



REPUBLIC OF KENYA



Ndiema & 6 others v Ganza Limited & 2 others (Commercial Case E018 of 2023) [2025] KEHC 6792 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE E018 OF 2023**

A MSHILA, J

MAY 23, 2025

BETWEEN

MILLICENT YEGO NDIEMA 1ST PLAINTIFF
GLORIA WAKHU 2ND PLAINTIFF
JUSTUS MUTUKU KALINGA 3RD PLAINTIFF
MAGANA NJUGUNAMUJNGAI 4TH PLAINTIFF
MEHTA PARESH CHIMANLAL 5TH PLAINTIFF
MEHTA NEETA PARESH 6TH PLAINTIFF
TOM ONYANGO MACAKIAGE 7TH PLAINTIFF

AND

GANZA LIMITED 1ST DEFENDANT
HOMEX HOUSING LIMITED 2ND DEFENDANT
ECOBANK KENYA LIMITED 3RD DEFENDANT

RULING

1. Before court is an application by way of Notice of Motion dated on 5th June, 2023 and brought under Order 40 Rule 1 of the Civil Procedure Rules and Section 1A & 3, 63 (e) of the *Civil Procedure Act* and all other enabling provisions of the law. The Plaintiffs/Applicants sought for orders:-
 - a. Spent
 - b. That pending the hearing and determination inter partes of this Application, this Honourable Court be pleased to issue a preservative and/or temporary injunction, restraining the 1st, 2nd and 3rd Defendants/Respondents, their agents, servants, relatives and/or assignees or anyone



claiming under them from trespassing, disposing/selling, transferring, commencing any kind of construction on, charging and/or in any other way whatsoever interfering with, or any acts which are inconsistent with the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Plaintiffs'/Applicants' ownership and possession of the land parcel Kabete/Kibichiko/4166, Kabete/Kibichiko/4167 owned by the 7th Applicant and parcels subdivided from Kabete/Kibichiko/906 in respect to Maisonettes No. 47, 40, 2 and 37, owned by the 1st, 2nd, 3rd, 4th 5th and 6th Plaintiffs/ Applicants.

- c. That pending hearing and determination inter partes of the main suit, this Honourable Court be pleased to issue an order directing the Defendants/Respondents to share a copy of titles for Maisonettes no. 47, 40, 2 and 37 with the 1st, 2nd, 3rd, 4th, 5th and 6th Plaintiffs/Applicants respectively being parcels subdivided from Kabete/Kibichiko/906.
 - d. That pending hearing and determination inter partes of this application, this Honourable Court be pleased to issue a temporary injunction restraining the Land Registrar Kiambu Land Registry from authorizing any transfer and/or title registration in reference to the land parcels Kabete/Kibichiko/906, Kabete/Kibichiko/4166, Kabete/Kibichiko/4167 and/or any of other parcels being portions subdivided from Kabete/Kibichiko/906 to any person.
 - e. That pending the hearing and determination inter partes of the main suit, this Honourable court be pleased to issue a permanent injunction restraining the 1st, 2nd and 3rd Defendants/ Respondents, their agents, servants, relatives and/or assignees or anyone claiming under them from trespassing, disposing/selling, transferring, commencing any kind of construction on, charging and/or in any other way whatsoever interfering with, or any acts which are inconsistent with the Plaintiffs'/Applicants' ownership and possession of the land parcel Kabete/Kibichiko/4166, Kabete/Kibichiko/4167 and parcels subdivided from Kabete/Kibichiko/906 in respect to Maisonettes No. 47, 40,2 and 37, owned by the 1st, 2nd, 3rd, 4th 5th and 6th Plaintiffs/ Applicants.
 - f. That pending the hearing and determination inter partes of this application, this Honourable court be pleased to issue preservation orders of the suit properties pending reference to arbitration.
2. The application is premised on the grounds that the Applicants purchased maisonettes erected on the suit properties free of encumbrances from the 1st and 2nd Defendant/Respondents and made the requisite payments and took possession to date. They learnt that the 1st and 2nd Defendant/Respondent caused the said properties to be charged by the 3rd Defendant/Respondent for a loan without their knowledge and consent and that the 3rd Defendant/Respondent is now threatening to auction the said properties as such the orders sought should be granted.
 3. Gloria Wakhu, the 2nd Applicant swore her affidavit in support of this application on her own behalf and on behalf of her co-applicants. She averred that vide a sale agreement dated 30/11/2017 the 1st Applicant entered into a sale agreement with the 1st and 2nd Respondents for sale of Apartment No. C36 on the 10th Floor, Block C which was to be erected on the land parcel Title Number Kabete/Mwimuto T.136 & Kabete/Mwimuto T.137, however the same didn't materialize as the same was terminated vide Deed of Termination of agreement dated 30/11/2017 and the 1st Applicant was offered Maisonette no. 47 erected on Kabete/Kibichiko/906 (Kitusuri Gardens) free from all encumbrances and consequently, a sale agreement dated 30/11/2017 was executed between the 1st Applicant and the 1st and 2nd Respondent and a deposit of 2 million was paid to the 2nd Respondent and a receipt was issued and the balance was paid as per the terms of the sale agreement. The completion date was agreed



- between the 1st Applicant and the 1st and 2nd Respondent to be not later than 8/08/2020. Upon full payment, the 1st Applicant took possession of the Maisonette no. 47 and has been staying there to date.
4. She contended that on 20/09/2017 she was offered maisonette no. 40 erected on Kabete/Kibichiko/906 which was free from all encumbrances and on 29/8/2018 she entered into a sale agreement with the 1st and 2nd Respondent whereby she paid the purchase price and the completion date was agreed to be on or before 8/8/2020. Upon making full payment she took possession of the maisonette no. 40 and has been staying there to date. On 9/2/2018, the 3rd and 4th Applicants jointly entered into a sale agreement for sale of maisonette no. 37 as in the offer letter dated 25/6/2015. On 9/2/2018, the 1st and the 2nd Respondents changed the property purchased by the 3rd and 4th Respondents and they further signed a deed of termination of the agreement dated 9/2/2018 and they were offered Maisonette No. 6 erected on Kiambaa/Thimbigua/7697 'Maya Residence'. The said agreement was also terminated and 3rd and 4th Applicants were relocated to Maisonette No. 2 erected on Kabete/Kibichiko/906 and a sale agreement dated 8/9/2020 was executed and on 16/10/2020 they took possession upto date. Further, that on 18/7/2014, the 5th and 6th Applicants jointly entered into a sale agreement for purchase of Maisonette no. 107 erected on Kabete/Kibichiko/906. That due to failure by the 1st and the 2nd Respondents to honour their obligations, the 5th and 6th Applicants were transferred to Maisonette no. 37 erected on the same Kitusuri Gardens and that they took possession pursuant to a letter dated 16/12/2020 but to date they have never received the title and/or completion documents. Maisonette 13, 11, 10 and 23 were offered to the 7th Applicant on Kitusuri Gardens on 1/4/2015. On 5/10/2016 the 7th Applicant entered into an agreement for Maisonettes no. 13, 11, 10 and 23 on Kabete/Kibichiko/306 and on 24/7/2019 he signed a deed of termination in exchange of Maisonettes no. 4 and 120 on Kabete/Kibichiko/4166 and Kabete/Kibichiko/4167 and has been living there to date free of encumbrances. It is until recently that the Applicants learnt that their respective units are charged with the 3rd Respondent without their knowledge and consent. The suit parcels were to be subdivided and each was to be given a title in respect of their maisonette but the 1st, 2nd, 3rd, 4th, 5th and 6th Applicants were never issued with their titles. The 7th Applicant's units have been charged for Kshs. 422,000,000/= and that the 1st and the 2nd Respondents have refused to supply the Applicants with the completion documents. She further averred that the 3rd Respondent's agents have been visiting them threatening them that they will auction their properties as the 1st and 2nd Respondents have failed to service the loan. The Applicants are apprehensive that the Respondents who seem to be working in cohorts to deprive them of their property are likely to sell their maisonettes unless the court intervenes by issuing the orders sought.
5. John Mwangathe Head of Remedial Management Department at Ecobank Kenya Limited swore the replying affidavit dated 10th November, 2023 on behalf of the 3rd Respondent. He deposed that the 3rd Respondent was not a party to the sale agreements between the Applicants and the 1st and 2nd Respondents. On 6/3/2018, they granted the 2nd Respondent a loan of Kshs. 422,000,000 secured by a charge over Kabete/Kibichiko/906 and a further debenture over the assets of the 1st Respondent which was loan was to be paid within 12 months after a 12 months moratorium after disbursement. The account fell into arrears and the 1st and 2nd Respondent even after several demands failed to regularize the account as such the 3rd Respondent issued the relevant notices in exercise of their statutory power of sale. The 3rd Respondent issued a caveat that they financed the said properties and any payments should be paid through them. The mother title was subdivided and was discharged to give way to a replacement charge for the resultant titles. The Applicants even after being aware of the caveat failed to pay money through the 3rd Respondent as such the 3rd Respondent is not entitled to release or discharge any of their titles. In any case, the current possession by the Applicants was said not to have been approved by the 3rd Respondent. He averred that the sale agreements between the Applicants and the 1st and



2nd Respondent were signed between 2016 and 2020 when the suit property had already been charged and a search would have relieved the position as such the Applicants cannot allege that the properties were sold free of encumbrances. The 3rd Respondent did not require consent of the Applicants for the 2020 replacement charge as the same was to discharge the mother title to allow for its sub division. The Applicants were said to have been aware that the title to their property had been charged by the 3rd Respondent and would only receive their titles once the 1st and 2nd Respondents cleared their loan with the bank. The Applicants claim was said to be with the 1st and the 2nd Respondent as they are the ones who sold properties to them and the claim against the 3rd Respondent should be dismissed. In any case it was contended that the Applicants have not established a prima facie case and the case is brought in bad faith to deprive the 3rd Respondent of its right to recovery.

6. The 1st and the 2nd Respondents did not file their response to the Applicants' application.
7. The application was canvassed by way of written submissions.

Applicants' Submissions

8. The applicants submit that they have established a prima facie case while relying on the decision of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR. The Applicants aver that they are bonafide purchasers as such have a right which the 3rd Respondent wants to alienate. The 5th and the 6th Applicants were said to have entered into an agreement for sale in 2014 before the properties were charged in 2015. The Applicants aver that there was material non-disclosure that the property was encumbered and the information was only available after full purchase price had been paid and when the 7th Applicant was undergoing a transfer between units. The 1st and 2nd Respondents advocates were accused of omitting to disclose that the properties in question were encumbered. The Applicants have proved their payment as such they have established that they have a prima facie case. The Applicants submit that upon full payment they settled on the suit properties with their families and that there is a looming auction due to the failure by the 1st and 2nd Respondents in payment of the loan as such they will suffer irreparable loss if the orders sought are not granted. Reliance was placed in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR. With regard to the balance of convenience, the Applicants submit that the same should tilt in their favour as they are innocent purchasers for value. Reliance was placed in the case of *Tritex Industries Limited & 3 others v National Housing Corporation & another* [2014] eKLR.

3rd Respondent's Submissions

9. The 3rd Respondent submits that the suit properties have been charged by the 3rd Respondent and the 1st and the 2nd Respondent should not transfer the charged property without the consent of the 3rd Respondent as such the current sale and possession thereafter was not approved by the 3rd Respondent. The 3rd Respondent avers that the sale agreements were signed when the suit property had already been charged to the 3rd Respondent and if the Applicants conducted due diligence they would have discovered the Charges. A caveat was issued by the 3rd Respondent and none of the Applicants paid the purchase price through the 3rd Respondent. The 3rd Respondent contends that they are not a party to the sale agreements as such the Applicants are prevented from imposing rights on a party that is not a party to the contract and the Applicants claim lies with the 1st and 2nd Respondent. Reliance was placed in the case of *Maheshkumar Popatlal Shah v Highgrove Holdings Limited & another* [2020] eKLR. The Applicants were said to have failed to establish a prima facie case. Further it was submitted that if the Applicants will suffer any loss the same can be compensated by way of damages as the damages are quantifiable. Reliance was placed in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA



No. 77 of 2012 [2014] eKLR. Lastly the 3rd Respondent avers that if the injunction is issued, there is a likelihood that the outstanding amount will grow higher due to interests as such the 3rd Respondent stands to suffer the greater injustice if the orders sought are granted as such the balance of convenience should tilt in its favour.

Issues For Determination

10. Having considered the application by the Applicants, the replying affidavit and the rival submissions, the main issue arising for determination is whether the Applicants are deserving of the order for preservation and/or temporary injunction sought.

Analysis

11. The law regarding grant of injunctions is found in Order 40 Rule 1 of the Civil Procedure Rules which provide 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;
- (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 order.”

11. The Applicants sought for a temporary injunction as against the Respondents as there is a looming auction over the suit properties due to the failure by the 1st and the 2nd Respondent to service the loan due as ranted by the 3rd Respondents.

12. The conditions for grant of injunctions are well settled in the case of *Giella v Cassman Brown & Co. Ltd* [1973] E.A 358 where it was held that: -

“The conditions for the grant of an interlocutory injunction are 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 normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be doubt, it will decide an application on the balance of convenience.”

13. The Court of Appeal in the case of *Mrao Ltd v First American Bank Of Kenya Ltd* [2003] eKLR gave a determination on a prima facie case. The court stated that:

“...in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. The Applicants aver that they entered into sale agreements with the 1st and 2nd Respondent over the sale of maisonettes on the suit land and that they subsequently made full payment and took possession



but were never issued with the titles to the said units and only became aware of the existing Charge later as such the 3rd Respondent should be restrained from auctioning the said properties as they are innocent purchasers for value.

15. The 3rd Respondent contends that the 1st and the 2nd Respondents applied for a loan which was secured by a charge over the suit properties. By the time the Applicants were purchasing the suit properties the Charge was already in place. In any case, the 3rd Respondent is not a party to the sale agreements between the Applicants and the 1st and 2nd Respondent as such the orders sought should not be granted. The Applicants claim was said to lie with the 1st and the 2nd Respondents.
16. The court in the instant application is required to satisfy itself that there is a prima facie case established.
17. In the case of *Silvester Momanyi Marube v Guizar Ahmed Motari & Another* [2012] eKLR, Odunga J. held that: -

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively.”

18. The court at this stage is not required to determine the merits and demerits of the Applicants' claim. The court is only required to determine whether the Applicants have established a prima facie case or irreparable loss or in whose favour the balance of convenience tilts.
19. It is clear from a perusal of the sale agreements between the Applicants and the 1st and 2nd Respondents that the same were entered between the year 2016 and 2020 whereas the suit properties were charged on 24/2/2015. There is also evidence that the existence of the charge was indicated in the agreements that the properties were currently charged with Ecobank. The Respondents have provided documentation that they notified the general public that they had acquired a charge over the said suit properties and that any payments in regard to the sale and/or purchase of the units should be made through the bank.
20. The Applicants aver that they only became aware of the charge after payment of the purchase price. This averment on awareness can only be tested by evidence at trial and whether the 3rd Respondents made its interest over the suit properties known to the general public and whether that same information was also provided in the sale agreements and whether a search at the lands registry and whether the 3rd Respondent was privy or a party to the sale together with the Applicants claims of material non-disclosure are all issues that can only be addressed at the trial.
21. Be that as it may, at this point it is not in dispute that the 1st and the 2nd Respondent had defaulted in the loan repayment and unless otherwise demonstrated by the 1st and the 2nd Respondents that the 3rd Respondents right to sale has not crystalized, or the efforts being made to redeem the said properties and/or that the 3rd Respondent has not followed the required procedure in its exercise of its statutory power of sale. Unfortunately, the 1st and the 2nd respondents failed to participate in these proceedings to answer the above questions. Therefore there are no good reasons to restrain the 3rd Respondent from exercising its statutory right of sale



22. In the circumstances, this Court is satisfied that the Applicants have not established that they have a prima facie case against the 3rd respondent. This was the position in the case of Naftali Ruthi Kinyua v Patrick Thuita & another [2015] eKLR where the Court of Appeal stated that:-

“With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid v Ethicon Limited [1975] AC 396 stated thus:-

‘If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to an interlocutory relief.’”

23. This Court is satisfied that any loss that the Applicants may suffer can be compensated by way of damages as the damages are quantifiable. Refer to the case of Nguruman Limited v Jan Bonde Nielsen & 2 others CA No.77 of 2012 [2014] eKLR.

24. On the last key principle, there is a likelihood that the accruing interest on the outstanding amount will continue to accrue leading to a higher debt as such the 3rd Respondent stands to suffer the greater injustice if the orders sought are granted as such the balance of convenience tilts in its favour.

25. In the circumstances this Court is satisfied that the Applicants are not deserving of the order for preservation and/or temporary injunction sought and that the application is lacking in merit

Findings And Determinations.

26. For the forgoing reasons this Court makes the following findings and determinations.

- i. The application is found to be devoid of merit and it is hereby dismissed.
- ii. Costs shall be in the Cause.
- iii. Mention on 2/07/2025 before the Deputy Registrar for pre-trial.

DATED SIGNED AND DELIVERED VIA TEAMS THIS 23RD DAY OF MAY, 2025.

A. MSHILA

JUDGE

In the presence of:-

Sanja -Court Assistant

N/A for the Applicants

Fundi for the 3rd Respondent

