



**Kamau v Business Partners International (K) Limited; Cimex Concrete Company Limited  
(Interested Party) (Civil Suit E018 of 2024) [2025] KEHC 5301 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL SUIT E018 OF 2024  
RC RUTTO, J  
APRIL 11, 2025**

**BETWEEN**

**ANN NJERI KAMAU ..... PLAINTIFF**

**AND**

**BUSINESS PARTNERS INTERNATIONAL (K) LIMITED ..... DEFENDANT**

**AND**

**CIMEX CONCRETE COMPANY LIMITED ..... INTERESTED PARTY**

**RULING**

1. Before this Court is the Plaintiff's/Applicant's Notice of Motion application filed under Certificate of Urgency dated 23<sup>rd</sup> July 2024 seeking the following orders, that:
  - a. Spent
  - b. Spent
  - c. That the honourable Court be pleased to issue a temporary injunction restraining the defendant /respondent herein either by himself, its agents, invitees and or servants specifically Messrs. Regent Auctioneers from selling by public auction or in any manner adversely dealing with the plaintiff/ applicant's property known as LR No 8361/8(IR 81154) Maporomoko Estate West of Thika-Kiambu County pending the hearing and determination of this suit
  - d. Costs of this application abide the outcome of the suit.
2. The application was supported by the affidavit of Ann Njeri Kamau sworn on 23<sup>rd</sup> July 2024 in which she deposed that she was the registered owner of Parcel of land LR No. 8361/8(IR No 81154) Maporomoko Estate West of Thika-Kiambu County (the suit land). That the suit land comprises of matrimonial property acquired in the course of her marriage, the suit land had been advertised for



- auction by the defendant/respondent's agents Regent Auctioneers purportedly towards the recovery of a loan given to the Interested Party.
3. It was contended that the subject loan was advanced to the Interested Party and she offered the property as collateral in 2019 and has never been appraised on the developments culminating into the intended auction. That all the efforts to get the details of the said loan have been futile, and it was apparent that the respondent had levied unlawful and illegal interest and penalties on the principal sum. Further that the intended sale by way of auction is laden by illegalities and ought to be stopped by way of injunctive reliefs as the applicant will suffer irreparable loss.
  4. The application was opposed. The Respondent filed a Replying Affidavit sworn on 6<sup>th</sup> August 2024 by Michael Muthengi, the Country Manager of the defendant. It averred that the application was bad in law, a conglomeration of falsehood and an abuse of the court process. It was stated that the defendant advanced a loan of kshs 40,000,000 to the Interested Party which facility was secured by a first charge and registered in favor of the property LR No 8361/8 registered in the name of Ann Njeri Kamau the plaintiff. That the plaintiff was a chargor and a guarantor for the facility, she was one of the directors of the borrower and was thus privy to the transaction between the defendant and the borrower and that the security offered on the facility and the requisite spousal consent was issued.
  5. The Defendant/Respondent also deponed that the borrower's repayment was characterized by perpetual default and sporadic payment in breach of the contractual obligation and as a consequence the facility fell into arrears and the defendant commenced the process of realization of security.
  6. It was further deponed that the Defendant issued the plaintiff/chargor, the borrower and the Chargor's spouse and guarantors a 30 days' demand notice dated 26<sup>th</sup> November 2020, upon lapse of the 30 days and no payment made, the defendant instructed CM Advocates to issue a 90 days Statutory Notice dated 2<sup>nd</sup> February 2021. The borrower failed to settle the arrears and hence the defendant was entitled to call up the entire loan and sell the charged property thus they issued a 40 days Statutory Notice dated 18<sup>th</sup> May 2021.
  7. The Respondent stated that they instructed Kenya Shield Auctioneers who proceeded to serve the Plaintiff and borrower with a 45 days Redemption Notice dated 15<sup>th</sup> February , 2022 informing them that they would sell the property via public auction upon the lapse of the 45 days.
  8. The Respondent averred that the contract was entered into freely between the parties and with the knowledge of the conditions contained therein and the allegations that the loan was exorbitant was meant to muddle the issues and cloud the failure to honor their end of the bargain.
  9. The Respondent stated that the orders sought if granted would be highly prejudicial to the defendant noting the loan arrears stood at kshs.55, 826, 095.73 and continue to accrue interest.
  10. It was also averred that the plaintiff had not established a prima facie case with a probability of success and had not met the threshold for grant of the orders sought and thus the application should be dismissed with cost.
  11. The application was canvassed by way of submissions as follows.

### **Applicant's Submissions**

12. Vide submissions dated 25<sup>th</sup> September 2024 the applicant set out three issues for determination, namely: whether the plaintiff/applicant had demonstrated a prima facie case with a probability of success; whether the plaintiff/applicant will suffer irreparable harm and injury that cannot be compensated by damages; and, whether the balance of convenience lies in favour of plaintiff/applicant.



13. On whether the plaintiff has demonstrated a prima facie case with a probability of success, reliance was placed to the case of *Mrao Limited v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR and it was submitted that the applicant had demonstrated a prima facie case with a probability of success for the reason that the charge amount was not fully advanced to the Interested Party; the requisite statutory notices were not personally served upon the applicant and no valuation of the property has been undertaken.
14. It was submitted that by dint of the charge amount of kshs.40,000,000 not being fully disbursed to the Interested Party in breach of the terms of the charge, the applicant had a prima facie case with a probability of success. She relied on the case of *Zainabu Ayub Mohamed & Another vs Rafiki Microfinance Limited* [2019]eKLR to buttress the same.
15. The Applicant averred that prior to the Respondent exercising its statutory power of sale, she was not personally served with any document or notice. Reliance was placed on the case of *Elizabeth Wambui Njuguna v Housing finance Co. of Kenya Limited* [2006] eKLR to buttress the point that the omission to serve a valid statutory notice is not an irregularity to be remedied by damages but is a fundamental breach of statute.
16. It was submitted that the Respondent had not led any evidence to suggest that proper valuation of the suit property was undertaken and this amounted to a breach of statutory obligation and in light of this, the applicant had demonstrated a prima facie case with a probability of success.
17. On whether the Applicant will suffer an irreparable harm and injury, reliance was placed on the case of *Peter Kimani Nene v Kenya Commercial Bank Limited* [2016] KEELC 99 which stated that disputes over land evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.
18. The Applicant contended that unless the Respondent is restrained by way of an injunction, the Respondent shall proceed with the sale of the property thus occasioning the Applicant severe harm that cannot be compensated by way of damages as the livelihood of other dependents will also be affected.
19. On whether the balance of convenience lies in favour of the Applicant, reliance was made to the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR to buttress the meaning of the balance of convenience. It was urged that the balance of convenience lies with the Applicant who being in occupation of the suit property shall render her family homeless. Reliance was also made to the case of *Suleiman vs Amboseli Resort Limited* [2004] 2 KLR 589 where it was stated that the court in responding to prayers of interlocutory injunctive relief should opt for the lower rather than the higher risk of injustice.
20. The Applicant urged that she had satisfied the threshold for grant of temporary injunction restraining the sale of property pending the hearing and determination of the suit.

### **Respondent's Submissions**

21. The Respondent filed its submissions dated 3<sup>rd</sup> October 2024. It set out two issues for determination namely: whether the plaintiff has satisfied the test for a grant of an injunction, and whether the plaintiff is entitled to the orders sought.
22. While submitting on the first issue, reliance was made to the case of *Giella vs Cassman Brown and Company Limited* (1973) EA 358 which set out the principles that should be considered before granting an order for temporary injunction and submitted that the Applicant had failed to meet any of the tests.



23. On whether the Plaintiff had demonstrated a prima facie case with a probability of success, reliance was made to the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2023] eKLR to urge that the Plaintiff had failed to establish a prima facie case since the allegations were unsupported and baseless. Further that a dispute over interest and amount due is not sufficient to restrain a charge from exercising its statutory power of sale. To buttress this, reliance was placed on the case of *Peter Ngungi Ngángá v Family Bank Limited & Another* [2021] eKLR.
24. It was also submitted that there was no evidence to show that the parties declared the agreement to have been frustrated by Covid 19 pandemic and the Applicant allegations were misleading information and a red herring.
25. It was further submitted that the allegation that the legal process on the requisite notices as outlined under statute were not followed is misguided. Reliance was made to the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR to urge that a party with the burden of proving a prima facie case must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained.
26. It was the Respondent's position that the issue of valuation raised in the plaintiff's submissions was never raised in the plaintiff's pleadings and as such does not warrant response from the defendant. Reference was made to the case of *Fibre Link Limited v Star Television production Limited* [2015] eKLR to buttress the point that submissions are not an avenue to submit evidence but must only clarify issues.
27. It was the Respondent's contention that the Plaintiff/Applicant had failed to establish a prima facie case with any chance of success and her application should be dismissed.
28. On whether the Plaintiff had shown that she might suffer irreparable injury, it was submitted that the Plaintiff freely and voluntarily offered the suit property as security fully aware that in case of default, the property would be sold and that the Respondent had at all times acted in accordance with the law in exercising its rights to redeem the facility as well as serving the requisite statutory notices.
29. On whether the balance of convenience favors the Plaintiff/Applicant, it was submitted that the Plaintiff had failed to meet the first two tests as demonstrated and thus the balance of convenience does not favor her. They urged that the application was without merit and was meant to frustrate the defendant in its legitimate exercise of its statutory power of sale. Thus, the Plaintiff had failed to meet the test for grant of an injunction by failing to establish that she was deserving of the orders sought.

### **Analysis and Determination**

30. I have considered the Application, the affidavits and the submissions of both parties on record and find that the main issue for determination is: whether an order of temporary injunction should be issued pending determination of the suit.
31. The three conditions for grant of such an order were well set out in the leading case of *Giella v Cassman Brown* [1973] E.A 358 and later reiterated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR where it was held inter alia, that:

“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 be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by



an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

32. In this instance, the Applicant argued that she had established a prima facie case justifying the granting of injunctive orders. She submitted that she would suffer irreparable loss that cannot be adequately compensated by way of damages and that the balance of convenience favored grant of the orders. On the other hand, the Respondent emphasized on the circumstances leading to the filing of this suit by providing a detailed chronology of events that culminated in this suit and this application. In summary, the Respondent maintained that the Applicant failed to establish a prima facie case as the allegations about the loan were false, the contract was entered into freely between the parties who had full knowledge of the terms and conditions contained therein.

33. The Court of Appeal in the case of Nguruman Limited case (supra) opined that:

“...these are the three pillars on which rest 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... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

34. What then constitutes a prima facie case? In the Court of Appeal case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, the Court held as follows

“the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case...

...In civil cases a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

35. The Plaintiff averred that she was a guarantor of the loan advanced to the Interested Party and the property LR No 8361/8(IR 81154) was used as the collateral. That the property is a matrimonial property where she lived with her family and the Respondent were in the process of selling it, which sale would render them homeless.

36. The Plaintiff/Applicant challenged the disbursement of the loan advanced to the Interested Party asserting that the full loan amount had not been released and that she had not been served with the requisite statutory notices. . She further urged that her effort to get the status of the loan from the defendant had proved futile.



37. Upon consideration of the evidence presented, the Court finds that the Plaintiff/Applicant has sufficiently demonstrated a prima facie case. This preliminary threshold has been met by showing a legitimate grievance that merits a further inquiry.

38. As regards, whether the Plaintiff/Applicant stands to suffer irreparable loss, I draw guidance in the case of Nguruman Limited case (supra) where it was expressed as follows:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

39. The Applicant averred that the suit property was matrimonial property and, in the event, it is sold, her dependants would be rendered homeless and they would not be able to recover it by way of damages. This averment remained uncontroverted as the respondent maintained that the suit property had been voluntarily offered as security. Accordingly, I agree that the Plaintiff has surmounted the second condition.

40. As regards the balance of convenience, I associate myself with the decision in Pius Kipchirchir Kogo (Supra) where it was held as follows:

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

41. In light of my findings above, I am satisfied that the Plaintiff/Applicant has satisfied the conditions necessary for the grant of the injunction orders sought.

42. As a result, I find that the Plaintiff's/Applicant's Notice of Motion dated 23<sup>rd</sup> July 2024 has merit and the same is allowed. There shall be a temporary injunction restraining the defendant /respondent herein either by himself, its agents, invitees and or servants specifically Messrs. Regent Auctioneers from selling by public auction or in any manner adversely dealing with the plaintiff/ applicant's property known as LR No 8361/8(IR 81154) Maporomoko Estate West of Thika-Kiambu County pending the hearing and determination of this suit.

43. The costs of this application shall abide the outcome of this suit.

Orders accordingly.



**DELIVERED, DATED AND SIGNED THIS 11<sup>TH</sup> DAY OF APRIL, 2025**

**RHODA RUTTO**

**JUDGE**

.....For Applicants:

.....For Respondent:

Sam Court Assistant:

