**Murungi v ABSA Bank Kenya PLC (Civil Case E005 of 2025)**
**[2025] KEHC 12681 (KLR) (9 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12681 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT THIKA**

**CIVIL CASE E005 OF 2025**

**FN MUCHEMI, J**

**SEPTEMBER 9, 2025**

**BETWEEN**

**JURGEN KAUMBUTHU MURUNGI ..... PLAINTIFF**

**AND**

**ABSA BANK KENYA PLC ..... DEFENDANT**

**RULING**

## Brief facts

1. The application for determination is dated 11th April 2025 seeks for orders of an injunction restraining the defendant by themselves, their servants, employees or agents from selling, transferring or otherwise dealing in all of that property known as LR. No. Ruiru/Ruiru West Block 3/1276 pending the hearing and determination of the suit.

2. In opposition to the application, the respondent filed a Replying Affidavit dated 12th May 2025.

## The Applicant's Case.

3. The applicant avers that he is the registered proprietor of land parcel number Ruiru/Ruiru West Block 3/1276. The applicant states that he secured a loan facility for a sum of Kshs. 16,650,000/- from the respondent to finance the balance of the purchase price of the suit property. The loan was secured by registration of a charge on the suit property on 25th October 2019.

4. The applicant states that he consistently repaid the loan until August 2024 when the prevailing economic circumstances in the country hit his business hard which forced him to make a request for restructure, which did not elicit a courtesy of response from the respondent's end. On 6th August 2024, the respondent illegally issued a three months statutory notice to the applicant.

5. The applicant asserts that he reached out to the respondent on a payment plan but the respondent ignored the same and issued him with another statutory notice on 8th January 2025. On 24th February 2025, the applicant contacted the respondent's Collection and Recoveries Manager, one Mr. Samuel Njuguna on regularizing the account to avoid being in default. The applicant states that he requested for confirmation to pay Kshs. 700,000/- which was outstanding at the time to bring the account up to date and continue with the normal monthly payments as scheduled however the said email did not elicit any response from the respondent.

6. The applicant states that his advocates wrote to the respondent on the said proposition but the respondent did not respond in regard to subject. The applicant further states that the suit property has been put up for sale by public auction on 22nd April 2025 in blatant ignorance and contravention of the Auctioneers Rules and other statutory edict governing the enforcement and recovery of securities.

7. The applicant is apprehensive that the suit property will be irregularly sold by way of public auction by the respondent and the substratum of the suit will be lost forever unless the orders sought are granted.

**The Respondent's Case**

8. The respondent states that by a charge instrument dated 6th august 2019 between the applicant as chargor and the bank as chargee over Land Reference Number Ruiru/Ruiru West Block 3/1276, the bank granted the applicant financial facilities for a sum of Kshs. 16,650,000/-. It was an express term of the said charge instrument that the charge over the suit property would secure payments to the bank of such sums as shall be owed to it by the applicant on the current account or other accounts and in default, the bank would exercise its rights under the *Land Act*, to sell the property and realise the sums due.

9. The respondent avers that it issued the applicant with a three months statutory notice on 5th August 2024 for the outstanding amount of Kshs. 23,503,818.65/-. On 8th January 2025, the applicant was issued with the forty days statutory notice to sell to realise the outstanding amount which at the time was for a sum of Kshs. 23,887,826.75/-. On 17th February 2025, the bank through its advocates instructed Garam Investment Auctioneers to serve the 45 days redemption notice upon the applicant to enable him redeem the suit property. The respondent avers that prior to the advertisement and intended sale of the suit property, a valuation was conducted by Landmark Realtors Ltd in compliance with the provisions of the *Land act* to ascertain the current market value and forced sale value of the property.

10. The respondent states that the applicant is intent on delaying its security realization process, by making empty promises yet the realization process has since lawfully commenced. Further no prejudice shall be occasioned to the applicant as he was well aware of the implications of the charge specified in Clauses 7 & 8 of the charge instrument and that any loss therefrom may be compensated by way of monetary damages.

11. The respondent avers that the applicant has not denied indebtness and thus he has approached the court with unclean hands and should not benefit from the equitable remedies of an injunction. Further, the applicant has failed to show how he would suffer irreparable injury incapable of being compensated by way of monetary damages. In any event, the bank being a financial institution is well capable of compensating the applicant if any loss is occasioned to him. The respondent argues that the applicant has not established a *prima facie case* by showing any infringement that has occasioned to him.

12. The applicant filed a Further Affidavit dated 13th June 2025 and states that the allegations by the respondent that the outstanding loan balance is Kshs. 23,887,826.75/- is baseless and incorrect as the outstanding loan amount is Kshs. 16,698,522.96/-. The applicant further states that it did not make empty promises to repay the loan amount but made proposals which the respondent never agreed or denied. The applicant argues that it has always being willing to ensure its compliance with the loan obligations but the respondent has failed to respond to its requests, emails and calls.

13. The applicant avers that it made a deposit of Kshs. 1 million on 21st May 2025 as per the directions of the court issued on 16th April 2025 making the outstanding loan amount to Kshs. 16,610,468/-.

14. Parties disposed of the application by way of written submissions.

**The Plaintiff's/Applicant's Submissions**

15. The applicant refers to the cases of *Giella vs Cassman Brown* [1973] EA 360 and *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR and submits that he acquired a loan facility from the respondent that was secured by registration of a charge against the title of the suit property and made payments until he began experiencing financial difficulties which he informed the respondent and requested for a restructure but the respondent did not respond to the same. The applicant submits that although the respondent states that the outstanding loan sum is Kshs. 23,887,826.75/-, they did not attach a current loan account statement to reflect the same. The applicant argues that the same remains baseless and is incorrect as the outstanding loan amount is Kshs. 16,698,522.96/-. The applicant submits that based on the discrepancies in the loan arrears, he has shown that he has a genuine and arguable case which shows that there exists a right which has been infringed by the opposing party which calls for an explanation or rebuttal.

16. The applicant submits that he will suffer irreparably as he and his family stay on the suit property and if the orders sought are not granted they will be left out in the cold and homeless. The applicant refers to the case of Joseph Siro Mosioma vs Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR and submits that he cannot be compelled to accept damages as compensation in the event of a breach of law.

17. Relying on the case of Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR, the applicant submits that the balance of convenience tilts in his favour.

**The Defendant's/ Respondent's Submissions**

18. The respondent refers to the case of *Mrao Limited vs First American Bank of Kenya & 2 Others* (2003) KLR 125 and submits that he applicant has not denied that he is in arrears and neither has he denied that he was served with the statutory notices. The respondent further submits that it has previously engaged the applicant on numerous occasions on possible repayment plans which remained as promises since the applicant never actualized them to date, thus it proceeded with the realization process. Furthermore, the applicant misled the court into believing that he had complied with the conditional orders of payment of Kshs. 1 million to obtain an extension of interim orders, only demonstrates his dishonesty and lack of intent to settle the outstanding sum.

19. The respondent submits that the applicant is intent on frustrating its security realization process as he is aware that pursuant to Clause 7 and 8 of the Charge that in the event of default, the bank reserves the right to exercise its statutory power of sale.

20. The respondent relies on the case of *National Bank of Kenya Limited vs Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR at 507 and submits that parties to a contract are bound by the terms and

conditions thereof and it is not the business of courts to rewrite such contracts. Thus, the applicant is intent on escaping his obligations under the charge agreement which he executed with full knowledge of the consequences.

21. The respondent submits that it was well within its rights to initiate security realization especially after accommodating the applicant who nonetheless continued to default on the facility. Thus, the respondent argues that the applicant has not demonstrated a *prima facie case* with a probability of success warranting the court to grant the equitable remedy of an injunction.

22. Relying on the cases of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR and *Ben Gitonga Muiruri Mungai vs Equity Bank (Kenya) Limited* [2019] eKLR, the respondent submits that the value of charged property is quantifiable and damages suffice as compensation. The applicant signed the charge instrument well aware of the consequences of default. He was aware of the value of the charged property and insisted on using it to secure a facility knowing that it would fetch a high amount thus he is estopped from claiming that he would suffer any irreparable harm that cannot be compensated by way of damages.

23. The respondent submits that having established that the applicant has not proven a *prima facie case* and that no irreparable harm will be occasioned to him upon sale of the charged properties, the court ought not consider the balance of convenience because essentially no doubts arise as to the first two grounds. Relying on the case of *Andrew Muriuki Wanjohi vs Equity Building Society Ltd & 2 Others* [2006] eKLR, the respondent submits that court ought to consider the risk that the debt may outstrip the value of the suit property provided the chargee complies with all other legal requirements, it should be permitted to realise the security. The respondent argues that it stands to loose if the facility is allowed to continue accruing and may end up surpassing the value of the charged property. Thus, the balance of convenience tilts in its favour.

**Issues for Determination**

24. The main issue for determination is whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

**The Law**

**Whether the Applicant Has Met the Requisite Conditions to Warrant the Granting of a Temporary Injunction**

25. The principles of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs Trufoods* [1972] EA 420 and *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358. Restating the said principles, Ringera J, (as he then was) in *Airland Tours & Travel Limited vs National Industrial Credit Bank* Nairobi (Milimani) HCCC No. 1234 of 2002 set them out as follows:-

    a. A *prima facie case* with a probability of success at trial;

    b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;

    c. If the court is in doubt about the existence or otherwise of a *prima facie case* it should decide the application on a balance of convenience;

    d. The conduct of the applicant meets the approval of the court of equity.

26. Similarly, in *Dr. Simon Waiharo Chege vs Paramount Bank of Kenya Ltd* Nairobi (Milimani) HCCC No. 360 of 2001, Ringera J, (as he then was) held:-

> " The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a *prima facie case* with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience.
>
> And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity."

**A *Prima Facie Case* with a Probability of Success at Trial**

27. What then constitutes a *prima facie case*? In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125,

> " The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show *prima facie case* with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless an 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....A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "*prima facie case*" but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a suitable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of *prima facie case*, the former being the lesser standard of the two...In civil cases a *prima facie case* is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently being infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie case* is more than an arguable case. It is not sufficient to raise issues but 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."

28. It is not disputed that applicant took out a credit facility with the respondent on 6th August 2019. Further, the applicant does not dispute that he is in arrears of the said loan facilities. The applicant does

not dispute that he was served with the requisite statutory notices. The applicant's bone of contention is the discrepancy in the loan amount and the fact that he reached out to the respondent to restructure the loan but the respondent did not respond to his request.

29. It is trite law that a dispute as to the amount outstanding cannot be a ground for an injunction. In the case of *Mrao Limited vs First American Bank of Kenya Ltd & Others* (*supra*) the court held:-

> The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is to be arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.

30. Similarly in *J. L. Lavuna & others vs Civil Servants Housing Co. Ltd & Another* Civil Appl. No. Nai 14/95 which was cited with approval in *John Nduati Kariuki t/a Johester Merchants vs National Bank of Kenya Ltd* [2006] KECA 219 (KLR) where the court stated:-

> I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.

31. In *John Nahashon Mwangi vs Kenya Finance Bank Limited (in Liquidation)* [2015] KEHC 6789 (KLR) the court held:-

> Mere disputes on the amount of interest or loan amount will never be a ground on which a mortgagee will be restrained from exercising its power of sale of the mortgaged property. Except, where the amount of loan is excessive or interest charged is unlawful, and unserious, the court will restrain a mortgagor from exercising statutory power of sale. The excessiveness of the loan amount or the unlawfulness of the interest charged should be easily discernible from the terms of the charge and the applicable law.

32. A cursory glance at the pleadings show that the initial loan amount was Kshs. 16,650,000/- which was disbursed in August 2019. The applicant stated that as at February 2025, it made a total payment of Kshs. 9,800,000/-and thus the variance stood at Kshs. 700,000/-. On further perusal of the pleadings by the respondent shows that since July 2024, the applicant made payments to the total sum of Kshs. 750,000/- despite making promises to pay a lumpsum of Kshs. 5 million by 30th July 2024, a further lumpsum of Kshs. 2 million by 30th August 2024, Kshs. 1 million by 30th October 2024 and monthly repayment of Kshs. 300,000/- effective 25th July 2024. As at 8th January 2025, the loan facility had outstanding arrears in the sum of Kshs. 23,887,826.75/-. Thus, in my considered view, the amount does not seem excessive from the terms of the charge.

33. Furthermore, the applicant has not come to court with clean hands as he has not disputed that he is in default of the loan facility or that he was not served with the requisite notices. In the case of *Joseph Siro Mosioma vs Housing Finance Company of Kenya & 3 Others* [2008] KEHC 3673 (KLR), the court stated:-

> On the plaintiff's entitlement to an injunction assuming that the application is a competent one, I must say the following. The plaintiff has not disputed the validity or the terms of the charge pursuant to which the bank seeks to exercise its statutory power of sale. He has not

disputed that he is in default of loan repayment or that he has been served with the requisite statutory notice.

34. The applicant argues that he reached out to the respondent to restructure the loan but it did not receive any response. I have perused the email correspondence between the applicant and respondent and noted that the respondent sent the applicant several emails informing it of its default and inability to fully service the outstanding loan at the onset of the realization process by the bank. Further from the emails, it can be discerned that the applicant made several payments to the respondent to repay the loan but the same did not materialize. Thus, it is my considered view that the respondent was effectively communicating with the applicant who was aware at all times that he was in default of the loan facility.

35. Based on the foregoing, it is my considered view that the applicant has not established a *prima facie case*.

**Irreparable Injury**

36. In *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR the court considered *Halsbury's Laws of England* on what irreparable loss is and stated that:-

> " 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."

37. Similarly, in *Maithya vs Housing Finance Co. of Kenya & Another* [2003] 1 EA 133 at 139 where Honourable Nyamu J, stated as follows:-

> " Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities....Loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the respondent cannot pay damages should it become necessary."

38. The issue is whether the applicant has demonstrated that he will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages. The applicant submits that the suit property is his matrimonial home where he resides with his family.

39. The court in *Julius Mainye Anyega vs EcoBank Ltd* [2014] eKLR held:-

> The suit property may be a matrimonial home. But what is startling is the applicant's argument which, properly understood, suggests that matrimonial homes should never be sold under the mortgagee's statutory power of sale. These statements have become quite common in applications for injunction to restrain a mortgagee from exercising the statutory power of sale. I want to disabuse mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a

mortgage will not be created on such property without first obtaining the consent of the spouse.

40. The law is clear that once a property is offered as security it becomes a commodity of sale. It is therefore my considered view that the applicant has not shown that he stands to suffer irreparable harm. It is therefore my considered view that the applicant has not demonstrated any irreparable loss.

**Balance of Convenience Test**

41. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

> The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the inunction will be greater than which is likely to arise from granting it.

42. In light of the above, it is my considered opinion that the balance of convenience tilts in favour of the respondent because the inconvenience caused to it will be much greater than that caused to the applicant as its right of statutory power of sale has crystallized and it served the requisite notices to the applicant who had defaulted on the loan facility. Thus the balance of convenience tilts in favour of the respondent.

**Conclusion**

43. I therefore find that the applicant herein has not met the threshold of granting an interlocutory injunction and as such the prayers sought in this application are hereby declined.

44. Consequently, the application dated 11th April 2025 lacks merit and is hereby dismissed with costs.

45. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF SEPTEMBER, 2025.**

**F. MUCHEMI**

**JUDGE**