



Mama Watoto Supermarket v NCBA Bank Kenya Plc (Civil Case E006 of 2025) [2025] KEHC 8238 (KLR) (11 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE E006 OF 2025
S MBUNGI, J
JUNE 11, 2025**

BETWEEN

MAMA WATOTO SUPERMARKET APPLICANT

AND

NCBA BANK KENYA PLC RESPONDENT

RULING

1. The applicant herein filed a motion dated 25th March, 2025 under Certificate of Urgency seeking the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this Application, injunctive orders be issued against the Defendant/Respondents, their agents, their assignees, their nominees or their successors from advertising, offering for sale, auctioning either by private treaty or public auction, transferring, alienating, leasing, entering upon, taking possession of or otherwise dealing with property known as Kakamega/Municipality/Block1/83,Kakamega/Municipality/ Block1/84,Kakamega/Town/Block 11/120, Butso/ Shikoti/ 1780 and Kakamega/Town Block /11 /119.
 - c. That pending the hearing and determination of this Suit, injunctive orders be issued against the Defendant/Respondents, their agents, their assignees, their nominees or their successors from advertising, offering for sale, auctioning either by private treaty or public auction, transferring, alienating, leasing, entering upon, taking possession of or otherwise dealing with property known as Kakamega/Municipality/Block 1/83, Kakamega/ Municipality / Block 1/84,Kakamega/Town/Block 11/120, Butso/ Shikoti/ 1780 and Kakamega/town Block/ 11/119.



- d. That the Defendant/ Respondent be directed to render and deliver to the Plaintiff a true and correct account and the entire statement of account of the loan account.
 - e. That the costs of this application be borne by the Defendants/Respondents herein.
2. The application was premised on the grounds appearing on the face of the motion and supported by the affidavit sworn by Paul Kahiu Waweru, a director of the Plaintiff/Applicant. He deponed that the Plaintiff entered into a loan agreement with the Defendant on or about 14th May 2024 in the sum of KShs. 201,687,000/=, which was secured by several properties including those now threatened with auction.
 3. It was the Applicant's contention that, as of 24th March 2025, it had repaid KShs. 104,444,964.96/= and that additional payments were still ongoing despite difficult economic conditions. The loan agreement, according to the Applicant, provided for a review of terms by or before September 2024.
 4. The Applicant further avers that notwithstanding these repayments, the Respondent issued a statutory notice of sale intending to auction the secured properties, which action was alleged to be premature and procedurally defective. The Respondent is said to have failed to consider or respond to a settlement proposal sent by the Applicant on 20th February 2025.
 5. The Applicant states that the threatened sale is unlawful and irregular, and that unless restrained, the Plaintiff would suffer irreparable harm, including loss of critical business assets. It maintains that it has remained committed to loan repayment even under prevailing financial challenges, and that the loan account has never been non-performing. The Applicant also notes that sales proceeds from its business continue to be deposited in accounts held with the Respondent.
 6. The affidavit also disputes the loan balance claimed by the Defendant, stating that the amount of Kshs. 205,050,828.20/= is exaggerated and inaccurate, warranting proper reconciliation of accounts prior to enforcement of any recovery action.
 7. Vide a replying affidavit dated 22nd April, 2025, sworn by Christine Wahome, Senior Legal Counsel for the respondent, the Respondent opposed the Application and raised several grounds.
 8. The deponent averred that the Application is an abuse of court process and intended to frustrate the Respondent's statutory mandate of recovery and realization of charged securities.
 9. It was deponed that the statutory notice dated 11th October 2023 was properly issued in compliance with Sections 90 and 96 of the Land Act and duly served upon the Applicant. The deponent annexed a copy of the said statutory notice and proof of dispatch to support this claim.
 10. The Respondent contended that the Applicant had been in persistent default despite numerous demands, and had failed to engage meaningfully with the Respondent to regularize the loan account, thereby necessitating the commencement of the realization process.
 11. The deponent further averred that the Applicant had previously made proposals to settle the outstanding amounts but had not honored the same, undermining the credibility of its current plea for injunctive relief.
 12. The Respondent argued that the Applicant has not demonstrated a prima facie case with a probability of success, nor shown that it stands to suffer irreparable harm that cannot be compensated by damages.
 13. It was also asserted that the balance of convenience tilted in favor of allowing the Respondent to proceed with the exercise of its statutory power of sale, having complied with all legal requirements.



14. In a further affidavit sworn on 7th May, 2025 by Paul Kahiu Waweru, the applicant deponed that there were glaring discrepancies in the figures presented by the respondent. He averred that the Applicant had so far repaid KShs. 108,945,095.68 out of a total borrowed amount of KShs. 204,000,000/=, and attached a copy of the statement of loan account marked “PKW 1.”
15. According to the Applicant, the outstanding balance as per its records is KShs. 148,748,902.78/=, in contrast with the Respondent’s stated balance of KShs. 172,390,900.73. This discrepancy, the Applicant argues, is significant and requires judicial scrutiny to ensure that the Plaintiff is not unfairly burdened with paying more than it owes.
16. The Applicant deponed that the orders sought in the present application were critical to preventing prejudicial and premature enforcement while the actual amount owed is accurately determined. It also emphasized its continuing efforts to settle the loan, asserting that payments are ongoing and that the Plaintiff had demonstrated good faith throughout.
17. After listening to the counsels of both parties during hearing interpartes on 23.04.2024, the court directed that the application be canvassed by way of written submissions. Both parties have complied. On record are the applicant’s submissions dated 7th May, 2025 and the respondent’s submissions dated 22nd May, 2025.

Applicant’s Case.

18. The Applicant submitted that the issue for determination is whether the Applicant has satisfied the legal threshold for the grant of a temporary injunction. In support of this position, the Applicant relied on the established principles set out in *Giella v. Cassman Brown* [1973] EA 358, which require that the Applicant demonstrate a prima facie case with a probability of success, irreparable harm that cannot be adequately compensated by damages, and that if the Court is in doubt, the matter be decided on a balance of convenience.
19. On the issue of a prima facie case, the Applicant submitted that it has been consistent in making repayments towards the loan, and this fact was not in dispute. Specifically, the Applicant pointed out that a payment of KShs. 40,000,000/= was made in March 2025, yet the Respondent failed to account for this in its claimed outstanding balance. It was contended that the Applicant has paid over 50% of the amount disbursed and that the Respondent’s denial of this fact raises legitimate factual disputes that should be ventilated during trial. The Applicant therefore submitted that these circumstances reveal the existence of a genuine and arguable case which meets the threshold of a prima facie case as defined in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR.
20. On the second condition of irreparable harm, the Applicant submitted that all the charged properties have been put up for auction. It was argued that if the auction is allowed to proceed, the Applicant and its directors would lose their homes and business premises, rendering them destitute. The Applicant argued that no amount of damages would be sufficient to compensate for such loss, given the scale of disruption to livelihood and business. The Applicant placed reliance on *Joseph Siro Mosiomo v. Housing Finance Company of Kenya Ltd & 3 Others* [2008] eKLR, emphasizing that the right to property under Article 40 of *the Constitution* should not be undermined simply because damages are theoretically available.
21. Regarding the third condition, the balance of convenience, the Applicant submitted that it stands to suffer significantly more than the Respondent should the injunction be denied. The Applicant contended that while the Respondent continues to recover its dues, notably, with payments being applied first to interest and penalties before reducing the principal, the Applicant risks losing its source



of livelihood. The Respondent, on the other hand, would not suffer comparable prejudice as payments are still being received. The Applicant referred to *Hezron Kamau Gichuru v. Kianjoya Enterprises Ltd & Another* [2022] eKLR, where the Court observed that the balance of convenience lies with the party who stands to suffer greater harm should the interim relief be denied.

22. In conclusion, the Applicant submitted that it had satisfied all the requisite conditions for the grant of a temporary injunction. It urged the Court to preserve the subject properties pending the full hearing and determination of the main suit, in order to avoid rendering the proceedings nugatory and to protect its constitutional and commercial interests.

Respondent's Case.

23. It was the respondent's submission that the Applicant had not met the established threshold for the grant of an interlocutory injunction as laid down in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and restated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. The Respondent emphasized that an injunction is an equitable remedy granted only where the applicant demonstrates a prima facie case with a probability of success, likelihood of irreparable harm, and that the balance of convenience tilts in their favour.
24. On the issue of irreparable harm, the Respondent contended that the Applicant had failed to demonstrate with cogent evidence that it would suffer harm that could not be adequately compensated by an award of damages. The Respondent argued that the Applicant's assertions were speculative and unsubstantiated, noting that the value of the charged properties was ascertainable from the valuation reports on record.
25. The Respondent submitted that it is a reputable financial institution with the financial capacity to compensate the Applicant, if necessary. Consequently, any harm that may result from the exercise of its statutory power of sale could be redressed by an award of damages. The court was referred to *Wilstone Mdindi Mwawugunga v Kenya Women Microfinance Bank Plc* [2022] eKLR, where the court held that injunctive relief is unwarranted where a party fails to establish irreparable harm.
26. As to the balance of convenience, the Respondent maintained that it tilted in its favour. It presented evidence showing that the Applicant's total debt exposure stood at Kshs. 171,791,136.86, with arrears of Kshs. 48,819,824.12 as at 3rd April, 2025, which continued to accrue interest. It was the Respondent's case that the Applicant had several opportunities to redeem the property but failed to do so. If the arrears were settled, the accounts would be regularized.
27. Further, the Respondent submitted that it had complied with all statutory requirements under the *Land Act* and the *Land Registration Act* by issuing the necessary statutory notices, which had not been contested by the Applicant. Relying on *Willow Park Limited v Jamii Bora Bank Limited & Another* [2019] eKLR, the Respondent argued that a borrower who has defaulted on loan repayment, despite having received sufficient notice, does not deserve equitable relief from the court.
28. Lastly, the Respondent invoked the equitable maxim that "he who comes to equity must come with clean hands." Citing *Kyangavo v Kenya Commercial Bank Ltd & Another* [2004] eKLR, the Respondent submitted that the Applicant, having borrowed, utilized, and defaulted on the loan, could not now seek the aid of equity without having first fulfilled its financial obligations. The respondent prayed that the application be dismissed with costs.



Analysis and Determination.

29. I have carefully considered the application, the supporting affidavit, the replying affidavit, the rival submissions by parties and annexures attached.
30. The main issue for determination is whether the Applicant has satisfied the legal threshold for the grant of a temporary injunction as set out under Order 40 Rule 1 of the Civil Procedure Rules, and as reaffirmed in the landmark decision of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. The Court must examine whether the Applicant has established a prima facie case with a probability of success, whether it stands to suffer irreparable harm not compensable by damages, and whether the balance of convenience tilts in its favor.
31. This Court's power to grant injunctions is provided under Section 63(c) of the *Civil Procedure Act* and Order 40 Rules 1 and 2 of the Civil Procedure Rules. These provisions empower the Court to issue temporary injunctions where it is shown that the property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit, or where a party threatens to breach a contract or commit another wrongful act, in order to preserve the subject matter pending the hearing and determination of the suit.
32. The first question that arises is whether there exists a lawful and binding contract between the parties. It is not contested that the Respondent advanced a loan facility to the Applicant pursuant to a duly executed charge instrument over the suit properties. The Applicant has not disputed the existence of the loan agreement, nor has it alleged that the contract was procured by fraud, misrepresentation, or any other vitiating factor. Accordingly, the Court finds that the contract between the parties was valid and enforceable.
33. The Court further notes that the Respondent followed the prescribed statutory process in initiating the recovery of its loan. The Respondent produced evidence of service of the requisite notices, including a demand notice dated 30th August, 2024 following loan arrears by the applicant, statutory notice under Section 90(1) of the *Land Act* issued on 4th November, 2024, the notice of intention to sell under Section 96(2), and the redemption notice under Rule 15 of the Auctioneers Rules issued on 10th April, 2025. These have not been controverted by the Applicant.
34. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court held that once a chargor has defaulted in repayment and the chargee has complied with the statutory requirements, the chargee is entitled to exercise its statutory power of sale.
35. The Applicant does not dispute the fact of default or the outstanding loan arrears, but has expressed concern that the outstanding loan amount might be inaccurate. The Respondent annexed a detailed loan statement showing a financial exposure of Kshs. 171,791,136.86 and arrears of Kshs. 48,819,824.12 as at 3rd April 2025.
36. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal reiterated that the equitable remedy of injunction cannot be used to shield a party from the legal consequences of its own breach of contract or default.
37. Moreover, in *Wilstone Mdingi Mwawugunga v Kenya Women Microfinance Bank Plc* [2022] eKLR, the Court declined to grant an injunction where the Applicant had defaulted in repayment and the Respondent had complied with all statutory requirements. The Court emphasized that a reputable financial institution that can adequately compensate the borrower in damages should not be restrained from exercising its statutory power of sale merely on the basis of defaulting claims that are unsupported by cogent evidence.



38. In this case, the Respondent is a licensed financial institution capable of compensating the Applicant should any harm be established. The value of the charged properties is known and ascertainable from the valuation reports on record. As held in the case of Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR.

“The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.” (emphasis mine)

39. On the issue of irreparable harm, the Applicant submitted that it risks losing its source of livelihood if the suit properties are sold. However, this assertion was not supported by cogent or documentary evidence demonstrating that the properties are indeed income-generating or that their sale would cause injury that cannot be adequately compensated by damages.

40. The law is settled that irreparable harm must be actual, substantial, and not speculative. As stated in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR,

“if the loss or injury can be compensated by an award of damages, then an injunction should not issue since equity does not normally assist one to enforce a contract for which damages are an adequate remedy.”

Similarly, in Standard Chartered Bank of Kenya Limited & Another v Kaburu & Another [2022] KEHC 13546 (KLR), the Court found that the possibility of sale of charged property does not, per se, amount to irreparable harm if the loss is quantifiable and compensable in damages.

41. With regard to the balance of convenience, the Court must weigh the hardship likely to be suffered by each party. The Applicant argues that it stands to suffer more if the injunction is denied. However, the Respondent has established that it is owed a significant amount of Kshs. 171,791,136.86, with arrears of Kshs. 48,819,824.12 as at 3rd April 2025, which continues to accrue interest. Preventing the Respondent from realizing its security would continue to expose it to financial risk and deny it the ability to recover what is rightfully owed.

42. In Kyangavo v Kenya Commercial Bank Ltd & Another [2004] eKLR, the Court observed that “he who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights.” The Applicant, having failed to service the loan, cannot now turn to equity for protection without demonstrating willingness or effort to meet its obligations. The balance of convenience, therefore, tilts in favor of the Respondent.

43. Further, injunctive relief is equitable in nature and must be reserved for deserving cases. This position was enunciated in Wilstone Mdindi Mwawugunga v Kenya Women Microfinance Bank Plc [2022] KEHC 2696 (KLR) where the court held thus:

“The only remedy or cure in the treatment of a debt is, repayment. It will not be in the interest of justice for a lending institution which has discharged its obligation in a contract to keep begging for its money which is a key tool in trade. Courts should not be summoned to cover the guilt where such coverage will be at the detriment of the other party. On a balance of convenience justice tilts in the respondent’s favour.”



44. A borrower who has defaulted and refuses to regularize the loan account despite multiple statutory notices cannot benefit from equitable relief.

Conclusion and Disposition

45. For the reasons I have explained, I find that the Applicant has not satisfied the threshold for the grant of a temporary injunction as set out in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and affirmed in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR.
46. Accordingly, the Notice of Motion dated 25th March, 2025 lacks merit and is hereby dismissed with costs to the Respondent.
47. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF JUNE, 2025

S.N. MBUNGI

JUDGE

In the presence of:

Court Assistant: Elizabeth Agong'a.

Mr. Udoto for the appellant present online.

Mr Rotich for the respondent present online.

