



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maluki & another v ABSA Bank Kenya PLC & another (Commercial Case E283 of 2023)  
[2023] KEHC 21371 (KLR) (Commercial and Tax) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E283 OF 2023  
JWW MONG'ARE, J  
AUGUST 15, 2023**

**BETWEEN**

**ISAAC MUTUNGA MALUKI ..... 1<sup>ST</sup> PLAINTIFF**

**CAROLYNE MUTHEU MUTUNGA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ABSA BANK KENYA PLC ..... 1<sup>ST</sup> DEFENDANT**

**REGENT AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion Application dated 20/6/2023 filed by the plaintiffs/applicants moved the court, under a certificate of urgency, pursuant to Order 40 Rule 1(a) & 4, Order 50 Rule 1 of the [Civil Procedure Rules](#), section 1A, 1B & 3A of the [Civil Procedure Act](#) seeking the following orders:-
  1. Spent
  2. Spent
  3. Pending the hearing and final determination of this Application, this honourable court be pleased to issue a temporary injunction restraining the Defendants, by themselves or through their agents, employees and/or servants or any person claiming under them from selling by way of public auction or otherwise and interfering with the Plaintiffs/Applicants' peaceful possession and entitlement of Land Reference Number 37/254/2(IR. NO. 12626/1).
  4. Pending the hearing and final determination of this suit, this honourable court be pleased to issue a temporary injunction restraining the defendants, by themselves or through their agents, employees and/or servants or any person claiming under them from selling by way of public



auction or otherwise and interfering with the plaintiffs/applicants' peaceful possession and entitlement of Land Reference Number 37/254/2(IR. NO. 12626/1).

5. Such orders as may appear to the court just and fit to grant.
6. Costs to be borne by the defendants.
2. The application is supported by the grounds set on its face and the supporting affidavit of Isaac Mutunga Maluki, the 1<sup>st</sup> plaintiff/applicant, sworn on 20/6/2023 with the consent of the 2<sup>nd</sup> plaintiff/applicant given on the same date and a further affidavit sworn on July 6, 2023. The application is opposed and the Respondents have filed a replying affidavit sworn by Samuel Njuguna, the Legal Officer of the 1<sup>st</sup> defendant on June 30, 2023.
3. The applicants are the registered proprietors of all that parcel of land known as LR. NO. 37/254/6(IR. NO. 126261/1) hereinafter referred to as the "suit premises" and have moved this court seeking to stop the respondents from selling the same by public auction, in exercise of their statutory power of sale. The applicants contend that the respondents have not served them with proper statutory notices as required by the law and therefore the intended sale is illegal and premature as the Banks right of sale has not yet accrued.
4. In the affidavit sworn by the 1st applicant, Isaac Maluki Mutunga, the applicants' accuse the respondents of failing to accord them their legal right of redemption as set out in the law. The applicants admit to have been advanced the loan at Kshs.49,500,000/- in January 2022 and for a period of 15 years. While acknowledging indebtedness to the respondents, the applicant aver that they have approached the bank seeking a grace period as they await payment from their customers in the month of August 2023.
5. In response, the respondents oppose the application. Through the replying affidavit Samuel Njuguna, the legal officer of the 1<sup>st</sup> applicant, contend that all requisite statutory notices were issued and served on the applicants through their postal addresses as required by law. That a 90 day statutory notice was issued on 4<sup>th</sup> November 2022 notifying the Applicants that the account was in arrears and that the loan balance as at that date stood at Kshs.50,375,608.90/- and the same continued to accrue interest. A 40 day statutory notice was further issued on February 14, 2023 but was not heeded to by the applicants. Again on April 12, 2023 the respondents averred that the applicants were served with the 45 days redemption notice in accordance with the law. The respondents annexed as evidence the three statutory notices and marked them as SM-02, SM-03 and SM-04 respectively.
6. Upon receipt of instructions the 2<sup>nd</sup> respondent served the 45 day redemption notice and annexed the certificate of service marked SN-05 as proof of service of the said Statutory Notice, complete with photographic evidence. The respondents allege that it was only after the property was advertised for sale by public auction on 21/6/2023 that the applicants moved to court seeking to stop the sale. The respondents further argue that the applicants have not demonstrated a desire to repay the loan. Once the loan was released to them it immediately went into default and there has been no proposal or even an attempt to repay the loan even after moving to court and obtaining a temporary reprieve from the courts. The Respondents urge the court to dismiss the application and allow the bank to proceed with the sale by public auction to recover the loan advanced to the applicant which continues to accrue interest.



## Analysis and Determination: -

7. I have considered the pleadings and the submissions filed by the parties and I have identified one issue for determination, to wit:-

“whether the plaintiffs/applicants/applicant has met the threshold for a grant of an order of injunction”. In the *Locus Classica* case of *Giella v Cassman Brown Company limited*, (1973) E.A at page 353 and as elaborated in the Court of Appeal case of *Nguruman Limited v. Jan Bode Nielsen & 2 others*, (2014) eKLR, the court stated that:-

“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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

8. In describing what amounts to a prima facie case would look like, Justice Bosire, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR had this to say:-

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case. I would certainly think that it would be in the Appellant’s interest to adopt a genuine and arguable case standard, rather than one of a prima facie case, the former being, in my opinion, the lesser standard of the two.”

So what is a prima facie case? I would say that in civil cases 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.”

9. Have the applicants established a prima facie case? That is the question this court seeks to answer from the onset, I note that the applicants admit to being indebted to the respondents. They the applicants confirm that they did make some payments but were not consistent in their repayment of the loan. As per the date on the charge, the loan was advanced on January 6, 2022 for Kshs.49,500,000/-. As at June 2022, the loan stood at Kshs.51,053,898/-. I note that there has been no proposal offered even in these proceedings by the Applicants on how the Applicants intended to service the loan. Even in the application before the court, there is no indication on how or what they intend to do to repay the Respondents or at all. Instead the Applicants argue that they were not served with the requisite statutory notices.
10. I have carefully perused the annexures from the defendants and I note that the postal address used by both Applicants is the same. I also note all notices were mailed to the said P.O. Box 3031-00506, Nairobi, which is also the same address on the supporting affidavit of the applicants. To my mind, the applicants had been advanced a loan less than 6 months and they were under an obligation to ensure that the same was serviced as per the terms of the contractual documents they executed. I further note that the respondent has availed copies of the notices issued including the 45-day statutory notice



issued on 13/4/2023 and served upon the 1<sup>st</sup> applicant complete with a photographic evidence. These facts have not been controverted. The applicants do not deny that P.O. Box 3031-00506, Nairobi, is their mailing address. If it was true that no service was effected, there would be nothing stopping the Applicants from swearing a supplementary affidavit to deny or controvert these facts. I am satisfied that there was proper service of the requisite Statutory Notices necessary before the Respondents could exercise their statutory power of sale.

11. It is therefore plain from the foregoing that the plaintiffs/applicants have failed to demonstrate that they have a prima facie case with the probability of success as is required. That being the case, it would be pointless for the court to proceed to consider the two other *Giella Case* Principles, namely irreparable harm and balance of convenience. This is because the 3 conditions are sequential to be applied as separate distinct and logical hurdles, a point well elucidated in the Case of *Nguruman Limited v Jan Bonde Nielsen & others* [2014] eKLR thus:-

“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...if prima facie case is not established, then irreparable injury and balance of convenience need no consideration...”

12. In the result, it is my finding that the plaintiffs/applicants' Notice of Motion dated 20/6/2023 is devoid of merit and the same is hereby dismissed with costs to the Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2023**

.....

**J. W. W. MONG'ARE**  
**JUDGE**

In the Presence of:-

Omulloh for the Applicants.

Mr. Kinoti for the Respondents

Sylvia- Court Assistant

