



REPUBLIC OF KENYA



**Waweru (Suing as the Legal Representative of the Estate of Kenneth
Waweru Wanjau (Deceased)) v Family Bank Limited (Civil Case
E002 of 2023) [2025] KEHC 8888 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E002 OF 2023
A MSHILA, J
JUNE 20, 2025**

BETWEEN

**AGNES ELIZABETH GATHONI WAWERU PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KENNETH
WAWERU WANJAU (DECEASED)**

AND

FAMILY BANK LIMITED DEFENDANT

RULING

1. Before court is an application by way of Notice of Motion dated on 31st January, 2023 and brought under Section 1A, 1B of the [Civil Procedure Act](#), Order 40 rule 1 and 2, Order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The Plaintiff/Applicant sought for orders:-
 - a. Spent
 - b. THAT a temporary order of injunction do issue to restrain the defendant/respondent either by itself, its servants, agents and/or anyone else claiming under it from doing the following acts or any of them, that is to say; harassing, interfering with the Plaintiff's right of possession and/or access, advertising for sale, disposing of, selling by public auction evicting or otherwise leasing, letting or otherwise howsoever from interfering with the ownership to and or interest in all that piece of land known as land reference number RUIRU/MUGUTHA BLOCK 1/6XX5 pending interpartes hearing of this application.
 - c. THAT a temporary order of injunction do issue to restrain the defendant/respondent either by itself, its servants, agents and/or anyone else claiming under it from doing the following acts or any of them, that is to say; harassing, interfering with the Plaintiff's right of possession and/or



access, advertising for sale, disposing of, selling by public auction evicting or otherwise leasing, letting or otherwise howsoever from interfering with the ownership to and or interest in all that piece of land known as land reference number RUIRU/MUGUTHA BLOCK 1/6XX5 pending interpartes hearing of this suit.

2. The application is premised on the grounds that the deceased had offered RUIRU/MUGUTHA BLOCK 1/ 6XX5 as guarantor to secure a legal charge of Kshs.10,500,000/= to Liberty Group (E.A) Limited and upon his demise the Respondent ought to have served his intention to sell to the administrator of the deceased's estate. In the circumstances, the intended sale without first informing the deceased's estate was said to expose the deceased's estate to irreparable loss.
3. Agnes Elizabeth Gathoni Waweru the Legal Representative of the estate of Kenneth Waweru swore her affidavit in support of this application. She deponed that the deceased who was her son died of a road traffic accident on 7/3/2022. She stated that she was informed by her nieces on 23/12/2022 of a Notice of Intention to sell the deceased's property known as RUIRU/MUGUTHA BLOCK 1/6XX5 by the Respondent in its exercise of its right to sell. She stated that she learnt that the deceased had guaranteed a loan facility for Liberty Group (E.A) Limited with the title deed being security. She averred that the said notice is irregular as the Respondent ought to have served the administrators of the deceased's estate as such the Respondent was said to be denying the estate an opportunity to redeem the deceased's suit property. The court was urged to grant the orders sought as no prejudice will be suffered upon the Respondent as they still have power to sell LKT/ENKARIAK-RONGENA/3XX1 and 3XX2 and THIKA MUNICIPALITY BLOCK 19/1029 which were also charged as security for the advanced loan.
4. WAMBANI SYLVIA the Respondent's Legal Manager filed her replying affidavit dated 13th March, 2023. She stated that the applicant is well aware of the Chargor's obligations having received the notice of intention to sell. That the Respondent intends to accord the Applicant an opportunity to redeem the charged property. The Respondent deposed that prior to the issuance of the statutory power of sale, the Applicant had been issued with a 90 days' statutory notice of sale dated 30th August, 2022 for the arrears of Kshs. 26,183,701.01. The Applicant failed to pay and a further 40 days' notice of intention to sell dated 30/11/2022. The guarantee given by the Chargor was said to not be affected by the death of the guarantor.
5. The parties were directed to canvass the application by way of written submissions.

APPLICANTS' SUBMISSIONS.

6. The Applicant submits that she has demonstrated a prima facie case with a probability of success. Reliance was placed in the case of Mrao Vs First American Bank of Kenya Limited & 2 others (2003) KLR 12. The Applicant has provided a death certificate indicating that the Notice of Intention to sell was served on the guarantor who passed away on 7th March, 2022, nine (9) months prior to service. Reliance was placed in the case of Ragui vs Barclays Bank of Kenya Limited (2001) 1 KLR 647. The notices ought to have been served upon the administrators of his estate. The Applicant was said to be deserving of the orders sought to stop the bank from exercising its power of sale for want of form. The Applicant submits that she stands to suffer irreparable injury that cannot be compensated by an award of damages. That the Respondent should not be allowed to hinge on an illegality to infringe on the Applicant's right. Reliance was placed in the case of Bakari (Suing as the Administrator of the Estate of Zuhura Salim Ali, Deceased) vs Gulf African Bank Limited & 2 others (Civil Appeal E047 OF 2022) (2023) KEHC 2493 (KLR) (24 March, 2023). The balance of convenience was said to tilt in favour of the Applicant as the Respondent acted on an illegality by effecting statutory notices to a deceased



person. Reliance was placed in the case of Suleiman vs Amboseli Resort Limited, Civil Case No. 1078 of 2003 Ojwang Ag. J (as he then was).

RESPONDENT’S SUBMISSIONS.

7. The Respondent submits that the Applicant doesn’t have a prima facie case and therefore prays that the court allows the bank to exercise its Statutory Power of Sale. It stated that, it is not in contention, that the deceased proprietor was in default as per the bank statements and the consequence for the default is that the Respondent exercises its Statutory Power of Sale. Reliance was placed in the case of Brits Freighters Limited v Standard Chartered Bank (K) LTD (2018) eKLR. The Applicant has not adduced any evidence that she informed the Bank about the Chargor’s demise. The Applicant has failed to demonstrate how she will suffer irreparable damage if the statutory power of sale is exercised. It submitted that it is pre-mature for the Applicant to claim that she has an interest in the suit property because the succession proceedings that would determine her interest have not been concluded. The Respondent averred that proper service was effected upon the Applicant who admitted to receiving the 40-day notice of intention to sell, which had been served in the same manner as the 90-day statutory notice. The court was invited to take judicial notice that the address reflected in the Applicant’s supporting affidavit is the same address used for service. At the time these notices were issued, the Applicant was already the administrator of the estate of the deceased property. The Respondent relies on the case of Wanjira Gategwa v Unaitas Sacco Society Limited & another (2021) eKLR.

ISSUES FOR DETERMINATION.

8. Having considered the application by the Applicant, the replying affidavit and the rival submissions, the main issue arising for determination is whether the Applicant is deserving of the order of temporary injunction sought.

ANALYSIS.

9. 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.”

10. The Applicant sought for a temporary injunction as against the Respondent as the intended sale without first informing the deceased’s estate was said to expose the deceased’s estate to irreparable loss.
11. The key principles for determining whether the Applicant is deserving of the injunctive orders sought are laid down in the case of Giella versus Cassman Brown (1973) EA 358. Similarly, in the case of



Kibutiri Vs Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR, the Court held that:

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also *E.A Industries Vs. Trufo ods* (1972) EA 420.”

12. On the first principle that is whether the Applicant has established a prima facie case; the Applicant avers that the Respondent issued a Notice of Intention to Sale dated 30/11/2022 addressed to Kenneth Waweru the Chargor who passed away on 7/3/2022. The Respondent ought to have been served upon the administrators of his estate as such the bank should be restrained from exercising its power of sale for want of form.
13. The Respondent contends that the consequence for the default is that the bank exercises its Statutory Power of Sale. The Respondent avers that proper service was effected upon the Applicant who admitted to receiving the 40-day notice of intention to sell, which had been served in the same manner as the 90-day statutory notice.
14. In the case of *Mrao versus First American Bank Of Kenya Limited & 2 Others* (2003) KLR 125, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”
15. The court in the instant application is required to satisfy itself that there is a prima facie case established. The court at this stage is not required to determine the merits and demerits of the Applicant’s claim. The court is only required to determine whether the Applicant has established a prima facie case.
16. In the case of *Silvester Momanyi Marube -Vs- 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.
17. The Applicant has expressed that she only learnt of the loan when she was informed that service of the notices for statutory sale had been effected by the Respondent. The Applicant herein is suing on behalf of the son who is deceased.
18. In the circumstances, the court therefore, is satisfied that the Applicant has demonstrated that she has a prima facie case having established that the deceased died on 7/3/2022 while the alleged notices are dated 30/11/2022 which is nine months after the death of the Chargor.
19. On the second principle the Applicant argues that she stands to suffer irreparable injury that cannot be compensated by an award of damages. The Respondent should not be allowed to hinge on an illegality



to infringe on her rights as such the court ought to protect the suit property so that the main suit is not rendered nugatory if the Respondent is not restrained from selling the suit property.

20. The Respondent contends that the Applicant has failed to demonstrate how she will suffer irreparable damage if the statutory power of sale is exercised. Further, that it is pre-mature for the Applicant to claim that she has an interest in the suit property because the succession proceedings that would determine her interest have not been concluded.
21. In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* (2014) eKLR irreparable loss was discussed thus;-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. 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 standard 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.”
22. This Courts considered view is that there is need to preserve property that is subject to court proceedings so as to protect the court from giving orders in vain upon hearing and determining a suit. Order 40, *Civil Procedure Act* gives court the discretion to issue orders which are in the nature of an injunction restraining dealings on property pending further orders by the court.
23. This Court is therefore, inclined to find that the Applicant and the Estate of the Deceased will suffer irreparable loss that cannot be compensated by way of damages in the event the suit property is sold as she has demonstrated that the alleged notices were served upon the Chargor who had passed away by the time of service and not the administrator of the deceased’s estate.
24. Further, to the fore going, this court finds that the balance of convenience tilts in favour of the Applicant as she stands to suffer the greater harm if the application is disallowed.
25. Refer to the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR where it was held that:-

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour 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”.
26. The upshot, this Court is satisfied that the application has merit and that the Applicant is deserving of the orders sought.



FINDINGS & DETERMINATIONS.

27. For the forgoing reasons this Court makes the following findings and determinations;
- a. This Court finds the application to have merit and it is hereby allowed;
 - b. A temporary order of injunction be and is hereby issued restraining the Respondent either by itself, its servants, agents and/or anyone else claiming under it from doing the following acts or any of them, that is to say; harassing, interfering with the Plaintiff/ Applicants right of possession and/or access, advertising for sale, disposing of, selling by public auction evicting or otherwise leasing, letting or otherwise howsoever from interfering with the ownership to and or interest in all that piece of land known as land reference number **RUIRU/MUGUTHA BLOCK 1/6XX5** pending hearing and determination of this suit.
 - c. The Applicant to provide the Respondent with a written letter of undertaking for security for costs and damages within seven (7) days hereof
 - d. Costs shall abide the outcome of the suit.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 20TH DAY OF JUNE, 2025.

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

Kiiru for Respondent

N/A for applicant

