



REPUBLIC OF KENYA



Gikonyo v Premier Bank Limited & 2 others (Environment & Land Case E051 of 2023) [2025] KEELC 439 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELC 439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E051 OF 2023
LC KOMINGOI, J
FEBRUARY 6, 2025**

BETWEEN

DR BETTY MUTHONI GIKONYO PLAINTIFF

AND

PREMIER BANK LIMITED 1ST DEFENDANT

STANLEY NGIGI WANYOIKE 2ND DEFENDANT

KEYSIAN AUCTIONEERS 3RD DEFENDANT

RULING

1. This is the Notice of Motion dated 27th November 2023 brought under Sections 1A, 1B, and 63 of the *Civil Procedure Act*, Order 40 of the Civil Procedure Rules, Article 40 of *the Constitution* and all other enabling provisions of Law
2. It seeks orders;
 - i. Spent.
 - ii. Spent.
 - iii. That, pending the hearing and determination of the main suit, an order of temporary injunction be and is hereby issued against the Respondents barring them by themselves, jointly and severally, their agents, employees, servants or anyone acting on their instructions or interests from selling, leasing, utilising in any way, further charging or interfering in any way whatsoever with all that parcel of land comprised in the title number Ngong/Ngong/56387.
 - iv. The costs of this application be provided for.
3. This application supported by the affidavit sworn by Dr. Betty Gikonyo the Plaintiff/Applicant herein on the 27th November 2023. It is premised on the grounds that she is the registered owner of property



known as Ngong/Ngong/56387 (herein after referred to as “the suit property”) with a valid title and she had never sold nor leased it out to anyone. It is her case that she discovered that the 2nd Respondent forged and caused title to the suit property to be registered in his name and using the fake title charged the suit property to the 1st Defendant/Respondent as a loan guarantee for one Abdinoor Malim Issack who had borrowed Kshs 15,000,000. The said borrower defaulted in the loan repayments and the 1st Defendant/Respondent instructed a valuer known as Accurate Valuers Limited to undertake valuation of the suit property for purposes of exercising its Statutory power of sale. The Plaintiff/Applicant states that being the lawful proprietor of the suit property, any form of foreclosure on it would cause her irreparable damage.

4. The 1st Defendant/Respondent in its Replying Affidavit sworn by the Legal Manager Claris Ogombo confirmed that following one Abdinoor Maalim Issak’s loan application, they offered him a diminishing Musharaka sale and lease back facility of Kshs. 15,000,000 the their offer letter dated 26th January 2022. Subsequently, the 2nd Defendant/Respondent as the proprietor of the suit property executed a consent, guarantee and indemnity of the loan. On 27th January 2022 a consent for the charge was granted by the Kajiado North Land Control Board, and on 28th January 2022 an official search of the property was undertaken which confirmed that the 2nd Defendant/Respondent was the registered owner. On 1st February 2022 a valuation of the suit property was undertaken and on 2nd February 2022 the Charge was presented to Kajiado Land registry for registration. The Charge was registered on 4th February and a search carried out on the same day confirmed as much.
5. The borrower later defaulted in his repayment and the 1st Defendant/Respondent issued him with demand letters on 17th April and 2nd May 2023. This default was not remedied and the 2nd Defendant/Respondent was issued with a Ninety (90) day statutory notice on 15th May 2023. Both the borrower and the 2nd Defendant/Respondent once again failed to remedy the default and the 1st respondent proceeded to issue them with the forty (40) day notice to sell. On 31st October, the 1st Defendant issued instructions to Keysian Auctioneers to proceed to sell the suit property by way of a public auction in exercise of its Statutory Power of sale. On the same day, the 1st Defendant/Respondent instructed Accurate Valuers Limited to carry out a valuation of the property for purposes of the sale. On 7th November 2023, Keysian Auctioneers served the Chargor with the forty (45) day notice to sell. It was during this period that the Plaintiff/Applicant instituted these proceedings and sought for injunctive relief against the 1st Defendant/Respondent.
6. The 1st Defendant/Respondent thus sought dismissal of the application on grounds that if the orders are granted, it would suffer loss despite having followed due process in placing a Charge over the suit property.
7. This application was canvassed by way of written submissions.

The Plaintiff/Applicant’s submissions

8. Counsel for the Plaintiff/Applicant submitted on the following issues for determination as summarised here below.
9. On whether the Plaintiff/Applicant had made a case for granting of an interlocutory injunction as per *Giella vs Cassman Brown* [1973] EA 358, While making reference to *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR, Counsel submitted that the Applicant had established a prima facie case with a probability of success. This is because she was the legally registered owner of the suit property and had its original title which she had neither sold nor disposed of in any way. On whether she would suffer irreparable loss that could not be adequately compensated by an award of damages,



counsel submitted that land being immovable property meant that no other parcel could replace the one owned by the Plaintiff/Applicant and thus no amount of compensation would adequately cater for the loss citing Pius Kipchirchir Kogo vs Frank Kimeli Tenani [2018] eKLR. And while still citing this Pius Kipchirchir case, counsel submitted that the Plaintiff/Applicant would suffer more inconvenience if the orders sought were not granted.

The 1st Defendant/Respondent's submissions

10. Counsel for the 1st Defendant/Respondent cited the case of Giella vs Cassman Brown Co. Ltd [1973] EA and Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR on considerations to make for grant of interlocutory injunctions. While making reference to the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR counsel submitted that the Plaintiff/Applicant had not established a prima facie case because the 1st Defendant/Respondent conducted due diligence before registering a charge against the suit property. Their search findings indicated that the 2nd Defendant/Respondent was the duly registered owner of the suit property and thus protected by Section 26 of the *Land Registration Act*. Counsel also submitted that the 1st Defendant/Respondent followed the due process in exercising its Statutory Power of Sale and is entitled to the same.
11. On whether the Plaintiff/Applicant would suffer irreparable loss that could not be adequately compensated by an award of damages, counsel submitted that a prima facie case not having been established, meant that this ground and that of a balance of convenience were of no consideration since they should be determined sequentially citing Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR.
12. Counsel added that it was the 1st Defendant/Respondent who was at the risk of suffering severe financial loss and injury in the event that the orders are granted because it would be unable to enforce its right over the suit property. Counsel therefore sought for dismissal of the application with costs to the 1st Defendant/Respondent.

Analysis and determination

13. I have considered the Notice of Motion, the Affidavit in support, the response thereto, the rival submissions, the authorities cited, I find that the following issues arise for determination:
 - i. Whether the Notice of Motion dated 27th November 2023 for grant of interlocutory injunction is merited;
 - ii. Who should bear the costs of this application?
14. The conditions for granting an interim injunction are well-established in Giella v. Cassman Brown & Co. Ltd [1973] E.A. 358, which provides that an applicant must satisfy the following:
 - i. Establish a prima facie case with a probability of success.
 - ii. Demonstrate the likelihood of suffering irreparable harm.
 - iii. Show that the balance of convenience tilts in their favour where there is doubt.
15. They were restated by the Court of Appeal in Nguruman Limited v Jan Bonde Nielsen, Herman Philipus Steyn also Known As Hermannus Phillipus Steyn & Hedda Steyn [2014] KECA 606 (KLR) where it was held:

“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.”

16. The first ground for determination is whether the Plaintiff/Applicant has established a prima facie case with the likelihood of success guided by the Court of Appeal’s case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR which explained that a prima facie case:

“...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...”

17. The Plaintiff/Applicant’s case is that she is the lawful proprietor of the suit property and asserts that her title was fraudulently transferred to the 2nd Defendant/Respondent. She further states that the 2nd Defendant/Respondent used the fraudulent title to guarantee a loan facility from the 1st Defendant/Respondent and the borrower has since been defaulted, prompting the intended exercise of the statutory power of sale by the 1st Defendant/Respondent.
18. The 1st Defendant/Respondent, through its Legal Manager, Claris Ogombo, confirmed that due diligence was conducted before creating the charge, including a search at the land registry, which confirmed the 2nd Defendant/Respondent as the registered owner of the suit property. The charge was properly registered, and statutory notices were issued to the borrower and the 2nd Defendant/Respondent after default.
19. The Plaintiff/Applicant’s claim of fraud raises a significant issue, which necessitates a thorough examination of the evidence at the trial. While the court cannot conclusively determine the validity of the title at this stage, the Plaintiffs/Applicant’s assertions present a prima facie case requiring adjudication.
20. The Plaintiff/Applicant also contends that any foreclosure on the suit property would cause her irreparable harm. Land, being a unique asset, this Court finds that if the suit property is sold, and the her ownership is later established, recovery may not be feasible, and damages may not suffice.
21. The balance of convenience must weigh the rights of the Plaintiff/Applicant against the potential prejudice to the 1st Defendant/Respondent. The 1st Defendant/Respondent argues that granting the injunction would cause it loss, having lawfully created the charge and followed due process in exercising its statutory power of sale. However, where fraud is alleged, courts are inclined to preserve the status quo until the dispute is resolved. The balance of convenience favours maintaining the status quo to prevent irreparable harm.
22. I am satisfied that the Plaintiff/Applicant has demonstrated an arguable case that meets the threshold for grant of an interim injunction restraining the 1st Defendant/Respondent from exercising its statutory power of sale over the suit property pending the hearing and determination of the suit.



23. It is a curious that the 2nd Defendant/Respondent neglected to participate in these proceedings despite being said to be the registered owner of the suit property. Why did he not oppose the said yet he was only a guarantor?
24. I find merit in the Application and grant the following orders;
- a. That a temporary injunction is hereby issued restraining the Defendants/Respondents barring them by themselves, jointly and severally, their agents, employees, servants or anyone acting on their instructions or interests from selling, leasing, utilising in any way, further charging or interfering in any way whatsoever with all that parcel of land comprised in the title number Ngong/Ngong/56387. Pending the hearing and determination of this suit.
 - b. That costs of this Application do abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6TH FEBRUARY 2025.

L. KOMINGOI

JUDGE.

In the Presence of:

Mr. Sigoma for the Plaintiff/Applicant.

Ms. Mwaniki for the 1st Defendant/Respondent.

N/A for the 2nd Defendant/Respondent.

N/A for the 3rd Defendant/Respondent.

Court Assistant – Mutisya.

