



REPUBLIC OF KENYA



KENYA LAW
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**Nyamu v Mwangi & 2 others (Civil Appeal E188 of 2024)
[2025] KEHC 1812 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E188 OF 2024
JM NANG'EA, J
FEBRUARY 12, 2025**

BETWEEN

GEORGE GITHAE NYAMU APPELLANT

AND

SILVESTER NDUNI MWANGI 1ST RESPONDENT

AMICA SAVING & CREDIT 2ND RESPONDENT

WATTS AUCTIONEERS LTD 3RD RESPONDENT

RULING

1. This ruling follows the Appellant's Notice of Motion dated 3rd September, 2024 by which orders are sought as hereunder;
 1. Spent
 2. Spent
 3. That pending hearing and determination of the appeal herein suit, a temporary injunction be issued restraining the 2nd and 3rd Respondents by themselves, their agents, servants and/or employees from selling by public auction or completing any conveyance or transfer of any sale conducted by auction of the Appellant's properties aforementioned(sic).
 4. That the costs of this Application be in the cause.
2. The Appellant swore an affidavit in support of the Motion and averments therein will be set out hereafter.
3. Only the 2nd and 3rd Respondents replied to the application vide affidavit evidence sworn by the 2nd Respondent's Head of Credit (Robert Mbau).



4. The Appellant deposes to guaranteeing a loan facility of Kshs. 2,500,000/=, exclusive of some charges applied in favour of the 1st Respondent. The loan was advanced by the 2nd Respondent to the 1st Respondent under agreed terms and conditions. The loan was secured by the Appellant's properties known as Miti Mingi/Mbaruk Block 8/2191 and Miti Mingi/Mbaruk/Block 8/2192 which were to be charged to the 2nd Respondent.
5. The Appellant further avers that he thereafter learnt that the 2nd Respondent is not a licenced banking institution authorised to receive and cause to be registered charge instruments. The court is therefore told that the entire transaction was illegal. This illegality notwithstanding, the Appellant pledges that the 1st Respondent committed to clear the loan arrears and did in fact pay off the loan in full. The Appellant therefore expresses shock and dismay at the 2nd Respondent's attempt to realise the charged securities.
6. The Appellant also brings to the court's attention that the lower court had struck out his suit and discharged a temporary injunction he had obtained, after upholding the 2nd Respondent's Preliminary Objection that the court had no jurisdiction to entertain the suit. It was argued before he trial court that the claim should have been lodged with the Co-operatives Tribunal pursuant to Section 76 of the *Co-operative Societies Act* seeing that the 2nd Respondent is a Cooperative Society of which the 1st Respondent is a member. This appeal also challenges the trial court's ruling on the preliminary point.
7. For the stated reasons inter alia the Appellant craves the stated reliefs.
8. The 2nd Respondent confirms the transactions it entered into with the Appellant and the 1st Respondent. According to the 2nd Respondent the necessary charge documents were prepared and the security perfection process was successfully completed.
9. The 2nd Respondents contends that the 1st Respondent thereafter defaulted in the loan repayment necessitating recovery action. The court is told that it is the practice within the Sacco movement that where a member applied for a fresh loan while having an existing past loan, the two loans are consolidated.
10. The 2nd Respondent refutes the Appellant's claim that the 1st Respondent repaid all his loans, exhibiting a letter dated 31st July, 2023 by the borrower requesting for extension of time to make good the loan arrears. It is therefore contended that the Appellant is merely misleading the court to sanitise the 1st Respondent who defaulted on the loan advanced to him.
11. The 2nd Respondent's Head of Credit avers inter alia that the court had been misled to issue a temporary injunction stopping sale of the charged properties in the circumstances, hence the plea that this application be dismissed.
12. Learned Counsel for she parties filed Written Submissions which I have perused against the rival affidavit evidence. The famous of *Giella vs Cassman Brown & Co.* remains key in determination of an application for temporary injunction.
13. Firstly, the applicant must show a prima facie case with a probability of success. Secondly, the applicant should also demonstrate that irreparable loss will result if injunction is not ordered. Lastly, the Court, where in doubt, will determine the application on a balance of convenience.
14. In the case of *Mrao vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR 125 a prima facie case was defined as one which on the material presented to court or a tribunal a conclusion can reasonably be reached that the applicant's right has been infringed as to call for an explanation or rebuttal.



15. In *Moses C. Muhia Njoroge & 2 Others V. Jane W. Lesaloi and 5 Others* (2014) eKLR a prima facie case was similarly defined to include “but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the other”.
16. It is now settled that the three limbs are required to be surmounted sequentially (see the Court of Appeal decision in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR).
17. The Respondent’s evidence that the debt was admitted by letter dated 31/7/2023 has not been controverted. It is trite law that where indebtedness is acknowledged or only the amount of the debt is disputed, a chargee cannot be restrained from exercising statutory power of sale of the charged property.
18. A prima facie case with a reasonable probability of success has not therefore been established owing to the foregoing court’s observations. This finding is sufficient to dispose of the application.
19. Besides, if for academic purposes only, the Respondent is able to compensate the Appellant in the event that he succeeds in the suit or appeal being a banking institution. The Appellant would not therefore suffer irreparable loss. (See *Halsbury’s Laws of England Third Edition Volume 21, paragraph 739 at page 352*).
20. Regarding the Preliminary Point on jurisdiction the 2nd Respondent raised, the same will be considered and determined in the appeal as the trial court’s decision thereon is what provoked the appeal.
21. The upshot is that the application is dismissed in its entirety and the costs thereof shall be determined in the appeal.

J.M. NANG’EA, JUDGE.

JUDGEMENT DELIVERED THIS 12TH DAY OF FEBRUARY, 2025 IN THE PRESENCE OF:

Mr. Muriithi Advocate for the Appellant

Ms Ariga Advocate for Mr. Getange for the 2nd and 3rd Respondents

Court Assistant (Ng’eno)

J.M. NANG’EA, JUDGE.

