



**Kimani v Faulu Micro-Finance Bank Limited (Civil Suit
E005 of 2025) [2025] KEHC 5805 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E005 OF 2025
SM MOHOCHI, J
MAY 7, 2025**

BETWEEN

DAVID CHEGE KIMANI PLAINTIFF

AND

FAULU MICRO-FINANCE BANK LIMITED DEFENDANT

RULING

Background

1. The Plaintiff/Applicant was granted a loan facility in the sum of Kshs. 16,000,000/= which was to be disbursed in two tranches of Kshs. 12,000,000/= and Kshs. 4,000,000/= respectively which loan facility was secured by a charge over the parcels of land of Title Numbers: L. R. No.s Kiambogo/Kiambogo Block 2/16827 (Mwariki), Kiambogo/Kiambogo Block 2/16828 (Mwariki) and Nakuru Municipality Block 22/1549.
2. Applicant was served with a Ninety (90) day Statutory Notice dated 29th July, 2024 and a Forty (40) day Statutory Notice in respect of the loan arrears in the sum of Kshs. 17,299,569.28 as at 7th November, 2024, failure to which, the Respondent would exercise its Statutory Powers of Sale. The loan remained in arrears, prompting the Respondent to issue the Notification of Sale dated 19th February, 2025 and a 45-day Redemption Notice dated 21st February, 2025 for the sum of Kshs. 18,153,687/=.
3. The statutory sale by auction was scheduled on 6th May 2025 and the Respondent has not explicitly stated that the auction has occurred by the time of this ruling.

Applicants Case

4. The Applicant/Plaintiff entered into a loan agreement with the Defendant Bank in November 2023 and secured a facility of Kshs 16 million using three parcels of land whose collective forced sale value exceeded Kshs 43.7 million.



5. That, barely within the first few months of repayment, the Defendant began exerting pressure, demanding payments over and above what was agreed, and threatening to sell the Plaintiff's properties.
6. That the redemption notice claims a significantly inflated amount inconsistent with the loan terms and repayments made this discrepancy in the amounts due raises serious concerns requiring judicial scrutiny.
7. That despite some delays in making scheduled payment due to business fluctuations, he has been making consistent monthly payments as per the repayment schedule, and the bank has always accepted these payments which demonstrates commitment to servicing the loan, as evidenced in his loan statements.
8. That assertion by the Defendant that the Plaintiff is in material default is inaccurate and disputed, further justifying the need for the Court to intervene and preserve the subject matter pending hearing. The bank's conduct, including verbal threats, unauthorized visits to the Plaintiff's business premises, and notices issued before due process is followed, amounts to harassment.
9. That the notices served are not only vague and undated (in the case of the redemption notice). That the Respondent has also failed to provide proper accounts justifying the amount now claimed. Based on this, the Plaintiff has demonstrated that there is a real and substantive dispute over the debt amount. The Defendant's conduct threatens his legal and equitable rights under the charge instruments.
10. That he has not willfully defaulted and the notices issued were irregular and prematurely issued.
11. That the Applicant charged three high-value parcels of land as security for a Kshs 16 million loan facility. The said parcels are well above Kshs 58,000,000 as per the valuation report conducted by Fidelity Valuers Limited. The forced sale values were also substantial, collectively amounting to over Kshs 43,700,000. These figures underscore the disproportionate nature of the bank's threatened auction in relation to the original loan of Kshs 16 million.
12. Further they are not merely immovable assets, but also income-generating premises, housing rental businesses and a hotel enterprise from which the Plaintiff derives his livelihood.
13. That permitting the auction would result in the disposal of significantly undervalued high-value property, causing economic injustice and irreparable loss to the Plaintiff, especially where there is an ongoing dispute on the actual outstanding amount. The Plaintiff is concerned that should the auction proceed, the charged properties which are income-generating and commercially strategic will be sold at a gross undervalue that does not reflect their true market or even forced sale value.
14. That the loss occasioned by such a sale would be irreversible, as the Plaintiff would not be in a position to recover or reacquire the same property at its actual market worth. Beyond being valuable immovable property, the subject parcels house a hotel enterprise and rental premises that form the Plaintiff's primary source of livelihood as evidenced in the valuation report with pictures too.
15. That the Plaintiff employs several staff and serves the public from these premises. Any disruption through a forced sale would not only bring the business to a halt but also render the Plaintiff and his dependents economically destitute.
16. That the reputational and emotional harm to the Plaintiff's business, the loss of goodwill, and the economic displacement of his employees and future economic stability cannot be compensated adequately by monetary damages



Respondent's Case

17. The Application is opposed vide Preliminary Objection dated 16th April, 2025 on the grounds that the High Court lacks original jurisdiction to hear and determine this matter on account of pecuniary value of the dispute in question and/or the value of the properties.
18. That the law allows the Respondent as the chargee to exercise its statutory power of sale in the event of default by the Applicant-Borrower/Chargor, to repay the loan facility as per Section 90(1) of the [Land Act, 2012](#).
19. That the Respondent discharged its duty by issuing the requisite statutory notices to the Applicant therefore the rights of the Applicant have not been infringed.
20. The Respondent served the 45-day redemption notice and the Notification of sale through its auctioneer and the Applicant did not exercise his Right of Redemption The Plaintiff/Applicant's Bank Statements illustrate that once the loan tranches were disbursed, the Applicant failed to service the loan facilities on a regular basis with the required monthly instalments, and subsequently stopped making any repayments altogether, forcing the loan into arrears.
21. That, the alleged issue of interest rates complained about by the Plaintiff/Applicant does not even arise because he stopped repaying the loan in altogether, not even making payment of the initial loan instalments, let alone any alleged increased interest/instalment rate, and is thus undeserving of injunctive relief. Furthermore, the Applicant has not denied that the loan is in arrears.
22. That the Respondent has complied with all the provisions of the law, and therefore, the Plaintiff/Applicant does not have a prima facie case, that should warrant the Court to exercise its discretion in favour of the Plaintiff/Applicants.
23. That the question of irreparable damage cannot arise, as the value of the land has been determined in the valuation report.
24. That, the Applicant has not established or demonstrated that they might suffer irreparable injury which cannot be remedied by an award of damages in the absence of an injunction, which is a threshold requirement.
25. That, the Applicant's has made no effort to make repayment nor engaged the Respondent to potentially restructuring their loan. The Respondent has suffered loss and continues to suffer loss, having loaned the Applicants money which they have not repaid.
26. That the Applicant's case fails the three-part test for an interim injunction to be granted, and the Applicants have failed to serve the Respondent with their response to the Preliminary Objection.

Analysis & Determination

27. Upon considering the pleadings, response thereto and the respective submissions filed, I find the following to be the one broad issue that arises for determination:

“Whether an interim injunction should issue to bar the Respondent from exercising its statutory power of sale pending hearing and determination of the suit”



28. Determination on whether to grant interim injunctions is governed by Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

“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.

29. The principles that guides this Court in dealing with applications for injunctions were well settled in the celebrated case of Giella –vs-Cassman Brown and company Limited Civil appeal No.51 of 1972 where it was held as follows:

- i. The Applicant must establish a prima facie case with a probability of success.
- ii. Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.
- iii. Applicant has to demonstrate that balance of convenience tilts in its favour.

30. Further, in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

“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. (See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86).

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 is 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. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

31. It is also settled law, that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact made on the basis of the conflicting Affidavit evidence. In



connection thereto, in *Mbuthia vs Jimba Credit Finance Corporation & Another* [1988] KLR 1, the Court of Appeal guided as follows:

“...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”

32. Before I venture into determination of this matter, I may mention that it cannot be a point of debate that a person who receives a loan from a lender and who voluntarily and lawfully gives out his property as collateral or security for the loan is presumed to be fully aware that in the event of default in repayment of the loan within the terms and timelines agreed, the lender is at liberty to sell off the property to recover the money lent out.

33. On this point, Pall J in *Muhani & Another vs. National Bank of Kenya Ltd* [1990] KLR 73 held as follows;

“The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties The very object of the legislation granting a chargee a statutory power of sale would be negated if the Courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale”.

34. Further, in the case of *Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation)*, HCCC No. 82 of 2006, Warsame J (as he then was) observed as follows:

“..... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

35. Similarly, Ringera J, in the case of *Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001* [2001] 2 EA 540, also held as follows:

“Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them.

36. In order to determine whether the application meets the required threshold the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the Court held that: -

“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. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. 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 is 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. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

As to whether the Applicant has established a prima facie case?

37. The case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 defined a prima facie case as follows;

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. 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.”
38. A close perusal of the affidavit in support of the application the plaint and the Applicant's submissions reveals the “quicksand” on which this suit is constructed;
39. There is an unequivocal admission of the debt.
40. A cursory look at the plaint filed and reliefs sought is indicative of the plaintiff/Applicant aggrievement wherein he seeks the following reliefs;
 - a. Declaration that the Defendant's actions in varying the loan terms and engaging in unlawful debt collection practices are illegal and in breach of the loan agreement
 - b. A permanent injunction restraining the Defendant, its agents, or representatives from selling, disposing of, or in any way interfering with the Plaintiff's properties LR No. Kiambogo/kiambogo Block 1/16827 (Mwariki), LR No. Kiambogo/kiambogo Block 1/16828 (MWARIKI) and LR No. Nakuru Municipality Block 22/1549.
 - c. An order compelling the Defendant to provide a clear, detailed, and accurate statement of the Plaintiff's loan account, including all payments made and the interest calculation methodology.
 - d. General damages for harassment, reputational damage, and business disruption caused by the Defendant's unlawful actions.
 - e. Any other relief this Honourable Court may deem just and fit to grant.
 - f. Costs and Interests of this suit
41. A Plaintiff/Applicant must demonstrate a legitimate right to sue, rather than merely offering a superficial or illusory claim of cause of action has was held by Telanga Judge in the case of *Bajranglal Agarwal v. Smt. Susheela Agarwal and Ors*, CCCA.No.62 of 2024.
42. The Court notes that, the Applicants main issue in dispute is the alleged variations of interest rates charged and Applicant has not demonstrated effort to make repayment of the contractual monthly instalments nor demonstrated efforts at either engaging the Respondent to potentially restructuring their loan or in fact resolve the alleged interest charged dispute.
43. The amounts of interests in dispute remain foggy at this juncture but shall be subject to the main suit.
44. Typical Lender Liability Causes of Action would include;



- i. Breach of Contract. A lender and borrower share a contractual relationship, which could result in a lender being held liable for breaching oral, implied and written contracts. Common breach of contract claims includes assertions that a bank failed to: advance funds after a loan commitment became legally binding, extend a loan, honor a loan modification or forbear after agreeing to do so; or take actions required under loan documents or interpret loan documents properly.
 - ii. Breach of the Implied Covenant of Good Faith and Fair Dealing. Borrowers have also used traditional breach of contract claims to file claims based on a breach of the Implied covenant of good faith and fair dealing. Some lenders have been found liable for
 - (a) refusing to release a deed of trust in an effort to pressure the borrower into paying off another loan and
 - (b) manipulating an appraisal of the borrower's property to cause a default. Economic Duress. Courts have distinguished between a lender
 - i. making threats and
 - ii. threatening to do that which it has a legal right to do or refusing to do that which it is not legally required to do.
 - iii. Tortious Interference with a Contract which can occur when a lender intentionally induces a breach of the borrower's contract with a third-party.
 - iv. Inappropriate Collateral Sales. Lenders have had problems where they sell collateral Inappropriately after a loan default. the method, manner, time, place and terms of the sale must be commercially reasonable. Some Courts have held that a sale is *commercially unreasonable if the lender relied on an appraisal/Valuation that it knew or should have known was too low, or provided insufficient publicity for the sale to generate a sufficient number of bids.
 - v. Instrumentality Theory. A lender could expose itself to liability to the borrower and third-parties where the lender exercises such control over the borrower's day-to-day business operations that, in effect, the borrower becomes an instrumentality of the lender.
 - vi. Breach of Fiduciary Duty. The elements to establish a fiduciary relationship between a bank and a borrower are
 - (a) the borrower has faith, confidence, and trust in the bank,
 - (b) the borrower is in an unequal position and has weakness or lack of knowledge, and
 - (c) the bank exercises dominion, control, or influence over the borrower's business affairs.
45. The Court is unpersuaded of an irreparable injury being occasioned if the auction occurs and the injury needs to be actual, substantial and demonstrable and one that cannot be compensated by an award of damages especially one of monetary compensation.
46. This Court can only deploy the balance of convenience test where a prima facie case exists in this instance the parties entered into a contract upon which default the Respondent is contractually obliged to exercise its right to statutory sale, the concept of balance of convenience was defined in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLR as:

"The meaning of balance of convenience will 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

47. In the case of Labelle International Ltd Vs. Fidelity Commercial Ltd & Another (2003) Z.E.A. it was held that; -

“It is now established law that when part of the amount claimed is admitted or proved to be due, a charge cannot be restrained by an injunction.”

48. An injunction will not be issued hereof when the Applicant’s claim is that of a dispute of the amount owed to the bank in interest while he is clearly in default on the scheduled payments I am unpersuaded as this Court has already established that indeed the Applicant owes the bank an amount which needs not to be ascertained and the dispute on interest charged can be adjudicated whilst parties fully comply with their contractual obligations in this instance the Applicant as has been exhibited has been in actual loan default. I am thus unable to deploy the balance of convenience to deploy injunction in the face of admitted default, doing so shall imply judicial overreach in interfering with a running contract.

49. This Court has original unlimited jurisdiction thus the Notice of Preliminary Objection by the Respondent on the jurisdiction of this Court is overruled and the issue of want of jurisdiction to entertain the suit shall be considered in the hearing of the main suit.

50. The Upshot is that, the Notice of Motion 3rd April 2025 is without any merit and the same is accordingly dismissed with costs to the Respondent.

51. The Applicant Plaintiff is urged to comply with Order 11 of the Civil Procedure Rules in setting down the suit for pretrial hearing within the next sixty (60) from the date hereof.

It is so ordered.

SIGNED, DATED AND DELIVERED ON THIS 7TH DAY OF MAY 2025

Mohochi S.M

JUDGE

