



REPUBLIC OF KENYA



**Ndungu v NCBA Bank Kenya PLC (Civil Suit E591 of 2024)
[2025] KEHC 3366 (KLR) (Commercial and Tax) (18 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E591 OF 2024
BK NJOROGE, J
MARCH 18, 2025**

BETWEEN

SUSAN WAIRIMU NDUNGU PLAINTIFF

AND

NCBA BANK KENYA PLC DEFENDANT

RULING

1. This is a Ruling in respect of two applications filed by the Plaintiff/Applicant. They both seek injunctions against the Defendant/Respondent. It is only therefore fair and just that this Ruling addresses the issues raised in the two applications.
2. The 1st application is filed under a Certificate of Urgency. It is by way of a Notice of Motion dated 6th May, 2024. It is supported by the affidavit of Susan Wairimu Ndungu sworn on 6th May, 2024 with annexures. It seeks the following orders;
 - a. Spent.
 - b. Pending hearing and determination of this application there be and is hereby issued an order of injunction to restrain the Defendant, its agents, officers, employees, assigns or any other person acting for, in the legal place of and on authority of the Respondent from charging interest and penalties on the Applicant's loan account number.
 - c. Pending hearing and determination of the suit there be and is hereby issued an order of injunction to restrain the Respondent, its agents, officers, employees, assigns or any other person acting for/in the legal place of and/or authority of the Respondent from charging interest and penalties on the Plaintiff/Applicant's loan account number 112/350077.



- d. Pending the hearing and determination of this application there be and is hereby issued an order of injunction to restrain the Respondent, its agents, officers, employees, assigns or any other person acting for, in the legal place of and/or authority of the Respondent from the realizing the securities and more specifically from selling, auctioning, disposing of or in any other manner interfering with maisonette No. 05, Court C, in Edenville Two Erected on Land Reference No. 21/03/01 as the collateral.
 - e. Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the Respondent, its agents, officers, employees, assigns or any open person acting for, in the legal place of and or authority of the Respondent from the realizing the securities and more specifically from selling, auctioning, disposing of or in any other manner interfering with maisonette No. 05, Court C, in Edenville Two erected on Land Reference No, 21103/01 as the collateral.
 - f. Pending hearing and determination of this application there be and is hereby issued an order compelling the Respondent, its agents, officers, employees, assigns or any other person acting for in the legal place of and on authority of the Respondent to delist the Plaintiff's name to any Credit Reference Bureau on the basis of loan account number 112/35 00 85/1121350077.
 - g. Costs of this application be provided for.
3. The 2nd application is undated. It is accompanied by a certificate of urgency dated 19th September, 2024. It is supported by the affidavit of Susan Wairimu Ndungu sworn on 19th September, 2024 with annexures. It seeks the following orders;
 - a. Spent.
 - b. Pending hearing and determination of this application there be and is hereby issued an order of temporary injunction to restrain the Respondent, the agents, officers, employees, assigns or any other person acting for, in the legal place of and or authority of the Respondent from realizing the securities and more specifically from selling, auctioning, disposing of or in any other manner interfering with Maisonette No. 05 Court C, in Edenville Two, erected on land reference No. 21103/01 as the collateral.
 - c. Pending hearing and determination of the main suit there be and is hereby issued an order of injunction to restrain the Respondent, the agents, officers, employees, assigns or any other person acting for, in the legal place of and or authority of the Respondent from realizing the securities and more specifically from selling, auctioning, disposing of or in any other manner interfering with Maisonette No. 05 Court C, in Edenville Two, erected on land reference No. 21103/01 as the collateral.
 4. The two applications are opposed by the Defendant/Respondent through the Replying Affidavit of Christine Wahome sworn on 20th July, 2024 with annexures.
 5. When this matter came up on 5th November, 2024, the Court made the following orders;

“The two applications dated 6th May, 2024 and 19th September, 2024 be heard together. The Defendant's response to the application dated 6th May, 2024 is deemed to be the response to the application dated 19th September, 2024
 6. Directions were also issued that the applications be disposed of by way of written submissions. The Court has seen and considered the Plaintiff/Applicant's written submissions dated 11th November,



2024 with annexures. Similarly, the Defendant/Respondent has also filed written submissions dated 10th December, 2024.

Issues for Determination

7. The Court having perused the pleadings and the submissions filed herein, frames a single issue for determination.
 - a. Whether the Applicant is entitled to an injunction as sought.

Analysis

8. The leading decision on injunctions is the celebrated case of *Giella -vs- Cassman Brown* [1973] E.A. 358. It established that for an injunction to be granted, the Applicant has to establish a prima facie case, with high chances of success. That irreparable loss and damages would be suffered unless the injunction is granted and that such loss cannot be compensated for by way of general damages. That lastly, in whose favour does the balance of convenience lie?
9. This is the same position adopted by the court in *Nguruman Limited -vs- Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR).

The court of appeal states as follows;

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.”

10. Lastly the Court refers to *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others* (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) (7 March 2003) (Judgment). On what consolidates a prima facie case, the Court of Appeal stated the following;

“So what is a prima facie case? I would say that in civil cases it is a case in 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.”

11. In answering this question, the Court applies the 3-way test applicable to applications for injunction.

Has the Plaintiff Established a Prima Facie Case?

12. At the core of the dispute between the Plaintiff and the Defendant is the manner of the repayment of the loan advanced to the Plaintiff. Initially the facility was in US Dollars and the repayments were in the same currency. When the Plaintiff's salary changed from dollars to Kenya shillings, she requested



for a conversion of the facility to Kenya Shillings. The conversion was done. The repayments changed from US Dollars to Kenya Shillings.

13. A disagreement has arisen as to what was the agreed rate of conversion.
14. In view of this disagreement, the amount claimed by the Defendant is higher than that which the Plaintiff expected to repay. The loan has subsequently gone into default. The Plaintiff requested for a reconversion back to US Dollars, however the Defendant bank declined. It cited as a reason that the Plaintiff's salary was no longer in US Dollars.
15. The bank has set out to exercise its statutory power of sale and the Plaintiff is aggrieved.
16. It is not in doubt that there is a dispute between the parties as to what was agreed during the conversion. This being a question of facts and evidence it can only be determined through a trial.
17. The court notes that at this interlocutory stage, a prima facie case on the dispute has been established.

Does the applicant stand to suffer irreparable loss that cannot be compensated for by way of general damages?

18. The bank is said to have indicated that as at 13th December, 2023, the loan amount was Kshs.22,333,257.35. Then by an email dated 18th December, 2023 the loan amount was said to be Ksh.23,212,020.45.
19. The Plaintiff complains that the bank proceeded to recover a sum of Ksh.759,461.95 from the Plaintiff's bank account. This amount was applied towards repaying the loan during the month of January and February 2024.
20. This had caused the Plaintiff to move her salary account to another bank. This was to stop the bank from raiding her finances, so to speak.
21. The Plaintiff is offended that the bank has been bombarding her with demands through emails and have threatened to report her to the Credit Reference Bureau (CRB).
22. She states that on 17th September, 2024, she was served with a statutory notice.
23. The Defendant through the Replying Affidavit of Christine Wahome sworn on 30th July, 2024 maintains that the Plaintiff is in default.
24. That since the Plaintiff no longer receives her salary through the Defendant's bank, there are insufficient balances to repay the loan. That as at 28th May, 2024, the loan arrears stood at Kshs.1,215,713.71.
25. To this Court it is not in dispute that the Plaintiff took out a loan with the Defendant. The loan was secured against the title to the house at Edenville Two, the subject matter of this suit.
26. The terms of a mortgage are very clear. In the event of non-payment, the bank will exercise its statutory power of sale. The value for the house as well as the loan amount can be quantified to the last cent. If the bank was to sell the house this cannot be said to be an irreparable loss, that is cannot be quantified or compensated for by way of general damages.
27. The Court refers to Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002) (2003) KECA 175 (KLR) (7 March 2003) (Judgment) Kwach J.A. stated as follows;

“The principles governing the grant of interlocutory injunctions as set out in *Giella v Cassman Brown and Co Ltd* [1973] EA 358, have been lucidly analysed by Bosire JA. In



recent times a tendency has developed in the Superior Court of treating applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale just like any application for injunction in an ordinary suit. The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-

“When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”(emphasis added)”

In whose favour does the balance of convenience tilt?

- 28. The Court is not persuaded that this is a proper case to grant an injunction.
- 29. It is not disputed that a mortgage facility was granted. The mortgage document is not disputed. The dispute seems to be on the conversion of the loan from US dollars to Kenya shillings. This was followed by a subsequent request to re-convert back to US dollars from the Kenya Shillings. The bank has declined this second reconsideration.
- 30. From the facts presented at this interlocutory stage, the Court is not persuaded to grant the injunction sought. Certainly, it has not been pleaded that the Bank is incapable of compensating the Applicant, should it turn out that the exercise of statutory power of sale is improper.
- 31. No evidence was led to show that the Respondent wish to list the Applicant with the Credit Reference Bureau (CRB).
- 32. As to costs, the same follow the event. The Respondent is awarded the costs of the application.

Determination

- 33. The Plaintiff/Applicant's applications dated 6th May, 2024 and 19th September, 2024 are dismissed with costs to the Defendant/Respondent.
- 34. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS 18TH DAY OF MARCH 2025.

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent

Mr. Luyai– Court Assistant

