Family Bank Limited v Kirima t/a Mint Bar & Restaurant & another (Commercial Appeal E014 of 2024) [2025] KEHC 18721 (KLR) (8 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18721 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL APPEAL E014 OF 2024

J NGAAH, J

DECEMBER 8, 2025

BETWEEN

FAMILY BANK LIMITED ..... APPELLANT

AND

ERICK MUTURI KIRIMA T/A MINT BAR & RESTAURANT .... 1ST RESPONDENT

MUGA AUCTIONEERS & GENERAL MERCHANTS ..... 2ND RESPONDENT

JUDGMENT

1. By a plaint dated 3 June 2024 filed in the Mombasa Chief Magistrates' Court Civil Case No. 819 of 2024, the 1st respondent sued the appellant for:

> "(a) A declaratory order against the defendant and in favor of the Plaintiffs that;
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> (i) The advertisement for sale made by the defendant through the interested party herein on 29th May, 2024 failed to comply with and violates Sections 90 and 96 of the *Land Act*, therefore null and void; •
>
> (ii) The said advertisement violates the plaintiff's rights to discharge under Section 85 of the *Land Act*.
>
> (b) And order of permanent injunction against the defendant, their agents, auctioneers or persons acting on their instructions from Realizing the security over property title number LR NO. Kiambaa/Ruaka/1850 on the basis of the defective advertisement,
>
> (c) Costs of this suit together with interest thereon at court rates; and

(d) Any other or further relief this Honourable court may deem fit and just to grant."

2. Alongside the plaint, the 1st respondent filed an application for, among other things, an injunction to stop the 1st respondent from disposing of title no. Kiambaa/Ruaka/1850 pending the hearing and determination of the main suit. The prayers for this particular order were couched as follows:

> " 2. That pending hearing and determination of this application inter par/es, this Honourable Court be pleased to issue a temporary injunction restraining the defendant/respondent and the interested parties either by themselves, agents, servants and/or any person acting on her directions/instructions from further advertising for sale, selling, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or administrators or exercising any power of a chargee to lease, let, charge or otherwise howsoever interfere with the Plaintiffs property title number LR NO. Kiambaa/Ruaka/1850.
>
> 3. That pending hearing and determination of the main suit, pending hearing and determination of this application inter partes, this Honourable Court be pleased to issue a temporary injunction restraining the defendant/respondent and the interested parties either by themselves, agents, servants and/or any person acting on her directions/instructions from further advertising for sale, selling, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by public auction or private treaty, toking possession, appointing receivers or administrators or exercising any power of a chargee to lease, let, charge or otherwise howsoever interfere with the plaintiffs property title number LR NO. Kiambaa/Ruaka/1850."

3. The appellant opposed the application and a replying affidavit to that effect was sworn by Sylvia Wambui, the appellant's manager in charge of legal services.

4. In her ruling dated 29 August 2024, the learned senior principal magistrate, Honourable M.L. Nabibya allowed the application. Even then, the learned magistrate had established that the 1st respondent did not have a prima facie case and, further, the 1st respondent had not demonstrated that he was bound to suffer irreparable loss which could not be adequately compensated by way of damages. To quote the learned magistrate:

> " From the response to the application, it is evident that the respondent served the statutory notices and the issue in contention by the applicant is the dwelling house on the land. I doubt he has a premafacie (sic) case with chance to succeed.
>
> On whether the applicant shall suffer irreparable injury which cannot be compensated by damages.
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> I am not convinced that the is any chance to suffer loss or damage that cannot be compensated by way of damages. However, it will be of concern if the issue of the dwelling house being on the charged property is not addressed first before the intended sale.
>
> On this ground therefore, I am of the opinion that the applicant may suffer that which could be unresolved at this stage. It is important therefore that the subject matter be preserved pending hearing interparty for the real issues to be addressed.

On the above basis which is a balance of convenience, I allow the application."

The appellant was aggrieved by this decision and hence filed the instant appeal.

5. In the memorandum of appeal dated 12 September 2024, the appellant has raised only one ground of appeal which is that "the learned magistrate erred in law and in fact in granting an injunction after finding that the 1st respondent had not surmounted the first two hurdles in Giella v Cassman Brown."

6. To this extent, it is a rather straight forward appeal and the only question this Honourable Court is concerned about is whether, having held that the 1st respondent neither demonstrated a prima facie case nor that he was exposed to irreparable loss that could not be adequately compensated by way of damages, it was open to the learned magistrate to allow the application and grant the injunction.

7. Fortunate for me, this is not a new question. Among the authorities which the appellant has relied upon in the submissions filed on its behalf are two cases where the same question arose. The first of these cases is East African Development Bank v Hyundai Motors Kenya Limited [2006] eklr. In this case, the respondent sought for an injunction in this Honourable Court. In addressing himself to the principles which the court ought to consider in granting an interim injunction, Njagi, J. held as follows:

> "To every issue raised by the plaintiff, the defendant had an answer. I have warned myself that I am not expected to decide finally at this stage. But I have to state whether in my view, the plaintiff has shown a prima facie case with a probability of success. Secondly, an interlocutory injunction will not 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. These are the well settled principles which ought to guide the court as enunciated in Giella Vs. Cassman Brown & Company Ltd [1973] E.A. 358."

8. Applying these principles to the case before him, the learned judge held as follows:

> "On the face of the record, it is my humble view that the plaintiff has not established such prima facie (sic) with a probability of success as envisaged in Giella V. Cassman Brown & Company Limited (supra)..."

9. As to whether the plaintiff had demonstrated that he would suffer irreparable damage as not to be adequately compensated by award of damages, the learned judge held as follows:

> "The second limb of the formula laid down in Giella Vs. Cassman Brown & Company Limited (supra) is that 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. The plaintiff has not placed any material before the court which would tend to show how an award of damages cannot adequately compensate the loss of the suit property in the event it was disposed off (sic) by way of security. Indeed, they suffered the property to be charged, they knew full well the risk of the failure to honour their undertaking. I think that this second limb is also not satisfied and to that extend I need not consider the balance of convenience."

10. Despite his reservations about the applicant's application, and, to be precise, despite the fact that the learned judge was clear in his mind that the plaintiff had not satisfied the two conditions for grant

of injunction, he, like the learned magistrate has done in the application that provoked this appeal, effectively allowed the application for injunction and held as follows:

> " ...it would be unfair to deny it (the plaintiff) the benefit of arguing Sections 59, 69 and 100 A of the Transfer of Property Act vis-à-vis the corresponding provisions of the Registration of Titles Act. This would assist the court in determining with finality the validity or otherwise of the charge instrument on the basis of which the statutory power of sale is sought to be exercised."

11. When the defendant appealed, the Court of Appeal held that the learned judge had erred in law. In allowing the appeal the Court of Appeal posited the following questions:

> " The learned Judge thought that the property had to be preserved. But had the respondent established a prima facie case with a probability of success? According to the learned Judge the respondent had not done so. Had the respondent placed before the court material to show that an award of damages would not adequately compensate? Again the learned Judge found no material to that effect. Then on what basis could the interlocutory injunction be granted?"

12. In faulting the learned judge for allowing the application despite having established that the applicant had fallen short of the threshold for grant of interlocutory injunction, the Court held:

> " In view of the foregoing, we are satisfied that since the learned Judge made very clear findings as regards the conditions for granting an interlocutory injunction which were to the effect that the respondent had failed to meet these conditions then there were no other avenues open to the learned Judge to grant interlocutory injunction. An attempt to consider other circumstances apart from the laid down conditions was rejected in Abel Salim & Others Vs. Okong'o & Others (supra)".

13. On that note the court allowed the appeal and set aside the learned judge's order. The court ordered, further, that the respondent's application be dismissed. The appellant was awarded costs in the appeal and in the superior court.

14. The second decision that deserves mention on this question is the decision by the Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR. At the very beginning of its judgment, the Court of Appeal summarised the case before them in the following terms:

> " The sole issue raised in this interlocutory appeal is whether the learned Judge of the High Court (Odunga, J.) 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. 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 High Court; whether irreparable injury would result if the injunction was not granted and whether there was evidence that the balance of convenience was in favour of the 1st respondent. See Giella V. Cassman Brown [1973] EA 358."

15. In disposing of the appeal, the court, in a way, restated the principles in Giella versus Cassman Brown (supra) and held:

> "Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:
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> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> (a) establish his case only at a prima facie level,
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> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
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> (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".

16. The court explained that if an applicant for an injunction establishes a prima facie case, that, in itself, is not enough for the court to grant an interlocutory injunction. Besides establishing a prima facie case, the court must go further and satisfy itself that if the injunction is declined, the injury the applicant for injunction will suffer, will be irreparable. And by this it is meant that if damages recoverable in law is an adequate remedy and that, in any event, the respondent is disposed to pay those damages, no interlocutory order of injunction should be granted, irrespective of how weighty the applicant's claim may appear to be.

17. According to the learned judges of Appeal, if a prima facie case is not established, then the conditions of irreparable injury and balance of convenience need not be considered. In judges' words "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".

18. The two Court of Appeal decisions answer the question at hand in such a direct way that I need not strain any bit to explain how erroneous the learned magistrate's decision was. I will adopt Court of Appeal's reasoning in the two decisions and allow the appeal.

19. I also take cue from the Court's ultimate orders in East African Development Bank v Hyundai Motors Kenya Limited (supra) and substitute the learned magistrate's order allowing the application with the order dismissing the application. The appellant will have costs of the appeal and costs of the respondent's application in the lower court. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 8 OCTOBER 2025

NGAAH JAIRUS

JUDGE