



**Kahihu v Equity Bank (K) Limited & another (Miscellaneous Application E231 of 2022)  
[2025] KEHC 4622 (KLR) (Commercial and Tax) (10 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4622 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E231 OF 2022**

**BK NJOROGE, J**

**APRIL 10, 2025**

**BETWEEN**

**NICHOLAS MBUGUA KAHIHU ..... APPLICANT**

**AND**

**EQUITY BANK (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH M GIKONYO T/A GARAMINVESTMENTS LIMITED .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. This is a Ruling in respect of the Plaintiff's application under a Certificate of Urgency by way of a Notice of Motion dated 25<sup>th</sup> March, 2022. In the main it seeks an injunction restraining the bank from auctioning the property known as title No. Dagoretti/Riruta/3225 Macharia Road Kawangware 56 Kanungaga Area Nairobi County.
2. The Applicant has been enjoying interim orders granted on 25<sup>th</sup> March, 2022.
3. The Application is supported by the Affidavit of Nicholas Mbugua Kahihu sworn on 25<sup>th</sup> March, 2022 with annexures.
4. The Application is opposed by the Respondents through the Replying Affidavit of James Gitau sworn on 6<sup>th</sup> June, 2022.
5. Directions were given that parties file their written submissions. The Court has perused the submissions filed by the parties as well as the authorities cited.
6. The Court notes that Counsel previous on record for the Applicant ceased acting for the Applicant. This is pursuant to orders issued on 28<sup>th</sup> November, 2024. Therefore, the Applicant was served directly



with the application but did not attend Court on 10<sup>th</sup> February, 2025. This Ruling is therefore on the basis of the submissions filed.

### **Issues for Determination**

7. Having perused the pleadings filed and the submissions, the Court frames two issues for determination.
  - a. Whether there is a proper suit before the Court.
  - b. Whether an injunction can be sustained in the circumstances.

### **Analysis**

8. The Court notes that at the heart of the dispute is the 1<sup>st</sup> Respondent's exercise of its statutory power of sale. The Applicant took out a loan of Ksh.23,120,000/= on 4<sup>th</sup> August, 2018. He thereafter fell into default. He complains that whilst exercising its statutory power of sale, the bank has undervalued his property. Initially the property was valued at Ksh.45,000,000/= as at 9<sup>th</sup> October, 2018 before the loan was taken. Prior to the scheduled auction, the bank's valuer had valued the same property at Ksh.18,000,000/= for a forced sale value and a market value of Ksh.30,000,000/=.
9. That common sense dictates that properties appreciate upwards in value.
10. The Applicant commissioned a separate valuation on 24<sup>th</sup> March, 2022 and the open market value was Ksh.35,000,000/= while the forced sale value was Ksh.26,250,000/=.
11. The Applicant sees this as a scheme by the bank to under value the property and sell it at a loss.
12. He admits that he is indebted to the bank at Ksh.29,733,156.59 and that is in default.
13. His main concern is that an independent valuation should be done before the auction takes place. This is so that the true value of the property can be determined.
14. The Respondents on the other hand submit that the Applicant is in debt. He took out a loan and he has defaulted. The variance in the valuation report is blamed on the effects of the Covid-19 pandemic. The property which was developed for rental occupancy was experiencing a fall in occupancy levels. This was one of the effects of the global pandemic. The fall of the global property values during the pandemic also affected the value of this property. That property price had severely dipped. That the injunction sought is not deserved.
15. Having summarized the dispute, the Court proceeds to look at the two (2) issues framed.

#### **a. Whether there is a proper suit before the Court.**

16. Unconventionally, the Respondents have raised the Preliminary Objection through paragraphs 16 and 17 of their Replying Affidavit as follows;

“ 16. That foregoing notwithstanding, I am further advised by our advocates on record which advise I hold to be true that the application before the court is incurably defective as an application under Order 40 of the *Civil Procedure Rules* cannot be made in Miscellaneous application and the respondents will at the earliest opportunity raise a preliminary objection as to the validity of the proceedings before the court.



“17. That there is no suit on record against which an injunction under Order 40 of the *Civil Procedure Rules* would issue.”

17. The Court notes that the Applicant has not Responded to this issue in his submissions, or by way of Supplementary submissions.
18. The Court would not wish to encourage the raising of Preliminary Objections by way of Replying Affidavits. There is a reason why even in the traditional practice before this Court, they are raised by way of a separate Notice of Preliminary Objection.
19. The issue raised is a glaring one that this Court cannot ignore. This is a Miscellaneous Application. It is commenced by way of a Notice of Motion under a Certificate of Urgency. There is no substantive suit by way of a Plaint or an originating Motion before this Court.
20. This Court has previously pronounced itself as to a similar objection in [\*Stanbic Bank Kenya Limited & another v Wanjala\*](#) (Civil Appeal E237 of 2023) [2025] KEHC 3848 (KLR) (Commercial and Tax) (27 March 2025) (Judgment) as follows; -

“It is not in dispute that no Plaint or an Originating Summons was filed before the Trial Court.

36. The Court was confronted with a Notice of Motion and an affidavit in support.
37. Section 19 of the *Civil Procedure Act* states as follows;

Institution of Suits

19. Institution of suits  
Every suit shall be instituted in such manner as may be prescribed by rules.
38. Order 40 of the Civil Procedure Rules//// states as follows;  
Cases in which temporary injunction may be granted [Order 40, rule 1.]  
Where in any suit it is proved by affidavit or otherwise—
  - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of



the property as the court thinks fit until the disposal of the suit or until further orders.

39. The now famous case of *Giella v Cassman Brown E.A* (1973) EA 350 states that an Applicant has to prove a prima facie case with a probability of success.
40. To this Court it is clear that the prima facie case to be proved would be the substance in the suit, the subject of the interlocutory application. An application for an injunction cannot survive on the basis of an application alone. It has to be based on a claim by way of a suit, seeking substantive reliefs.
41. The Court refers to the decision in *Cresta Investments Limited v Gulf African Bank Limited & another* [2020] eKLR and *Mbugua & another v Mbugua & 4 others* (Miscellaneous Application E064 of 2023) [2024] KEHC 2405 (KLR) (16 January 2024) (Ruling) in support of this finding.

“Moreover, an application for injunction under Order 40 of the Civil Procedure Rules is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all.”
42. It follows therefore that the Notice of Preliminary Objection was well taken. An injunction cannot be sought in absence of a suit. A Motion cannot properly form the basis of the suit contemplated in the proceedings before the Trial Court.”

21. The Court still holds to the same position.

#### **(b) Whether an Injunction can be Sustained in the Circumstances**

22. The Court’s view is that in absence of a formal suit the injunction sought cannot be sustained. The Court notes that in the first limb of the three-way test in the decision in *Giella v Cassman Brown E.A* [1973] EA 350, an affidavit has to prove a prima facie case. In absence of a proper suit, no prima facie case can be said to have been proved. The Court sees no need to belabour considering the other two limbs laid down in the *Giella* Case.
23. In the circumstances, the proceedings are struck out and the interim injunction granted is discharged. The costs of the application are awarded to the Respondents. The same are to be taxed on the scale applicable to miscellaneous applications. This is because there was no proper suit before the Court.

#### **Determination**

24. The Application by way of a Notice of Motion dated 25<sup>th</sup> March, 2022 is hereby struck out.
25. The costs thereof are allowed to the Respondents on the scale indicated above.
26. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF APRIL, 2025**

**NJOROGE BENJAMIN K**

**JUDGE**

In the presence of;



N/A.....for the Applicant

Miss Muturi for the 1<sup>st</sup> Respondents

Mr. Luyai – Court Assistant

