

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
COMMERCIAL APPEAL NO. E018 OF 2024

ABSA BANK KENYA PLC.....1ST
APPELLANT

DALALI TRADERS AUCTIONEERS2ND
APPELLANT

VERSUS

MARTIN **KIRIMI**
MBAYA.....RESPONDENT

JUDGMENT

1. This is a Judgement in respect of an Appeal from the Ruling and orders of the Chief Magistrates Court at Nairobi (**Hon. B.M. Cheloti**) delivered on 13th December, 2023 in **COMMSU NO. E802 OF 2023.**

Background Facts

2. By a Letter of Offer dated 13th January 2015, the Bank granted the Respondent a loan facility of KES 7,200,000 for equity release and debt consolidation. This was subject to the Staff Housing Loan Terms and Conditions. The loan attracted a staff preferential interest rate of 6%, variable at the Bank's discretion. It was repayable over 180 months at a

monthly instalment of KES 60,758. **Clause 2(d)** provided that the preferential staff rate would cease immediately upon termination of the Respondent's employment unless otherwise agreed in writing. To secure the facility, a charge dated 13th February 2015 was registered over the Respondent's property, Title No. NAIROBI/BLOCK 82/2612, situated in Nairobi County.

3. The Respondent's employment with the Bank ended on 3rd May 2016, triggering the cessation of the preferential staff interest rate and application of the standard customer rate. Following his departure, the Respondent defaulted on the loan, a fact he admitted. This prompted the Bank to commence realization proceedings and issue statutory notices under sections 90 and 96 of the Land Act, 2012. The Respondent subsequently filed **Milimani Commercial Suit E802 of 2023** seeking injunctive reliefs. This was on grounds that the statutory notices were not issued and that the interest rate was unlawfully varied. In a Ruling dated 13th December 2023, the Learned Magistrate granted the injunction, leading to the present appeal by the Appellants.

4. Subsequently, the Appellants filed the Memorandum of Appeal dated 25th January 2024 against the Ruling of the Chief Magistrate's Court at Nairobi (**Hon. B.M. Cheloti**) delivered on 13th December 2023 in **COMMSU NO. E802 OF 2023** on the following grounds:

a) The Magistrate erred in law and in fact by misdirecting herself and failing to consider and appreciate the laid down principles of granting temporary injunctions as set out in the case of Giella vs Cassman Brown Ltd 1973 EA 358.

b) The Magistrate erred in law and in fact by considering the issue for determination to be whether the Respondent's Application for an injunction raised any triable issues when in fact the issue for determination was whether the Respondent had met the necessary conditions stipulated in the case of Giella vs Cassman Brown Ltd 1973 EA 358 for grant of temporary injunctions.

- c) *The Magistrate misdirected herself and based her findings on a wrong consideration of the law regarding the nature of the Application filed by the Respondent,*
5. Further to the above, the Appellants prayed for orders that
- a) *The appeal be allowed with costs.*
- b) *The ruling and order made on 13th December, 2023, be set aside and be substituted with an order dismissing the Respondent's Notice of Motion dated 24th September, 2023, with costs.*

Issues for determination

6. The Court has carefully reviewed the Appellant's Memorandum of Appeal filed herein, the pleadings and proceedings from the lower Court, as well as the submissions by the parties in support of their respective positions. The only issue for determination in this appeal is;
- a) *Whether the Respondent proved their case for an interlocutory injunction before the Trial Court.*

Analysis

7. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)** the Court of Appeal held that:

“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) 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.”

8. The above-mentioned principles on interlocutory injunctions were reiterated by the Court of Appeal in East Africa in the

case of ***Giella v Cassman Brown & Co. Ltd (1973) EA*** as follows:

a) The Applicant must first establish a prima facie case with a probability of success.

b) The Applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.

c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the Applicant.

9. It is noteworthy that the Trial Court, in allowing the impugned application, only considered whether the instant application raises triable issues. On this the Court finds that the Trial Court erred in its determination since the Applicant was required to satisfy the triple requirements as set out in ***Giella v Cassman Brown & Co. Ltd (1973) EA***.

10. The Court will now seek to determine whether the Respondents made out a case to warrant the grant of an injunction order;

11. *Prima facie case* - A *prima facie* case was defined by the Court of Appeal in the case of ***Mrao Ltd v. First***

American Bank of Kenya Ltd & 2 Others [2003] KECA

175 (KLR) as follows-

***“So what is a prima facie case? I would say that in civil cases 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. 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.*”**

12. It follows, therefore, that a *prima facie* 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.
13. The Respondent herein had argued that the Appellant failed to serve him with the **Ninety (90) days** mandatory statutory notice before issuing the redemption notice and

the notification of sale. On the other hand, the Appellant maintained that the statutory notices were sent to the Appellant and that the Respondent, in his Affidavit, acknowledged receipt of the 45-day statutory notice.

14. Upon perusal of the documents annexed to the affidavits filed by the parties, this Court notes that the Appellant exhibited the letter dated 27th February 2023, the 90-day statutory notice, and the 40-day statutory notice dated 6th June 2023.

15. Additionally, the Court has observed that two Certificates of Postage were exhibited. One of the certificates of service, and particularly the one for the 90-day statutory notice, is not legible. It is therefore impossible at an interlocutory stage to figure out the details in it. Hence, making it impossible to conclude that the Appellant did in fact send the notice to the Respondent. Perhaps at a full hearing the Appellant will be able to prove to the Court through hard evidence and legible documents that service was indeed effected.

16. At this interlocutory stage, the Court is not required to delve into the substantive merits of the case when assessing whether a *prima facie* case has been demonstrated. This position was set out in **Nguruman Limited vs Jan Bonde Nielsen CA No. 77 of 2020** where the Court of Appeal stated as follows: -

“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 that has been or is threatened with a 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.”

17. Consequently. The Court finds that the Respondent did establish a prima facie case with a probability of success.
18. On the second limb of irreparable loss, the Respondent had argued that he would suffer irreparable injury which cannot be adequately compensated by an award of

damages, as he will lose his property and will be rendered homeless and destitute.

19. On this issue, the Appellant took the position that the Respondent did not show in what way the sale of the suit property would lead to irreparable injury.

20. The Court agrees that the Respondent, other than pointing out that he would lose his property, has not demonstrated that he will suffer irreparable loss that cannot be compensated by an award of damages.

21. In the present circumstances, the Court exercises its discretion guided by the principle of the balance of convenience. Having weighed the potential prejudice to each party, the Court is satisfied that the risk of injustice to the Respondent arising from the Appellant's failure to provide sufficient proof of service of the requisite 90-day statutory notice outweighs any harm that may be suffered by the Appellant if the sale is temporarily halted.

22. Accordingly, the Court finds that the balance of convenience tilts in favour of the Respondent, and the intended sale should not proceed at this stage.

23. The Court notes that the Appeal is hinged on the fact that the Trial Court did not consider the triple ingredients set out in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA.**

24. The Trial Court was of the opinion that the application for an injunction raised triable issues which could only be determined through a hearing. The Court agrees with the Appellant, that existence of triable issues is not a ground for consideration while granting injunctive reliefs.

25. The power of the Court on appeal is set out in **Section 78 of the Civil Procedure Act** as follows;

78. Powers of appellate court

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

26. The Court having applied the three ingredients in considering an application for an injunction, reaches a similar decision as the Trial Court but for different reasons. The Appeal succeeds to the extent that the Trial Court did not satisfy the triple requirement for the grant of an injunction. However, the Court still finds that the Respondent herein is deserving of an order of injunction pending the determination of the suit.

27. As to costs, the same follow the event unless the Court finds otherwise. The Court notes that the Appeal was well taken, though ultimately it did not have the effect of

dislodging the injunctive orders. The fair order in the circumstances is not to saddle the Appellant with costs. Let each party bear its/his own costs of this Appeal.

Determination

28. The Appeal is hereby dismissed in its entirety for lack of merits.
29. Each Party to bear its/his own costs of this appeal.
30. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI
THIS 28TH DAY OF APRIL, 2026.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

N/A for the Appellants.

Mr. Mutisya for the Respondent.

Mr. John Paul - Court Assistant.