



**Co-operative Bank of Kenya Limited v Nyalyka Enterprises &  
Engineering Company Limited (Environment and Land Appeal  
E001 of 2024) [2025] KEELC 4713 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4713 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E001 OF 2024  
LC KOMINGOI, J  
JUNE 19, 2025**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**NYALYKA ENTERPRISES & ENGINEERING COMPANY  
LIMITED ..... RESPONDENT**

*(Being an Appeal against the Ruling of Hon. V. Kachuodho (PM) in Kajiado Chief  
Magistrate's Court ELC Case No. E146 of 2022 delivered on 10th August 2023)*

**JUDGMENT**

1. In her Ruling dated and delivered on 10<sup>th</sup> August 2023 in CM ELC Case No. E146 of 2022, the learned Hon. V. Kachuodho allowed the application for temporary injunction against the Appellant herein.
2. Aggrieved by the said decision, the Appellant filed this Appeal seeking that the said Ruling be set aside, that the application dated 19<sup>th</sup> December 2022 be dismissed and this Appeal be allowed on the grounds that:
  1. The learned Trial Magistrate erred in Law and in fact by allowing the Application dated 19<sup>th</sup> December 2022.
  2. The Learned Trial Magistrate erred in Law by granting injunctive orders restraining the Appellant from exercising its statutory power of sale yet no steps were underway for the sale of the secured property.
  3. The Learned Trial Magistrate erred in Law and in fact in restraining the Appellant from selling property LR No. Kajiado/Kaputei-North/50768 which had been sold to a third party through a private treaty.



4. The Learned Trial Magistrate erred in Law and in fact in failing to find that the Respondent was in default of the loan amount,
  5. The Learned Trial Magistrate erred in Law and in fact in failing to find that the Respondent had admitted owing the debt.
  6. The Learned Trial Magistrate erred in Law and in fact in failing to appreciate the Appellant's weighty evidence in totality.
  7. The Learned Trial Magistrate erred in Law in falling to give reasons in the ruling.
  8. The Learned Trial Magistrate erred in Law and in fact in failing to consider the submissions of the Appellant dated 17<sup>th</sup> March 2023
  9. The Learned Trial Magistrate erred in Law and in fact in failing to consider the authorities submitted by the Appellant.
3. This Appeal was canvassed by way of written submissions.

### **The Appellants' submissions.**

4. Counsel for the Appellant highlighted the issue for determination was whether this appeal was merited.
5. Counsel submitted that the trial Court erred in its Ruling delivered on 10<sup>th</sup> August 2023 by granting the Respondent an interlocutory injunction as sought in her Application dated 19<sup>th</sup> December 2022. This is because the Respondent was undeserving of the orders on grounds that the Application was premature because the Appellant had not commenced the process of crystallising its Statutory Power of Sale. The Appellant had neither issued the Respondent with statutory notices, commissioned the properties for valuation nor advertised them for sale. The suit properties were therefore not in danger of being sold. The Trial Court thus erred in its determination that there was an imminent danger of the properties being sold while there was no reasonable threat in existence.
6. Counsel also submitted that the injunctive orders were also erroneous because property Kajiado/ Kapatiei North 50768 was sold off years before the Lower Court suit was filed to Woof Enterprises Ltd Contractors to settle balance of the money owed to them by the Respondent. Therefore, the injunctive relief directed at the Appellant for a non-existent parcel of land was erroneous. Counsel also pointed out that the Respondent had approached the Court with unclean hands and should not be granted the reliefs sought. Reference was made to *Ambient Construction v National Bank of Kenya Ltd* [2019] eKLR and *Caliph Properties Ltd v Barbel Sharma & another* [2015] eKLR which held that injunction being an equitable remedy, then he who comes to equity must come with clean hands. Counsel also added that the Respondent had not established the set principles under *Giella v Cassmna Brown* [1973] EA 358 for grant of injunctive reliefs because since there were legal obligations between the parties, the respondent ought to adhere to them.
7. Counsel also submitted that the Trial Court's decision was erroneous because it did not have a ratio deciding citing *Eston Mwirigi Ndege & another v Patrick Gitonga Mbaya* [2018] eKLR.
8. As such, the Ruling should be set aside and the Appeal allowed.

### **The Respondent's submissions.**

9. Counsel for the Respondent submitted that this Appeal was unmerited, an abuse to the Court process and should be dismissed because the injunctive orders issued at the lower court were merited and the Appellant had not proved its case for stay of execution. Counsel also argued that this Court did not



have jurisdiction to determine the Appeal because it was filed out of time contrary to Section 79G of the *Civil Procedure Act*.

10. Counsel also submitted that the Respondent was deserving of the orders granted by the Lower Court pointing out that the Appellant breached its duty of reasonable care and was demanding more payment from the Respondent out of its own mistake/ doing. The Appeal should therefore be dismissed with costs and the hearing at the Lower Court be expedited and dispensed with.

### **Analysis and Determination**

11. I have considered the Grounds of Appeal, the Record of Appeal, the rival submissions and the authorities cited. The nine grounds of Appeal raised by the Appellant can be compressed into the following issues;
  - i. Whether the Learned Trial Magistrate erred in Law in granting the injunctive orders sought by the Respondent restraining the Appellant from exercising its statutory power of sale yet no steps were underway for the sale of the secured property.
  - ii. Whether the Learned trial Magistrate erred in law and in fact in restraining the Appellant from selling LR. Kajiado/Kaputiei – North 50768 which had been sold to a third party through a private treaty.
  - iii. Whether the appeal is merited.
  - iv. Who should bear costs of this Appeal?.
12. It is the Appellant's case that the application for injunction was premature as the bank had not commenced the process of crystallizing its statutory power of sale.

There was therefore no imminent and the possibility of the suit properties being sold when no recovery procedures had been commenced.
13. It is also its case that Land Parcel NO. Kajiado/Kaputiei North/50768 was neither in possession of the bank nor the Respondent as the same had been sold to Woof Enterprises Limited and injunctive orders could not issue in respect thereof.
14. The Respondent on the other hand submitted that there is no Memorandum of Appeal on record as the Appellant had not sought leave to file the appeal out of time.

The Appeal is however properly on record after this court in the Ruling dated 19<sup>th</sup> December 2023 in ELC Misc. E.012 of 2023 granted the Appellant leave to file the Appeal out of time. The Respondents' submission on this issue is therefore misconceived.
15. The principles for grant of temporary injunction were set out in the precedent setting case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.

In the case of *Mrao Ltd v First American Bank of Kenya & 2 Others* [2003] 125 the Court of Appeal stated what amounts to a prima facie case.
16. In her Ruling dated 10<sup>th</sup> August 2023, the Learned Trial Magistrate observed that; "the Plaintiff/Applicant having demonstrated imminent danger and/or possibility of suit property being auctioned before the issues raised herein are determined. I find the balance of convenience tilts in the applicant's favour." With due respect I find that the Learned Trial Magistrate failed to offer reasons for her conclusion.
17. I agree with the Appellant's submission, that the trial court did not give reasons to support her decision.



18. The trial court failed to consider that no steps had been taken to realise the securities hence the issue of imminent danger of them being sold could not arise. No notices had been issued under Section 90 of the *Land Act*, 2012. No further steps had been taken as per Sections 94-97 of the *Land Act*, 2012.

In my view if the Respondent was not able to demonstrate any of the above hence he had not established a prima facie case and the probability of success at the trial. I agree with the Appellant submission that the Application was premature.

19. I find that the Respondent did not satisfy any of the conditions set out in the Giella Case to warrant the grant of the orders sought. In the case of Paul Gitonga Wanjau v Gathuti Tea Factory Co. Ltd & 2 Others [2016] eKLR . Mativo J referred to Halsbury’s Laws of England; and observed thus;

“It is the very first principle of injunction that prima facie, the court will not grant an injunction to restrain an actionable wrong which damages are the proper remedy. Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first that the injury is irreparable and second that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have right to recover damages is no objection to the exercise of jurisdiction by injunction, if his right cannot be adequately protected or vindicated by damages”.

20. I have considered the facts in the suit before the lower court and I find that the Respondent did not demonstrated that it will suffer irreparable injury which could not be compensated by an award of damages.

21. The Respondent had defaulted in the repayment of the loan and hence the balance of convenience could not tilt in its favour.

22. I find that the learned trial magistrate erred in granting the injunctive orders against the Appellant restraining it from exercising, its statutory power of sale yet no Respondents had been taken to realise the securities.

23. I also agree with the Appellants submission that the Respondent was dishonest by claiming that Kajiado/Kaputiei – North/50768 was under threat of auction yet it had been sold by private treaty.

24. I find that the Learned Trial Magistrate erred in restraining the Appellant from selling the said property yet it had been sold.

I find that the Respondent was not entirely truthful to the trial court. In the case of Francis J.K. Icatha v Housing Finance Co. Ltd. HCC No.414 of 2004 as cited in Ambient Construction v National Bank of Kenya Limited [2019] eKLR it was held that;

“A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make payments to the defendant/respondent a debt which he expressly undertook to pay”.



25. I agree with the Appellant's submission that in granting the injunctive orders, the trial court aided the Respondent in deriving its advantage from its failure to fulfil its obligations to the detriment of the Appellant.
26. In conclusion I find merit in this Appeal and the same is allowed.
27. In essence;
  - a. The ruling delivered on by Hon. V. Kachuodho (PM) on 10<sup>th</sup> August 2023 in ELC E.146 of 2022 is hereby set aside and is substituted with an order dismissing the Notice of Motion dated 19<sup>th</sup> December 2022 with costs.
  - b. That the Costs of this Appeal shall be borne by the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19<sup>TH</sup> DAY OF JUNE 2025.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Ms. Mululu for the Appellant.

Mr. Kurauka for the Respondent.

Court Assistant – Mutisya.

