



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**(CORAM: R MWONGO, J)**  
**CIVIL CASE NO. 6 OF 2018**  
**(Formerly Nakuru ELC Case No. 166 of 2017)**

**GILGIL TREATMENT.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**I & M BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONENT**

**EQUIP AGENCIES LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONENT**

**R U L I N G**

**Background**

1. The Plaintiff's application before me was filed under Certificate of Urgency on 29<sup>th</sup> November, 2018. I certified it urgent and directed the Applicant to serve the Respondents forthwith. The Respondents were also ordered to file their responses ready for inter partes hearing on 4<sup>th</sup> December, 2018.
2. On that date, the Applicant was represented by Ms. Kimere, whilst the 1<sup>st</sup> Defendant was represented by Mr. Wawire. The 2<sup>nd</sup> Defendant's counsel was Mr. Mirie.
3. Since the Applicant is a tenant of the 2<sup>nd</sup> Defendant who is a Chargor of the 1<sup>st</sup> Defendant and since another application in HCCC No. 9 of 2016 between the 2<sup>nd</sup> Defendant as Plaintiff and the 1<sup>st</sup> Defendant as Defendant was also before me under Certificate of Urgency, I proposed to the parties on 4<sup>th</sup> December 2018, that suits be consolidated. However, the counsel for the 2<sup>nd</sup> Defendant declined and urged that the two suits should be heard concurrently rather than as a consolidated suit.
4. A concurrent hearing was finally agreed and, accordingly, this application must be treated as part of a suit that is running concurrently with the matter in **HCCC No 9 of 2016** between **Equip Agencies Limited** (Plaintiff) and **I & M Bank Limited** (Defendant). This latter suit concerns the exercise of the bank's powers of foreclosure in respect of its charge over **Title Number Gilgil Township Block 2/210** ("the Charged Land") belonging to the 2<sup>nd</sup> Defendant.
5. The court did not hear the application herein and the one in HCCC No. 9 of 2016, on 4<sup>th</sup> December, 2018. Instead, the court held off record discussions with the parties with the aim of attempting to promote ADR or more expeditious resolutions of the entire dispute. At the urging of the court, it was hoped instead to fix the substantive suit for hearing and determination, given the chequered history of the

case. It was agreed to postpone the hearing of the application and instead request the responsible decision making director of the 1<sup>st</sup> Defendant to attend court and, if persuaded, to agree to fix the substantive suit for expeditious hearing on a fast-tracked basis early in 2019.

6. On 5<sup>th</sup> December 2018, 1<sup>st</sup> Defendant's director **Mr. A. V. Chavda** attended court as requested, and indeed addressed the court on the question of fixing the two suits for hearing on a fast-tracked basis. However, he was unable to accept the court's proposal, and it was finally conceded that the application must proceed.

### **The present Application within the context of the suit**

7. This file was transferred to Naivasha from Nakuru ELC court following a Ruling delivered by **Ohungo J** in **ELC Case No. 166 of 2017** on 25<sup>th</sup> May, 2018. The Applicant asserts that the said Ruling is the subject of an appeal. The said Ruling of **Ohungo J** dismissed the Applicant's Notice of Motion seeking injunctive relief against the Defendant's herein to restrain them from advertising, offering for sale, transferring, laying claim to or in any other manner dealing with the Plaintiff's properties, and improvements located on the Charged Land. That application and a plethora of others arising in the ELC Court are well described in the said Ruling. The ruling also transferred the file to this court to be heard contemporaneously with HCCC No. 9 of 2016.

8. The present Notice of Motion seeks orders to stay the intended auction, scheduled for 6<sup>th</sup> December 2018, of the Charged Land by the 1<sup>st</sup> Defendant bank pursuant to its statutory powers of sale. It seeks grant of a temporary injunction restraining the Defendant from selling or transferring the Charged Land pending the lodging, hearing and determination of an application in the Court of Appeal under **Rule 5 (2) (b) of the Court of Appeal Rules**; and also pending the hearing and determination of the said appeal in the Court of Appeal.

9. The Applicant has attached a copy of the Notice of Appeal dated 7<sup>th</sup> June 2018 filed in the High Court at Naivasha on 8<sup>th</sup> June 2018, together with a draft Memorandum of Appeal.

10. According to the Applicant, the 1<sup>st</sup> Defendant's advertisement of the auction of the Charged Land includes properties and assets belonging to it. These are described under the heads "**(2) Post Treatment Sections**" and "**(3) Godowns**". These properties are further expounded by the Applicant in a twelve-page Schedule marked "JNB4" and entitled "**Gilgil Telecommunication Industries (GTI) - Plant and Machinery Valuation.**"

11. The suit founding the substratum of the Applicant's claim against the Defendants is premised on a Plaint dated 13<sup>th</sup> April 2017 and filed with the original Notice of Motion on 13<sup>th</sup> April 2017 in the ELC Court in Nakuru. In the Plaint the only prayer sought, other than costs of the suit, is for:

***"a) a permanent order of injunction restraining the Defendants either themselves or through their agents, servants or employees from advertising or offering for sale, transferring, laying claim to or in any other manner dealing with the Plaintiff's properties located on all that parcel of land known as Gilgil Township Block 2/210."***

12. In effect, the present application is substantively similar to the application filed in the ELC Court which was dismissed by the Ruling of **Ohungo J** earlier mentioned and which is sought to be appealed from.

13. For proper context, in the plaint the suit is itself premised upon the following substantial facts:

a) That the Applicant is a tenant of the 2<sup>nd</sup> Defendant on a two year lease commencing 1<sup>st</sup> February, 2016 (paragraph 3 plaint).

b) That the Applicant's business is the processing of wooden poles (paragraph 4 plaint).

c) That the Applicant "sought permission from the Landlord, which consent was granted", and the Applicant "proceeded to make the necessary modifications and construction of fixtures on the property" (paragraph 5 plaint).

d) That at the time the Applicant made the improvements "it was not aware of that the property had been charged to the 1<sup>st</sup> Defendant and did so under the understating that it would be allowed to remove the fixtures and demolish the structures upon completion of the lease or termination of the same. Therefore the improvements have always been the property of Gilgil Treatment Industries" (paragraph 6 plaint).

e) Finally, that on the 3<sup>rd</sup> April 2017 the Applicant became aware of the advertisement in the Daily Nation wherein the auctioneers, Garam Investment Auctioneers were inviting members of the public to an auction to be held on 24<sup>th</sup> April, 2017 in which the leased property and developments thereon would be auctioned to the highest bidder (paragraph 7 plaint).

14. Again, for the purpose of proper context, the Tenancy Agreement dated 1<sup>st</sup> February 2016 between the Applicant and the 2<sup>nd</sup> Defendant, is exhibited. It is for a tenure of two (2) years from 1<sup>st</sup> February 2016 to 31<sup>st</sup> January, 2018, at a monthly rent of Kshs 58,000/= exclusive of costs payable to service providers for garbage, maintenance and security services.

### The Hearing

15. At the hearing, the 1<sup>st</sup> Defendant opposed the application. The 2<sup>nd</sup> Defendant, though Mr. Mirie stated that they do not oppose the application, and confirmed that they are the Applicant's landlord, and that the application does not touch on them. As such they left the matter to the court.

16. The 1<sup>st</sup> Defendant, through Mr. Wawire opposed the application on these grounds:-

a) First, that this court has no jurisdiction as the application is Res Judicata and an abuse of the court process. On this limb it was pointed out that the decision by **Ohungo J in Nakuru ELC No. 166 of 2017** dealt substantively with the same issues as raised in the present application. Further, that the fixtures alleged by the Applicant to be in their properties, were not proved to be theirs. In addition, it was urged that the High Court dismissed similar multiple applications in **HCCC No. 9 of 2016 Equip Agencies Limited v I & M Bank Limited** whose subject matter is the same property. Finally, that the Court of Appeal at Nakuru in **Civil Application No. 73 of 2018 Equip Agencies Limited v I & M Bank Limited** and in **Civil Appeal 2 of 2017 Nakuru Equip Agencies Limited v I & M Bank Limited**, found that there was no *prima facie* basis entitling the applicant therein for interim orders of injunction.

b) Second, it was argued that the Applicant has inordinately delayed in filing the application for injunction. The Respondent pointed out that the application is filed eight months after the date of delivery of the ruling of **Ohungo J** on 25<sup>th</sup> May 2018, and no explanation is afforded. Counsel further pointed out that the Applicant sought to remove their properties at the time when the interim injunction was granted pending inter partes hearing in October 2017, but since that time the Applicant had not taken any steps to remove their properties. In any event, a Valuation Report by Kiragu & Mwangi exhibited by the Respondent dated 10<sup>th</sup> October 2013, discloses that the properties claimed by the Applicant were contained on the said valuation report prepared for purposes of loan facility to the 2<sup>nd</sup> Defendant, before the applicant's tenancy came into existence.

c) Third, on substantial loss the Respondent/ 1<sup>st</sup> Defendant argued that it had not been shown by the Applicant that any loss to them cannot be compensated by damages. The Respondent argued that the greater loss stands to be suffered by them since any further delays in realizing the security

resulted in automatic interest charges and other realization costs.

d) The 1<sup>st</sup> defendant referred to the case of **Cieni Plains Company Ltd & 2 Others v Ecobank Kenya Ltd [2018] eKLR** in which the Court of Appeal directed the chargors to deposit substantial sums of money into the account of the chargee bank as a condition in order to secure an injunctive relief. Here, the charger had not offered to pay any deposit to secure injunctive relief.

17. At the close of the hearing the court, noting that the auction is scheduled for the following day, 6<sup>th</sup> December 2018, and noting that the Respondent insists that the same should not be stayed having already been stayed several times before, asked what comfort the parties would be entitled to if the court were to exercise its discretion to allow a potentially flawed sale to proceed. Counsel for the Respondent, on taking advice from his client's director present in court, undertook as follows and stated for the record:

***“That in the event that there is found to be any wrongful or defective aspect of the auction sale the bank (I & M Bank Limited) hereby undertakes to indemnify the Applicant in damages.”***

### **Issues and Analysis**

18. The issues for determination are:

- a) Whether the application is res judicata.
- b) Whether the Applicant's application was timeous.
- c) Whether the conditions in **Giella v Cassman Brown & Company Ltd [1973] EA 358** are fulfilled by the Applicant.

### **Res Judicata**

19. I have carefully perused the Ruling of **Ohungo J** in **ELC Nakuru Case No. 166 of 2017** declining to grant the Applicant an injunction therein. There, he learned judge struck out the Applicant's Notice of Motion dated 13<sup>th</sup> April 2017 with which the Applicant's suit was filed. He struck out the said application seeking to stay the intended auction **“for being res judicata.”**

20. Similarly, prayer 2 of the present application seeking stay of the auction intended to be held on 6<sup>th</sup> December, 2018 being a similar application as that already dealt with by **Ohungo J**, cannot stand. It is an issue between the parties that has already been dealt with. It is res judicata. I so find and hold.

21. I would treat prayers 3 and 4 seeking temporary stay of the auction pending lodging, hearing and determination of the application to the Court of Appeal and pending the hearing and determination of the intended appeal in the Court of Appeal in the same light as part of the rubric of an appeal against the determination of the finding of res judicata. However, to be more exhaustive I will, further examine these two prayers under the other heads of analysis.

### **Delay and whether the Applicant's application was timeous**

22. The application herein was filed on 29<sup>th</sup> November 2018. The Ruling of **Ohungo J** which is sought to be appealed from was delivered on 25<sup>th</sup> May 2018. Thus six (6), not eight months as argued by the Respondent, have elapsed since the date of the ruling. As pointed out the respondent, what has been filed in this court is a Notice of Appeal dated 7<sup>th</sup> June 2018 and filed on 8<sup>th</sup> June 2018. The appeal in the court of Appeal has not in fact been lodged, and the applicant sought to explain at the bar the failure to file the appeal on the basis that the file having been transferred from Nakuru to Naivasha, it was not easy to get the proceedings. However, no evidence was availed to show that the proceedings had been applied for or that there was any difficulty in obtaining the same.

23. To this end, I am not satisfied that the applicant's delay in filing the application is explained or justified. However, what is sought by the applicant is not a stay of the execution of any matter subsequent to the ruling of **Ohungo J.** What is sought is an injunction against the auction sale pending an application to appeal and the hearing and determination of the appeal. Hence the next issue is apt.

### **Whether the conditions in Giella -Vs- Cassman Brown are fulfilled**

24. The real question is whether this court is prepared to issue an injunction restraining the auction scheduled for sale today, 6<sup>th</sup> December 2018, pending the application to the Court of Appeal and pending the hearing and determination of the appeal?

25. I briefly state that the principles in **Giella v Cassman Brown** for grant of injunctive relief as follows:-

- a) Is a prima facie case with probability of success demonstrated?
- b) Does the applicant stand to suffer irreparable harm that cannot be compensated by damages if the injunctive relief is not granted?
- c) On which side does the balance of convenience lie?

26. As to whether the applicant has made out a prima facie case with a probability of success I make the following observations. The success of the applicants' case is wholly and inextricably intertwined with the success of the 2<sup>nd</sup> Defendant's case. The 2<sup>nd</sup> Defendant is the Chargor of the Charged Land which is the subject of the auction sale. The applicant's entire case revolves around whether or not, ultimately, their alleged properties on the Charged Land are subject to the sale, and on the efficacy of the tenancy agreement. I will say no more on this as that is the subject of the substantive suit, but that context is important to keep in mind as an overarching consideration.

27. As to whether the Applicant's application in the Court of Appeal has been demonstrated to be likely to succeed, I observe as follows. First, the Applicant did not strenuously argue that their appeal would be rendered nugatory if the application is not granted, although it may be taken as implied. Their key concern was as to the loss they may suffer in respect of their alleged assets on the Charged Land and in respect of the business and large number of the employees they have. Counsel was, indeed, clear and very categorical that the principle objective of their application:

***"...is not to stop the 1<sup>st</sup> Defendant from exercising their foreclosure rights."***

28. Second, the Court of Appeal, in the two appeals filed before it relating to the 2<sup>nd</sup> Defendant's application for injunction and which as I stated earlier are intertwined with the success of the Applicant's application herein, found and stated as follows:-

#### **a) In Equip Agencies Ltd v I & M Bank Ltd Civil Appeal No. 2 of 2017**

***"The Appellant after taking the first loan, applied for many more facilities which were granted. It would appear that the Appellant did not service the loans as required and, upon requesting restructure of the same, did not service more loans. The Appellant was not entitled to protection of an interim order of injunction and the (High Court) Judge was right to so hold."***

#### **b) In Equip Agencies Ltd v I & M Bank Ltd Civil Application No. 73 of 2018**

***"Given the litigation history of the matter involving the Applicant's previous bids to restrain the Bank from exercising its power of sale and in light of the parameters within which the Applicant will have to demonstrate during the appeal, that the decisions of 17<sup>th</sup> May 2018 constitutes a wrong exercise of discretion we are not persuaded, prima facie, that the Appellant's appeal is arguable."***

29. The strong position taken by the Court of Appeal against the continued attempts to restrain the exercise of the 1<sup>st</sup> Defendant's foreclosure rights as against the Chargor's right, persuades me that this application, founded as it is upon a substratum of a tenancy agreement in respect of property which the Applicant alleges belongs to it on the Charged Land, but which allegation is disputed by the Chargee Bank, is equally bound to meet the same fate at the Court of Appeal. It has little, if any, chances of success. On this ground the application fails.

30. Even if I am wrong on this point of probability of success, on the next principle in **Giella** on irreparable harm to the Applicant, the following consideration must be noted. The Applicant did not offer to carry any cost to secure the stoppage of the auction of sale should the appeal fail. Instead, however, the respondent bank undertook the unusual step that should the auction sale proceed and any fault in such auction be found, they would be willing to pay damages to the Applicant. The undertaking given by counsel is instructive and concrete, and in the following words:

***“That in the event that there is found to be any wrongful or defective aspect of the auction sale, the Bank hereby undertakes to indemnify the Applicant in damages.”***

31. Upon that undertaking, and given the Applicant's assertion that the primary object of their application is not to stop the bank from exercising its foreclosure rights, I think they have comfort in the bank's undertaking. I am therefore not persuaded that the auction sale should be interrupted.

### **Disposition**

32. A final matter before I conclude. In **HCCC No. 9 of 2018**, which as earlier pointed out is inextricably intertwined with this case, I have declined to grant the injunction sought therein to stop the auction sale. If the Chargor (2<sup>nd</sup> defendant) herein has been deprived prima facie of the grant of an interim injunction, can the tenant of the Chargor unprotected by an unregistered tenancy agreement find succor of such protection? I think not.

33. Ultimately, and looking at the matter holistically, and for all the reasons given herein, I hereby determine that prayer 1 is res judicata. As for prayers 2 and 3 of the application herein I am not persuaded to grant the same.

34. Accordingly the application fails in its entirety and is hereby dismissed with costs.

35. Orders accordingly.

**Dated and Delivered at Nairobi this 6<sup>th</sup> Day of December, 2018.**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:-

**1. Ms Ndungu holding brief for Kimere** for the Plaintiff/ Applicant

**2. Mr. Wawire** for the 1<sup>st</sup> Defendant/Respondent

**3. Ms Ndungu holding brief for Mirie** for the 2<sup>nd</sup> Defendant/Respondent

**4. Court Clerk – Quinter Ogutu**