



Windsor View Gardens Limited & another v Cooperative Bank of Kenya Limited (Civil Case E683 of 2024) [2025] KEHC 8489 (KLR) (Commercial and Tax) (5 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E683 OF 2024
F GIKONYO, J
JUNE 5, 2025**

BETWEEN

WINDSOR VIEW GARDENS LIMITED 1ST PLAINTIFF

JILK CONSTRUCTION COMPANY LIMITED 2ND PLAINTIFF

AND

COOPERATIVE BANK OF KENYA LIMITED DEFENDANT

RULING

1. The plaintiffs filed the notice of motion dated 13th November 2024 under Order 40 of the Civil Procedure Rules seeking a temporary injunction to restrain the defendant from selling, alienating and/or dealing with the 1st plaintiff's use, ownership, title to and/ or legal interest in all that parcel of land known as L. R. No. 22XX2 (I. R. 8810).
2. The application is premised on the grounds outlined in the supporting affidavit sworn by Sammy Maina Kamau on 13th November 2024.

Background.

3. The plaintiffs took out various loan facilities from the defendant bank. In February 2015, the 1st applicant took out a loan facility of Kshs. 164,000,000/-, secured by a First Legal Charge dated 18th February 2015 over L. R. No. 22XX2 (I. R. 88101) (the charged property). The 2nd plaintiff took out loan facilities of Kshs. 164,000,000/- and Kshs. 29,000,000/-, secured by a Further Charge dated 24th January 2020 and Second Further Charge dated 27th November 2020, respectively, over the charged property.



4. The defendant sought to sell the charged property based on a merged tripartite default of the facilities, prompting the plaintiffs to file this suit through a plaint dated 13th November 2024. The plaint was filed along with the application that is under consideration.

Grounds.

5. The grounds in support of the application are, as follows:-
 1. The intended purported statutory sale of the charged property by the defendant is unlawful, unjustifiable and/or unconscionable.
 2. The defendant has in total violation and/or disregard of the law purported to subject the plaintiffs to alleged unlawful interests as the basis of the said purported sale.
 3. The interest forming the bulk of the alleged amount owed by the plaintiffs is unlawful and has no legal basis.
 4. The defendant did not issue default notices to the 1st plaintiff.
 5. It is in the interest of justice that the orders sought be granted.
 6. The plaintiffs submitted that the defendant has unlawfully merged the three facilities and is purporting to sell the suit property on the basis of tripartite default. It contended that the three facilities secured by the charged property were neither intended to run concurrently nor to be ranked *pari passu*. It also contended that each facility was separate and distinct, with independent obligations and terms.
 7. In addition, the plaintiffs submitted that the defendant's failure to issue a default notice to the 1st plaintiff constitutes a breach of fiduciary duty.
 8. The plaintiffs further argued that the interest charged, which constitutes a bulk of the alleged outstanding amount, has been illegally imposed on the facilities.
 9. The plaintiffs asserted that the sale of the charged property would result in irreparable harm that cannot be compensated by an award of damages. They also asserted that the premises are well established and generate rental income, essential for the 1st plaintiff's continued operation as a going concern. That if the defendant proceeds to sell, the 1st plaintiff will be deprived of rental income, rendering it unable to offset any alleged default on the financial facilities, resulting in irreparable harm which cannot be compensated by an award of damages.
 10. The plaintiffs added that the balance of convenience weight in their favour as the loss and damage that would be occasioned by the sale would result in irreparable harm.
 11. The plaintiffs relied on *Giella v Cassman Brown & Co Ltd*, (1973) E. A. 38, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR, *Nguruman Ltd v Jan Bonde Nielsen & 2 Others*, [2014] eKLR, *JM v SMK & 4 Others* [2022] eKLR, *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR and *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargarora & Another* [2019] eKLR.

Response.

12. In response, the defendant bank filed a replying affidavit, sworn by its special assets remedial officer, Kennedy Odhiambo, on 9th December 2024, and written submissions dated 5th March 2025.



13. The 1st and 2nd plaintiffs defaulted on their respective facilities, and the defendant issued various demands, notifying them of the extent of the default and granting them time to pay the arrears, specified below:-
 1. Demands dated 7th and 28th February 2023 to the 1st plaintiff
 2. Demands dated 1st March 2024, 24th May 2024, 24th June 2024, 4th July 2024 to the 2nd plaintiff.
 3. Demand dated 30th September 2024 to both the 1st and 2nd plaintiffs.
14. The 1st and 2nd plaintiffs persisted with default. Consequently, the defendant thereafter issued a 90-day statutory notice dated 25th July 2024 to the plaintiffs. The plaintiffs failed to rectify the default. This led the defendant to issue the plaintiff with a statutory 40-day notice of intention to sell dated 7th November 2024.
15. As at 30th November 2024, the 1st plaintiff had been in arrears for 35 days, while the 2nd plaintiff had been in arrears for 382 and 386 days in relation to their respective facilities.
16. The Second Further Charge dated 27th November 2020 provides that it shall rank *pari passu* in all respects with the first charge, the further charge and that the Second Further Charge would prevail in case of any conflict.
17. The defendant contended that the allegation that the charges and their obligations were neither to run concurrently nor to be ranked *pari passu* is a misrepresentation of the facts, aimed at misleading the court.
18. The instant application and the injunctive orders sought are frivolous attempts by the plaintiffs to circumvent the loan agreements.
19. The application is frivolous and vexatious.
20. The defendant submitted that the plaintiffs have not satisfied the legal standard to merit the grant of an injunction. It argued that the parties had a contractual agreement, which was voluntary, which the court cannot rewrite. It also argued that the plaintiffs have not provided any particulars or calculations to demonstrate that the interest charged was outside the scope permitted by the law or the agreement.
21. The defendant also submitted that since the applicants have not established a *prima facie* case, the court should not delve into the other conditions.
22. The relied on *Giella v Cassman Brown & Co Ltd*, [Supra], *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [Supra], *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [Supra], *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Limited* [2002] E. A. 503, [2011] eKLR, *Mugo v Equity Bank Limited* [2023] KEHC 24167 (KLR), *Gulf African Bank Limited v Mohamud Sheikh Hussein* [2018] eKLR

Analysis and Determination.

23. In determining whether to grant an injunction under Order 40 of the Civil Procedure Rules, the court looks at the circumstances and justice of the case whilst asking the traditional questions encapsulated in the case of *Giella v Cassman Brown & Co Ltd* [supra]:
 - a. Whether the applicant has established a *prima facie* case with a probability of success;
 - b. Whether the applicant will suffer irreparable harm that cannot be compensated by damages if the injunction is not granted; and



- c. If the court is in doubt, where the balance of convenience lay.
24. A prima facie case is established upon material presented, “... that there exists a right which has apparently been infringed by the opposite party...” (Mrao Ltd v First American Bank of Kenya Ltd & 2 others [supra]); ‘or is threatened with violation.’ (Nguruman Ltd v Jan Bonde Nielsen 8 2 Others, [supra])
25. In this case, the plaintiffs have advanced three major grounds.
Pari passu ranking
26. First, they contended that the defendant has unlawfully merged the three facilities and is purporting to sell the suit property on the basis of tripartite default. On the other hand, the defendant asserted that the second further charge dated 27th November 2020 provides that it shall rank pari passu in all respects with the first charge, the further charge and that the second further charge would prevail in case of any conflict.
27. Recital B of the Second Further Charge reads as follows:-
“It has been agreed between the parties that this Further Charge shall rank pari passu in all respects with the Existing Charge and that, in the case of any conflict between the provisions of the Existing Charge, the Further Charge and this Second Further Charge (hereinafter “Charge”), the provisions of this Charge shall prevail.”
28. From the above, it was agreed between the parties that the second further charge would rank pari passu with the first and further charges. According to Black’s Law Dictionary, pari passu means “by an equal progress”. Therefore, the first ground fails.

Illegal interest.

29. The second ground advanced by the plaintiff is that the defendant’s purported sale of the charged property is unlawful as it is based on illegal interest rates.
30. The plaintiffs did not produce any evidence to demonstrate that the interest charged was over that which was agreed upon or was not permitted by or was against the law. He who alleges proves. Illegal interest must be established.
31. In *Pelican Investments Ltd v National Bank of Kenya Ltd* [2000] 2 EA 488 (CCK) it was held that: -
“Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest...in any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction.”
32. The second ground, therefore, also fails.

Default and Statutory notices.

33. The plaintiffs contended that the defendant did not issue the 1st plaintiff with a default notice.
34. The defendant demonstrated through annexures “KO4a”, “KO4b” “KO4g” and “KO6” that it served the 1st plaintiff the default notices and statutory notices. Thus, the third ground also fails.



35. It is worthy of note that, whereas the plaintiffs argued that they resumed payment of the loan, the evidence show they are in massive default.
36. On the basis of the material before the court, it is difficult to conclude that there is any right that has been infringed or threatened with violation.
37. On the whole, therefore, I find that the plaintiffs have not established a prima facie case with a probability of success.
38. The proposition that the plaintiffs will suffer irreparable injury is not supported in evidence. And, in the circumstances of this case, the balance of convenience tilts in favour of refusing the injunction.

Disposal.

39. In the upshot, the plaintiffs' application dated 13th November 2024 is dismissed for want of merit with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 5TH DAY OF JUNE, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Muchiri for Defendant/Respondent

Okwiri for plaintiff – Absent

CA Kinyua

