



Wandaka (Suing as the Legal Representative of the Estate of George Gachuki Githu - Deceased) v Family Bank Limited (Civil Case E004 of 2024) [2025] KEHC 14301 (KLR) (15 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL CASE E004 OF 2024
AK NDUNG'U, J
OCTOBER 15, 2025**

BETWEEN

SALOME MUTHONI WANDAKA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE GACHUKI GITHU - DECEASED) PLAINTIFF

AND

FAMILY BANK LIMITED DEFENDANT

RULING

1. This ruling resolves the application by way of a Notice of Motion dated 30/12/2024 and brought under Section 1A, 1B of the *Civil Procedure Act*, Order 40 rule 1, Order 51 rule 1 of the Civil Procedure Rules for orders that;
 - i. Spent
 - ii. Spent
 - iii. A temporary injunction be issued restraining the Defendant/Respondent by themselves, their servants, agents and/or employees or whomsoever is acting on their behalf from continuing with the recovery process, selling through a public auction or private treaty or in any other way interfering with parcel of land known Title Number Nanyuki Marura Block 3/3555 (Sweetwaters) pending hearing and determination of the suit.
 - iv. This court be pleased to order the Defendant/Respondent to issue the Plaintiff/Applicant with certified copies of loan statements, letter of offer, charge documents, life insurance policy cover documents and all other documents with regards to the loan facilities secured by Title Number Nanyuki Marura Block 3/3555(Sweetwaters).
 - v. The Defendant/Respondent be condemned to bear the costs of this application.



2. The application is based on the grounds on the face thereof and is supported by an affidavit of Salome Muthoni Wandaka, the Applicant. She deponed that she is the legal representative of her deceased husband's estate who prior to his demise, had taken a loan facility with the Respondent which was secured by Title Number Marura Block 3/3555(Sweetwaters). One of the conditions in the offer letter was that the offer was subject to a valid life insurance cover and upon deceased's demise, she informed the Respondent who assured her that they were pursuing the insurance for payment of the claim. After about two years, she was served with the notice to sell from the Respondent stating that they would sell the suit property and this was done albeit non service of statutory notices required under the law. She demanded for an explanation and she was informed that the loan had not been insured at the time of the deceased's death.
3. That she has been advised that by the fact that the loan was secured by a life insurance cover, the estate was legally discharged from settling the debt. That the Respondent is also in breach of Section 97(2) of the Land Act which creates a duty upon them to conduct a forced valuation before exercising the right of sale.
4. The application is opposed through a replying affidavit sworn by Wambani Deya, Respondent's legal manager. He deponed that the deceased was granted a loan facility of Kshs.2,970,000/- vide an offer letter dated 11/01/2014 secured by a legal charge over LR. No Nanyuki Marua Block 3/3555(Sweetwaters) and Nanyuki Municipality Block 7/85. Subsequently, the deceased made an application for a mortgage loan facility with the purpose of restructuring the current loan facility which the Respondent accepted vide a letter of offer dated 10/07/2018. On 25/10/2018, the deceased also secured a further charge over LR. No. Nanyuki Marua Block 3/3555 (Sweetwaters). That according to Clause 9(c) of the offer letter, group life insurance cover was not applicable and the only insurance covers that existed on securities were policy schedule fire insurance cover over residential property situate on Nanyuki Municipality Block 7/85 and Orient home policy schedule cover over building situate on Parcel LR No. Nanyuki Marua Block 3/3555 (Sweetwaters) which expired on 01/04/2021.
5. He deponed that the estate started accruing arrears in 2022 and the Respondent were not aware of the deceased demise on 22/01/2022 and the deceased's estate was given time to regularize the position with regards to the facilities and despite the period given, they failed to do so necessitating the Respondent to issue a 90 days statutory notice dated 29/07/2024 which was served on the administrators of the estate vide registered mail. The arrears were not cleared hence a 40 days notice dated 13/11/2024 was served upon the administrators, the beneficiaries and Laikipia County land registrar through registered mail which was ignored by the administrators. Consequently, a valuation of the Nanyuki Marua Block 3/3555 (Sweetwaters) was conducted through a valuation report dated 22/11/2024.
6. That the Applicant moved the court on 05/12/2024 denying the existence of statutory notices and by the time she was moving the court, the Respondent was yet to serve a 45 day redemption notice nor had it advertised thus the sale had not yet crystallised. That on 13/01/2025, the outstanding loan balance was at Kshs.1,536,043.75/- which amount continues to accrue interest. That the amount of Kshs.8,965/- that was deducted from the account on 16/08/2023 was mortgage protection cover and not life insurance policy. That he is advised that the Respondent complied with the law by issuing demand notice, statutory notices and carrying out a valuation and the terms of the charge and further charge were breached and the loan facility remains unpaid which the Applicant admitted hence the application should be dismissed.
7. In rejoinder, the Applicant filed a supplementary affidavit where she maintained that following the deceased's demise, she informed the Respondent who assured her that it was in the process of initiating a claim under the applicable insurance cover to offset the outstanding loan. That the Respondent's



reliance on clause 9(c) of the offer letter is misleading and seeks to divert from existence of deductions towards an insurance cover which is acknowledged at paragraph 20 of the affidavit. That the deductions reflected on the loan statement marked as ‘mortgage protection cover’ on 16/08/2023 shows that an insurance policy was in place and it is unjust for the Respondent to deny the existence of a life insurance policy when deductions were being made and the Respondent made representation that they were pursuing an insurance claim. That the deceased complied with clause 10(f) of the offer letter which required a borrower to procure a valid life insurance policy.

8. She deponed that the estate through herself as an administrator made efforts to engage the Respondent upon being served with the notice to sell whereas other statutory notices were not properly served or adequately communicated hence, the timelines under Section 90 and 96 of the Land Act were not effectively triggered. That she has never been appointed as a personal representative or administrator of the deceased’s estate at the time of service of the alleged statutory notices. Further, the Respondent was aware of the deceased’s demise hence not entitled to accrued facility as from 02/01/2022 and should have recovered the outstanding amount from the mortgage protection cover as it had assured her. That since the facility was insured at the time, the estate was legally discharged from settling the debt upon the deceased’s demise.
9. The application was canvassed by way of written submissions. Applicant’s counsel argued that the deceased’s estate was not served with the 90 day statutory notice pursuant to Section 90 of the Land Act but was only served with the 40 day notice of intention to sell. The 45 days redemption notice was also not served. Additionally, the estate was not properly served as there was no legally appointed administrator at the time of the said service as the applicant obtained limited grant ad litem on 20/12/2024 hence the Respondent cannot claim to have served statutory notices upon the deceased’s estate prior to the appointment of a legal representative. He placed reliance on the case of *Martevé Guest House Limited vs Njenga & 3 others* (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR).
10. He submitted that the Respondent accepted the deceased’s mortgage protection cover in place of a life insurance policy hence its reliance on Clause 9(c) that the life insurance cover was not applicable is misleading. That the Respondent admitted the existence of a mortgage insurance cover and deductions thereon and the purpose of the said cover is to protect both the lender and the borrower in the event of the borrower’s death or incapacity and in event of the borrower’s death, the insurance is meant to cover the outstanding loan balance. That even after the restructure, the terms of the formal offer letter remained applicable as reaffirmed by the addendum letter dated 16/06/2020. Therefore, the Applicant has established a prima facie case.
11. He maintained that the mortgage protection cover was still valid at the time of the deceased’s death and failure to claim the insurance pay-out should not prejudice the Applicant’s lawful occupation of the property. That the Applicant stands to suffer loss and injury if the Respondent is allowed to sell without following the due process thus evicting the Applicant and her family from their only home. That the balance tilts in her favour for reasons given.
12. In rejoinder, the Respondent’s counsel submitted that on the claims that the deductions reflected in the loan statement and marked as mortgage protection cover on 16/08/2023 affirm the existence of an insurance cover, the same were for the insurance renewal for the permanent buildings situate on L.R No. Nanyuki Marua Block 3/3555 Sweetwaters and LR. No. Nanyuki Municipality Block 7/85 and not mortgage protection covers as evidenced in the loan statement. On the claim that it accepted Applicant’s mortgage protection cover in place of a life insurance policy, he submitted that this is misleading as the only insurance covers that were effective were for the permanent buildings on the said parcels. On the claim that it made deductions for the life insurance cover, he submitted that clause 9(c) of the offer letter provided that the facility was in addition to interest, also attract ‘group life



- insurance fee of Kes N/A' hence no money was used by the Respondent to pay the premiums for the life insurance. He submitted that the 90 statutory notice was served upon the applicant via her postal address which was the same address that she used to swear affidavit of spousal consent.
13. As to the prayers sought for injunction, he submitted that even if the Applicant establishes a prima facie case, that itself is not sufficient basis for the grant of an injunction. Further, the court must be satisfied that the Applicant will suffer irreparable harm that is not recoverable in damages and where the said damages are recoverable, an order of injunction should not be affirmed however strong the Applicant's claim may appear as was held in *Total Kenya Limited v David Njane T/A Argwings Twin Service station & 2 others* (2018) eKLR. Further, failure to establish a prima facie case does not permit an Applicant to leap frog the first hurdle in favour of satisfying the other requirements that are in between.
 14. As to whether the Applicant has established a prima facie case, he submitted that the Applicant claimed that she was only served with the 40 days notice of intention to sell but to the contrary, the Respondent served the 90 days notice upon the administrators of the deceased's estate, the beneficiaries and the Applicant through registered mail which were attached together with the certificate of postage. With respect to failure to conduct valuation of the suit property, he submitted that the same was done and a valuation report dated 22/11/2024 was prepared. He maintained that the Respondent was only obliged to deduct monies for the payment of insurance premiums for the policy schedule fire insurance cover over residential property situate on parcel Nanyuki Municipality Block 7/85 and orient home policy schedule insurance cover over building situate on Parcel No. Nanyuki Marua Block 3/3555(Sweetwaters) which it complied with and there was no mortgage protection cover that existed for the loan. That the Applicant has not produced proof of payment of the life insurance cover to demonstrate that the life insurance cover or the mortgage protection cover existed or even a medical report submitted to the insurance company to determine the amount of premiums payable. Therefore, the Applicant has not proven a prima facie case and has failed to demonstrate any right which has been violated by the Respondent.
 15. As to whether the Applicant will suffer irreparable harm, he submitted that the Applicant will not suffer any harm and it is the Respondent who stands to suffer as the outstanding loan continue to accrue contractual and default interest. That if the Applicant was to suffer any loss, the loss is quantifiable and the Respondent is a financial institution with the ability and will be willing to compensate for the loss. That the balance of convenience lies with the Respondent as the Applicant has failed to make repayments as agreed and has failed to redeem the outstanding balance. That the Respondent will experience a great level of inconvenience as the Applicant has failed to honour the contractual loan obligations. Hence, the applicant has not met the threshold for the grant of the orders sought.
 16. I have considered the application, the response by the Respondent and the rival submissions filed. I have applied my mind to the applicable legal principles.
 17. The Applicant seeks to stop the Respondent from exercising its power of sale over the suit property on account that the 90 days statutory notice was not served, that by the time the 40 days intention to sell notice was served, there were no legally appointed administrators of the deceased's estate hence the notices were irregularly served and that the deceased had secured a life insurance cover as per clause 10(f) of the offer letter hence the Respondent ought to have claimed the outstanding loan from the cover. Further, that she was assured by the Respondent that they were to follow on the payment from the policy cover after she informed them about the deceased's demise.



18. The Respondent's claim on the other hand is that there was no such cover that existed and the only policy cover that existed was over the policy schedule fire insurance cover over residential property situate on parcel Nanyuki Municipality Block 7/85 and orient home policy schedule insurance cover over building situate on Parcel No. Nanyuki Marua Block 3/3555(Sweetwaters) which it complied with and there was no mortgage protection cover that existed for the loan. Further, the statutory notices were served upon the administrators, beneficiaries of the deceased's estate and the Applicant moved the court before the 45 redemption notice could be served and advertisement had not been done hence the sale had not yet crystalized.
19. It is trite law that in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;
- (a) establish her case only at a prima facie level,
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) shows the balance of convenience is in her favour.
20. This was enunciated in the celebrated case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) discussed in length the triple requirements as highlighted above and held as follows;

“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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted. On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. Recently, this court in *Mrao Ltd. V. First American Bank of*



Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“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 been 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.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed. In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

21. The question that arises therefore is whether the Applicant has established a prima facie case, demonstrated that she will suffer irreparable damages which the Respondent cannot compensate by way of damages and has she demonstrated that the balance of convenience would tilt towards maintaining the status quo.
22. As was held in the Nguruman Ltd case (supra), the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
23. The Applicant’s claim is that by the time the 90 day statutory notice was allegedly served and the 45 days notification for sale was issued, there was no legal representative to the deceased’s estate hence the notices were irregularly served. The Court of Appeal had opportunity to address this scenario in *Marteve Guest House Limited v Njenga & 3 others* (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR) (28 April 2022) (Judgment) (with dissent - W Karanja, JA) where Nambuye J held that;

“In the absence of the bank demonstrating that the chargor’s right of redemption became extinct upon her death; nor existence of any other provision of law other than the [Law of Succession Act](#) Procedures under which the bank could have moved to exercise its statutory



power of sale after the death of the deceased who was the chargor; coupled with lack of explanation on the part of the bank as to why it directed auctioneers to serve the estate of the deceased, left no doubt that the bank was obligated in law to invoke the process for the exercise of its statutory power of sale within the remit of the procedures provided for in the *Law of Succession Act.*”

24. Hannah Okwengu JA took the view that;

“As chargee, the Bank had the option under section 66 of LSA to apply for letters of administration for the estate of the deceased to enable it exercise its statutory power of sale. Nevertheless, in light of the Bank’s interest in the suit property, and the rights of the deceased’s beneficiaries, the Bank could only exercise this option by applying to have a person or persons entitled to a grant of letters of administration for the estate of the deceased chargor appointed as such by the court. This would have enabled the Bank to serve the estate of the deceased with the necessary notices through the appointed administrators, to give an opportunity for the estate to pay the debt failing which the Bank would be able to pursue its statutory right of sale, the administrators stepping into the shoes of the deceased chargor. The Bank did not follow this avenue and the estate of the deceased was not given an opportunity to redeem the suit property before the sale. To that extent the Bank’s statutory power of sale had not accrued.”

25. The Respondent averred that the 90 days statutory notice dated 29/07/2024 was served on the administrators of the estate vide registered mail. The arrears were not cleared hence a 40 days notice dated 13/11/2024 was served upon the administrators. At the time of the service of the said notices, there were no legally appointed administrators as the Applicant herein was legally granted a limited grant ad litem on 20/12/2024 attached to her application.

26. There is also the issue as to whether the property was secured by a life insurance policy which question in my view can only be determined after hearing the case on merit. I am fortified in this finding by the holding of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002* where he stated that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in *Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR)* where it was stated:

“....I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein....”

27. Flowing from the above, and noting the timing of the appointment of the Applicant as an administrator, and guided by the principles in *Nguruman Ltd and Giella vs Cassman Brown and Company Ltd* cases, am persuaded that the application has merit and is allowed save for the prayer for supply of documents, which prayer this court opines is achievable through the usual procedural



exchange of documents between parties and where default arises, the same can be enforced through a notice to produce. I make the following orders;

- a. A temporary injunction be and is hereby issued restraining the Defendant/Respondent by themselves, their servants, agents and/or employees or whomsoever is acting on their behalf from continuing with the recovery process, selling through a public auction or private treaty or in any other way interfering with parcel of land known Title Number Nanyuki Marura Block 3/3555 (Sweetwaters) pending hearing and determination of the suit.
- b. Costs to abide the outcome of the trial

DATED SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF OCTOBER, 2025

A.K. NDUNG’U

JUDGE

