



REPUBLIC OF KENYA



KENYA LAW
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**Tuwei v Ronoh & 3 others (Civil Suit E002 of 2025)
[2025] KEHC 2058 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E002 OF 2025
RN NYAKUNDI, J
FEBRUARY 14, 2025**

BETWEEN

NELLY CHEMUTAI TUWEI PLAINTIFF

AND

VICTOR CHERUIYOT RONO 1ST DEFENDANT

TURBO TOP DIARIES LTD 2ND DEFENDANT

EQUITY BANK (K) LTD 3RD DEFENDANT

**PETER OKOTH OLOOT T/A INDOMITABLE AUCTIONEERS 4TH
DEFENDANT**

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 22nd January 2025 where the Applicant is seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That a temporary injunction do issue restraining the Defendants/Respondents whether by themselves, their servants, agents or anyone claiming through them from selling, transferring, charging or carrying out any dealings on the parcel of land known as Turbo West/Osongorai Block 6(Kiprono Too) 15 pending hearing and determination of this suit.
 - d. That in the alternative to (2) and (3) above, there be an order staying the 3rd Defendant/ Respondent from exercising the power of sale pending hearing interpartes of this Application and thereafter the main suit.



- e. That such other and/or further relief be granted as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter.
2. The Application is based on the grounds on the face of it and can be summarized as follows;
 - a. That through the 4th Respondent, the 3rd Respondent intends to sell the Plaintiff/Applicant's matrimonial home comprised in title number Turbo West/Osongorai Block 6(Kiprono Too) 15 herein the suit property in alleged realization of its charge entered between the 1st and 3rd Defendant for the benefit of the 2nd Defendant without the consent nor participation of the Plaintiff/Applicant who is the spouse of the 1st Defendant/Respondent.
 - b. That the Plaintiff/Applicant resides at the suit property as the matrimonial home with her child of the marriage between her and the 1st Defendant/Respondent who is now estranged and has never granted any consent nor has any ever been sought to charge the suit property to the 3rd Defendant/Respondent.
 - c. That the said charge is invalid as the Plaintiff/Applicant did not give spousal consent for the property to be charged by her husband Victor Cheruiyot Ronoh the 1st Defendant/Respondent.
 - d. That therefore the auction of the suit property slated for 25/02/2025 should be stopped so that the suit is not rendered nugatory and to prevent irreparable damage and harm upon the Plaintiff/Applicant and the child of the marriage residing on the suit property.
 - e. That the Applicant came to learn of 45 days' notice of redemption and later notice of sale over their matrimonial property Title Number Turbo West/Osongorai Block 6(Kiprono Too) 15 that is set to be auctioned on the 25/02/2025.
 - f. That the Plaintiff/Applicant has sought audience and information on the alleged charge between the Defendants/Respondents from the Defendants to no avail yet the Applicant has legal and equitable rights over the suit property.
 - g. That there is an imminent danger that the Applicant's matrimonial property may be sold via an invalid charge document and intervention of this Honourable Court is crucial in the circumstances.
 - h. That the orders sought are not in any way prejudicial to the Defendants/Respondents while the Applicant will be greatly prejudiced if the orders sought are not granted.
 3. The Application is supported by the annexed affidavit dated 22nd January 2025 sworn by Nelly Chemutai Tuwei, the Plaintiff/Applicant herein which have read the contents.

Analysis and Determination

4. I have considered the applicant's notice of motion, its supporting affidavit and annexures thereto and there is only one sole issue of determination is;

Whether applicant has established grounds for granting of injunctive orders:

5. I take cognizant note that Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2020 provides that the court has powers to grant an order of temporary injunction to restrain such acts and prevent the wasting, damaging, alienation, sale, removal or disposition of the suit land.



6. This is an application for temporary injunctive relief pending suit, and is governed by the principles in *Giella v Cassman Brown* and reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* Ca No. 77 of 2012 [2014] eKLR where the Court held thus:

“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 damages; and if the court is in doubt then it can decide the application on a balance of convenience.

7. Therefore, according to the principles set out in *Giella v Cassman Brown*, an applicant is required to establish:
- a. The existence of a prima facie case based on the Notice of Motion Application and Affidavit Evidence,
 - b. The likelihood of irreparable injury to the applicant if the injunction is not granted;
 - c. On where the balance of convenience tilts in case the court cannot decide based on the first two requirements.

On whether the applicant has established a prima facie case

8. In the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR the Court of Appeal stated that:

“With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid v Ethicon Limited* [1975] AC 396 stated thus, "If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."

9. I note that the Applicant stated in her grounds supporting the Application that through the 4th Respondent, the 3rd Respondent intends to sell the Plaintiff/Applicant's matrimonial home comprised in title number Turbo West/Osongorai Block 6(Kiprono Too) 15 herein the suit property in alleged realization of its charge entered between the 1st and 3rd Defendant for the benefit of the 2nd Defendant without the consent nor participation of the Plaintiff/Applicant who is the spouse of the 1st Defendant/Respondent.
10. Moreover, the Applicant stated that she resides at the suit property as the matrimonial home with her child of the marriage between her and the 1st Defendant/Respondent who is now estranged and has never granted any consent nor has any ever been sought to charge the suit property to the 3rd Defendant/Respondent. The Applicant also stated that the said charge is invalid as she did not give spousal consent for the property to be charged by her husband Victor Cheruiyot Ronoh the 1st Defendant/Respondent.
11. From the above, I make reference to Section 12 of the *Matrimonial Property Act* which relates to the special provisions relating to matrimonial property and provides as follows;
1. An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.



12. In a nutshell, it is clear that the matrimonial home comprised in title number Turbo West/Osongorai Block 6(Kiprono Too) 15 herein the suit property need to be protected from auction by the 3rd Respondent pending the hearing and determination of the suit.

On whether the Applicant stands to suffer an irreparable injury that cannot be adequately compensated by an award of damages:

13. The Applicant has to establish that she would suffer an irreparable injury that cannot be adequately compensated or remedied by any monetary award or damages that may be awarded later.
14. The Applicant has also adduced concrete evidence of the Respondents selling and disposing the matrimonial home comprised in title number Turbo West/Osongorai Block 6(Kiprono Too) 15 herein the suit property, through an auction by the 3rd Respondent slated for 25th February 2025. The documentary evidence in the form of an annexure (a copy of the 45 days' notice of redemption) adduced has not been controverted and are compelling evidence of such sale and disposal vide an auction.
15. I am guided by the decision of Family Bank Limited v Tassels Enterprises Limited & 2 Others [2021] eKLR which cited the ruling of the Court of Appeal in Nguruman Limited v Jane Bonde Nielsen & 2 Others [2014] eKLR, it was submitted that speculative injury or unfounded fear cannot be termed as irreparable damage as the injury must be grave and irreparable. It must be actual, substantial and demonstrable. In this case it was submitted that the Plaintiff /Applicant has not demonstrated any grave and irreparable injury she stands to suffer if the orders sought are not granted since she has not demonstrated any contribution made to the acquisition of the suit properties and stands to suffer no loss as she did not contribute to the acquisition of the same and secondly the said properties do belong to the Defendant /Respondent.

In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course... The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed based on the balance of convenience while being aware that formal evidence will be adduced at the hearing...

16. The applicant stated that there is an imminent danger that her matrimonial property may be sold via an invalid charge document and intervention of this Honourable Court is crucial in the circumstances.

On a balance of convenience

17. In the case of Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another [2019] eKLR, it was held that:
- “ the meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience



caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.”

18. I take note that where an application is not clear cut on whether the application was made a prima facie case or will suffer irreparable loss, the court can determine the applications on the balance of convenience.

19. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR, where the court expressed itself thus:

Where any doubt exists as to the applicants’ right, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.

20. I also note that the Plaintiff/Applicant stated that she has sought audience and information on the alleged charge between the Defendants/Respondents from the Defendants to no avail yet the Applicant has legal and equitable rights over the suit property.

21. From the foregoing, in my considered view, taking all the above into account, the Applicant has made out a case for the court to grant the interlocutory orders sought herein. The Respondents will not suffer inconvenience in case the status quo is maintained, as the applicant has no intention of alienating the suit property herein. Consequently, upon considering the application, I issue the following orders:

- a. That a temporary injunction do and is hereby issued restraining the Defendants/Respondents whether by themselves, their servants, agents or anyone claiming through them from selling, transferring, charging or carrying out any dealings on the parcel of land known as Turbo West/ Osongorai Block 6(Kiprono Too) 15 pending hearing and determination of this suit.
- b. That an order be and is hereby issued staying the 3rd Defendant/Respondent from exercising the power of sale pending hearing and determination of the main suit.
- c. The costs shall be in cause.
- d. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF FEBRUARY, 2025

R. NYAKUNDI

JUDGE

