Kahuna Construction Limited v Equity Bank (Kenya) Limited (Civil Suit E189 of 2023) [2025] KEHC 9623 (KLR) (Commercial & Admiralty) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9623 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

CIVIL SUIT E189 OF 2023

MA OTIENO, J

JULY 3, 2025

BETWEEN

KAHUNA CONSTRUCTION LIMITED ..... PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED ..... DEFENDANT

RULING

1. For determination is the Plaintiffs' Notice of Motion application dated 4th May 2023 brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 40 Rules 1(a), 2(1), and 2 of the Civil Procedure Rules. The application seeks orders that:

    i. Spent

    ii. A temporary injunction to restrain the Defendant, whether by itself, its agents, servants, or any other persons acting on its instructions, from advertising, selling, transferring, alienating, disposing, or selling by public auction the suit property known as Dagoretti/Uthiru/1417, Nairobi County, pending the hearing and determination of this application.

    iii. A permanent injunction restraining the Defendant in similar terms, pending the hearing and determination of the main suit.

    iv. Costs of this application be provided for.

2. The application is supported by the affidavit sworn on 4th May 2023 by Belinda Njeri Kamuyu, the sole director of the Plaintiff/Applicant, and is premised on the grounds listed on the face of the application.

3. The Plaintiff alleges unlawful and premature attempts by the Defendant to realize the security over the suit property for a loan which then stood at Kshs. 2,660,513.50. While admitting that it had defaulted

in repaying a loan facility, the Plaintiff asserts that it is willing and capable of liquidating the said loan once it receives payment from a contract it executed with the government.

4. The Plaintiff contends that the default on its part was occasioned by unforeseen economic hardships caused by the COVID-19 pandemic, and the failure by the government (Kenya Defence Forces), one of its clients, to pay for the contracts executed with the Plaintiff.

5. It is further the Plaintiff's position that it is likely to suffer irreparable loss and damage if the subject property is sold, since the property serves as its primary source of income and houses several commercial businesses, including a car wash, restaurant and a bar from which it obtaines monies to service the debt. The Plaintiff asserts that the disposal of the suit property will not only cause untold emotional stress but is also likely to lead to the loss of employment for its employees.

6. On 8th May 2023, the Court issued interim injunctive relief in terms of prayer (2) of the application, subject to the Plaintiff depositing Kshs. 2,000,000 within twenty-one (21) days. The Plaintiff failed to comply with the said condition, and the interim injunction was to lapse automatically as ordered

7. The Defendant opposes the application vide the affidavit of Patricia Nzenge, the Defendant's Credit Manager, sworn on 28th October 2024, and a further affidavit by George Ndomeh sworn on 6th February 2024. According to the Defendant, the statutory notices under Sections 90 and 96 of the *Land Act* were properly issued.

8. The Defendant further avers that the Applicant is not entitled to the equitable remedy of injunction since it has not only defaulted in loan repayment, but has also failed to honour the court order issued on 8th May 2023, requiring the Plaintiff to deposit Kshs. 2,000,000 within twenty-one (21) days, as a precondition of the interim injunction granted by the court then.

9. The Defendant, therefore, asserts that the Plaintiff, having admitted indebtedness to the Defendant, has failed to establish any of the principles for the grant of an interlocutory injunction as established in Giella v Cassman Brown & Co Ltd (1973) EA 358.

10. The Application was canvassed by way of written submissions. The Plaintiff filed its submissions dated 12th November 2024, whilst the Respondent filed theirs dated 5th December 2024.

Analysis and Determination

11. Having considered the application, the affidavits filed in response thereto, and the rival submissions, I find the sole issue for determination in this matter to be whether the applicants have met the threshold for granting the injunctive relief sought.

12. The relevant provision for granting a temporary injunction is Order 40 (1) of the Civil Procedure Rules, 2010, which stipulates that:

> " 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; 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."

13. In considering an interlocutory injunction application, Courts are guided by the principles laid down in Giella v Cassman Brown & Co. Ltd [1973] E.A. 358, as further reinforced in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2013] eKLR. The applicable tests are:-

    a. The applicant must show a prima facie case with a probability of success;

    b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

    c. If the court is in doubt, it will decide an application on the balance of convenience.

Whether there exists a Prima Facie Case

14. On whether the applicants have made out a prima facie case with a probability of success to warrant the grant of the injunction, the Court of Appeal in the case of Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125, stated 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. In the present case, it is not in dispute that the Plaintiff obtained a loan facility from the Defendant vide a letter of offer dated 11th September 2019 with a variation of terms on 30th December 2019 and 14th January 2021 for a total sum of Kshs. 36,000,000/-. That, as security for the loan, the Plaintiff offered the suit property, being Dagoretti/Uthiru/1417, Nairobi County.

16. It is equally undisputed that the Plaintiff defaulted on repayment. The Plaintiff, however, attributes the default on her part to the COVID-19 pandemic and the failure by its clients, the Kenya Defence Forces (KDF) and the Kenyan Government, to pay them for the services they (Plaintiff) rendered to the entity.

17. It is worth noting that the Plaintiff has not disputed the statutory notices, the applicable interest rate, the loan accounts, or the outstanding loan amount. The pleadings suggest that the primary reason for filing this suit is the financial difficulty the Plaintiff is experiencing in repaying the loan. However, such hardship, standing alone, does not constitute a prima facie case with a probability of success as contemplated in Giella v Cassman Brown (supra).

18. Further, a review of the record reveals that on 5th May 2023, this Court (Sifuna J.) granted an interim injunction in this matter on condition that the Plaintiff deposits a sum of Kshs. 2,000,000/- within 21 days from the date thereof, failure to which the interim injunction was to automatically lapse.

19. The record, however, reveals that the Plaintiff did not comply with the court's direction. As at the date of writing this Ruling, there is no indication that the Plaintiff has paid the 2 million in line with this court's order of 5th May 2023.

20. In Showind Industries Ltd v Guardian Bank Ltd (2002) 1 EA 284, the Court (Ringera J – as he then was) stated that:

> "As I understand the law, an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straightforward. Moreover, as the remedy is an equitable one, it may be denied where it would be inequitable to grant the relief for the reason, for example, that the applicant's conduct does not meet the approval of a court of equity or his equity has been defeated by laches. I will determine this application on the basis of the above broad principles." [emphasis added].

21. In the circumstances, this Court is of the considered view that the Plaintiff, having defaulted on both contractual and court-ordered obligations, is not entitled to an order of injunction, which is a discretionary equitable remedy. Equity does not aid a party who approaches the Court with unclean hands.

22. The upshot is that apart from failing to demonstrate the existence of a prima facie case with a probability of success, the Plaintiff, by its conduct, has also not demonstrated that it is not deserving of equitable remedies of this court.

Whether irreparable harm will result

23. The second limb under Giella vs Cassman Brown(supra) is that an applicant must also establish that it will suffer irreparable loss if an order of injunction is not issued. In Halsbury's Laws of England [Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] it is stated that: -

> "It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance,"[Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

24. In T W M v P K M & 2 others [2017] eKLR, the Court stated as follows on the question of irreparable harm: -

> "On the issues of irreparable loss, this case brings out an important contractual principle that security pledged to a financial institution or bank stands the risk of being sold and the intended sale is within the contemplation of the parties to the loan agreement. In other

words, the sale of property by the mortgagee cannot lead to irreparable loss since it is the contractual arrangement or intention of the parties and expressly provided for in the loan agreement or mortgage deed. Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established, and what the court can do is to cause the ascertainment of the right value for forced sale of the property."

25. The property in question is charged as security for a loan. As indicated above, such property becomes a commodity liable for sale upon default. If sold, the Plaintiffs can be adequately compensated in damages should the sale be later found to be unlawful. Therefore, it is the view of the Court that no irreparable harm has been demonstrated.

26. Finally, the balance of convenience in this matter favours the Defendant. The Plaintiffs have admitted default, and the Defendant is exercising a lawful remedy. Restraining the Defendant at this stage would amount to granting a remedy in favour of a party in breach of contractual obligations.

27. Accordingly, the Defendant's application dated 4th May 2023 filed herein is found without merit and is accordingly dismissed with costs.

28. It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 03RD DAY OF JULY 2025

ADO MOSES

JUDGE

In the presence of: -

C/A – Moses

.....for the Applicant

.....for Respondent