



REPUBLIC OF KENYA



**MMN v Family Bank Ltd (Civil Appeal E028 of 2025)
[2025] KEHC 6845 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E028 OF 2025
EM MURIITHI, J
MAY 15, 2025**

BETWEEN

MMN APPELLANT

AND

FAMILY BANK LTD RESPONDENT

RULING

1. By Notice of Motion dated 20th March, 2025, the applicant seeks the following orders:
 1. Spent.
 2. Spent.
 3. That this court be pleased to issue a temporary injunction restraining the Respondent from selling or in any way interfering with the applicant's ownership of land parcel number Ino/Kerugoya/xxx and owner of motor vehicle Number xxx xxx pending the hearing and determination of the appeal.
 4. Costs of the application.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Mathew Munene Njagi. The applicant's case is that he is the registered proprietor of land parcel Number Ino/Kerugoya/xxx and owner of motor vehicle Number xxx xxx (Hereinafter referred to as the suit properties). He provided the suit properties as security for a loan of Kshs. 5,571,900/ with the Respondent which he has faithfully been repaying and has already repaid a sum of Kshs. 3,700,000/-.
3. However, the Respondent illegally and unlawfully attached the suit properties and without issuing him with the requisite legal notices.



4. The applicant avers on 22nd July 2024, he filed a Suit against the Respondent in Kerugoya Chief Magistrates Court Being Civil Suit No. E086 of 2024 and filed an application seeking to restrain the Respondent from selling and/or interfering with his possession of the suit properties pending the hearing and determination of the application and main suit. The ruling was delivered on 12th March 2024 by Honourable Nelly Wangeci Kariuki dismissing his entire application and striking out his Suit for reasons that the Court did not have jurisdiction to entertain the same. The import of the said Ruling is that the Respondent is now at liberty to proceed and sell and/or interfere with ownership of the suit properties which will be detrimental to his position.

He avers that his appeal has overwhelming chance of success. Lastly, that it is in the interest of justice that there be an order of injunction pending the hearing and determination of the Appeal.

5. The respondent on 21st March, 2025 filed a replying affidavit. The respondent avers that with respect to its security constituted in land title number Inoi/Kerugoya/xxx, they issued a 3-month statutory notice dated 2/4/2024 under the provisions of section 90 of the *Land Act*, 2012 to the Appellant requiring him to regularize the default by paying the amount outstanding on the loan facility then in the sum of Kes. 3,638, 128.43. The notice was served upon the Appellant by registered post through his postal address P. O. Box xxx - 10300 Kerugoya. Further, the above-mentioned notice lapsed without the Appellant regularizing the default as required thereunder. The Respondent issued a forty (40) days' notice of intention to sell the suit property dated 15/7/2024 under section 96 of the *Land Act* 2012 notifying the Appellant that it had elected to exercise its right as a chargee for sell the suit land if the subsisting default was not rectified by payment of the then outstanding balance in the sum of Kes. 3,893,898.00 within the notice period. The respondent avers that its security constituted in motor vehicle registration number xxx xxxx, the Respondent issued to the Appellant a notification dated 26/3/2024 pursuant to section 67 of the Movable Property Securities Rights Act, 2017 requiring the Appellant to remedy the default by paying the arrears due on the loan facility at the time failure to which it would avail to itself any of the remedies due to it under section 65 of the Act. Further, the Appellant did not rectify the default as notified with the consequence that the Respondent elected to repossess and dispose of the suit motor vehicle in realization of its security constituted therein. The Respondent instructed Messrs. Compliance Auctioneers to repossess the suit motor vehicle. Lastly, the Appellant had not satisfied the requirements for grant of temporary injunction pending hearing of appeal.
6. The applicant on 7th April, 2025 filed a further affidavit and reiterated his averments in the Supporting Affidavit.

Applicant Submissions

7. The Applicant is guided by the principles established in *Giella vs. Cassman Brown* (1973) EA 358 which articulates the conditions for granting an injunction:

“The conditions for the grant of an 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 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.”

8. The Applicant respectfully submits that despite his record of prompt repayments, the Respondent without issuing the requisite legal notices, issued notices to attach and sell the suit properties through public auction due to alleged defaults, a position that he vehemently contests,



9. The Applicant further submits that he has a profound sentimental attachment to the suit property, being his matrimonial residence where he resides with his family. Consequently, the impending sale of the suit property would inflict irreversible pain, embarrassment, and distress that cannot be adequately compensated by an award of damages. Notably, the suit properties are the only source of livelihood for the Applicant herein and the loss of these properties would precipitate extreme hardship and potential destitution for the Applicant and his family.

Respondent submissions

10. They submit that on the materials placed on record, the Appellant has failed to satisfy the requirements for grant of temporary orders set out in case of *Giella Vs, Cassman Brown* (1973) EA 358.
11. The grounds in support of the application as can be gleaned from the face of the notice of motion and the supporting affidavit are that the Appellant did not default in the repayment of the loan facility: and, that the Respondent did not issue the requisite statutory notices in the exercise of its statutory right of sale over the security land and motor vehicle and that the appeal has high chances of succeeding.
12. From the outset, we submit that the ground that the appeal has high chances of succeeding is not relevant to the determination of this application. The application is not made under Rule 5 (2) (b) of the Court of Appeal Rules that provides that one of the requirements for grant of orders of injunction pending appeal at the Court of Appeal is that for the Applicant to demonstrate that he has an arguable appeal. We submit that this ground be disregarded in the circumstances.

Issue

13. Whether temporary injunction pending appeal should be granted.

Analysis

14. The legal basis of the Notice of Motion Application dated 20th March 2025 is founded on Order 40 Rule 1 of the Civil Procedure Rules 2010 which dictates the circumstances under which a temporary injunction may be granted.
15. Order 40 Rule 1 of the Civil Procedure Rules 2010 states as follows:
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 for 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.
16. The Applicant is guided by the principles established in *Giella Vs, Cassman Brown* which articulates the conditions for granting an injunction.



Prima facie case with a probability of success

17. The applicant avers that the Respondent illegally and unlawfully attached the suit properties and without issuing him with the requisite legal notices.
18. The respondent avers that he served the notice through the last address of the appellant.
19. The Applicant submits that he has not defaulted in loan repayments; and as a matter of fact, he has made a substantial payment in settling the loan amount therefore, any actions taken by the Respondent concerning the sale or transfer of the suit properties are illegal, irregular and unwarranted.

Suffer irreparable injury

20. The applicant submits that the suit properties are the only source of livelihood and the loss of these properties would precipitate extreme hardship and potential destitution for the Applicant and his family.
21. The Respondent instructed Messrs. Compliance Auctioneers to repossess the suit motor vehicle. Further, the 40 days' notice to sell the suit property has lapsed, hence the respondents would exercise their right of sale. Needless to state, if the suit properties are sold, the applicant will suffer loss which although not irreparable harm, is substantial.

Balance of convenience

22. The appellant avers that his appeal has overwhelming chance of success.
23. The respondent submits that the appellant has not demonstrated an arguable appeal. The balance of convenience significantly tilts in favour of the Applicant herein so that he does not lose his property while the appeal is under consideration. The Respondent continues to hold the securities for the loan, and it has not been shown that the delay in recovery resultant from the injunction will put the loan amount beyond recovery by sale of the security.

Erinford properties' injunction

24. The correct provision for seeking an injunction pending the hearing and determination of the Appeal in the circumstances of this case is Order 42 Rule 6 (6) of the Civil Procedure Rules, which provides as follows:

“(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

25. However, the application is not defeated therefor, as provided in Order 51 Rule 10 (2) of the Civil Procedure Rules:

“10. Provision under which application is made to be stated [Order 51, rule 10]

- (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.



(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

26. In addition, the test in *Giella v. Casman Brown* relied on by the parties in the appeal is a general test for the grant of interlocutory injunctions, which is broader in its considerations than the applicable test in the *Erinford Properties* case [*Erinford Properties Ltd v Cheshire County Council*, [1974] 2 All ER 443] adopted in Kenya by *Madhupaper International Limited vs Kerr* (1985) KLR 840 approving *Wilson v Church No. 2* [1879] 12 Ch.D. 454.
27. In the decision of *Patricia Njeri & 3 Others vs. National Museum of Kenya* [2004] eKLR, the Court (A. Visram J. as he then was) distilled the principles governing grant of temporary injunction pending appeal, as follows:
- “In the *Venture Capital* case [*Venture Capital & Credit Limited vs Consolidated Bank of Kenya Ltd Civil Application No Nairobi 349 of 2003 (174 of 2003 UR)*] the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:
- (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited vs Kerr* (1985) KLR 840 (cited in *Venture Capital*). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries vs KCB* (1982 – 88) KLR 1088 (also cited in *Venture Capital*).
 - (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
 - (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt vs Rent Restriction Tribunal* (1982) KLR 417 (cited also in *Venture Capital*).
 - (d) The Court should also be guided by the principles in *Giella vs Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in *Venture Capital*).”
28. The Appellant has an arguable case in the appeal. The Appeal may be rendered nugatory, if the properties are sold in the meantime. As the Respondents already do have the title documents on the subject properties, no further security is ordered.

Orders

29. Accordingly, for the reasons set out above, the Court finds merit in the application for injunction pending appeal herein which is granted upon terms that:
- 1. A temporary injunction in terms of prayer NO. 3 of the Notice of Motion dated 20/3/2025 is granted.
 - 2. The Appellant shall file the Record of Appeal within thirty (30) days the date of this Ruling.
30. In default of the conditions made in granted No. 2 above, the order for temporary injunction will lapse and be of no effect.



Order Accordingly.

DATED AND DELIVERED THIS 15TH DAY OF MAY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Lumumba for Mr. Mwangi for the Appellant.

Mr. Juma for the Respondent.

