



Murigu & another t/a Geliwa Enterprise v ABSA Bank Kenya PLC (Civil Case E588 of 2024) [2025] KEHC 4684 (KLR) (Commercial and Tax) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E588 OF 2024**

PM MULWA, J

APRIL 10, 2025

BETWEEN

**GEORGE WAMBUGU MURIGU & ESTHER NJERI WARUHIU T/A GELIWA
ENTERPRISE PLAINTIFF**

AND

ABSA BANK KENYA PLC DEFENDANT

RULING

1. The Notice of Motion dated 16th September 2024 brought under Sections 31 and 31A of the *Banking Act* Cap 488 Laws of Kenya, Order 40 Rule 1(a) & 4(2), Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Article 159 of *the Constitution* of Kenya, seeks the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue an interim injunction restraining the Defendant, its agents, employees, or any person acting on its behalf, from negatively reporting or listing the Plaintiff's proprietors with any Credit Reference Bureau (including Metropol, Transunion, or any other licensed entity).
 - c. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue an interim mandatory injunction directing the Defendant, its agents, employees, or any person acting on its behalf, to delist and/or remove the Plaintiff's proprietors from any negative Credit Reference Bureau listings.
 - d. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue an interim injunction restraining the Defendant, its agents, employees, or



any person acting on its behalf, from further levying interest or making any further loan deductions/claims against the Plaintiff in relation to loan reference no. 0490L01213370001.

- e. spent
 - f. That pending the hearing and determination of this Suit, the Honourable Court be pleased to issue an interim injunction restraining the Defendant, its agents, employees, or any person acting on its behalf, from negatively reporting or listing the Plaintiff's proprietors with any Credit Reference Bureau (including Metropol, Transunion, or any other licensed entity).
 - g. That pending the hearing and determination of this Suit, the Honourable Court be pleased to issue an interim mandatory injunction directing the Defendant, its agents, employees, or any person acting on its behalf, to delist and/or remove the Plaintiff's proprietors from any negative Credit Reference Bureau listings.
 - h. That pending the hearing and determination of this Suit, the Honourable Court be pleased to issue an interim injunction restraining the Defendant, its agents, employees, or any person acting on its behalf, from further levying interest or making any further loan deductions/claims against the Plaintiff in relation to loan reference no. 0490L01213370001.
 - i. That pending the hearing and determination of this Suit, the Honourable Court be pleased to issue an interim injunction restraining the Defendant, its agents, employees, or any person acting on its behalf, from selling or interfering with the Plaintiff's proprietors' property, L.R. No. Karai/Gikambura/3489, by public auction, private treaty, or otherwise.
 - j. That pending the hearing and determination of this Suit, the Honourable Court be pleased to issue a temporary injunction restraining the Defendant, its agents, employees, or any person acting on its behalf, from pursuing any amount allegedly owed by the Plaintiff.
 - k. That the Honourable Court grants any further orders it deems fit.
 - l. That the costs of this Application be borne by the Defendant.
2. The application is premised on the grounds stated in the record and the affidavit of Esther Njeri Waruhiu, dated September 2024 and 10th November 2024. She avers that the Plaintiffs, as the registered owners of L.R. No. Karai/Gikambura/3489, seek to prevent the Defendant from illegally auctioning the property due to an alleged loan default.
 3. The dispute arises from a Kshs. 15 million loan agreement under a Letter of Offer dated 14th October 2021, intended to consolidate existing debts and finance business operations. However, the Defendant only disbursed Kshs. 6 million, engaged in irregular debits, unexplained fund transfers, and withheld proceeds from the sale of another property. The Plaintiff alleges fraudulent activities, unauthorized deductions, and the Defendant's failure to provide a facility agreement, making it impossible to verify the loan terms.
 4. Furthermore, the Plaintiff contests their negative CRB listing, asserting that the loan was fully repaid. They argue that the intended property auction is illegal and seek an injunction to prevent it, claiming a strong case with a high probability of success. The mandatory injunction also seeks the removal of the Plaintiff and its proprietors from the CRB listing, which would not prejudice the hearing and determination of the suit.
 5. Citing discrepancies in loan disbursement, unauthorized transactions, and misleading information in the Defendant's affidavit, the Plaintiff maintains that the Kshs. 6 million disbursed was fully repaid through property sale proceeds and additional repayments. Despite this, the Defendant continues to



- claim arrears. The injunction is sought to prevent further injustice, as the Plaintiffs argue that they owe nothing, and granting the orders will not prejudice the Defendant.
6. Opposing the application, the Defendant, through its Collections and Recoveries Manager, Boniface Muthinja, filed a replying affidavit sworn on 29th October 2024. He avers that the Plaintiffs have failed to make a compelling case for the mandatory injunctions. Granting such injunctions would allow a substantial part of the suit to be determined without testing the Plaintiff's evidence, leading to a miscarriage of justice.
 7. The Defendant asserts that the loan facility and arrears are not disputed and that the injunction is premature, as all necessary statutory notices have not yet been issued, and there is no imminent risk of sale. Allegations of irregular activities on the Plaintiff's accounts are denied. The Plaintiff had already sold one of the charged properties, with the proceeds used to reduce the loan balance.
 8. As of 16th October 2024, the outstanding debt stands at Kshs. 12,776,269.35, which continues to accrue interest. The Plaintiffs have been aware of their CRB listing since August 2023 due to their default, and the listing remains justified as the loan remains unpaid.
 9. The application was heard through written submissions. The Plaintiff/applicant filed submissions dated 22nd January 2025, while the Defendant/Respondent filed submissions dated 17th January 2025. I have carefully considered both submissions, the pleadings, and the applicable law.
 10. The key issue for determination is whether the Applicant has met the threshold for the grant of an interlocutory injunction.
 11. The Plaintiff contends that the Defendant breached the terms of the loan agreement by failing to disburse the full amount of Kshs. 15,000,000 as agreed in the Letter of Offer. The Plaintiff alleges that only Kshs. 6,000,000 was disbursed, and the remaining Kshs. 9,000,000 was purportedly disbursed eight months later but immediately reversed. According to the Plaintiff, the Defendant's actions amount to a fundamental breach of contract, justifying the grant of injunctive relief.
 12. The test for granting an interlocutory injunction, as laid out in *Giella v Cassman Brown* (1973) EA 358, requires the applicant to establish:
 - i. A prima facie case with a probability of success;
 - ii. That they will suffer irreparable harm which cannot be compensated by damages; and
 - iii. If in doubt, the Court should decide on the balance of convenience.
 13. In *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, the Court defined a prima facie case as one that demonstrates an apparent infringement of rights that calls for an explanation from the Defendant. The Plaintiff argues that the Defendant failed to disburse the full loan amount and that part of the funds were reversed. However, the Defendant has provided a comprehensive statement detailing how the loan was disbursed, showing that the Plaintiff received the entire agreed loan amount.
 14. The burden of proof rests on the Plaintiff to demonstrate that the full loan amount was not disbursed. However, no sufficient evidence has been tendered to support this claim. Courts have consistently held that documentary evidence outweighs mere allegations. (See *Kenya Commercial Bank Ltd v James Osebe* [1999] eKLR). In the absence of compelling evidence to contradict the Defendant's records, the Plaintiff's claim cannot stand.
 15. The Plaintiff's obligations under the loan agreement which was to repay the loan amount remain enforceable, as there is no evidence of a material breach by the Defendant. The claim of wrongful



CRB listing and impending property auction is equally without merit, as the listing arose due to the Plaintiff's own default in repayment, rather than any wrongful conduct on the part of the bank.

16. Accordingly, the prima facie case has not been established, and the application fails on the first limb of the Giella test. Further, in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal reaffirmed that where a prima facie case has not been established, there is no need to consider the other two limbs of the Giella test.
17. I agree with the Defendant that any dispute regarding loan computations does not justify an injunction, as established by precedent. The Plaintiffs have not provided evidence proving full repayment. A CRB listing due to default does not constitute irreparable harm because it is a consequence of the Plaintiff's contractual obligations. One cannot seek injunctive relief from the consequences of their own default
18. Courts have held that banks must not be unjustly restrained from enforcing valid loan agreements unless there is clear evidence of illegality or bad faith (*Kenya Commercial Bank Ltd v Patrick Kinoti* [2018] eKLR)
19. Accordingly, the prima facie case has not been established, and per the reasoning in *Nguruman Ltd* (supra) I see no point of considering the issue of irreparable harm because the principles of granting interlocutory injunction are by their nature cumulative..
20. The Plaintiff also seeks a mandatory injunction directing the Defendant to delist and/or remove the Plaintiff from any negative credit reference bureau listing. The test for granting a mandatory injunction is higher than that of an interlocutory injunction, as was emphasized in *Kenya Breweries Ltd & another v Washington Okeyo* [2002] eKLR, where the Court held that a mandatory injunction will only issue where there is a clear case beyond any controversy and exceptional circumstances exist.
21. A mandatory injunction compelling delisting from the CRB would interfere with the statutory framework governing credit reporting. A CRB listing is a lawful consequence of default and not an infringement of rights.
22. Since the Plaintiff has failed to meet the higher threshold required for a mandatory injunction, this relief is not warranted.
23. Having considered the arguments and applicable legal principles, I make the following orders:
 - i. The Plaintiff's application dated 16th September 2024 is devoid of merit and is dismissed.
 - ii. The Defendant is at liberty to proceed with lawful debt recovery measures, including maintaining the CRB listing and proceeding with the auction, provided it complies with all statutory requirements.
 - iii. The Plaintiff shall bear the costs of this application.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF APRIL 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Kuloba for Plaintiff/applicant



N/A for Defendant/respondent

Court Assistant: Kadzo

