



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL E256 OF 2025

**DANIEL OETA MAINA-----
APPELLANT/APPLICANT**

VERSUS

**BANK OF AFRICA (K) LIMITED ----- 1ST
RESPONDENT**

**BETA RECOVERY AUCTIONEERS ----- 2ND
RESPONDENT**

RULING

1. The Appellant brings a Notice of Motion Application dated 8th October 2025 for reliefs as herein below;-

1. **Spent.**

2. **Spent.**

3. **THAT pending the hearing and determination of this appeal, there be order of injunction restraining the Respondents, by themselves, its agents, servants, any entity and or any person, whatsoever from interfering,**

selling, transferring, disposing, or in any way alienating or encumbering, land parcel Number Njoro/Ngata Block 2/3402 (Kirobon "A"). (sic)

4. THAT the costs of this application be in the cause.

2. The Appellant swore an affidavit in support of the Motion. He avers that on 25/4/2025 the lower court dismissed his suit (**Nakuru CMCC No. 178 of 2023**) for non-attendance, which order provoked this Appeal. The Appellant laments that his former advocate was to blame for failing to inform him of the hearing date of the case that had been given as 21st February 2025, and also for failing to attend court on his behalf. His Application dated 9th July 2025 seeking reinstatement of the suit was also dismissed. Yet again, the Appellant faults his Advocate for not advising him that the Application had been rejected.
3. The Appellant beseeches the court not to punish him for his Advocate's mistakes. He craves the right to be heard and further urges the court to preserve the subject matter of the Appeal.

4. The 1st Respondent opposes the Application *vide* an affidavit in reply purportedly sworn on 16th October 2025 by its Senior Recoveries Officer (Victor Keitany). On advice of their legal Counsel, the witness contends that the Appellant does not deserve the discretionary relief of injunction in the circumstances of the dispute. According to the 1st Respondent, this Appeal would not be rendered moot if injunction is not granted. It is argued that the subject matter of the Appeal shall remain preserved and active because the Appeal seeks to have the suit reinstated while in the lower court's suit the Appellant wants the 1st Respondent to be compelled not to vary the terms of a mortgage facility initially agreed between the parties, in any manner. According to the 1st Respondent, disposal of the charged property would not, therefore, impact the validity of the suit if the Appeal is successful.
5. The 1st Respondent's witness further contends that granting the injunction would be more injurious to the Appellant than them. This is because the debt will continue to increase seeing that it stood at Kshs. 6,451,010.69 as at

the time of bringing the suit before the lower court in March 2023. As at 11th June 2025 the debt is said to have ballooned to Kshs. 10,587,601.53. It is pointed out to the court that forced sale value of the charged property stood at only Kshs. 6,150,000/- as of May 2025, leaving the 1st Respondent exposed to no chance of recovery. Based on the legal counsel obtained, the court is also told that the Appellant may be compensated in costs if the suit property is sold off to recover the debt.

6. The court is therefore *inter alia* told that injunction pending hearing and determination of the Appeal is not merited on the facts and in the circumstances of the case.
7. The Appellant has not offered further evidence in rejoinder. He does not also appear to have filed submissions.

1st Respondent's Submissions

8. Learned Counsel for the 1st Respondent refer the court to **Order 42 Rule 6 (6) of the Civil Procedure Rules** as the legal basis of an order of injunction pending Appeal. By dint of this provision such an application ought to be brought without undue delay; it must also be shown that the

Appellant/Applicant will suffer substantial loss if stay is not granted, and that security for costs that could ultimately be binding on the Applicant must be given.

9. Counsel further submit citing the case of **Patricia Njeri & 3 Others vs National Museum of Kenya (2004) KEHC 1614 eKLR** that injunction pending an Appeal is a discretionary relief that cannot be granted to a litigant who brings a frivolous appeal.
10. The 1st Respondent further impresses upon the court *inter alia* that injunction may not be granted where the order would inflict greater hardship than it would avoid. If refusing injunction would render an Appeal nugatory injunction may not also be granted, add the 1st Respondent's Counsel.
11. The well established principles guiding consideration of an Application for temporary injunction enunciated in the often quoted case of **Giella vs Cassman Brown Company** also apply, according to the 1st Respondent. I shall set out the principles later in this Ruling.

12. Determination of injunction applications including mandatory, prohibitory and permanent injunctions were long settled in the often quoted case of **Giella vs Cassman Brown & Company** *supra* cited in the 1st Defendant's submissions. The principles are;

"Firstly, 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."

13. Case law in **Mrao vs First American Bank of Kenya Limited & 2 Others** (2003) eKLR explains a *prima facie* case in civil cases as;

"A case which on the material presented, the court or tribunal properly directing itself will conclude that there exists a right which had apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter."

14. The three limbs above are required to be surmounted sequentially (see **Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR**). This means that the Applicant has to satisfy each of the three elements to obtain injunction orders.
15. Substantial loss does not arise in this case. If the Appeal is allowed the substratum of the suit is preserved as correctly observed by the 1st Respondent and the Appellant will be heard on the merits. The Appellant can be compensated by damages, in any event. On the other hand, the 1st Respondent stands to suffer greater loss as the debt may escalate and militate against recovery.
16. A *prima facie case* has not in the circumstances been made out by the Applicant. Irreparable loss would not also be occasioned to the Appellant since the 1st Respondent, a bank, is capable of indemnifying him. In light of these findings, it is unnecessary to consider the balance of convenience factor.
17. This Application is in the final analysis dismissed but the costs thereof shall abide the Appeal..

J. M. NANG'EA - JUDGE

Ruling delivered virtually this 26th day of January, 2025

in the presence of:

Mr Owino Advocate for the Appellant.

Mr Mayiga Advocate for the 1st Respondent.

The Court Assistant (Jeniffer).

J.M. NANG'EA - JUDGE.

ORIGINAL