



**Fedha v KCB Bank (Civil Appeal E084 of 2024)
[2025] KEHC 2365 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E084 OF 2024
REA OUGO, J
FEBRUARY 12, 2025**

BETWEEN

STEPHEN WANGUSI FEDHA APPELLANT

AND

KCB BANK RESPONDENT

RULING

1. The appellant/ applicant through a notice of motion dated 20th of July 2024 brought under sections 1 1A,1B, 3,3A of the *Civil Procedure Act* and Order 42 Rule 6 and Order 51 Rule of the Civil Procedure Rules is seeking injunctive orders temporary injunctive orders against the respondent by itself its servants' agents and/or employees whomsoever acting on behalf from trespassing onto advertising for sale selling transferring and disposing of land parcel number L.R Ndivisi/ Mihuu/2686, East Bukusu/ North Sungalo/4813 and Ndivisi/ Muchi/8581 (the suit properties) or selling auctioning or otherwise disposing of the same. The applicant also seeks costs to be borne by the respondents
2. In his affidavit in support of the application the applicant avers that via a plaint dated 25th October 2023, he sued the respondents and the respondent raised a preliminary objection on pecuniary jurisdiction which objection was allowed by the lower court via a ruling dated 3rd May 2024. Being dissatisfied with the ruling he appealed against the same in the current suit and the memorandum sets out the grounds which are meritorious with high chances of success. The applicant fears that the respondent is likely to issue instructions to auctioneers to proceed with the sale of the subject suit land parcels. He claims that refusing to grant the stay it will inflict more hardship than it would avoid, the application is timely and he is ready and willing to abide by the conditions this court will set.
3. The application was opposed. The respondent filed a replying affidavit sworn by David Kimaiyo a branch manager at its Weibo branch. The respondent gives a background of the suit that was instituted at Webuye Court. The applicant responded to their preliminary objection which was on the pecuniary jurisdiction of the Court which was that the two properties that were secured by a legal charge over the



suit properties are worth 50 million. The court heard the objection and upheld the same. The court did not direct the respondents to undertake any action and therefore the instant application is mischievous and attempts to seek orders disguised as an application for injunctive orders. The application does not attain the established threshold for the grant of an injunctive. The applicant failed to establish a prima facie case with the probability of success and therefore is not entitled to the orders, he has also failed to demonstrate the irreparable harm he will suffer if the others sought are not granted and which harm cannot be remedied by an award of damages. The applicant's application is an unnecessary attempt to prolong litigation thereby causing significant financial and operational hardship to the respondent whose statutory power of sale has lawfully occurred, the application is therefore incompetent and misconceived and an abuse of the good process and warranty dismissal. According to the respondent, the balance of convenience lies with the respondent and the applicant has not approached this court with clean hands and is therefore undeserving of the equitable reliefs. The orders sought a highly prejudicial and detrimental to the respondent and its shareholders and are intended to defeat the rights to property safeguarded by *the Constitution* of Kenya 2010.

4. The application was canvassed by way of written submissions. I have carefully read and considered the said submissions. The applicant is seeking injunctive orders. The threshold for granting such orders was laid out in the case of *Giella vs Cassman Brown* (1973) EA 358 the applicant has to establish a prima facie case, demonstrate irreparable loss if a temporary injunction is not granted and he has also to show that the balance of convenience tilts in his favor.

Determination

5. The applicant has to establish a prima facie case. In his affidavit in support of the application, he states that he is dissatisfied with the ruling, that he has appealed against the ruling, and that the respondent is likely to issue instructions to auctioneers to proceed to sell his land by way of public auction. The notice of objection was upheld for want of pecuniary jurisdiction. In the case of *Maro vs First Community Bank of Kenya and 2 others* [2003] eKLR the Court of Appeal held that a prima facie case is more than an arguable case. To merely state that the respondent is likely to auction the suit properties is not sufficient. I agree with the respondent that the applicant has failed to show that he has a prima case, and neither has he demonstrated that his rights have been infringed by the respondent to the suit properties.
6. On irreparable loss, the applicant has a duty to demonstrate the loss he will suffer if the injunction order is not granted. In his affidavit, he merely states he will suffer loss. This loss has not been explained nor demonstrated.
7. On whether the balance of convenience tilts in favor of the applicant, I find as follows, that the respondent has a right to exercise its statutory power of sale on any accrued sum in default of the loan obligations having offered the properties as security. The applicant has failed to show the inconvenience that will be caused to him which would be greater than that which may be caused to the respondent. He recognizes his obligation, but not the respondent's statutory right. I associate myself with the findings in the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR the court held that, "Inconvenience be equal, the plaintiff who will suffer. In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction would be greater than that which is likely to arise from granting". In this case, the respondent has demonstrated that there is an outstanding loan facility, and they will suffer harm in the event that orders are granted. The balance of convenience tilts in favour of the respondent. The application dated 20th July 2024 lacks merit and is dismissed with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 12TH DAY OF FEBRUARY 2025.

R.OUGO



JUDGE

In the presence of;

Applicant – Absent

Respondent - Absent

Wilkister - C/A.

