



**Hadar Limited v SBM Bank (Kenya) Limited (Civil Case
E031 of 2023) [2024] KEHC 8536 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E031 OF 2023**

A MSHILA, J

JULY 12, 2024

BETWEEN

HADAR LIMITED APPLICANT

AND

SBM BANK (KENYA) LIMITED RESPONDENT

RULING

1. Before court is the Notice of Motion application dated 20th September, 2023 brought under Section 1B, 3A of the [Civil Procedure Act](#), Order 51 rule 1 and Order 40 rule 1 & 2 of the [Civil Procedure Rules](#) and all other enabling provisions of the law. The Applicant sought for orders:-
 - a. Spent
 - b. That pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to issue a Temporary Injunction restraining the Respondent whether by itself, its servants, auctioneers, advocates and/or agents or whomsoever else acting on its instructions or authority from selling by public auction and/or private treaty or dealing in any other manner whatsoever with title number Kikuyu/Kikuyu Block 1/53.
 - c. That pending the hearing and determination of the suit, this Honourable Court be pleased to issue an injunction restraining the Respondents whether by itself, its servants, auctioneers, advocates and/or agents or whomsoever else acting on its instructions or authority from selling by public auction and/or private treaty or dealing in any other manner whatsoever title number Kikuyu/Kikuyu Block 1/53.
2. The application is premised on the grounds that the Applicant is apprehensive that if the sale is not halted, the Applicant will suffer irreparable harm and render this application nugatory as the property will be sold.



3. The application is supported by the affidavit of Cecilia Wanjiku Kabugi sworn on even date where she deposed that she is the Applicant's Director. The Applicant had taken a loan of Kshs. 17,310,000/= at Chase Bank before it went under receivership and its operations were taken up by the respondent. That the charge was over Kikuyu/Kikuyu Block 1/53 and personal guarantees. She deposed that the loan was disbursed in two tranches and that the loan of Kshs. 5,310,000.00 was fully paid. The loan of Kshs. 12,000,000/= fell in arrears and a statutory notice dated 24th February, 2017 was issued. She further averred that when Chase Bank was taken over by the Respondent the loan was re-structured under undue influence by the Respondent as such the offer letter dated 21st August, 2020 was said to be illegal. The Respondent was accused of failing to provide financial statements. That the Respondent issued a Notice in exercise of its statutory power of sale on 28/09/2021 but the Applicant paid up Kshs. 1.5 million cancelling the said notice. Upon the Applicant complying with the Respondent's notice to rectify default, the legal process should have started afresh. The loan balance was said to be contrary to the in duplum rule. It was also stated that the Respondent had refused to conduct a current forced sale valuation of the property. The Applicant avers that they are apprehensive that the Respondent will have sold the property while they are in the process of redeeming the property. In the end, the court was urged to allow the application.
4. Beline Ochiel the Respondent's Debt Recovery Manager filed her replying affidavit sworn on 25/10/2023. She deposed that the Applicant has failed to inform the court that a similar application was dismissed being Nairobi High Court Commercial Case No. 226 of 2017. That the Applicant has refused to pay the loan amounting to Kshs. 19,483,872/=. The Respondent issued the Applicant with the ninety (90) day statutory notice and before they could issue mandatory forty (40) days' notice to sell, the Applicant had approached the Nairobi Commercial Court but the application was dismissed for want of prosecution. In any event the loan was re-structured but the Applicant still failed to pay. Another statutory notice to sell of ninety (90) days dated 28/09/2021 and auctioneers notice of 45 days were issued and the same still remain in effect even after the negotiations failed. The Respondent averred that it had conducted a current forced sale valuation and the property was advertised for sale. She denied unduly influencing the Applicant into executing documents related to the loan facility. It was averred that as long as the loan remained in arrears the statutory notices were never extinguished. It denied claims of charging exorbitant interest rates. The conduct of the Applicant was said to be one of frustrating the Respondent and it is apprehensive that the arrears will outstrip the security rendering the contract unenforceable as such Applicant is undeserving of the orders sought.
5. Subsequently, Beline Ochiel filed a supplementary affidavit sworn on 3rd December, 2023 where she reiterated the contents of her replying affidavit.
6. The application was canvassed by way of written submissions.

Applicant's Submissions

7. The Applicant submits that it has established a prima facie case. Reliance was placed on the case of *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR. The Applicant avers that they have no loan balance. The process of exercising the statutory power of sale by the Respondent was said to be illegal. The use of the same statutory notice dated 28th September, 2021 was also said to be illegal. The demand of Kshs. 17,881,075/= was said to be against the in duplum rule. The purported loan statement by the Respondent was said to be a fabricated document. The Applicant contends that they intend to build flats intended for sale worth over 100 Million as such the loss of profit that the Applicant shall suffer cannot be compensated by way of damages in any case the loan balance was said to be 0.00/=. Reliance was placed in the case of *Pius Kipcjibirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR. The Respondent was said to have misrepresented the loan amount during the restructuring of



the loan. The Applicant submits that the balance of convenience should tilt in its favour. If the orders sought are not granted the property will be sold at a throw away price and in any case the entire loan amount has been paid.

Respondent's Submissions

8. The Respondent submits that the Applicant's main contention is on the loan amount. It was submitted that disputes in regard to loan amount shall not form the basis for grant of an injunction. Reliance was placed in the case of *Bharmal Kanji Shah & another vs Shar Depar Devji*. The Respondent contends that they have conducted a current forced sale valuation of the property. The allegations that the property was undervalued, were said to be mere speculation. Reliance was placed in the case of *Zum Zum Investment Limited vs Habib Bank Limited* (2013) eKLR. The Respondent submits that the Applicant can be adequately compensated by grant of damages. The property having being given for security, it was submitted that the same becomes a commodity for sale. Reliance was placed in the case of *Andrew M. Wanjohi vs Equity Building Society & another* (2006) eKLR. The bank was said to stand to suffer in the event the court grants the orders sought as the Applicant continues to neglect his obligation to pay the loan. Lastly, the conduct of the Applicant was said to be a blatant refusal to pay as such its conduct is meant to frustrate the Respondent's right to recover the debt as such the balance of convenience should tilt in favour of the Respondent so that the loan does not accrue to outrageous amounts.

Issues For Determination

9. Having considered the application herein, the Respondent's replying affidavit and the rival submissions. The main issue for consideration is whether the Applicant is deserving of the orders sought.

Analysis

10. The law regarding grant of interlocutory injunctions is found in Order 40 Rule 1 of the *Civil Procedure Rules* which provide as follows:

“Where in any suit it is proved by affidavit or otherwise:

- (a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree;
- (b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further order.”

11. The Applicant sought for an order of temporary injunction pending the hearing and determination of the Notice of Motion. The conditions for the grant of interim injunctions is well settled in the case of *Giella v Cassman Brown & Co. Ltd* (1973) E.A 358 where it was held that: -

“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.”

12. The Applicant submits that it has established a prima facie case as there is no loan balance. That the use of the same statutory notices renders the process illegal. The Respondent was said to be against the in duplum rule. The Applicant submitted that they will suffer irreparable loss and that the balance of convenience should tilt in its favour.
13. On the other hand, the Respondent avers that disputes with respect of the loan amount shall not form the basis for grant of an injunction. That a current valuation has been conducted for the property. It was submitted that the Applicant shall be compensated by way of damages in the event they suffer loss. The Applicant offered the property as security as such it is a commodity for sale. The Applicant was said to be frustrating the Respondent’s right to recover its money as such the orders sought should not be granted.
14. There is need to preserve property that is subject to court proceedings so as to protect the court from giving orders in vain upon hearing and determining a suit. Order 40, of *Civil Procedure Act* gives the court discretion to issue orders which are in the nature of an injunction restraining dealings on property pending further orders by the court.
15. The court at this stage is not required to determine the merits and demerits of the applicant’s claim. The court is only required to determine whether the applicant has established a prima facie case.
16. In the case of *Silvester Momanyi Marube -Vs- Guizar Ahmed Motari & Another* (2012) eKLR, Odunga J. held that: -

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”
17. The Applicant herein avers that it has fully paid the loan amount. At some point the Applicant avers that if the orders sought are not granted then their right to exercise its right to redemption will be curtailed. It is therefore, safe to say that indeed the Applicant has an outstanding loan with the Respondent. What is in contention is the amount due and whether due process was followed.
18. Reference is made to the case of *Labelle International Ltd Vs. Fidelity Commercial Ltd & Another* (2003) Z.E.A. where it was held that;-

“It is now established law that when part of the amount claimed is admitted or proved to be due, a charge cannot be restrained by an injunction.”
19. An injunction will not be issued hereof when the Applicant’s claim is that of a dispute of the amount owed to the bank as this court has already established that indeed the Applicant owes the bank an amount which needs to be ascertained.



20. The Applicant alleges that they will suffer irreparable loss which cannot be compensated by way of damages as they intend to construct flats with proposed value of 100 million as such if the orders sought are not granted, then the loss suffered cannot be compensated by damages.
21. This court notes that the Applicant having offered property namely Kikuyu/Kikuyu Block 1/53 as security for the loan offered the same becomes commodity for sale. In this regard, reference is made of the case of *Kitur Vs. Standard Chartered Bank & 2 Others* (2002) IKLR as follows:-
- “It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits.”
22. Similarly, in the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* (2018) eKLR the court stated as follows;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
23. In the case herein, the Applicant is apprehensive that the Respondent is likely to dispose of the property and deprive them of their proposed project valued at over 100 million. This courts considered view is that the proposed project is not relevant to this case, the property having been offered as security should be subjected to a current valuation to determine its current market value and any loss that will be suffered by the Applicant during the process of recovery if proved the bank should be in a position to compensate by way of damages.
24. Refer to the case of *Amir Suleiman v Amboseli Resort Limited* (2004) eKLR where Ojwang, Ag. J (as he then was), elaborated on what a “balance of convenience” means by stating that;-
- “The Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice.”
25. Therefore with regard to the balance of convenience and bearing in mind the in duplum rule, this court is satisfied that the same tilts in favour of the Applicant it should be given an opportunity to redeem itself.

Findings and determinations

26. For the foregoing reasons This court makes the following findings and determinations;
- i. The application is found to have merit and it is hereby allowed.
 - ii. Pending the issuance of fresh Statutory Notices an injunction restraining the Respondents whether by itself, its servants, auctioneers, advocates and/or agents or whomsoever else acting on its instructions or authority from selling by public auction and/or private treaty or dealing in any other manner whatsoever title number Kikuyu/Kikuyu Block 1/53.



iii. The Applicant shall bear the costs of this application.

iv. Mention on 7/08/2024 before the Deputy Registrar for pre-trial conference.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 12TH DAY OF JULY, 2024.

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Randiek for the Defendant/Respondent

Kithinji h/b for Kimosop for Plaintiff/applicant

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