Kigaa v Regal Tours and Travel Ltd & another (Civil Case E037 of 2025) [2025] KEHC 14413 (KLR) (13 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14413 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E037 OF 2025

G MUTAI, J

OCTOBER 13, 2025

BETWEEN

STEPHEN MWAURA KIGAA .... PLAINTIFF

AND

REGAL TOURS AND TRAVEL LTD .... 1ST DEFENDANT

STANBIC BANK KENYA LTD .... 2ND DEFENDANT

RULING

1. The plaintiff/applicant and Ms Margaret Mwikali Mwanzia borrowed a sum of Kes.8,000,000/- from the 2nd respondent. The borrowing, which the bank termed as equity release, was intended to pay off outstanding balances due from Regal Tours & Travel Ltd. The said company was previously the 1st respondent until the suit against it was withdrawn, vide a notice of withdrawal dated 30th April 2025.
2. As security for the said advance, the bank charged Land Reference No 13794 (Original No. 13724/71) measuring 0.0380 hectares, which belongs to the plaintiff/applicant. In the affidavit in support of the application for injunction, the plaintiff/applicant deposed, in his own words, that:-

   > "I agreed to provide my property, being LR No 13794 (Original No. 13724/71) Mombasa, leased as security for the facility upon compliance with all legal requirements."

3. It is not in dispute that the bank advanced the said money. It is also undisputed that the plaintiff/applicant failed to meet his obligations to repay the loan faithfully. Rather, what he states is that the charge was invalid as no consent to charge was presented, which document is specifically required under section 56(4) of the *Land Registration Act*, prior to the registration of a charge.
4. The plaintiff/applicant avers that despite there being no charge, the 2nd respondent has attempted to realize the charged property in purported exercise of an alleged power of sale. He deposed that he was notified of the intention to sell the property through an auction organized by Philip International

Auctioneers on 27th January 2025. Mr. Kigaa contended that the sale by public auction was unlawful, both because the charge was invalid and due to the lack of valuation of the charged property. The property was scheduled to be sold on 23rd April 2025. The plaintiff/applicant averred that the suit property was his family's home and that the sale pursuant to a defective charge would be a violation of his fundamental rights, render his family homeless, and cause him irreparable damage that cannot be compensated by an award of damages.

5. Although the plaintiff/applicant averred that he and his wife paid the amount referred to in the letter dated 20th December 2023, no evidence was produced.

6. The attempt to sell the charged property is what precipitated the filing of the suit and the application, the subject of these proceedings. The Notice of Motion dated 11th April 2025 seeks the following orders, as are material at this point:-

   1. Spent;

   2. Spent;

   3. Spent;

   4. Pending the final disposal of this suit, the plaintiff/applicant be granted a temporary injunction barring the defendant, by itself and or its servants, agents, and or other representatives, from in any way executing and or implementing the statutory notice of the sale of the plaintiff's property being LR No 13794 (Original No. 13724/71) Mombasa, leasehold;

   5. Pending the final disposal of this suit, the plaintiff/applicant be granted a temporary injunction barring the defendant, by itself and or its servants, agents, and or other representatives, from, in any way, selling, alienating by auction or otherwise, the plaintiff's property being LR No 13794 (Original No. 13724/71) Mombasa, leasehold;

   6. Such other or further relief under section 103 of the *Land Act* Cap 208 as this honourable court may deem fit."

7. The plaintiff/applicant admits executing the deed of indemnity dated 11th January 2023, whose terms included an averment that:-

> "I shall not attempt to curtail or prejudice or otherwise defeat the interest of the bank by asserting a claim of invalidity of the charge by reason of lack of consent under section 56(4) of the *Land Registration Act*."

8. The plaintiff/applicant in the supplementary affidavit averred that section 56(4) of the *Land Registration Act* was a statutory requirement which could not be the subject of an estoppel. He deposed that, notwithstanding the non-existence of a valid charge, he had nevertheless made further payments on 2nd and 12th May 2025 (of Kes.400,000/- each) and Kes.1,000,000/- on 19th June 2025.

9. The application is opposed. The bank, through its Manager Recoveries, Ms Njeri deposed that it advanced Kes.8,000,000/- to the plaintiff/applicant, which he was to repay in 180 instalments of Kes.100,957/- each. The loan was advanced on the strength of a legal charge dated 21st February 2023 over all that property known as LR No 13794 (Original No 13724/71), which is registered in the name of the plaintiff/applicants. Ms Njeri deposed that the plaintiff/applicant admitted that the charge exists.

10. She further deposed that due to the migration from manual to electronic registration of charges, the enactment of the Business Laws (Amendment) Act 2020 (sections 22 and 23 thereof), the requirement

for presentation of the Land Rate and Land Rent Clearance Certificates prior to the registration of a charge was done away with. The charge was registered on the basis of the deed of indemnity so that the plaintiff/applicant could access the loan.

11. She contended that the plaintiff did not service the loan in accordance with the charge & the loan agreement, as a result of which the bank had no choice but to seek to sell the charged property.

12. Regarding the application for injunction, Ms. Njeri averred that the test in Giella vs Cassman Brown had not been met, as the plaintiff/applicant received the loan, offered the charged property as security, the property was registered, and he executed a deed of indemnity, and that the plaintiff/applicant had admitted to being in default of his payment obligations. Further, he was served with the requisite notices; any damage that he suffered could be compensated by damages, which the bank, being very liquid, could pay, and the balance of convenience tilted in favour of the refusal of the orders sought.

13. The application was canvassed by way of written submissions.

14. The submissions of the plaintiff/applicant are dated 21st July 2025 and largely deal with the issue of the validity of the charge. The Court was urged to construe the charge strictly and to find it invalid for want of compliance with the statute.

15. On the other hand, the submissions of the 2nd respondent are dated 8th July 2025. The 2nd Respondent averred that the application lacked merit and should be dismissed. In support of their contention, they identified issues for determination as being:-

    1. Whether the plaintiff/applicant had met the threshold for the grant of the relief sought;

    2. Whether default on the part of the plaintiff/applicant negates the reliefs sought;

    3. Whether the legal charge dated 21st February 2023 is valid; and

    4. Whether the applicant is estopped from bringing the application; and

    5. Who bears the costs of the application?

16. Regarding the 1st issue, it was averred that the test in Giella vs Cassman Brown had not been met.

17. On the second issue, the 2nd respondent counsel submitted that, having not come to Court with clean hands, the plaintiff/applicant did not deserve equitable relief.

18. It was submitted that the charge was duly registered and, as such, was valid and legally enforceable.

19. The counsel for the Respondent asserted that the applicant was estopped from denying the validity of the charge, having drawn the loan, and also as he had executed the deed of indemnity.

20. On costs, it was urged that costs follow the event.

21. I have considered the application, the response thereto, as well as the submissions of the parties. In my view, the issues are

    1. Whether the applicant has satisfied the test for the grant of an injunction;

    2. Whether the charge is valid and legally enforceable;

    3. Whether the doctrine of estoppel was applicable: and

    4. Costs.

22. I will deal with issues 2 and 3 as they are related, first, before considering issues 1 and 4, in that order.

23. Section 56(4) of the *Land Registration Act* provides that the Land Registrar may not register a charge unless a land rent clearance certificate and consent have been provided. The said provision is one of statute and is couched in mandatory terms. It states that:-

> " (4) The Registrar shall not register a charge, unless a land rent clearance certificate, certifying that no rent is owing in respect of the land, and the consent to charge has been presented, or unless the land is freehold."

24. It would appear to me to be the case that any charge that is registered pursuant to the provisions of the said section is open to challenge. The want of compliance with section 56(4) of the *Land Registration Act* is therefore a serious issue that deserves further consideration.

25. Counsel for the 2nd Respondent has averred that there is an estoppel regarding the said matter. Reliance was placed on section 120 of the *Evidence Act*, which states that:-

> " When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

26. Estopped has been defined by Halsbury's Laws of England, volume 16, 4th Edition, at paragraph 1471 in the following terms:-

> " "Where a party lies by his words or conduct waived or made to the other party a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position the party who gave the promise or assurance either by words or conduct cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him. He must accept their legal obligations subject to the qualification which he has himself so introduced either by words or conduct, even though it is not supported by any legal agreement."

27. The question is whether estoppel can operate against a statutory provision. In my view, the answer is negative. Estopped is an equitable doctrine. It is trite that equity follows the law. Equitable principles do not override established legal rules or statutes. Equity supplements and clarifies the law but does not contradict or destroy it. I am thus unable to agree that the plaintiff/applicant is estopped from resiling from his obligation under the deed of indemnity.

28. Having decided as above, I must now consider if the test in Giella vs Cassman Brown & Co Ltd (1973) EA 358 was met. In the said case, the Spry, JA stated as follows at page 360:-

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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."

29. What amounts to a prima facie was settled in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003]KLR 125 as being:-

> " ... in civil cases, it is a case in which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

30. It would appear to me that the Plaintiff/applicant has shown that there is a prima facie. I say so insofar as the charge may not have been registered in accordance with the law. I also do not think that estoppel is applicable in these circumstances. That being the case, the plaintiff/applicant has surmounted the first hurdle.

31. Would the plaintiff/applicant suffer irreparable damage that is incapable of compensation by an award of damages? It would appear to me that the second respondent is a large international bank, duly licensed by the Central Bank of Kenya, engaged in a very profitable banking business. On the other hand, the plaintiff/applicant offered his property as security. When offering the property as security, he must have been aware of the pitfalls he would face in the event of default and willingly took them. By charging his property, he commoditized it and exposed to sale in the event of default.

32. I am guided by the decision of the Court in Hyundai Motors Kenya Ltd v East African Development Bank [2007]eKLR, where the Court stated that:-

> " A defaulting party who offered his property as security for a loan cannot claim that he would suffer irreparable loss as the security is a commodity for sale or possible sale."

33. As earlier indicated, the 2nd respondent is a bank with a sound financial footing. It hasn't been alleged that it would be unable to compensate the plaintiff, in the event the appeal succeeds. In the case of Sammy Japheth Kavuku–Vs- Equity Bank Limited and Another (2013) eKLR, stated that:-

> " I take judicial notice that the 1st Defendant is a reasonably sound financial institution. It stands better chances to compensate the Plaintiff should the Plaintiff succeed in the trial. Should the injunction be granted to restrain the Defendants from exercising statutory power of sale, the amount of the debt may continue to rise exponentially and the security may prove to be insufficient to cover the ultimate balance..."

34. Under the circumstances, I am unable to agree that the plaintiff/applicant would suffer irreparable harm. That being the case, it is my view that the plaintiff/applicant has not surmounted the 2nd hurdle.

35. Having not passed the second test, it isn't necessary for me to consider the third element, that is to say, where the balance of convenience lies. I say so as the Court of Appeal in Nguruman Ltd v Jan Bundle Melsen & 2 others [2014]KECA 606 KLR, the Court of Appeal held that:-

> " 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) ally 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

36. The test in Giella v Cassman Brown requires an applicant to pass the 3 hoops consecutively without leapfrogging any of them. In this case, having failed at the second hoop, the application must fail.

37. I must also state that an injunction is an equitable remedy. A party approaching a Court of Equity must do so with clean hands. In this case, the plaintiff/applicant obtained a loan and accessed the facility upon executing the deed of indemnity. He defaulted on his loan obligations and only made some payments upon filing the instant application, with the intention, I would imagine, of rewriting his past. His conduct is not that of a party who a Court of Equity can assist.

38. I will point out that a party who approaches the Court of Equity must do equity, that is, he ought to be prepared to do what is fair and just. I am afraid I saw no commitment on the part of the plaintiff/applicant to do equity.

39. In the circumstances, and taking into account all the relevant factors, the application dated 11th April 2025 is without merit and is dismissed.

40. Under section 27 of the *Civil Procedure Act*, costs follow the event. I therefore award the 2nd Respondent the costs of the application.

41. It is so ordered.

DATED AND SIGNED AT MOMBASA, THE 13TH DAY OF OCTOBER, 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Ousa Okello, for the Plaintiff/Applicant;

Mr Mbogo, for the 2nd Defendant/Respondent; and

Arthur - Court Assistant.