



Mwangi & another v Stanbic Bank Kenya Limited & another (Commercial Case E231 of 2025) [2025] KEHC 10930 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E231 OF 2025**

**BK NJOROGE, J
JULY 24, 2025**

BETWEEN

DUNCAN GITHIGA MWANGI 1ST PLAINTIFF

KIWI TIMBER & METAL WORKS LIMITED 2ND PLAINTIFF

AND

STANBIC BANK KENYA LIMITED 1ST DEFENDANT

JOSEPH M. GIKONYO T/A GARAM INVESTMENTS

AUCTIONEERS 2ND DEFENDANT

RULING

1. This is a Ruling in respect to the Plaintiffs/Applicants' application by way of a Notice of Motion dated 24th March, 2025.
2. It seeks the following orders
 1. Spent
 2. Spent
 3. An order of a permanent injunction be and is hereby issued barring and restraining the Defendants jointly and severally, their servants, agents and or anybody acting at the behest of the Defendants from advertising, readvertising, offering for sale by public auction or private treaty or in any other way dealing with that property known as Maisonette Number 5, erected on Land Reference Number 4857/70 (and Registered as Title No. I.R. 151310), in a purported exercise of the 1st Defendant's statutory power of sale, pending the hearing and determination of this suit.



4. This Honourable Court be pleased to exercise its powers under Section 106 of the *Land Act* 2012 to reopen the Charges entered into between the 1st Plaintiff and the 1st Defendant and: -
 - a. Require the 1st Defendant as Chargee to repay the part of the sums paid and or expenses incurred by the Plaintiffs towards perfection of a charge over the property known as Maisonette Number 4, erected on Land Reference Number 4857/70.
 - b. Require the 1st Defendant as Chargee to pay such compensation to the 1st Plaintiff which the Court shall think fit and/or
 - c. Direct the 1st Defendant as Chargee to cease acting in a discriminatory manner with respect to the granting of charges and order, without prejudice to any of the prayers contained herein, that the 1st Defendant do remedy its breach of the loan facility and forthwith disburse the sum of Kshs.16,900,000/- that remains due under the charge as loan facility agreements.
5. Costs of this application be borne by the Defendants.
3. The Application is supported by the Supporting Affidavit of Duncan Mwangi sworn on 24/3/2025 with annexures.
4. The Application is opposed by the Defendants. This is through the Replying Affidavit of Angela W. Njeri sworn on 2nd April, 2025.
5. The Plaintiffs in essence seek an injunction to restrain the Bank from exercising its statutory powers of sale.
6. The Court granted some interim reliefs on 3/4/2025 to preserve the suit property, pending the interpartes hearing and determination of this application.
7. The Court also directed the parties to file their respective submissions to the application. The Court has seen and perused Plaintiffs' written submissions dated 11th April, 2025.
8. The Defendants have also filed their written submissions dated 8/5/2025, which the Court has equally perused.
9. This matter came up for highlighting of submissions on 13/5/2025 when only the Plaintiffs' Counsel appeared and highlighted their submissions. The Court thereafter reserved the matter for this Ruling.
10. Initially a consent had been filed (thought erroneously) stating that this matter had been compromised and withdrawn. This is by way of a Consent dated 20/5/2025. However, the parties did countermand this consent by way of further consent dated 11/6/2025. This therefore paved the way for this Court to prepare this Ruling.

The Applicants' case

11. The Plaintiffs conceded that this Court can only deal with the issue of an injunction at this juncture. The rest of the reliefs sought can only be granted after a full hearing.
12. The Plaintiffs pleaded that he took a loan facility with the 1st Defendant for a sum of Kshs.36,500,000/-. This loan was to be secured by a charge over two properties namely Maisonette Number 4 and Maisonette Number 5 erected on L.R No. 4857/70. It was also to be secured by corporate guarantee executed by the 2nd Plaintiff. A letter of offer to that effect dated 16/7/2020 was issued which the 1st Plaintiff accepted.



13. As the Title Deed for Maisonette Number 4 was misplaced, the 1st Defendant issued an amended letter of offer dated 9/9/2020. The charge would be over Maisonette Number 4 for Kshs.16,900,000/-. The charge over Maisonette No. 5 would be for Kshs.19,600,000/-. The Plaintiffs accepted these amended terms.
14. As a result, thereof a sum of Kshs.19,600,000/- was disbursed to the 1st Plaintiff upon registration of a charge over Maisonette No. 5.
15. A provincial Title was issued in respect to Maisonette Number 4 and a charge for the sum of Kshs.16,900,000/- registered against the Title. However, the loan facility of Kshs.16,900,000/- was never disbursed.
16. The 1st Plaintiff had sought the loan of Kshs.36,500,000/- so as to purchase a property for the 2nd Plaintiff. This was Title Number Nairobi/Block 119/3746 that was charged to Kenya Women Microfinance Bank Plc. This was by way of a private treaty for a sum of Kshs.34,000,000/-. That as the entire loan was not disbursed, the acquisition of this property stalled. There was a looming danger that the Plaintiffs could find themselves in default in respect of that transaction too.
17. On the other hand, the 1st Plaintiff averred that he continued to service the loan to the 1st Defendant regularly. This was until the period of the Covid-19 pandemic when the loan fell into arrears.
18. The Bank has not issued the Plaintiffs with a statutory notice to sell the charged properties by way of a public auction.
19. The 1st Plaintiff's complaint is that though it was disbursed with a loan of only Kshs.19,600,000/-, the Bank is now proceeding to recover the loan. While recovering the loan, the Bank is proceeding as if it disbursed the entire loan of kshs.36,500,000/-.
20. There is also a complaint that the 2nd Plaintiff who signed a corporate guarantee has not been notified if the intended sale. No notice of the intended sale was served upon it. This is contrary to Section 96(3) (h) of the Land At. The Plaintiffs cite the case of Peter Kimani Nene -vs- Kenya Commercial Bank Limited [2016] KECLC 99 (KLR) and Muiru -vs- Equity Bank (Kenya) Limited (Civil Case E319 of 2023) (2024) KEHC 1049 (KLR).
21. The Plaintiffs further aver that when litigation commenced between the parties, the Bank released the original title to Maisonette Number 4 as well as the original charge for Kshs.16,900,000/-.
22. The Plaintiffs blame the 1st Defendant for failing to disburse the entire loan amount. This meant that the 1st Plaintiff could not finalise the transaction for the acquisition of the new property. This caused him a disadvantage that led to his default. He blames the 1st Defendant for the current state of affairs.
23. That since the Statutory Notice made reference to the wrong amount disbursed as Kshs.36,500,000/-, the Court should stop the exercise of the statutory power of sale. That it should allow the application with costs.

The Respondents' case

24. The 1st Respondent maintains that it entered into a loan facility agreement with the 1st Plaintiff. This was by way of a letter of offer dated 16/7/2020.
25. This offer was later amended by a letter of offer dated 9/9/2020. It is on the basis of this amended letter of offer that a sum of Kshs.19,600,000/- was disbursed. This was secured against a charge over Maisonette Number 5. It was also secured by a corporate guarantee and indemnity by the 2nd Plaintiff.



26. That the 1st Plaintiff undertook to repay this loan in 120 consecutive monthly instalments of Kshs.372,769.80. That the 1st Plaintiff fell into arrears on the loan repayments. This led the Bank issuing a Statutory Notice for realisation of the security. The Ninety (90) days' notice is dated 26/1/2023.
27. The 1st Plaintiff engaged the bank with a view to suspending the exercise of the statutory power of sale. He admitted the debt and made payments of Kshs.1,500,000/- on 14/4/2023 and a further amount of Kshs.2,000,000/- on 3/8/2023. A public auction schedule for 23/11/2023 was suspended at the request of the 1st Plaintiff.
28. The Bank therefore finds it strange that the 1st Plaintiff has switched the story. He now has embarked on blaming the Bank for issuing Statutory Notices as well as the manner in which the loan facility was disbursed.
29. That a meeting was held between the Bank and the 1st Plaintiff on 6/8/2024. The issues raised were fully addressed. The 1st Plaintiff admitted to being indebted to the Bank to a tune of Kshs.3,461,408.85 in terms of the loan arrears. This is exclusive of the principal loan amounts. That the 1st Plaintiff pleaded to settle the loan arrears, to forestall the intended sale of his properties. This is when a sum of Kshs.1,500,000/- was paid on 7/8/2024 and the Bank suspended the public auction scheduled for 13/8/2024.
30. The Bank released the original charge dated 22/9/2021 for Maisonette No. 4 to the 1st Plaintiff.
31. The Bank maintains that there is no dispute that the Statutory Notices were served. That the 1st Plaintiff did not challenge the validity of the Statutory Notices when they were issued.
32. The Bank maintains that the loan facility was granted to the 1st Plaintiff (at his request) to enable him pay off an existing loan with KCB Bank under loan account Number 1057620627. It maintained that it was a stranger to the allegation that the 1st Plaintiff took the loan to purchase a house.
33. It was averred that the loan arrears stood at Kshs.6,078,356.79 and the total existing loan as at 2/4/2025 stood at Kshs.20,572,965.04 The Bank stated that if the sale was stopped the Bank will be prejudiced. A copy of the valuation report dated 10/7/2024 was attached to the Replying Affidavit.
34. The Bank relies upon Patrick Waweru Mwangi & another -vs- Housing Finance Company of Kenya Limited [2013] eKLR, that once a debt is admitted the Court ought not to grant an injunction. It was submitted that the 1st Plaintiff has admitted to this debt severally.
35. The Court was also urged to follow the decision in Tuff Bitumen Limited -v- State Bank of Mauritius (Kenya) Ltd *& another (Civil Case No 24 of 2021)*
36. The Court was also referred to Wambugu v Northwave Credit Limited & 2 others on how the Court is to apply the three (3) ingredients to be proved in granting injunction orders. That the three (3) ingredients have to be demonstrated distinctly and separately. If any one fails, then an injunction would not lie. Lastly, the Court was referred to M'mbwani M'njau v K-Rep Bank Ltd & 2 others [2013] eKLR. This is to the effect that once a person offers by way of pledge his property to secure a loan, it is liable for sale in case of default.
37. The Court was urged to dismiss the application with costs.

Issues for determination

38. The Court having looked at the application, the Replying Affidavit and the respective submissions filed, frames a single issue for determination as follows;



- a. Whether the Court should grant an injunction pursuant to the statutory notice dated 26th January, 2023 as prayed for.

Analysis

39. The leading case in granting injunctions is *Giella Vs Cassman Brown & Co Ltd* (1973) E A 358.

40. It established three (3) criteria to be considered before granting an injunction, namely;

“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 compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.”

41. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) stated that these three (3) ingredients are to be proved/demonstrated sequentially.

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

42. As to what constitutes a prima facie case, the Court refers to *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) where the Court of Appeal stated as follows; -

“But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

a. Whether the Court should grant the injunction as prayed for.

43. The Court proceeds to analyse the pleadings and submissions made while applying the test laid out in the *Giella vs Cassman Brown* case.

i. Prima facie case

44. The 1st Plaintiff/Applicant applied for a loan facility of Kshs.30,500,000/-. The pleadings by both parties show that only a sum of kshs.19,600,000/- was disbursed. That by the virtue of the amended letter of offer dated 9/9/2020, it is only Maisonette No. 5 that was charged for a sum of Kshs.19,600,000/-



45. Yet the bank proceeded to issue a Statutory Notice dated 26th January, 2023 referring to the two charged properties as Maisonette No. 4 and 5. The mortgage amount was referred to a Kshs.36,500,000/-
46. It is this erroneous information that has compelled the 1st Plaintiff to come to Court. This is because it avers that only a sum of Kshs.19,600,000/- was disbursed and only Maisonette No. 5 was charged. This is an issue in dispute and arguable before this Court. The fact that the Bank returned the original charge in respect to Maisonette No. 4 for Kshs.16,900,000/- persuades this Court at least at the interlocutory stage, that a prima facie case has been made out.
47. Section 90 of the *Land Act* states as follows;

90. Remedies of a chargee

- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
 - (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - (a) the nature and extent of the default by the chargor;
 - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
48. The Court is persuaded that the Bank started on a wrong footing when it sought to exercise its statutory powers of sale on the basis of information that is now heavily contested. The Bank may have charged 2 properties but it disbursed funds on account of a single charge. To seek to realise securities of the two



houses, then later turn back and release one charge document, does not comply with the requirement to adequately inform the borrower of the default.

49. This is placing clogs or fetters to the equity of redemption.
50. The Bank is under a duty to issue the correct statutory notice that contains the correct information and describes the mortgage amount and the properties charged with sufficient clarity. Any misleading or erroneous information ought to be avoided.
51. The Court follows the decision in *Alfred Osanya v Giro Commercial Bank Ltd* [2014] KEHC 3482 (KLR) and *Kisimani Holdings Limited & Comcarrier Satalitte Service Limited v Fidelity Bank Limited* [2013] KEHC 1608 (KLR) where the Court stated as follows;

“It cannot be said that the 1st Plaintiff herein challenged that statutory notice dated 18th July 2012 other than detailing that it referred to other monies than those secured by the Charge Instrument dated 14th February 2011. I concur with the viewpoint of the 1st Plaintiff in this regard and find that the said Statutory Notices of 18th June 2012 and 18th July 2012 refer to monies other than those due and owing under the said Charge instrument. In view of the fact that the 1st and 2nd Plaintiff shared common directors, I have no doubt that the directors of the 1st Plaintiff were fully aware as to the account number which reflected the Term Loan arrangement. Again, unfortunately for the Defendant Bank, the said Statutory Notice details sums that must be paid to rectify the overall default of the 2nd Plaintiff not just the Term Loan default. In my view, the Defendant Bank cannot separate out the Term Loan default from the default on the other two accounts and persuade this Court that the Statutory Notice suffices for the Term Loan default. As a consequence, I hold that both Statutory Notices dated 18th June and 18th July 2012 are invalid and of no effect.”

(ii) - Irreparable loss and harm

52. If it turns out that the notices were irregularly issued, the loss suffered by the 1st Plaintiff would be monumental. It is not enough for the Bank to state, we have the money to compensate the customer, if it later turns out sold his house irregularly. That would hardly be justice as the sale would have arisen from an irregularity.

(iii) In whose favour does the balance of convenience tilt

53. The Court will not delve much into this issue as it is persuaded that it should grant an injunction to preserve the status quo.
54. The Bank may opt to retrace its steps and issue a statutory notice stating the correct property charged as well as the mortgage amount. The Court follows the reasoning of the Court of Appeal in *Tropicana Hotels Limited v SBM Bank (Kenya) Limited (Formerly Known as Fidelity Commercial Bank Ltd* [2023] KECA 1186 (KLR). The Court of Appeal stated as follows;

“The Learned Trial Judge, rightly in our view, having found that the statutory notice was not sent to the correct address and that the amount claimed in the notice was admittedly incorrect. In the exercise of his discretion, as he was entitled to do, the learned Judge barred the Respondent from basing its actions on the said Notice but gave the Respondent the liberty to issue a proper notice if it intended to exercise its power of sale in the event that the situation remained un-remedied.”



55. The Court has to balance between allowing the Bank to recover its monies lent to the Bank's customers and the Bank's customers right to exercise its equity of redemption.
56. As to costs, the Court notes that the 1st Plaintiff has already settled the Auctioneer's costs. The cost of this application will therefore be in the cause.

Determination

57. The Plaintiffs/Applicants' application by way of a Notice of Motion dated 24th March, 2025 is allowed in the following terms; -
- a. An order of an injunction be and is hereby issued barring and restraining the Defendants jointly and severally, their servants, agents and or anybody acting at the behest of the Defendants from advertising, readvertising, offering for sale by public auction or private treaty or in any other way dealing with that property known as Maisonette Number 5, erected on Land Reference Number 4857/70 (and Registered as Title No. I.R. 151310), in a purported exercise of the 1st Defendant's statutory power of sale, pursuant to the statutory notice dated 26th January, 2023 pending the hearing and determination of this suit.
 - b. The costs of the Application be costs in the cause.
58. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2025.

NJOROGE BENJAMIN K

JUDGE

In the presence of

Mr. Malesi holding brief for Mr. Gatheru Gathemia for the Plaintiffs/Applicants

Mr. Mwai Muthoni holding brief for Miss Kariuki for the Defendants/Respondents

Mr. Luyai Court Assistant

