



Mwanza & another v Stanbic Bank of Kenya Limited & another (Commercial Case E512 of 2024) [2025] KEHC 2321 (KLR) (Commercial and Tax) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E512 OF 2024
JWW MONG'ARE, J
FEBRUARY 14, 2025**

BETWEEN

THOMAS KILONZO MWANZA 1ST PLAINTIFF

KAREN NKATHA RIMITA 2ND PLAINTIFF

AND

STANBIC BANK OF KENYA LIMITED 1ST DEFENDANT

WESTMINSTER COMMERCIAL AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiffs have by an Application dated 28th August 2024 filed under a Certificate of Urgency and brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act* and Order 40 Rules 1a, 1b, 2 and 4 of the Civil Procedure Rules moved this Honourable Court seeking the following orders:-
 1. Spent
 2. Spent
 3. This Honourable Court be pleased to grant an order of temporary injunction restraining the Respondents whether by themselves, their agents, servants, employees and anybody acting on their behalf from advertising for sale, selling, leasing, taking possession or otherwise disposing All that Residential Town House Number Eight(8) erected on property Title Number Nairobi/Block 6//263/8 and situate on Peponi Road, Nairobi City County, pending the hearing and determination of this application.
 4. This Honourable Court be pleased to grant an Order of Temporary Injunction restraining the Respondents whether by themselves, their agents, servants, employees or anybody acting on



their behalf from advertising for sale, selling, leasing, taking possession or otherwise disposing of All the Residential Town Houses Number Eight (8) erected on Title Number Nairobi/Block 6//263/8 and situate on Peponi Road, Nairobi City County, pending the hearing and determination of this suit.

2. The Application is supported by the grounds set out on its face and the supporting affidavit of Thomas Kilonzo Mwanza, the first Plaintiff. It is opposed and the Defendants have filed a replying affidavit sworn by Edna Omangi, the 1st Defendants Manager- Non performing loans. Both parties, on the directions of this court, filed written submissions which I have carefully considered.

Analysis and Determination

3. I have carefully considered the application and the supporting affidavit filed in support thereof by the Applicant. I have equally considered the replying affidavit by the Defendant and the rival submissions by the parties and I note that for the only question that this court is called to determine is whether the Plaintiffs/Applicants have established a case for this court to issue an order of Temporary Injunction against the Defendant.
4. A party seeking injunctive orders must satisfy the parameters that are now well settled in law in the Locus Classica case of Giella Vs. Cassman Brown & Co., Ltd. [1973] E.A. 358. The court in that case stated that a party seeking for injunctive relief ought to satisfy the court that it is deserving of the orders sought by demonstrating it has a prima facie case with a probability of success and that it will suffer irreparable injury which would not adequately be compensated by an award of damages if an order of injunction is not granted and, that if the Court is in doubt, it should decide the application on the balance of convenience.
5. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see Nguruman Limited v Jan Bonde Nielsen & 2 others [2013] KECA 347 (KLR)).
6. What constitutes a prima facie case has been clearly defined by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR) when the said court stated explained as follows:

A prima facie case in a civil application 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.

7. A prima facie case flows from what has been pleaded in the plaint. A perusal of the pleadings reveal that indeed the Plaintiffs who are registered as owners of All that property under title number NAIROBI/BLOCK 6/263/8 situated along Peponi Road and comprising of Eight (8) number of Maisonettes and do confirm that the same was acquired for the sum of Kshs.100,000,000/=with the 1st Defendant partially financing the same at the tune of Kshs.35,000,000/= and the Plaintiffs investing Kshs.65,000,000/= therein.
8. The Plaintiff's accuse the 1st Defendant of moving in to exercise its statutory power of sale without according them the necessary courtesies to redeem their indebtedness by issuing the necessary statutory demand notices under the *Land Act*. They argue that the move to advertise and reserve a forced sale value of the property at Kshs.60,000,000/= and a market value of Kshs.80,000,000/= is a gross



undervaluation and a clear indication that the Defendants have not carried out a recent valuation as is required by law.

9. The Plaintiffs aver that they have diligently been repaying the loan until November 2023 when the 1st Plaintiff lost his job creating some financial difficulties but nevertheless have struggled to make payments and have indeed in 2024 paid a total of Kshs.2,811,484/= towards reducing the accrued arrears. They want the court to order the bank to enter into negotiations to come up with a suitable payment plan considering their change in fortunes. The Plaintiffs aver that given time, they are ready and willing to meet their obligations under the charge and letter of offer.
10. In opposing the application, the Defendants filed a replying affidavit sworn by one of the 1st Defendants' employees, EDNA OMANGI on 17th September 2024. It is the position taken by 1st Defendant that it is entitled to exercise its statutory power of sale having issued to the Plaintiffs the relevant statutory demand notices and afforded them an opportunity to redeem the charged property by repaying the loan. The 1st Defendant avers that the loan is in default and that the same stands at Kshs.39,750,553.69/= as at 5th September 2024. The Defendant further reiterates that it has, pursuant to the requirements of the *Auctioneers Act*, carried out on the suit property, a valuation to determine the market and forced sale values of the same before proceeding to advertise the property for sale. The 1st Defendant argues that the Plaintiffs having executed the offer letter and the charge instruments are aware of their obligations under the said charge and cannot therefore be seen to thwart the defendants right to exercise its rights created by the two contracts. They urge the court to vacate the interim orders and allow it to sell the suit property to recover the loan and the arrears therein.
11. In considering the matter before me I am aware that an order of injunction is an equitable relief that a court is called upon to grant upon balancing the rights and interests of both parties before it. I note that the Plaintiff admit that they have been servicing the loan faithfully from when it was granted to them until the 1st Plaintiff lost his job and encountered financial challenges. The Plaintiffs aver that despite their situation in 2024 they were able to raise and pay the sum of Kshs.2,811,484/= towards the loan and the arrears and that given time, they are prepared to repay the loan in full. Having considered the arguments by both parties and balancing the interest of both parties before me, I am satisfied that the Plaintiffs have set out a prima facie case.
12. The second question that I set out to answer is whether damages would be an adequate remedy if the orders for Temporary Injunction are not granted. I note that it is not disputed that to purchase the suit property, the Plaintiffs' invested a sum of Kshs.65,000,000/= of their own savings and borrowed from the Defendants a sum of Kshs.35,000,000/=:, which now on account of accrued interest stands at Kshs.39,374,761.34/=:. The instalment payable is Kshs.412,210/= per month. The Plaintiffs have demonstrated their willingness to repay the loan by paying in 2024, the sum of Kshs.2,811,484/=:, despite running into financial difficulties. I find this an act of good faith on the part of the Plaintiffs and a demonstration of their determination and intent to redeem the loan. The Defendant has not offered any contrary information to dispute the same. The above facts have not been disputed and or controverted. It is my finding therefore that in a scenario where a borrower has demonstrated willingness and capacity to redeem a charged property and has indeed invested quite a substantial contribution to the same, to allow the Defendant to proceed and dispose of the same without affording him or her an opportunity to redeem the same would be injurious to the Plaintiff and would occasion him/her irreparable harm. I am therefore persuaded that damages in the present scenario are not an adequate remedy as the Plaintiffs continue to service the loan despite facing financial challenges.
13. The Plaintiffs have been paying the loan save for 2024 when they ran into financial difficulties and hence the loan accrued arrears but despite that made a substantial payment towards the same in 2024



in excess of 2 million Kenya shillings. The property remains charged to the 1st Defendant whose right of redemption has not been extinguished. I am therefore satisfied that the balance of convenience tilts in favour of the Plaintiffs.

14. The sum total of my finding is that the Plaintiffs have established a case for this court to grant them the order of injunction. The same is hereby granted as prayed in the Plaintiffs application of 28th August 2024. However, as stated earlier, the court is alive to the rights of the bank under the charge and noting that the loan continues to accrue interest if it remains unpaid, and in balancing the rights of both parties before this court, the court will grant the Plaintiffs a limited period of 12 months to make good the arrears and or redeem the loan in its entirety failing which the Bank shall be at liberty to proceed and enforce their rights under the charge which remain intact despite the orders herein. The circumstances of this case demand that each party bear their own costs of the application. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2025.

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J.W.W. MONGARE

JUDGE

In the Presence of:-

1. Mr. Ondago for the Plaintiffs/Applicants.
2. Mr. Chebon for the Defendants/Respondents.
3. Amos - Court Assistant

