

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. APPEAL NO. E147 OF 2025

BETWEEN

**FRANCIS KITHUKA
MUSYOKA.....APPELLANT**

AND

ABSA BANK KENYA PLC.....
RESPONDENT

RULING

Introduction and Background

1. The Appellant has filed the Notice of Motion dated 26th May 2025 seeking an interlocutory injunction restraining the Respondent from selling the property **LR No. Nairobi/Block 127/366** pending the hearing and final determination of this appeal. The application is supported by the grounds on its face and the affidavit of the Appellant sworn on 15th May 2025. It is opposed by the Respondent through the replying affidavit of its Recoveries Manager in the Corporate Recoveries Department, SAMUEL NJUGUNA, sworn on 20th June 2025.

2. The background giving rise to the appeal and the present application is that in 2011, the Appellant obtained a Kshs 3.5 million loan from the Respondent when he was their employee, secured by the property **LR NO. Nairobi/Block 127/366**. He repaid the loan by way of salary deductions until May 2023 when he left employment and he currently works for the County Government of Kitui and claimed that he had been experiencing delayed salary payments, causing him to fall eight months in arrears. He averred that the Respondent consolidated his secured home loan with an unsecured personal loan and demanded Kshs 5,421,473.95.00, threatening to sell the property by public auction scheduled for 28th January 2025.
3. He moved to the subordinate court to forestall the auction and the learned magistrate granted granted a temporary injunction but dismissed his application after the hearing on 9th May 2025, effectively allowing the Respondent to proceed with the sale hence the present appeal and application. The application was canvassed by way of written submissions which are on record and I have considered the same together with the pleadings and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

4. From the pleadings and submissions, I note that the main issue for the court's determination is whether the Appellant is entitled to the injunctive relief pending appeal.
5. As submitted by the Respondent, Order **42 Rule 6** of the **Civil Procedure Rules** empowers this court in exercising its appellate jurisdiction to grant a temporary injunction as follows:

*“(6) Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power **in 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 a tribunal **has been complied with.**”*

6. From the above provision, a court will only exercise its discretion to grant an injunction where the procedure for instituting an appeal has been complied with. Since the Appellant has filed a memorandum of appeal stating the ruling being appealed from and the grounds of the appeal, I find that the procedure for instituting the appeal have been complied with (see **Umar Auto Garage New & another v Githere Investments Limited [2022] KEELC 203 (KLR)**). With that out of the way, the court

can now determine whether the Appellant has made out a case for the grant of interim injunction where Visram J., (as he then was), while considering an application similar to the one before the court in the case of **Patricia Njeri & 3 Others V National Museum Of Kenya [2004] KEHC 1614 (KLR)** spelt out the principles to be followed in considering such an application. He stated that the power of the court to grant any order of temporary injunction is discretionary and that the discretion must however be exercised judicially and not in a whimsical or arbitrary fashion. He added that the exercise of that discretion should be guided by certain principles as follows:-

- a) *The discretion will be exercised against an Applicant whose appeal is frivolous.*
- b) *The discretion should be refused where it would inflict greater hardship than it would avoid.*
- c) *The Applicant must show that to refuse the injunction would render his appeal nugatory.*
- d) *The court should be guided by the principles in Giella Vs Cassman Brown & Company Ltd (1973) EA 358.*

7. The Appellant depones that the learned magistrate's dismissal of his application left him exposed to imminent loss of the property which would render the appeal nugatory. The Appellant disputes

the amount claimed and says the Respondent illegally consolidated a secured loan with an unsecured personal loan without a valid Charge, that the Respondent has refused to provide a statement of account despite repeated requests, that the loan repayment period runs until 2043, and the Appellant is still within that period and that he has made arrangements to clear the legitimate debt once the correct outstanding amount is known.

8. In response, the Respondent depones that the Appellant has not made any payments since the original suit was filed and has not demonstrated any ability to pay, that the Further Charge dated 11th December 2018 expressly consolidated the facilities with the Appellant's consent. That under the loan agreement, default on any facility triggers the right to recover using any security, including the charged property and it contends that the Appellant does not dispute that significant sums are owed as the Respondent's statements show no deposits for 15-16 months from October 2023 to February 2025 on three loan accounts.
9. The Respondent avers that all statutory notices were served properly via registered post, email, and *WhatsApp* and the Appellant acknowledged receipt in an email dated 8th April 2024 and asked for 120 days to pay, but failed to do so. Further,

that the Respondent obtained a current valuation report dated 18th March 2024 from a licensed valuer showing the property market value at Kshs. 6 million and forced sale value of Kshs. 4.5 million. The Respondent states that the Appellant has not provided any counter-valuation and that the Respondent is a profit-driven entity and is entitled to recover its debt. That the Appellant's continued default means interest and penalties keep accruing, potentially exceeding the property's value and that the Respondent has sufficient resources to compensate the Appellant in damages if necessary.

10. As such, the Respondent contends that the Appellant has not established

a prima facie case as he admits the debt and has not paid, there is no irreparable harm as damages would adequately compensate the Appellant if the sale was wrongful and that the balance of convenience favours the Respondent as the debt is large, growing daily, and the Respondent has a statutory right to sell. That the subordinate court has already dismissed the Appellant's injunction application on 9th May 2025, finding the Respondent had followed due process and thus, the Respondent urges the court to dismiss the application and allow it to proceed with the sale of the property.

11. Going through the pleadings and submissions, I find that the Appellant's appeal, even though it is yet to be prosecuted, appears frivolous as his grounds of illegal consolidation, lack of notice, undervaluation were all expressly addressed and dismissed by the subordinate court. The Respondent has annexed the Further Charge dated 11th December 2018 where the Appellant consented to consolidation, there is proof of service of all statutory notices including via email to the Appellant on 8th April 2024 where he acknowledged receipt and asked for 120 days and a current valuation report dated 18th March 2024 showing a market value of Kshs. 6,000,000.00 and a forced sale value of Kshs. 4,500,000.00. The Appellant has not provided any counter-valuation or credible evidence to challenge the Respondent's documentation and re-litigating the same unsubstantiated claims on appeal suggests the appeal is not arguable, let alone with high chances of success.

12. I further note that the Appellant's main fear is loss of the property. However, it should not be lost that once a property has been offered as security, it becomes a commodity of sale in the event of default (see **Maina & another v Equity Bank Limited & 2 others [2023] KEHC 23538 (KLR)**). While this might be inconvenient for the Appellant, it does not elevate the loss to

“irreparable” in a legal sense, as its value can be ascertained and compensated by damages. The Appellant has not disputed that the Respondent is a large, licensed commercial bank with the financial capacity to pay damages if the appeal eventually succeeds and the sale is found to have been wrongful. Therefore, the appeal would not be rendered nugatory as damages are an adequate remedy.

13. The Appellant also admits he is in default and he continues to occupy or benefit from the property while the debt grows daily. The Respondent, as a financial institution, is entitled to enforce its statutory power of sale and granting an injunction would cause greater hardship to the Respondent because of continued financial loss, ballooning arrears potentially outstripping the property’s value, than to the Appellant who could be compensated by damages. This admission of indebtedness on its own take the Appellant out of the ambit of a *prima facie* case as set out in ***Giella Vs Cassman Brown(supra)*** and an injunction cannot be granted in such circumstances. In sum, I find that the Appellant has not met the test for the grant of an order of interim injunction pending the hearing and determination of the appeal.

Conclusion and Disposition

14. The upshot is that the application dated 26th May 2025 is dismissed with costs. It is so ordered.

DATED SIGNED AND DELIVERED virtually at NAIROBI this

8th DAY of MAY 2026

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Irungu holding brief for Mr. Ngata Kamau for the Appellant/Applicant
2. Mr. Pere for the Respondent
3. Amos- Court Assistant