and have paid a total sum of Kshs.55,642,884.01 that is inclusive of interest and bank charges out of the principal loans advanced amounting to Kshs.29,983,720.00 and that according to their auditors' statement of the loan account there is an overpayment of Kshs.1,808,050.16 as at 18th May, 2023 as per a copy of the audited loan statement.

17. They lamented lack of statutory notice as there was no evidence of a 40 days statutory notice of sale having been issued or served in terms of section 96(1), (2), (3) of the *Land Act*, 2012 to run concurrently with the Auctioneer's notice of 45 days under the Auctioneer's Rules, wheich they tated was a mandatory requirement.

18. They stated that the amount advanced was Kshs.30,000,000/- and not Kshs.35,000.000/- as alleged by the Respondent and further that the alleged latter sum is evidence of recklessness, mismanagement and dereliction of fiduciary duty on the part of the respondent and the same is said to have come out clearly in the evidence so far provided in the supporting affidavits and even from the Respondent's own Replying Affidavit.

19. They relied on the case of *Isaiah Nyabuti Onchonga v Housing Finance Company of Kenya Ltd & Another* [2020] eKLR, the court ordered the 1st Defendant, (HFCK) whee the court stated as hereunder: -

> " to render a true and just account of the debt excluding all penalty interest and default charges levied..."

20. It was their view that the issue of interest and penalties charged was raised by the borrower and as enunciated in the case of *Bomet Teachers Training College Ltd-vs- Bank of Africa Ltd & Mistan Auctioneers* [2021] eKLR, their case is sold as the court posited as on the "in duplum rule" while citing the elucidation of the rule by the Court of Appeal in *Kenya Hotels Ltd v Oriental Commercial Bank*: -

> " In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May 2007 it has been applied by the courts with reasonable degree of consistency. See *Lee G. Muthoga v Habib Zurich Finance (K) Limited & another* [2016] eKLR, *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* [2019] eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.
>
> "The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides."

21. The Applicant continued that the application of this rule was recently reiterated by the Court of Appeal in the case of *Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & Another* [2020] eKLR in the following terms:-

> " As we have shown section 44A of the *Banking Act* came into force on 1st May 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to 4 | P a g e a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2): "The maximum amount referred in subsection (1) is the sum of the followinga) The principal owing when the loan becomes non-performing; b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes nonperforming; and c) Expenses incurred in the recovery of any amounts owed by the debtor". By that provision if a loan becomes non-performing and the debtor resumes payment on the loan and the loan becomes non-performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non-performing. In addition, by section 44A (6) it is provided: "This section shall apply with request to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation." Section 44A has retrospective effect and this as explained by this Court in the case of *James Muniu Mucheru v National Bank of Kenya Civil Appeal No. 365 of 2017*.

22. It was their case that they should not be condemned to take damages when their rights have crystalized. They relied on the case of *Joseph Siro Mosioma v HFCK & 3 Others* [2008] eKLR , agreed with that court where it was held thus:-

> " that damages is not an automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

23. The respondents filed comprehensive submissions and stated that the Applicant does not have a prima facie case. They relied on the Court of Appeal decision in *Mrao Ltd v First American Bank of Kenya Ltd. & 2 others* [2003] KLR 125:

> " But as I earlier endeavoured to show, and I cited ample authority for it, a *prima facie case* is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and a probability of success of the Applicant's case up on trial. That is clearly a standard which is higher than an arguable case.]"

24. It was their case that the Defendant Bank's statutory power of sale has properly arisen since default has been demonstrated and service of all the necessary statutory notices shown to have been served. It is therefore inequitable for the Plaintiffs to fault the Defendant Bank for the intended sale of the property by public auction as the loan is outstanding. Reliance was placed on the decision of the Court of Appeal in the case of *Aberdare Investment Limited v Housing Finance Co. of Kenya and Another* [1992] EA 1 where the court stated: -

> " The choice of remedy for recovery of an unpaid loan under a mortgage is that of the mortgagee, and the mortgagor cannot tell the mortgage to take such action, as may suit the mortgagor'.

25. The bank was of the view that the suit property was valued through a recent valuation exercise and as such the balance of convenience tilted in the bank's favour as they can adequately compensate the plaintiff. They relied on the decision of *Maithya vs. Housing Finance Co. of Kenya and another* [2003] IEA 133 where court held that:

> [The balance of convenience tilts in favour of the lender, since it is in a position to repay should the borrower succeed at trial, whereas the borrower's security continues to be eaten away by the mounting redemption money and may prove insufficient.] (See also *St. Ann's Limited vs Planfarm Limited & another* Civil Appeal No. 79 of 2009 and *Banana Hill Investment Ltd. Vs Pan African Bank Ltd & 2 others, Civil Appeal No. 68 of 1986*)

26. It was their parting shot that the remedy herein sought by the Plaintiff (Guarantor/Chargor) is an equitable remedy and he who comes to equity must come with clean hands. To them, the Plaintiffs admitted in various correspondence that the loan was in arrears. Reliance for this submission was placed on the decision of *Daniel Kamau Mugambi v Housing Finance Company of Kenya Ltd* [2006] eKLR quoting the case of Francis *J.K Ichatha v Housing Finance Co. of Kenya Limited*, where the court stated as doth: -

> " A plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks

equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the Defendant/Respondent a debt of which he expressly undertook to pay."

27. They urged the court to dismiss the Application

Analysis

28. The test in this matter is whether the Applicant has met the threshold for grant of injunction. In the locus classic case of *Giella v Cassman Brown & Co. Ltd* [1973] EA, 358, 360, sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

> " The conditions for the 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."

29. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

> " 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) ally 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. See *Kenya Commercial Finance Co. Ltd v. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie case* that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. 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."

30. In this case, the first issue is *prima facie case*. There is a world of difference between the values given by both parties. However, it is not lost on me that the land was valued as 24,000,000/= 16 years later.

31. *Prima facie case* was defined in in the case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 others*[2003] eKLR, the Court of Appeal noted that: -

> " 4. A *prima facie case* in a civil application includes but is 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."

32. The dispute relates to a huge property valued between 96,000,000/= and 181,500,000/= depending on the party submitting. The loss incurred will be irreparable if the property is sold and it turns out the debt is not due. The payments indicate a more likelihood than not that the balance of convenience tilts in favour of the Applicant.

33. *Halsbury's Laws of England*, 3rd Edition Volume 21, Paragraph 739 page 352 which defines irreparable injury as;

> 'injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question.'

34. The balance of convenience was succinctly set out in the case of *Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another* [2019] eKLR, where it was held as doth:

> " The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed."

35. This was earlier stated in the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 Others* [2016] eKLR, as hereunder:-

> " Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right...Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies."

36. This is in line with the decision in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where it was held that:

> " The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

37. Before I depart, I need to address a debt of 5,300,000/. This appears to be a serious bank withdrawal on a single day. It is not completely documented. The persons paid are unknown. This appears to be a phantom entry. The entire amount is granted and withdrawn the same day. Default on this occurred immediately, even before acceptance. This cannot be related to the loan at hand. It is a debt which must have become time barred by 2014. If this is the debt the bank bases to claim on a documented mortgage, the bank's position is weakened. I do not suppose that the Applicant applied and were granted a top up loan orally. All this said, the further affidavit of 5/4/2024 buttresses the Applicant's case.

38. In the end I find the application merited. Accordingly, I allow the same in terms of prayer 3. Costs shall abide the outcome of the case. The suit should be head and concluded by 27/7/2026.

39. The matter be fixed for directions on 24/7/2024 before Justice Ng'arng'ar for pre-trial conference.

Determination

40. The upshot of the foregoing, I make the following orders: -

    a. An injunction do issue against the defendant restraining them whether by themselves, their servants and/or assigns from interfering with the Plaintiffs' quiet possession, alienating, selling, offering for sale, transferring, disposing, using, charging, mortgaging, developing or in any way disposing all that property known as LR. No. 18378/23 Mtwapa pending the hearing and determination of this suit.

    b. The matter be fixed for 24/7/2024 before court 4 for directions on pre-trial conference in Mombasa.

    c. This file be transmitted forthwith to Mombasa.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF JUNE, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Ms. Nduku for the Plaintiff/Applicant

Miss. Osewe for the Defendant/Respondent

Court Assistant – Jedidah