

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E068 OF 2025

SIMON NJOROGE WANDERI
APPELLANT

VERSUS

EQUITY BANK (K) LTD **1ST**
RESPONDENT

NGURE AUCTIONEERS **2ND**
RESPONDENT

JUDGEMENT

1. Before this Court for consideration is the appellant's Notice of Motion Application dated 19th March 2025, which is expressed to be anchored **under Articles 47, 48, 50 and 159 of the Constitution of Kenya** as read together with **Sections 1A, 1B, 3, 3A of the Civil Procedure Act; Orders 40, 42 Rules (1), and (6), Order 50 Rule 6, and Order 51 Rule (1) of the Civil Procedure Rules**. The appellant prays for the following Orders as against the Respondent s that:
 - i. *Spent.*
 - ii. *That this Honourable Court be pleased to issue stay of execution of the orders of the trial court issued on 21st February, 2025 pending the hearing and determination of this Application.*
 - iii. *That this Honourable Court be pleased to issue stay of execution of the orders of the trial court issued on 21st February, 2025 pending the hearing and determination of this Appeal.*

- iv. *That this Honourable Court be pleased to grant an Order of temporary injunction restraining the Respondents herein whether by themselves, their agents and/or servants from proclaiming, advertising for sale and/or actual selling by public auction, selling, entering, taking possession of, or in any way interfering and /or dealing with the current ownership of Land Parcel No. THIKA MUNICIPALITY BLOCK 24 / 917 pending the hearing and determination of this Application.*
- v. *That this Honourable Court be pleased to grant an Order of temporary injunction restraining the Respondents herein whether by themselves, their agents and/or servants from proclaiming, advertising for sale and/or actual selling by public auction, selling, entering, taking possession of or in any way interfering and /or dealing with the current ownership of Land Parcel No. THIKA MUNICIPALITY BLOCK 24 / 917 pending the hearing and determination of this Appeal.*
- vi. *That this Honourable Court be pleased to set aside the Orders issued by the trial Court on 21st February, 2025 pending the hearing and determination of this Application and the Appeal.*
- vii. *That in the alternative, this Honourable Court be pleased to find that the Appellant was not heard on the substantive suit and do direct that the substantive suit be heard on merit pursuant to an Order of Injunction against the Respondents being issued stopping any sell and/or interference with Land Parcel No. THIKA MUNICIPALITY BLOCK 24 / 917.*

viii. *That the Honourable Court do enlarge time and/or grant leave to the Appellant to file the annexed memorandum of appeal from the Ruling by Hon. V. Wakumile delivered on 21st February, 2025 in THIKA Civil Suit No. E047 of 2024 and that the annexed Memorandum of Appeal be deemed as duly filed upon grant of this application.*

2. The application is premised on the following grounds;

- i. *That on 21st February, 2025 the Appellant's application seeking temporary injunctive orders of an intended illegal auction by the Respondents was dismissed vide a Ruling and the entire suit was marked as closed without first hearing the Appellant on the substantive suit.*
- ii. *That time for filing an appeal lapsed because the trial court never uploaded the Ruling on the CTS System in time and the uploaded Ruling was not complete, this forced the Appellant to physically follow up on the Ruling. Further, the Appellant was looking for money so as to be able to lodge this appeal which raised serious triable issues and he is therefore praying for time to be enlarged to lodge in his appeal.*
- iii. *That the decision by the trial court is surely prejudicial to the Appellant who was not heard on his case.*
- iv. *That the Court dismissing the Application for stay simply mean that the Respondents is allowed to proceed and illegally auction the Respondent's property sitting on Land Parcel No. THIKA MUNICIPALITY BLOCK 24/917 to the detriment of the Appellant and consequently continue to violate the*

Appellant's right to a fair hearing and access to justice.

- v. *That in the Ruling, the Trial Court was of the view that the Application would succeed on account of non-compliance (on the part of Respondent) with Section 90, 96 and 97.*
 - vi. *The Appellant's application to the trial court dated 20th May, 2024 was premised on Section 90, 96 and 97 which the trial Court overlooked in its Ruling.*
 - vii. *That there was absolutely no reason nor justification for the Court to dismiss the entire case and mark it as closed without first hearing the parties.*
 - viii. *That the Appellant who was seeking for temporary injunctive orders is yet to be heard in the substantive suit and that the event of the suit is yet to be determined.*
 - ix. *That it is unconscionable, unfair, and against the rules of natural justice for the Trial Court to dismiss the application seeking for injunctive orders against the illegal auction, condemn the Appellant to pay the cost therein and mark the case as closed without first hearing the Appellant substantively.*
 - x. *That it will be fair and in the interest of justice for this application to be allowed.*
- 3.** The Respondent opposed the subject Application through the Replying Affidavit sworn by *Njenga Ndungu* on 8th May 2025 in his capacity as the Credit Manager with the 1st Respondent Bank at its Kenyatta Avenue Branch situated in Thika town.
- 4.** The 1st Respondent averred that the stay orders sought in prayers 2 and 3 of the subject application should not be

granted since the Appellant has not offered any security as provided by **Order 42 Rule 6** of the **Civil Procedure Rules** for stay of execution.

5. Furthermore, the injunctive orders sought in prayers 4 and 5 of the notice of motion should not be granted for two reasons. Firstly, the 1st Respondent is only executing its remedy as a Chargee as provided by **Section 90** of the **Land Act** and has followed the correct procedure in doing so. Secondly, the Applicant has not satisfied the conditions set out in **Order 40** of the **Civil Procedure Rules** for the grant of an injunction as enunciated by the Court in **Giella v Cassman Brown & Co. Ltd 1973** which are that one has a prima facie case with a probability of success, one is likely to suffer irreparable loss which cannot be adequately compensated by damages and the application is on a balance of convenience.
6. In addition, the trial Court, held that the 1st Respondent duly issued the three notices in accordance with the law before exercising its rights as Chargee.
7. The Respondent refuted the Applicant's allegation contained in paragraph 2 of the Appellant's supporting affidavit that the 1st Respondent tried to sell his property illegally, as attested to by the Annexures marked NN-1, NN-2 and NN-3 being copies of the three notices issued to the Appellant together with the certificate of postings. The 1st Respondent subscribed to the position that it complied with **Sections 90, 96 and 97 of the Land Act.**
8. That the Appellant is a guarantor to one Emma Wangeci Kuria (borrower) and he offered his property **Thika Municipality Block 24/917** as security and same was charged by the 1st Respondent for Kshs. 7,000,000 advanced to the borrower. That the aforesaid borrower defaulted, and the 1st Respondent issued notices to the borrower and the Appellant (guarantor) in accordance with **Sections 90, 96 and 97 of the Land**

Act through the postal address that he provided by the 1st Respondent for communication being postal address P.O. Box 410-10202 Kangema and at all material times executed the documents with the said postal address and the Applicant never questioned the same. The 1st Respondent relied on its annexure marked NN-4 being copy of the Charge registered against the property as proof of the Applicant's postal address.

- 9.** That the 1st Respondent engaged the Appellant, the borrower and the other co-guarantor following the borrower's default whereby, they requested that the terms of the loan repayment be varied and vide a letter of offer dated 30.10.2023, the 1st Respondent agreed to vary the terms of the loan and they all executed the same.
- 10.** That the Applicant further executed a personal Guarantee and undertaking dated 1st December 2022 for the sum of Kshs. 24,000,000 in favour of the borrower. Annexed hereto and marked NN-5 is a true copy of the said Guarantee and Undertaking.
- 11.** That the reasons given by the Appellant for filing his appeal out of time are not sufficient and compelling and should be dismissed.
- 12.** Furthermore, the Appellant failed to produce any evidence such as a letter to the Executive Officer of the court requesting for a complete copy of the ruling and neither has he produced the complete copy after allegedly following it up physically. There is no evidence on record to support his allegation.
- 13.** That on the hearing of the main suit, the Applicant may make the relevant application before the trial magistrate to reopen the lower court case for purposes of hearing of the main suit.
- 14.** That the trial Court dismissed the Applicant's application after

establishing that the Respondents had complied with the law, therefore, he had no case before the court.

- 15.** That the Applicant is truly indebted to the 1st Respondent and the instant application amounts to an abuse of the Court process as the borrower breached the revised terms of the conditions of the grant of the loan facility. Further, as at 6th May 2024, the total outstanding loan amount was Kshs. 19,088,797 as attested to by the annexure marked “NN-6” on file being a copy of the loan statement compiled by the 1st Respondent.
- 16.** That by dint of the Applicant’s guarantee of Kshs.24,000,000 to the borrower, the Appellant is obliged to settle the outstanding loan dues as stated in the guarantee instrument, in view of the fact that the security property is worth much less than the guaranteed amount.
- 17.** That the Applicant has failed to honor the said Guarantee and undertaking to the 1st Respondent and since the commencement of the suit, the Applicant has not offered to pay even the amount that he concedes that he has guaranteed to the 1st Respondent, therefore, the Applicant has approached the court with unclean hands.
- 18.** The subject Notice of Motion was dispensed by way of written submissions. Through written submissions dated 12th August, 2025 the Applicant identified the following three (3) issues for determination:
 - i. *Whether the trial court erred in fact and in law by dismissing the substantive suit and marking it as closed without a hearing.*
 - ii. *Whether the action by the trial court dismissing the substantive suit was prejudicial to the applicant herein.*

- iii. *Whether the trial court made sufficient consideration before dismissing the application for temporary injunction by the appellant.*
- 19.** The Respondent filed written submissions dated 20th June, 2025 wherein the following issues for determination were isolated;
 - i. *Whether the Appellant has met the threshold for grant of an injunction.*
 - ii. *Whether the Appellant has met the conditions for stay of execution pending appeal.*
 - iii. *Whether the Appellant should be granted leave to file an appeal out of time.*
- 20.** In support of his submissions, the Respondent relied on the holding of Court in the case of **Patrick Waweru Mwangi and Another v Housing Finance Co. of Kenya Ltd (2013) eKLR; Nguruman Ltd v Jan Bonde Nielsen and 2 others (2014) eKLR; Miscellaneous Application No. 42 of 2024 Seven L. General Trading Ltd and another v Simon Githuku Karau; and, Robert Njoka Muthara and another v Barclays Bank of Kenya Ltd and another (2017) eKLR.**
- 21.** Having so recapitulated the pleadings and rival submissions of the parties herein, the Court identified the following issues for resolution:
 - i. Whether the instant Application is merited.
 - ii. Which party shall bear the costs of the Application.
- 22.** The trial Court's decision entered on 21st February 2025 dismissed the Applicant/Intended Appellant's Notice of Motion Application dated 20th May 2024 seeking, *inter alia*, an order of temporary injunction restraining the 1st and 2nd Respondents from advertising for sale or actually selling

through public auction his land parcel number THIKA MUNICIPALITY BLOCK 24/917.

23. In the well-known case of **Giella v. Cassman Brown [1973] E.A. 358** the Court set out the parameters which an Applicant seeking a temporary injunction is required to satisfy, as hereunder:

“First, 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.”

24. The Applicant/Intended Applicant averred that the delay in filing an appeal against the impugned decision was occasioned by the trial Court which failed to upload the same on the CTS platform thereby, compelling the Applicant to pursue a physical copy of the aforesaid decision. Furthermore, the Respondents are keen to dispose the Applicant’s property at a throw away price through auction.

25. In ruling in favour of the Respondents, the trial Court found that the Applicant was properly served by the 1st Respondent with Notices for the sale of the security being land parcel number THIKA MUNICIPALITY BLOCK 24/917 pursuant to the provisions of **Sections 90, 96 and 97** of the **Land Act**. Further, the trial Court determined that in view of the propriety of the Notices served by the 1st Respondent, the Applicant was engaging in “mischief” by seeking the Court’s intervention. Furthermore, the trial Court determined that Applicant failed to meet the threshold for the grant of a temporary Injunction as set out in the decision in **Giella**

versus Cassman Brown & Co. Ltd 1973.

- 26.** The Court has painstakingly considered the Memorandum of Appeal on file dated 19th March 2025 wherein the Applicant/Intended Appellant raises some nine (9) grounds against the impugned decision. One of the grounds subscribed to by the Applicant/Intended Appellant is that the trial Court ought not have dismissed his application at the interlocutory stage or, without there being a full trial. He argued and submitted that the trial Court ought to have heard the parties on the suit itself or substantively before dismissing his application dated 20th May 2024.
- 27.** Having in mind the dictates of the Constitution of Kenya on substantive justice, the Court holds and finds that pursuant to the provisions of **Articles 50** and **159** of the **Constitution of Kenya**, the Applicant/Intended Applicant was entitled to have his case before the trial Court heard on the merits.
- 28.** In the premises, the Court is persuaded and satisfied that the trial Court ought not have dismissed the Applicant/Intended Applicant's suit at the interlocutory stage as it did vide the impugned decision rendered on **21st February 2025**. By dismissing the Applicant/Intended Applicant's entire cause through its Ruling on an application seeking a temporary injunction, the trial Court denied the Applicant/Intended Applicant a hearing.
- 29.** The following are the Final Orders of the Court,
- 1) *The prayers enumerated as iii, iv, v, vi, vii and viii in the Application before the Court dated 19th March 2025 are hereby allowed as prayed.***
 - 2) *No orders as to costs***
- Dated, Signed and Delivered Virtually this 30th day of April, 2025.**

**HON. T. W. OUYA
JUDGE**

In the presence of:

Mrs. Njehia - Respondents

No appearance by or for Appellants

Kelvin/Hamza - Court Assistants

ORIGINAL