

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E125 OF 2025

DR. CALVIN NYAKURE KUNI.....1ST APPELLANT
MARTHA MOKEIRA BISIERI MORAYA.....2ND APPELLANT

VERSUS

MWANANCHI CREDIT LIMITED.....RESPONDENT

RULING

1. This Appeal arises from the refusal by the trial Court in **Eldoret Chief Magistrate’s Court Civil Case No E1011 of 2024**, to grant an interlocutory injunction to restrain the Respondent from exercising its chargee’s statutory power of sale.

2. The Appellants, by way of the Notice of Motion dated 17/06/2025 filed through **Messrs Wambua Kigamwa & Co. Advocates**, have now moved to this Court seeking orders as follows:

ii) [.....] spent

ii) [.....] spent

iii) **That an injunction do issue against the Respondent restraining it whether by itself, its servants and/or agents from advertising, selling, transferring or in whatever way alienating the land parcel known as ELDORET MUNICIPALITY/BLOCK 14/2855 pending the hearing and determination of this Appeal.**

iv) **That the costs of this Application be provided.**

3. The Application is supported by the Affidavit sworn by the 1st Appellant in which he deponed that the Appellants are the proprietors of the leasehold interest in the said parcel of land known as **Eldoret Municipality/Block 14/2855 (hereinafter “the property”**. He deponed that they sought for a financial facility from the Respondent in the sum of Kshs 4,500,000/- upon which an offer was made to them by way of the letter dated 1/04/2024, which they accepted and a charge registered over the property on 20/05/2024 to the Respondent. He urged that they continued to service the facility over time and amongst the known sources of finances for repayment is a private health facility known as **Fountain Health Care Limited** where the 1st Appellant has been offering consultancy services as a medical practitioner, a fact which is within its knowledge, that despite efforts to service the **Eldoret High Court Civil Appeal No. E125 of 2025**

facility, the Respondent moved to exercise the chargee's statutory power of sale over the property. He deponed that, as such, they moved to file the said **Eldoret Chief Magistrates' Court Civil Case No. E1011 of 2024**, in which they also filed the application seeking an interlocutory injunction to restrain exercise of the statutory power of sale, which Application was however determined against them by way of the Ruling dated 27/05/2025. He urged that aggrieved by the decision, they filed this Appeal, which he contended, raises germane matters for consideration, is not frivolous, and hence the need to preserve the property by way of an injunction, and also, that the Appellants will suffer irreparable loss if the Application is not granted.

4. The Application is opposed by the Respondent by way of the Replying Affidavit filed through **Messrs Munyaga Githaiga Advocates**, and sworn by one **Cedella Akech**, who introduced herself as the Respondents' Legal Officer. She deponed that by the letter of offer and loan agreement dated 12/04/2024, the parties entered into a loan agreement in which the Respondent advanced to the 1st Appellant a loan facility in the sum of Kshs 4,500,000/-, and that the 1st Appellant voluntarily agreed that the said property would be attached as security for performance of the loan and interest until payment in full. She deponed that it was a term of the agreement that the loan was to be repaid over a period of 24 months in accordance with the amortization schedule and that the funds were then disbursed to the 1st Appellant, that the 2nd Appellant was listed as a guarantor of the agreement and executed a personal guarantee for performance of the terms, that a charge instrument was then registered over the title to the property as an encumbrance by way of the letter of consent dated 16/05/2024, and the same duly registered. She contended that the Appellants have since defaulted in discharge of their loan obligations, and as at 10/02/2025, the outstanding balance stands at Kshs 8,244,071.48, and the Appellants' prolonged and continuous default has accumulated penalties and arrears in the sum of Kshs 857,112/- as at 10/02/2025, which continues to accumulate. She contended that despite reminders, the Appellants have ignored to clear the outstanding arrears, that as provided under **Section 90** of the **Land Act 2012**, the Respondent intends to exercise its remedies as a result of the default and sent out the notice required under **Section 90(2)** of the **Land Act** informing the Appellants the nature and extent of the default, the action required to remedy the default and consequences of non-compliance, which notice the 1st Appellant duly received but ignored despite acknowledging receipt thereof and being in default. She then contended that contrary to the 1st Appellant's allegations, the notice was issued on 2/10/2024 and the 90 days have thus lapsed. She deponed further that the Respondent also issued to the Appellants the 40-day statutory notice on 6/01/2025 as required under **Section 96(2)** of the **Land Act**. She thus asserted that having

failed to remedy the default, it is only prudent that the Respondent be allowed to exercise its statutory power of sale.

5. She reiterated that by the email dated 26/11/2024, the 1st Appellant clearly acknowledges existence of outstanding penalties and arrears but has failed to make good the claim, that the Appellants have not adduced any evidence showing that they have been servicing the loan amount, and have therefore not established a *prima facie case*. Counsel, in conclusion, urged that in exercise of the statutory power of sale, the Respondent intends to undertake a further valuation on the property aside from the valuation already undertaken on 12/12/2023.
6. The parties then filed written Submissions. The Appellant's Submissions is dated 30/08/2025, while the Respondent's is dated 23/07/2025.

Applicants' Submissions

7. Counsel for the Appellants cited the provisions of **Order 42 Rule 6 (6)** of the **Civil Procedure Rules**, and also the case of **Butt v Rent Restriction Tribunal, Civil Application No. NAI. 6 of 1979**, and reiterated that the Appeal raises germane matters for consideration hence need to preserve the property by way of an injunction to preserve the substratum of the Appeal. He reiterated that the Appellants will suffer irreparable harm and damage which will not be adequately compensated by an award of damages as the Respondent is in breach of the law in seeking to exercise the statutory power of sale, and that the Court should therefore tilt towards maintaining the status – quo, and by assuming the lower risk.

Respondent's Submissions

8. Counsel for the Respondent urged that an injunction is an equitable remedy, and a party seeking it must satisfy the three-fold test laid down in **Giella v Gasman Brown & Co. Ltd EA 358**, but the Appellants have not demonstrated the principles to be met to warrant grant of the orders. Regarding *prima facie* case, Counsel cited the case of **Stek Cosmetics Limited v Family Bank Limited & Another [2020] KEHC 1464 (KLR)**, and also the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**, and urged that the Appellants' case is an afterthought. He submitted that the Appellants are yet to make any substantial payment towards repayment of the loan, that the Appellants, upon failing to discharge their obligations, are now attempting to use the Court as a shield for non-performance of the loan obligations, and have not tendered any evidence to show that they have been even remotely servicing the loan. He reiterated that the Appellants have therefore not made out a *prima facie* case with a likelihood of success, have also failed to demonstrate

any irreparable harm they would suffer if the orders sought are not granted that cannot be remedied by damages, and he cited the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] KEHC 7263 (KLR)**.

9. He submitted that that the balance of convenience is also in favour of allowing the Respondent to continue with exercise of its statutory power of sale, and cited the case of **Kombo v Rafiki Micro-Finance Bank Limited & Another (Civil Appeal 90 of 2023) [2024] KEHC 155 (KLR)**. He contended further that the Appellants seek an equitable remedy yet they have approached this Court with unclean hands, and cited the case of **JM v SMK & 4 others [2022] KEHC 2265 (KLR)**. He submitted that the trial Court correctly held that the Respondent had issued the requisite notices, and also that suspension of the Respondent's exercise of its statutory power of sale would amount to rewriting the contract. He urged the Court to adopt a similar stand, and also cited the cases of **South Nyanza Sugar Co. Ltd vs Leonard O. Arerea (2020) eKLR** and **Mboya v National Bank of Kenya & another (Civil Case E001 of 2024) [2024] KEHC 5786 (KLR)**.

Determination

10. The one issue that arises for determination herein is “**whether, pending hearing and determination of this Appeal, a temporary injunction should be granted to restrain the Respondent from exercising its chargee’s statutory power of sale by disposing or selling off the suit property.**”
11. Generally, the law governing the grant or refusal of interlocutory injunctions is set out under **Order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides as follows:

"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit;

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging,

alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further."

12. Specifically, this Court's power to grant an injunction pending Appeal is provided under **Order 42 Rule 6(6)** of the **Civil Procedure Rules**. The same is premised in the following terms:

"Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with."

13. The conditions for consideration in applications for injunctions were settled in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) EA 358**, in which the Court pronounced itself in the following terms:

"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."

14. The said test was also considered in the case of **American Cyanamid Co. v Ethicon Limited (1975) AC 135** where the elements were broken down as follows:

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

15. It is also settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact on the basis of the conflicting Affidavit evidence. In connection thereto, in **Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1**, the Court of Appeal guided as follows:

"...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

16. Although as aforesaid, I should not delve deeply into determining substantive matters, to make a determination whether a *prima facie* case has been established, I must examine the facts deponed in the rival Affidavits and apply them to the law.

17. As to what amounts to a *prima facie* case, the Court of Appeal, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** held as follows:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter.”

18. It is evident that the trial Court declined to grant the injunction on the ground that the Applicant had not established a *prima facie* case. I have also considered the Respondent’s Replying Affidavit, more so with regard to the issue of service of the statutory notices, which is the crux of the Application herein.

19. I put emphasis on the above because, in law, in exercising its statutory power of sale, a chargee is required to issue notices to the chargee as follows:

- a) 90 days’ statutory notice of default, pursuant to **Section 90(1) and (2) of the Land Act, 2012.**
- b) 40 days’ notice of intention to sell, pursuant to **Section 96(2) of the Land Act, 2012.**
- c) 45 days’ redemption notice pursuant to **Rule 15(d) of the Auctioneers’ Rules, 1997.**
- d) 14 days’ notification of sale, pursuant to **Rule 25(e) of the Auctioneers’ Rules, 1997.**

20. The Respondent, in its Replying affidavit, exhibited a copy of the Statutory Notice dated 2/10/2024 stated to have been served upon the Respondent pursuant to the provisions of **Section 90(2) of the Land Act**, and also correspondence between the 1st Appellant and the Respondent whereof receipt of the notices is acknowledged. The Respondent has also exhibited a copy of the 40-day statutory notice dated 6/01/2025 and also accrual of the arreras. Service of the notices is also supported by copies of certificates of postage exhibited

and there is no allegation that the address used to serve the notices was erroneous, and in fact, there is no denial of service. There is also no allegation of any fear that the Respondent will fail to serve the remaining notices when the time matures.

21. In the circumstances, my finding is that the Appellants have failed to demonstrate the existence of a *prima facie* case. As correctly urged by Counsel for the Respondent, granting the injunction in the absence of a *prima facie* case would amount to re-writing the parties' express contract yet it is a settled principle of law that parties to a contract are bound by the terms and conditions thereof. In appreciating this position, the Court of Appeal, in the case of **National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR**, stated as follows:

“A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

22. I therefore find that the evidence presented before this Court falls short of the threshold required to be met to establish the existence of a *prima facie* case.

23. Having found that no *prima facie* case has been established, it is no longer necessary for me to consider the second and third limbs of the rule in **Giella vs Cassman Brown**. For this position, I refer to the case of **In Nguruman Limited v Jane Bonde Nielsen and 2 Others, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR**, in which the Court of Appeal reiterated that:

“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 prima facie case is not established, then irreparable injury and balance of convenience need no consideration”

24. Nevertheless, suffice to mention that even on these other two limbs, I still rule against the Appellants since the Courts have on numerous occasions expressed the position regarding **Eldoret High Court Civil Appeal No. E125 of 2025**

mortgages over property. For instance, in the case of **Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation)**, HCCC No. 82 of 2006), Warsame J (as he then was) observed as follows:

“..... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

25. In the instant matter, the trial Court will be entitled to order the Respondent to compensate the Appellants should they prove their claims and succeed before it. In any case, there is no allegation that the Respondent, a well-grounded financial institution, would be incapable of compensating the Appellants for any eventual loss or injury, if any.

26. On **“balance of convenience”**, it is the position that the fact that a property is, or has a sentimental value, or is highly valued does not stop it from being auctioned as long as the requisite procedures have been followed according to the law. When charging such property, the borrower is presumed to be fully aware of the consequences of default. In the circumstances, I find that the **“balance of convenience”**, too, tilts towards non-interference with the Respondent’s right to proceed with recovery. On this position, I find company in the holding of **F. Ochieng J (as he then was)** in the case of **Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR** in which he stated the following:

“In my considered view if the 1st and 2nd defendants were restrained from selling off the suit property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st and 2nd defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property were sold, the plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd defendants would be able to compensate the plaintiff. In contrast, the stoppage of the intended sale by the chargor would result in the continued growth of debt, thus exposing them to potentially substantial irrecoverable losses. I therefore find that provided the chargee complies with all other legal requirements, he should be permitted to realise the security.”

27. For the above reasons, I find that the Appellants have failed to satisfy the requirements laid down for grant of interlocutory injunctions pending Appeal. The Application therefore fails.

Final Orders

28. In the premises, the Appellant's Notice of Motion dated 17/06/2025 is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF MARCH 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

N/A for the Appellants-Applicants

Mr. Odhiambo for the Respondent

Court Assistant: Brian Kimathi