



REPUBLIC OF KENYA



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Sumac Microfinance Bank Limited v Kaberere & another (Civil Appeal E104 of 2024) [2025] KEHC 14781 (KLR) (21 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E104 OF 2024
TW OUYA, J
OCTOBER 21, 2025**

BETWEEN

SUMAC MICROFINANCE BANK LIMITED APPELLANT

AND

JULIUS NDUNG’U KABERERE 1ST RESPONDENT

MICHAEL THUITA GACHOKA T/A BEYOND VISION

AUCTIONEERS 2ND RESPONDENT

(Being an appeal from the entire ruling and consequential orders by Senior Resident Magistrate Hon. S.K. Nyaga issued and virtually delivered on 14th August 2023 before the Kenol Senior Resident Magistrate’s court in ELC NO. E009 of 2023)

RULING

1. By an application dated 25th May 2023, the 1st Respondent moved the honourable court seeking:
 - i. A temporary injunction to restrain the Appellant from advertising for sale, selling by private treaty or public auction, leasing, subleasing, charging, disposing of or taking possession or subdividing or howsoever interfering with the 1st Respondent’s ownership and possession of Makuyu/Kimorori Block 1/xxx, Makuyu/ Kimorori Block 1/xxx and Makuyu/ Kimorori Block 1/xxx situated within Kenol, Murang’a county pending the determination of the suit;
 - ii. The honourable court do make an order that proper accounts be taken and furnished by the Appellant and that all necessary inquiries involving account be made as follows:
 - a. the actual amount lent
 - b. the actual interest charged
 - c. the actual penalties charged



- d. the actual bank charges incurred and debited to the account
 - e. actual interest rate used
 - f. the actual interest on interest charged
 - g. valuation charges & auctioneer charges
 - h. the actual interest on arrears charged
2. The application was supported by grounds on its face and the affidavit of Julius Ndungu Kaberere in support of the Application.
 3. It was averred that the 1st Respondent was the registered proprietor of Makuyu/ Kimorori Block 1/xxx, Makuyu/ Kimorori Block 1/xxx and Makuyu/ Kimorori Block 1/xxx.
 4. The claim was based on the fact that the 1st Respondent maintained a customer bank relationship with the Appellant and a current account number 100xxx. On 27th May 2022, the 1st Respondent was offered a loan facility for the sum of Ksh. 11,500,000.00 for a period of four years at an interest rate of 24% on a reducing balance scale.
 5. The loan was to be secured by first legal charge over Makuyu/ Kimorori Block 1/xxx at Ksh. 12,500,000.00 and existing first legal charge over title Makuyu/ Kimorori Block 1/xxx and title Makuyu/ Kimorori Block 1/xxx at Ksh. 4,000,000.00.
 6. However, the Appellant charged the property at Kshs. 12,500,000.00 and not Ksh. 11,500,000.00 and only Ksh. 8,500,000.00 was disbursed thus resulting in a deviation of Ksh. 4,000,000.00. This was also a departure from the Land Control Board Consent which showed that the amount to be charged over Makuyu/ Kimorori Block 1/xxx was Ksh. 12,500,000.00. Nevertheless, the Ksh. 4,000,000.00 was deemed part of the principal amount claimed by the Appellant despite it not having been disbursed.
 7. On or about 1st May 2007, Legal Notice No. 52 of 20th April 2007 was gazetted thus operationalizing Section 44A of the *Banking Act* which modified the contract between the Appellant and the 1st Respondent by introducing the concept of non-performing loans and reintroducing the concept of limitation of the amount claimable in respect of a non performing loan.
 8. In complete disregard of the said provisions, the Appellant failed to provide any Loan Statements to the 1st Respondent to determine the date when the 1st Respondent loan facility became non performing and to inform the 1st Respondent of the said determination and the purported principal amount and the interest accruing thereon and therefore any intended exercise of the statutory power of sale is premature.
 9. By flouting these provisions, the Appellant failed to disclose to the 1st Respondent the amount of interest owed and further, calculated at what rate, seeing as the charge as registered over Makuyu/ Kimorori Block 1/xxx provides for a rate of 19 % p.a whilst the letter of offer provides for a rate of 24 % p.a
 10. It was averred that if any liability accrued, the 1st Respondent was discharged from the same as the Appellant changed the terms of the contract without knowledge or consent by the 1st Respondent and that the further change offends the provisions of Section 44 of the *Banking Act* which forbids the varying of the Banking rate without the permission of the Minister of finance; and goes against the basic tenets of contracting in that the monthly payments become unknown and the borrowing contract becomes bad in law for lack of specificity. Hence rendering the borrowing contract an unconscionable bargain.



11. It was further averred that the Appellant purported to have issued several statutory notices sometimes on 15th September 2022 and 30th January 2023 and alleging that the 1st Respondent was in default and that the account was in arrears of Ksh, 13,408,450.00 notices which were never served upon the Plaintiff;
12. The 1st Respondent averred that the Statutory Notices are null and void in law and do not constitute a lawful demand under the provisions of the Land Act for reasons that the notices have never been served upon the Plaintiff and the charge created by the Plaintiff secured the specific amounts stated over each specific property thereon and not any other amount.
13. The Appellant through their agent the 2nd Respondent advertised the 1st Respondent's property on the Daily Nation Newspaper on the 24th May 2023 and a sale by way of auction scheduled for 9th June 2023. Therefore, the Appellant's action of putting up the properties for sale is illegal, premature and fraudulent in that:
 - a. The Appellant failed to act honestly
 - b. The Appellant failed to fully disburse the loan facility as over the letter of offer and charge
 - c. The Appellant failed to make and issue valid Statutory Notice as provided for under Land Act
 - d. Attempting to secretly sell the Makuyu/ Kimorori Block 1/xxx and Makuyu/ Kimorori/ Block 1 xxx and Makuyu/ KImorori/ Block1/xxx without informing the 1st Respondent with Makuyu Kimorori/ Block 1/xxx being matrimonial property.
14. The Appellant opposed the Application through its Replying affidavit dated 8th June 2023. He first lodged a preliminary objection that the affidavit annexed to the 1st Respondent's Application had not been properly notarized in the United Kingdom but had rather purportedly been sworn, witnessed and commissioned in Nairobi, Kenya. Therefore, the affidavit is of no evidentiary value and ought to be struck out in limine.
15. It was also averred that the 1st Respondent had previously defaulted in repaying his loan. In 2020, the 1st Respondent instituted a similar claim which was compromised by consent in Nairobi Chief Magistrate's Court no. 1887 of 2020 Julius Ndung'u Kaberere v Sumac Microfinance Bank Limited.
16. The reprieve granted to the 1st Respondent pursuant to the consent order translated into accommodation of an additional facility which is the subject of the instant dispute. The 1st Respondent voluntarily offered a first ranking legal charge dated 28th May 2021 over Title Number Makuyu/ Kimorori Block 1/xxx and Makuyu/ Kimorori/ Block 1/xxx registered in the name of Julius Ndungu Kaperere for the sum of Ksh. 4,000,000.00 in favour of the Appellant and a legal charge dated 3rd June 2022 over Title Number Makuyu/ Kimorori/ Block 1/xxx registered in the name of Julius Ndungu Kaberere for the sum of Ksh. 12,500,000.00 in favour of the 1st Defendant Bank.
17. Consequently, the securities were perfected and the Appellant issued the 1st Respondent with a Facility letter dated 27th May 2022 outlining the contractual relationship between the parties in that the 1st Respondent agreed to take up a Business Loan facility of Ksh. 11,500,000.00 from the Appellant. Which loan was to be repaid in forty-eight months by remitting the sum of Ksh. 374,921.00 to the Appellant bank one month from drawdown until payment in full at the rate of 24% per annum on a reducing balance basis. A default rate of 2% was applied per month over an above the contractual interest rate.



18. The Appellant averred that the 1st Respondent received the total loan amount in his account nevertheless, he consistently defaulted on the loan facility. Thus, breaching the terms of contract. It was therefore nefarious for the 1st Respondent to approach the honourable court at the eleventh hour for his wilful default seeking equity, while well aware of his default and gross misrepresentation of the facts.
19. Furthermore, contrary to the 1st Respondent's allegations, the statutory notice was duly served upon him as required by law. Despite service of the 90-day statutory notice, the 1st Respondent continued in default which prompted the Appellant Bank to serve the 1st Respondent with a Notice of intention to sell the suit properties dated 30th January 2023 pursuant to section 96 of the Land Act.
20. When the 1st Respondent continued in default, the Appellant engaged the 2nd Respondent to recover the outstanding amount.
21. The 1st Respondent's property was subjected to valuation prior to the advertisement for the auction sale. Despite prior notification, the Applicant has continued in default culminating the Appellant's action to advertise the suit properties for sale on the Daily Nation on 24th May 2023.
22. It was finally averred that the 1st Respondent having breached his contractual obligations and failing to heed to the Appellant's Bank demands to pay. The 1st Respondent can have no recourse, equitable or otherwise, on account of his indolent actions. The 1st Respondent was prima facie in breach of his contractual obligations and could therefore not be deemed to have suffered irreparable loss as the secured suit properties were offered as commercial commodities for sale in the event of the Applicant loan default and the balance of convenience tilted in favour of the Appellant whose security interests in the suit property is in danger of being outstripped by the escalating debt due to Applicant's failure to regulate his loan default.
23. By a ruling dated 14th August 2023, the trial court determined that a prima facie case and a balance of convenience had been established as per the case of Amir Suleiman vs Amboseli Resort Limited [2004] eKLR. Therefore, in consideration of the pleadings and written submissions by both parties, and in the interest of justice allowed the application pending the hearing and determination of the main suit. On the other hand, the Appellant's Preliminary objection was dismissed on the basis that it was not based on pure point of law but on disputed facts contrary to the position in Mukisa Biscuit Manufacturer Ltd Vs Westend Distributors Ltd [1969] E.A 696.
24. Aggrieved and dissatisfied with the ruling of the court, the Appellant filed the instant appeal via a memorandum of appeal dated 1st September, 2023 on the grounds that:
 - a. The learned magistrate erred in fact and in law by failing to consider the appellant's preliminary objection on the 1st respondent's supporting affidavit for being defective and irregularly drawn, witnessed and commissioned
 - b. The learned magistrate erred in fact and in law by failing to subject the plaintiff's interlocutory injunction application against the separate, distinct and logical conditions for an injunction expected to be surmounted sequentially
 - c. The learned magistrate erred and in fact and in law by holding that the plaintiff had established a prima facie case with a probability of success despite failing to offer any justifiable or legal reason for such a determination
 - d. The learned magistrate erred in fact and in law by holding that the plaintiff shall suffer irreparable loss incapable of being redressed by damages despite failing to offer any justifiable or legal reasons for such a determination



- e. The learned magistrate erred in fact and in law by holding that the balance of convenience laid with the plaintiff despite failing to offer any justifiable or legal reason for such a determination
 - f. The learned magistrate erred in fact and in law by wholly misdirecting the application of law and granting the plaintiff an interlocutory injunction pending the hearing and determination of the main suit on the basis of irregular and extraneous considerations.
25. Therefore, the Appellant prayed that the appeal be allowed and that the ruling of the trial court be set aside in its entirety.
26. By order of the court, the appeal was disposed through written submissions.
27. It was submitted on behalf of the Appellant that the trial court failed to offer a rationale for its decision. The decision of the court granting the injunction was merely based on emotive reasoning and not sound principles of the law.
28. It was also submitted that the 1st Respondent had not established a prima facie case. In any case, damages would be an adequate remedy to the 1st Respondent and therefore, the 1st Respondent was not deserving of the equitable remedy of injunction. It was also submitted that the balance of convenience tilted in favour of the Appellant because the 1st Respondent continued to be in default, and the loan facility amount continues to accrue a contractual and default interest. Therefore, the trial court misapplied its discretion in granting an interlocutory injunction stopping the Appellant from exercising its statutory power of sale.
29. The Respondent on the other hand submitted that it had established a prima facie case with a probability of success as there was non-service both the 90 days' notice under Section 90 of the Land Act and the 40 days' Notice under Section 96 of the Land Act was never received as the 1st Respondent had relocated to the UK and could therefore not access the said notices. The illegal variation of interests contrary to Section 44 of the Banking Act. The respondent placed reliance on the case of Samaki Industries Limited v Bullion Bank Ltd.
30. The 1st Respondent would also suffer irreparable damage as undervaluation of the suit property might lead to under sale. Mbutia vs Jumba C.A No. 111 of 1996 yet the parcels are of a sentimental value to the 1st Respondent as the sale of the properties would render him destitute.
31. Regarding the Balance of Convenience, the 1st Respondent submitted that failure to preserve the suit properties would further expose other innocent third parties to suits thus complicating the suit further. The injunction is merely to preserve the suit property pending the hearing and determination of the main suit. Therefore, the decision of the trial court needs to be upheld and the appeal be dismissed with costs.
32. This being a first appeal, the Court is enjoined to reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses. See: *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] 1 EA 123 (CAZ).
33. I have considered the grounds of appeal, authorities cited, submissions of learned counsel and the applicable law. The main issue that commends itself for determination is whether the instant appeal is merited.
34. The sole issue raised in this interlocutory appeal is whether the learned magistrate in granting the 1st respondent's prayer to restrain the appellant by an order of temporary injunction properly exercised his discretion or whether he misdirected himself in some matter and arrived at a wrong decision.



35. Put differently, this court is being asked to determine whether the 1st respondent presented a prima facie case with a probability of success before the trial court; whether irreparable injury would result if the injunction was not granted and whether there was evidence that the balance of convenience was in favor of the 1st respondent. See *Giella v Cassman Brown* [1973] EA 358.
36. Ordinarily, this Court would not express any concluded view on the dispute between the parties and must not also form a distinct impression as to the merits of the suit at this stage since such determination is reserved for the trial court after the interlocutory appeal has been disposed of.
37. Before advertng to the issue in dispute it is appropriate to reiterate that before this Court can interfere with the exercise of a discretion of the trial court it must be shown that the trial court has either erred in principle in his approach or has left out of account factors he ought to have considered or has taken into account some factors that he should not have considered or that his decision was wholly wrong, or that the decision was so aberrant that no reasonable judge, aware of his duty to act judicially could have reached it. These are the words of Sir Charles Newbold, P. expressed in this often-cited *Mbogo & Another V. Shah* [1968] EA 98 decision as follows:
- “.....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”
38. The Court of Appeal appreciating this dictum stated thus in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR)
- “...as an appellate court this Court has a limited function in an appeal from the grant or refusal of an order of injunction issued by the court below. It has no jurisdiction to exercise an independent original discretion of its own. It must defer to the exercise of discretion by the Judge in the court below and must not interfere with it merely upon the ground that the members of this Court would have exercised the discretion differently.”
39. It is common ground that the 1st Respondent charged the suit property to the Appellant. However, when the 1st respondent defaulted in payment, the appellant opted to exercise its statutory power of sale. It is the exercise of that statutory power of sale that the 1st Respondent sought to challenge when he filed the application subject of this appeal.
40. It is not my duty as it was also not for the trial magistrate to determine the case on its merits while considering the application for temporary injunction. The role of the learned magistrate was merely to consider whether the principles for the grant of an injunction at that stage were met.
41. There is no scope to confuse between an interlocutory and permanent orders of injunction and since the fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since *Giella* case (*supra*) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:
- “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) finally any doubts as to (b) by showing that the balance of convenience is in his favour.”

42. 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.
43. 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.
44. 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.
45. 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.
46. 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.
47. The Court of Appeal 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.”
48. In the *Nguruman* case (*supra*), the Court of Appeal further observed that,
- “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.”

49. Kwach JA in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) (7 March 2003) (Judgment) while commenting on the circumstances under which an injunction might be allowed restraining a bank from exercising its statutory power of sale stated thus:

“The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury’s Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-

725When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”(emphasis added)

50. Although it is admitted that the 1st Respondent obtained a loan facility from the appellant that was charged to the suit property, the 1st Respondent’s main contention is that the statutory power of sale should not be undertaken without reconciling the accounts to enable him know the amount due.
51. I note that in this regard, the 1st Respondent is challenging the amount that the appellant claims to be due. Flowing from this, I find that the learned trial court rightly exercised discretion in granting the injunction as allowing the exercise of the statutory power of sale to continue without proper accounts would result in irreparable injury to the 1st Respondent.
52. Regarding the issue of the Preliminary objection. As to whether a preliminary objection is one of merit, the Supreme Court pronounced itself on the threshold to be met. The Court endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696, in the case of *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors* (1969) EA 696:‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

53. Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.



54. In the instant case, it was contended that the affidavit in support of the application was defective for having been commissioned before an advocate and not notarized despite the 1st Respondent being outside the country. The question as to whether the 1st Respondent was in or outside the country is not a pure point of law as evidence has to be called to establish whether it is true or not.
55. I therefore find no fault in the finding of the trial court in dismissing the preliminary objection.
56. The upshot of the matter is that the appeal is disposed in the following terms:
- i. The appeal against the grant of temporary injunction is dismissed;
 - ii. The appeal against the preliminary objection is dismissed;
 - iii. The appellant to take proper accounts and furnish the same with the 1st Respondent before exercising the statutory power of sale.
57. Thirty (30) days stay of execution orders to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 21ST DAY OF OCTOBER, 2025.

HON. T. W. OUYA

JUDGE

