



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kioko & others t/a Kauti Academy v Equity Bank (Kenya) Limited & another  
(Civil Suit E014 of 2021) [2022] KEHC 15211 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 15211 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL SUIT E014 OF 2021  
SN MUTUKU, J  
JUNE 22, 2022**

**BETWEEN**

**JACOB MUTING'A KIOKO & OTHERS T/A KAUTI ACADEMY ... APPLICANT**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KELVIN NJUIRI MWAURA T/A KENTRACK AUCTIONEERS .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. Jacob Muting'a Kioko, & others t/a Kauti Academy, the Applicants, have brought this application through a Notice of Motion (the Application) dated June 22, 2021 anchored on Order 40 rule 1 and 2 of the [Civil Procedure Rules](#), Sections 1A, 1B, 3A, 95 and 63E of the [Civil procedure Act](#), seeking the following orders:
  - i. That this application be certified urgent and be heard *ex parte* in the first instance. (spent)
  - ii. That the two school buses KBR 976Z and KCD 102Q be unconditionally released to the Kauti Academy the Applicant herein pending the hearing and determination of the Application filed herein.
  - iii. That this Honourable Court be pleased to issue interim injunctive orders against the Respondents by themselves, their agents, servants, auctioneers and assigns, their representatives or any person whatsoever from selling, offering for sale, disposing off, alienating, and or in any other way tampering with the school buses KBR 976Z and KCD 102Q pending the hearing and determination of this application.
  - iv. That this Honourable Court be pleased to issue interim injunctive orders against the Respondents by themselves, their agents, servants, auctioneers and assigns, their



representatives or any person whatsoever from selling, offering for sale, disposing off, alienating, and or in any other way tampering with the school buses KBR 976Z and KCD 102Q pending the hearing and determination of the suit.

- v. That a declaration be made that the attachment of the two school Buses KBR 976Z and KCD 102Q Isuzu without proper Notices by both the Bank and the Auctioneer was irregular, unlawful, illegal hence null and void.
  - vi. That the auctioneer costs together with storage charges be paid by the 1<sup>st</sup> Respondent.
  - vii. That costs of this application be provided for.
2. The Application was supported by an Affidavit sworn by Jacob Muting'a Kioko on June 22, 2021 where he states that he is the Director of Kauti Academy hence competent and authorised to swear this affidavit. That the 1<sup>st</sup> Respondent advanced a financial facility amounting to Kshs 24,984,855.29 to Kauti Academy which facility was secured by registered charge over the assets of Kauti Academy. The terms of the loan were termly repayments collected by Equity bank as and when parents deposited school fees and that at the time of the illegal repossession of the school buses on June 10, 2021 the loan was not in default as it was not the end of the school term.
  3. It is further deposed, that, on June 10, 2021 Kentrack Auctioneers purporting to have been instructed by Equity Bank illegally attached and or repossessed Kauti Academy's school buses; that the same was done without any notice; that the illegal repossession documents drawn by Kentrack Auctioneers were served on the Applicants on June 18, 2021; that the said documents were back dated to June 10, 2021; that they declined to sign as it was long after taking the buses; that Equity Bank's letter dated June 15, 2021 purporting to instruct Kentrack Auctioneers to repossess the buses is a mockery of the law and a belated futile attempt to validate the illegal move by the auctioneers and that the repossession of the school buses has affected the school business and paralyzed the school transport making the applicants unable to settle the loan.
  4. The Application is opposed by the Respondent through their Replying Affidavit dated April 20, 2022 sworn by David Kande, the Credit Manager of Equity Bank Kitengela Branch. It is the case for the Respondents that the Applicant applied for a loan with the 1<sup>st</sup> Respondent for Kshs 24,984,855.29/- which was secured by a charge over property Title Number Kajiado/Kitengela/6930, KJD/Kaputei North/54501 & 54502 and chattels mortgage over motor vehicles KBY 565K, KCD 102Q and KAU 671A.
  5. It is their case that the Applicant alleges to have repaid the loan but he has not brought any proof of payments made towards the loan as agreed; that the Applicant was given several chances to bring to court documentary evidence of the proposal issued by the Respondent but he has not done so; that the Applicant has purposely misled the court in extending the status quo orders; that the Applicant has not made any substantive loan repayments as per the loan contract in the recent past and therefore the allegations that Applicant is willing to pay the loan is an attempt to hoodwink the court into granting their frivolous application.
  6. The Respondent contends that the current loan arrears stand at Kshs 4,652,005.51 and the total outstanding amount stands at 24,183,498.46; that it is only just and equitable that the 1<sup>st</sup> Respondent recover the outstanding loan by exercising its right of sale over the chattels.
  7. The Respondents also filed Grounds of Opposition dated March 23, 2022 however the same is not on the file record.
  8. The Applicant filed a reply to the Grounds of Opposition dated April 28, 2022.



9. The matter was canvassed through oral submissions on May 9, 2022. The Applicants Counsel argued that the procedure used by the Respondents was illegal; that they did not issue a demand notice for the loan arrears; that the loan facility was not in arrears; that the auctioneers took the two buses on June 18, 2021 and that the date on the instruction letter is June 15, 2021 which is a period of 3 days contrary to the 7 days that the law dictates; that procedure to recover the loan as provided in law was not followed; that the applicant expected a demand letter showing the amount disputed, amount collected, interest and the balance due; that the applicant's effort to consolidate the loan was met with a lot of deceit; that even the Bank manager who advised the applicant to do this denied the same and that Equity Bank ought to be guided as they are dealing with an educational institution and their action will deny the children their right to education.
10. The Applicant argued, further, that his reason for coming to court was that the 1<sup>st</sup> Respondent did not give the applicant a chance to reduce the loan amount. Further that the repossession was illegal as proper procedure was not followed and hence the court has mandate and authority to make right a wrong and guide the parties; that the applicants are aggrieved by the Respondents' actions and pray for the orders sought to be allowed.
11. The Respondents relied on their Replying Affidavit and asked the court to take judicial notice of the loan amounting to Kshs 24,984,855.29 and the arrears. They further argued that there is no documentation showing proof of the loan repayment and that the buses were released to the Applicant. They however sought for the dismissal of the application herein so they can repossess the buses.
12. The Respondents argued that what had been attached are the buses and not the school; that there are no repayment proposals and that they be allowed to proceed with attachment; that the case of *Giella -vs- Cassman Brown* [1973] EA 358 applies and that they are able to compensate the applicant and that the Applicant has defaulted and that the court should dismiss the application.

### Determination

13. The applicant is seeking injunctive orders against the respondents or anyone acting under them to restrain them from selling, offering for sale, disposing off, alienating and or in any other way tampering with motor vehicles number KBR 976Z and KCD 102Q Isuzu buses pending the hearing and determination of this application and the main suit.
14. The applicable principles for the orders in the nature sought by the Applicants found in the case of *Giella -versus- Cassman Brown and Company Limited* (1973) EA 385 where the court held that:
 

“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.”
15. Further, in determining what amounts to *prima facie* case, the court in *Mrao Limited -versus- First American Bank of Kenya and 2 Others* (2003) KLR 129, the Court of Appeal stated that;
 

“A *prima facie* case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an



arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

16. The central issue for consideration is whether the applicant has satisfied the conditions for granting a temporary injunction. The case for the applicant is that the loan facility is not in arrears. There is no documents, either bank statement or any other document showing that the loan repayments are on course and that there is no default.
17. The record shows that the repayments were to be termly on an account where the bank would automatically deduct the amounts after school fees has been deposited into that account. There is no document showing the records in that account and the repayments. This is left to the word of the 1<sup>st</sup> Respondent against that of the applicants.
18. While it is not denied that the applicants were advanced a loan facility and that the two school buses are part of the securities in respect thereof, I note that each party lays blame on the other without proof in terms of documents. It is the case for the applicant to show that he has been servicing the loan and that there are no arrears.
19. I have looked at the letters of offer for the loan facilities annexed as "JMK1". I have confirmed that the loan repayments were termly through direct debit/standing order effected through the Borrowers current account. The facility stated under clause 6 that, "the borrower to ensure that there is adequate funds in the account to meet loan repayments as they fall due and any default to lead to commencement of recovery process.
20. I have carefully read the application and all the attached documents. I do not see anywhere the Applicant showing evidence that as at the time the recovery process commenced, the account had adequate funds to meet loan repayments as they fall due. I pose the question: What happened when the school fees deposited in that account did not meet the amount of repayment for that particular period?
21. It is the applicants' claim that the letter of instructions to the 2<sup>nd</sup> Respondent is dated June 15, 2021 while the Notification of Sale is dated June 18, 2021, giving them 3 days instead of the 7 days required by the law. The respondents did not address this issue in the Replying Affidavit and in the submissions in court.
22. Section 12 (1) of the [Auctioneers Act](#) of the [Auctioneers' Rules](#) provides that:
  - "1. Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
    - (a) record the court warrant or letter of instruction in the register;
    - (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;
    - (c) in writing, give to the owner of the goods seven days' notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;



- (d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;
- (e) ensure safe storage of the goods pending their auction;
- (f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;
- (g) not remove any goods under the proclamation until the expiry of the grace period."

23. From the annexures provided the instruction letter to the auctioneers was dated June 15, 2021. The Notification of sale was dated June 18, 2021. The Applicant in their affidavit averred that the repossession occurred on June 10, 2021. The Respondent did not respond to this issue. If it is true that the repossession occurred on June 10, 2021, it is clear to me that this was done even before the letter of instruction was written. The Notification of Sale shows the date of instruction as June 10, 2021. This is direct contradiction with the Letter of Instruction from the 1<sup>st</sup> Respondent which clearly shows June 15, 2021 as the date of that letter.
24. Without rebuttal from the respondents, and going by the dates showing on the documents I have indicated above, it is clear to me that the repossession was done before instructions were given and the Notification of Sale does not comply with Rule 12 (1) (c) and (d) of the *Auctioneers Rules*.
25. I am persuaded that even though the Applicant has not shown proof of repayments, the procedure of recovery of the loan is flawed and failed to comply with the law. On that point alone, the applicants have established a *prima facie* case and this court must come to his aid to ensure that the law is followed and the correct procedure followed in recovery of the loan. But is this sufficient for this court to grant the prayers sought?
26. I have read *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR. In that case, the Court of Appeal restated *Giella vs Cassman Brown & Company* as follows:

“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.

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 vs 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."

27. It is not enough for the applicant to establish a prima facie case and expect to get the injunction. He must do more than that by establishing irreparable harm and balance of convenience. The above case puts this requirement in black and white.

28. The applicant must, after establishing prima facie case, proceed further and show that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction. So the Court of Appeal stated in the same case of *Nguruman Limited* case (supra), where that principle was dealt with as follows:

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

29. The attached properties are two buses. In their attempt to prove irreparable injury, the applicants told the court that school transport is paralyzed and this has affected the school business to an extent that they cannot service the loan timely, they are not able to hire school transport; that it affects the rights of the children whose best interest should be taken to account. I have considered this argument. Firstly, it has not been demonstrated that the attachment of the two school buses affects the entire school, including staff and secondly, there is no evidence that repayments of the loan are ongoing. Having carefully considered this issue, it is my view that the nature of the injury stated by the applicant is not one where monetary compensation, of whatever amount, will not be adequate remedy.

30. The applicants, should have, in my view, demonstrated their seriousness in trying to service the loan. I will echo the reasoning of the court in the case of [\*Andrew Muriuki Wanjobi -vs- Equity Building Society Ltd\*](#) (2006) eKLR where it was stated that:

"Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it.



31. On third principle of balance of convenience, it is my considered view that it tilts in favour of the Respondents. This court was told that the two buses have since been released. Therefore, it is not correct to even plead irreparable injury given the circumstances of this case.
32. My conclusion of this matter is that the applicants have failed to satisfy the requirements for grant of injunctions. Therefore, the Notice of Motion dated June 22, 2021 cannot stand. The same must fail and is hereby dismissed with costs to the Respondents. The applicants ought to pursue the main suit herein.
33. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 22ND JUNE 2022.**

**S. N. MUTUKU**

**JUDGE**

