



Kenya Women Micro Finance Bank Limited v Muthoka & another; National Gender & Equality Commission & 7 others (Interested Parties) (Civil Case E007 of 2023) [2024] KEHC 8322 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL CASE E007 OF 2023**

**RK LIMO, J
JULY 8, 2024**

BETWEEN

KENYA WOMEN MICRO FINANCE BANK LIMITED PLAINTIFF

AND

STELLAR KAVUTHA MUTHOKA 1ST DEFENDANT

KENNY MUTHOKA MALUKI 2ND DEFENDANT

AND

NATIONAL GENDER & EQUALITY COMMISSION INTERESTED PARTY

TEACHERS SERVICE COMMISSION INTERESTED PARTY

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION INTERESTED PARTY**

**CHINA CIVIL ENGINEERING CONSTRUCTION
CORPORATION INTERESTED PARTY**

DIRECTOR OF PUBLIC PROSECUTION INTERESTED PARTY

NATIONAL DROUGHT MANAGEMENT AUTHORITY INTERESTED PARTY

IRENE KASALU INTERESTED PARTY

GIMCO LIMITED INTERESTED PARTY

RULING

1. The Plaintiff/Applicant herein vide a Notice of Motion dated 30th October 2013 has come to this court for the following order/reliefs;



- i. This application be certified urgent and heard ex-parte in the first instance (spent)
- ii. This Honourable Court be pleased to admit the hearing and determination of this application ex-parte and service be dispensed with, in any event (spent)
- iii. That Pending the hearing and determination of this application, an order do issue directing all occupants of the property known as Title No .Kitui Municipality Block111/290& Kitui Municipality Block 1/90 and specifically the 1st to 7th Interested Parties to furnish the Plaintiff and the 8th Interested Party, Gimco Limited, the appointed receiver all lease agreements, tenancy agreements, or any Other document evidencing tenancy between itself and the Defendants.
- iv. That Pending the hearing and determination of this application, an order do and is hereby issued directing the Defendants and 1st to 7th Interested Parties to provide the Plaintiff and the 8th Interested Party with the Statement of Accounts, rent book and or any other documentation for proof of payment for rent from January 2023 to date.
- v. That Pending the hearing and determination of this application, an order do and is hereby issued directing:
 - a. The 1st and 2nd Defendants, either by themselves, their agents, employees, assigns, agents or any other persons acting under the Defendants' to forthwith grant unrestricted access to Gimco Limited, the duly appointed receiver of the property known as Title No. Kitui Municipality Block111/290& Kitui Municipality Block 1/90 for purposes of exercising the powers and functions of the receiver under Section 92 of the [Land Act](#), 2012.
 - b. The 1st and 2nd Defendants, together with all the tenants and specifically 1st to 7th Interested Parties, occupying the Property known as Title No. Kitui Municipality Block111/290& Kitui Municipality Block 1/90 to remit all rent to the following account:

Bank Name: Kenya Women Microfinance Bank PLC
Account Name: GIMCO Limited
Account Number: 1005XXXX40
Branch: Upper-hill
Swift Code: KWXXXENX
Branch Code: 21
Bank Code: 78
Pay bill: 101200
- vi. That Pending the hearing and determination of this application, an order be and is hereby issued restraining the Defendants, their agents, employees, assigns, agents or any other persons acting under the Plaintiffs' authority from interfering with Gimco Limited's management of properties known as Title No. Kitui Municipality Block111/290& Kitui Municipality Block 1/90 while exercising the powers and functions of the receiver under Section 92 of the [Land Act](#), 2012



- vii. An order be issued directing the Officer Commanding Kitui Police Station to provide police assistance to the agents of both the Receiver and the Applicant to access the said properties known as Title No. Kitui Municipality Block 111/290 & Kitui Municipality Block 1/90 using reasonable force to gain access
 - viii. That pending the hearing and determination of this suit herein, an order do issue directing that;
 - a. The 1st and 2nd Defendants either by themselves, the agents, employees, assigns agents or any other person acting under the Defendants to forthwith grant unrestricted access to the Gimco Ltd the dully appointed Receiver of that property shown as Kitui Municipality Block 111/290 & Kitui Municipality Block 1/90 for purposes of exercising the powers and correction of the receiver under Section 92 of the Land Act 2012.
 - b. That the 1st and 2nd Defendants together with all the tenants and specifically 1st to 7th Interested Parties occupying the property known as Kitui Municipality Block 111/290 & Kitui Municipality Block 1/90 to remit all rent to the following account:

Bank Name: Kenya Women Microfinance Bank PLC

Account Name: GIMCO Limited

Account Number: 1005XXXX40

Branch: Upper Hill

Swift Code: KWXXXENX

Branch Code: 21

Bank Code: 78

Pay bill: 101200
 - ix. Pending the hearing and determination of the suit, an order be and is hereby issued restraining the Defendants, their agents, employees, assigns, agents or any other persons acting under the Defendants' authority from interfering with Gimco's Limited management of properties known as Title No. Kitui Municipality Block 111/290 & Kitui Municipality Block 1/90 while exercising the powers and functions of the receiver under Section 92 of the Land Act, 2012
2. The applicant has listed down 26 grounds in support of its applications but in summary the same are as follows:
- a. That the Respondents charged to the applicant bank the subject properties vide a legal charge dated 20th March 2015 and that Clause 8 (c) of the charge provides that among the remedies for the bank as a Chargee is appointment of a receiver. That in addition, Special Condition No. 14 (b) of the Letter of Offer, the applicant provided a Deed of Assignment of rental income over the suit properties. That under the recitals, the Deed directed the landlord to assign all rental income to the bank. Further, that Clause 4 and 5 of the Agreement places the Applicant at priority in receiving rental income from the property.
 - b. That the Respondents defaulted on the loan advanced to them which default stood at Kshs 117,356,053.61/- as at 15th September 2021 and that the Respondents made the last instalment payment on 10th May 2018 for Kshs 950,957.01. The bank sought to exercise its statutory power of sale but the Respondents approached this court seeking injunctive orders vide an



application dated 8th September 2021. This court rendered itself on the application vide its ruling delivered on 17th March 2022 where it dismissed the Respondent's application.

- c. As the default persisted, the Applicant sought to sell the subject properties via auction but was not successful which prompted the applicant to issue a 30 days Statutory Notice. That the default was not rectified despite the notice, resultantly, the Applicant appointed Gimco Limited as a receiver of the rental income from the subject properties. That the receiver issued notices to all the interested parties herein who are tenants in the subject properties to provide their respective tenancy agreements and also informed them of the bank account where they would be paying rent to. That despite passing that information, the interested parties (tenants) refused to provide the tenancy agreements and also refused to pay rent to the bank account provided by the receiver which prompted filing of this application. That there are also 6 unoccupied units and attempts to get keys to enable the receiver access the units have been futile.
3. The applicant has supported the above grounds through an affidavit of Marion Wasike sworn on 30th October 2023 where she has mainly reiterated the same grounds. She avers that the attempt by the bank to exercise its statutory power of sale of the charged property turned futile when the bidders made bids below the forced sale value adding that the bank then opted to resort to its other remedy which was appointment of receiver.
4. She further avers that the appointed Receiver issued all the interested parties (tenants in the premises) with letters notifying them of where to channel payments of rent but the Interested Parties failed to pay or provide lease agreements between them and the respondent.
5. The applicant contends that failure by the Respondents and the Interested Parties to heed to the notices constitute breach of Deed of Assignment of Rental Income and the Land Act and that the same has prejudiced it and caused great injustice.
6. In its written submissions dated 4th April 2024 done through its advocates M/s Wamae & Allen Advocates, the Applicant has submitted on failure by the Defendants to file a replying affidavit, joinder of the Interested Parties, the question of the Interested Parties and the question of prayer of mandatory injunction at this interim stage.
7. The applicant submits that the grounds of opposition filed are not sufficient to rebut the facts raised in the application. He cites the case of Kennedy Otieno Odiyo & 12 Others vs Kenya Electricity Generating Company Limited (2010) eKLR where the court held that filing grounds of opposition in place of a replying affidavit did not rebut factual issues raised in an application. The applicant also relies on other decisions where the reasoning in the case of Kennedy Otieno Odiyo & 12 Others (supra) was upheld. The decisions are: Africa Merchant Assurance Company Limited vs Titus Kinyanjui Kienjuku (2017) eKLR, Mustano Rocco vs Aniello Sterelli (2019) eKLR, Guaca Stationers Limited & Anor vs Inamdar & Inamdar (2015) eKLR, and R vs Makueni District Lands Tribunal & 4 Others ex-parte Shadrack Kimuka Mutulu (2018) eKLR.
8. On enjoinder of the interested parties in this matter, the applicant submits that they were properly joined because they are directly affected by the issues at hand. The applicant cited the case of Kenya Medical Laboratory Technicians and Technologies Board & 6 Others vs Attorney General & 4 Others (2017) eKLR to buttress his contention that the question to be addressed is whether the intended interested party has an identifiable stake or a legal interest or duty in the proceedings. The applicant's position is that the Interested Parties ought to be in this suit as they have a duty to remit rent to the applicant or its appointed receiver.



9. On the question of a mandatory injunction at this interlocutory stage, the applicant submits the court has discretion to issue the said relief even at this stage as the applicant has established existence of a special circumstance to warrant issuance of the orders sought. The argument fronted is the applicant's rights as a chargee to collect rent from the suit properties has accrued.
10. To justify this position, the applicant cites the case of Joseph Kaloki t/a Royal Family Assembly vs Nancy Atieno Ouma (2020) eKLR where the Court of Appeal held that a mandatory injunction can be granted at an interlocutory stage if the case is clear and when the court thinks it ought to be decided at once and further where there is existence of special circumstances prompting issuance of the same. The applicant relies the case of Mumbu Holdings Limited v Credit Bank Limited & 3 others where the court found that parties had bound themselves to terms and conditions of a charge instrument and further that bank's statutory power of sale had arisen. The court went ahead and granted orders at interlocutory stage allowing unhindered access to the applicant's premises to the bank's agents and servants as well as prospective buyers.
11. The Respondents on the other hand have opposed this application vide Grounds of Opposition dated 6th November 2023 which are as follows;
 - i. That the instant application is frivolous, lacks merit and is an abuse of the court's process and time and ought to be struck off as such.
 - ii. That the 1st- 8th Interested Parties are wrongly joined to this suit as the suit is a civil claim thus any party wishing to join an interested party ought to have made a formal application. They rely on the case of Kenya Medical Laboratory Technicians and Technologists Board & 6 Others vs Attorney General & 4 Others (2017) eKLR to support their contention.
12. Reliance has also been placed on the Muruatetu Case where the Supreme Court of Kenya outlined the requisite elements to being joined as an interested party to a suit.
 - i. That the Plaintiff comes to court with unclean hands having breached the Charge agreement dated 20th March 2015 and thus cannot seek equitable relief from the Honourable Court.
 - ii. That no amount is due from the Defendant as regards the cause of action in this suit and he intends to tender evidence and testimony in support of this position at the appropriate forum and time.
 - iii. That the Plaintiff wishes to steal a match on the Defendants by seeking substantive orders at the interim stage. This is despite the Honourable Court yet to determine whether the Receiver was properly and validly appointed.
 - iv. That it is in the interest of justice that this Honourable Court finds the instant application and main suit as being frivolous, vexatious and an abuse of the court's process and time and ought to be struck off in toto in limine.
 - v. That the costs of the application be borne by the Plaintiff.
13. In their written submissions dated 18th April 2024 the respondents submit that the applicant has not established existence of special circumstances to warrant issuance of the orders sought at an interim stage as was found in the case of Maher Unissa Karim vs Edward Olouch Odumbe (2015) eKLR where the court found that the applicant had established a special circumstance and issued eviction orders after it found that there was no tenant/landlord relationship between the parties.



14. The Respondent has also cited the case of Alex Wainaina t/a John Commercial Agencies Vs. Janson Mwangi Wanjihia [2015] eKLR, on the submission that the court should not be quick to issue final orders at this interlocutory stage.
15. The Respondent further submits that the applicant has not satisfied the 3 key conditions for the grant of injunctory relief as stated in Giella – vs- Cassman Brown (1973) EA and have urged this court to apply the test in a separate distinct and sequentially and determine if the applicant has surmounted the 3 hurdles.
16. They submit that mandatory injunction as a relief can only be granted in special circumstance and have relied on the case of Mateo Unissa Karim –vs- Edward Oluoch Odumbe [2015] eKLR.
17. They further submit that courts should be cautious in making conclusive findings before the main hearing and rely on Alex Wainaina T/A John Commercial Agencies –vs- Janson Mwangi Wanjihia [2015] eKLR where the court affirmed that position. They further contend that the applicant has not demonstrated existence of special circumstances and contend that the existence of Deed of Rental Income is insufficient because in their view the same is being contested.
18. They submit that a grant of the reliefs being sought has the effect of finalizing this matter at an interlocutory stage adding that the enforceability of the charge instrument is being challenged in their defence. They submit that they will be highly prejudiced if the reliefs sought are granted at this stage.
19. This court has considered this application and the grounds advanced and the response by the defendants. There are two issues that have emerged in this application namely;
 - i. Whether the Interested Parties ought to be enjoined in this suit.
 - ii. Whether a prayer for mandatory injunction can and should be granted at this stage.

(i) Whether the Interested Parties should be enjoined in this suit

20. This issue is less contested in this matter as compared to the 2nd issue for determination. The Respondents take the position that the Interested Parties were wrongly enjoined and that the Interested Parties themselves should have formally applied to be enjoined.
21. Rule 2 of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines an interested party as follows;

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;”
22. Rule 7 of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules provide;
 - a. A person, with leave of the Court, may make an oral or written application to be joined as an interested party.
 - b. A court may on its own motion join any interested party to the proceedings before it.
23. From the above provisions anyone or entity with an identifiable stake or interest in the proceedings in court can be enjoined either with leave of court or court’s own motion. It is evident that the interested parties are tenants in the two named properties the subject of the application now before court. They have an identifiable legal stake in the proceedings herein without a doubt.



The applicant seeks to have all of them remit all the rent due to them instead of the respondents. It is true that an Interested Party can apply to be enjoined and the court pursuant to the cited rules (Rule 7) can enjoin him or her. The test to be applied was well illustrated in the case of Kenya Medical Laboratory Technicians & Technologists Board & 6 Others –vs- Attorney General & 4 Others [2017] where Mativo J (as he then was) held as follows:

“The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake or a legal interest or duty in the proceedings.

In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established”

24. The Respondents contention that a party can only be enjoined as an interested Party upon an application by that party is not entirely correct. A court can on its motion add or even remove a party that has been added wrongly under Rule 5 of the cited “Mutunga Rules”. This court finds that named Interested Parties have a stake in these proceedings and are proper person to be enjoined as Interested Parties because of the rights and obligations they have as tenants in the properties under dispute in this matter. It is not a must that they should have formally applied to be enjoined. Their enjoinder in my view is necessary to fully determine the issues at hand.

(ii) Whether the applicant should be granted orders of mandatory injunction at the interlocutory stage

25. The guiding principles for a grant of injunctive reliefs were well settled in the celebrated case of Giella –vs- Cassman Brown [1973] EA. The principles are:

- a. The applicant must show a prima facie with a probability of success.
- b. The applicant must show that they might suffer irreparable injury that cannot be adequately compensated by an award of damages.
- c. When the court is in doubt, it will decide the application on a balance of convenience.

26. The Court of Appeal in Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR restated these principles and observed that the applicant must satisfy the following conditions namely:

“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.”

27. In this matter the applicant is basically seeking two injunctive mandatory reliefs:



- a. An order directing the Defendants and its agents to provide statements rent books and other documents in relation to tenancy of the Interested Parties from January 2023 to date.
 - b. Remission of rental dues by the Interested Parties to the applicant/it's agent.
28. I will deal with the two reliefs separately and I will begin with the relief of an order to be supplied with statements of rent books and other documents in relation to the tenancy. The applicant has asked for this relief in this application and looking at the relief sought in the plaint under 7(I), it is evident that the applicant has also sought the same prayer in the suit. The respondents have faulted the applicant in that respect for trying to obtain a mandatory and final relief at an interlocutory stage before hearing the main suit.
29. It is now well settled that a mandatory relief ought not to issue at an interlocutory stage unless an applicant demonstrates existence of special circumstances that warrants issuance of such a relief.
30. In the case of Joseph Kithokoi Mutia –vs- Kenya Power & Lighting Company Limited [2016] eKLR, Aburili J referenced the case of Kenya Breweries Ltd & Another –vs- Washington O. Okeyo [2002] eKLR where the court of Appeal stated as follows:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application”.

31. Applying the above principles in this instance in respect to the first relief as framed above, this court finds that the applicant has not demonstrated with respect to prayers (3) and (4) of the application what prejudice it is likely to suffer if it awaits full trial for the court to determine if the prayer in the main suit is meritable. The applicant has not shown special circumstance that warrants this court to grant payer (3) and (4) of this application and the said prayers are declined.
32. In respect to the prayer for remittal of rents proceeds, this court finds that the applicant has demonstrated sufficient basis for consideration by this court.
33. Going by the documents exhibited by the applicant in its application, vide letter of offer dated 24th November 2014 the applicant extended a loan facility of Kshs. 70,000,000/= to the respondents which offer was duly accepted by the respondents as evidenced by their execution of the offer letter (see page 9) of the applicant’s bundle. Following the acceptance, a charge in favour of the applicant was made on 20th March 2015 with properties known as Title No. Kitui Municipality Block 111/290 and Kitui Municipality Block 1/90 as securities. Clause 8 of the said charge provide chargee’s remedies as follows:

“At any time after the occurrence of any of the events specified in Clause 7, the charge may serve notice on the chargor and/or the borrowers in accordance with Section 90 of the Land Act demanding payment of the money secured by this charge or demanding performance or observance of a covenant, express or implied in that charge and if the chargor and/or the borrowers does not comply with the notice served under Section 90 of the Land Act, the Chargee may exercise the following remedies in accordance with the Land Act;



- a. Sue the chargor and/or borrowers for any money due and owing under this charge
- b. Appoint a receiver of the income of the premises
- c. ...
- d. ...
- e. ...”

34. The question of issuance of the notice specified in the above clause was settled in the Ruling of this court of 17th March 2022 where this court found that the notice as also provided under Section 90 of the *Land Act* was lawfully issued.

35. The Respondents have not contested the facts adduced by the applicants through an affidavit sworn by Marion Wasike on 30th October 2023. Failure to controvert the evidence presented by the applicants demonstrates that the applicant’s claim or prayer to have rental proceeds at this interlocutory stage has met the threshold well illustrated in *Giella –Vs- Cassman Brown (Supra)*. The claim is uncontested as the Respondents have not filed any affidavit to contest the facts presented by the applicant.

36. In the case of *Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR* the court held as follows;

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.

37. The Court of appeal in *Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR* held a similar position when it stated as follows;

“The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants’ claims.”

38. The Respondents in this application are duly represented by counsel and were well placed to refute the evidence exhibited by the applicant if the facts are contested. It is true that they have filed grounds of opposition but grounds of objection or opposition can only refute matters of law but are incapable of refuting allegations of facts. The facts as presented by the applicant that the respondent have been of defaulting in repaying their loan has persuaded this court a grant a mandatory injunction at this stage respect of rental proceeds uncontested and should therefore be granted.



39. In Kennedy Otieno Odiyo & 2 Others –vs- Kenya Electricity Generating Co. Ltd [2010] eKLR the court held as follows:

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.

40. This court finds that in view of the fact that the respondents even in their statement of defence have not denied that a loan was advanced to them and given the uncontroverted facts presented by the applicant, the interest of justice tilts in favour of the applicant in its prayer to be allowed to exercise its rights and a remedy well covered in the Deed for Rental Income. The Respondents have not shown any basis to deny the applicant that right because their contentions are not supported by any evidence laid before this court. That is a special circumstance in this matter that persuades this court to grant the applicant at this stage some of the reliefs being sought.

In the premises this court finds merit in the application dated 30th October 2023 and is allowed in terms of the following prayers;

- a. An Injunction is hereby issued in terms of prayer 6 and 9 pending the hearing and determination of the suit herein.
- b. An order do issue in terms of prayer 7.
- c. An order in terms of prayer 8 (a) and (b).

Costs shall be in main cause.

Dated, SIGNED AND DELIVERED AT KITUI THIS 8TH DAY OF JULY, 2024.

HON. JUSTICE R. K. LIMO

JUDGE

