Blue Waters Hotel Ltd & 2 others v Guaranty Trust Bank (Kenya) Limited (Civil Appeal E081 of 2020) [2025] KECA 1421 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1421 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E081 OF 2020

MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA

JULY 31, 2025

BETWEEN

BLUE WATERS HOTEL LTD ..... 1ST APPELLANT

WILLIAM OSEWE GUDA ..... 2ND APPELLANT

STELLA MUTHEU OSEWE ..... 3RD APPELLANT

AND

GUARANTY TRUST BANK (KENYA) LIMITED ..... RESPONDENT

(Being an appeal from the Ruling and order of the High court at Kisumu, (Cherere J.) dated 28th July 2020) in HC civil suit No. 79 of 2018)

JUDGMENT

1. This is an interlocutory appeal against the ruling and order of Cherere J. dated 28th July, 2020 in the High Court of Kenya at Kisumu in Commercial Case No. 79 of 2018. Being an interlocutory appeal, we must be cautious in our determinations to guard against and ensure that we do not prejudge, prejudice, interfere, or even tie the hands of the bench that may be empaneled to hear the substantive suit later.

2. The facts leading to this appeal are fairly straightforward: Blue Waters Hotel Ltd, along with its directors, William Osewe Guda and Stella Mutheu Osewe, ("the appellants"), filed a suit against Guaranty Trust Bank (Kenya) Limited, ("the respondent"), challenging the respondent's exercise of its statutory power of sale over properties they had tendered as security for the loan facilities extended to them by the respondent. The dispute originated from a loan agreement entered into by the parties on 12th May, 2014, by which the respondent granted the 1st appellant a loan facility of Kshs.220 million, inclusive of Kshs.10 million overdraft, to finance the construction of the 1st appellant.

3. To secure the loan, the 2nd and 3rd appellants provided a legal charge over Land Title No. Kisumu Municipality/Block 13/16, ("the Kisumu property") along with a legal charge over apartments located in South C, Nairobi, ("the South C property") owned by them. Additional conditions for the loan facility included a debenture over all assets belonging to the 1st appellant, fresh valuation reports from the bank's approved valuers, personal guarantees from the 2nd and 3rd appellants, and a corporate guarantee from Ronalo Foods Ltd, backed by a Board Resolution. The charges over the Kisumu and South C properties were registered on 6th August, 2014, formally securing the loan.

4. On 23rd August, 2016, upon request from the appellants, the respondent restructured the outstanding loan facility of Kshs.217.2 million, whilst maintaining the original terms outlined in the letter of offer dated 12th May, 2014. This restructuring was accepted and signed by the 2nd and 3rd appellants personally and also on behalf of the 1st appellant. The restructuring, however, introduced new securities, including a Deed of Consideration between Ronalo Foods Ltd and the 1st appellant, a Board of Director's Resolution authorizing borrowing of up to Kshs.217.2 million, an irrevocable instruction from Ronalo Foods Ltd, directing the bank to channel funds toward loan repayment, personal guarantees from the 2nd and 3rd appellants, and a corporate guarantee from Ronalo Foods Ltd, supported by a Board of Directors Resolution.

5. On 2nd October, 2017, the respondent again at the request of the appellants granted them a six-month moratorium, after which monthly payments, including principal sum and interest, were to resume. As part of this moratorium, a new security was added, requiring Ronalo Foods Ltd to deposit Kshs.1 million weekly into an escrow account for the 1st appellant to facilitate repayments. Subsequently, on 31st October, 2017, the respondent restructured the loan facility once more at the request of the appellants to Kshs. 228.45 million, under the same conditions, continuing the requirement for Ronalo Foods Ltd to channel Kshs.1 million weekly into the escrow account.

6. Despite these arrangements, the appellants defaulted on the agreed re-payments schedules, prompting the respondent to issue a Statutory Notice on 7th February, 2018, under Section 74 of the Registered *Land Act* (now repealed) and Section 90 of the *Land Act*, demanding repayment of accumulated arrears of Kshs.6,190,761.95 plus interest within three months, failing which the bank would proceed with the sale of the charged properties to recover the full outstanding sum of Kshs.235,166,969.48. On May 17, 2018, the respondent issued a 40-day sale notice, specifically for the Kisumu property, due to accumulated arrears amounting to Kshs.15,586,599.95, contributing to the total outstanding debt of Kshs.239,643,924.88, inclusive of accrued interest.

7. In response, the appellants filed a plaint on 27th June, 2018, later amended on 6th July, 2018, challenging the right of the respondent to exercise its statutory power of sale on various grounds. Contemporaneously with the suit, the appellants took out an application, seeking both interim and mandatory injunctive reliefs against the respondent to prevent it from realizing their securities. They argued that the statutory notices issued were defective, as they did not specify the exact amount required to rectify the default. They also claimed that the 1st appellant had secured an additional loan facility of Kshs.100 million from Tourism Finance Corporation in a bid to satisfy the outstanding arrears, but the release of this facility was conditional upon the respondent lifting its charge over the South C property by 30th June, 2028, but the respondent had refused to play ball.

8. The appellants further alleged that the respondent breached clause 9.1(ii) of the Charge and Loan Agreement dated 12th May, 2014, by refusing to lift the charge. They contended that certain supplementary loan terms imposed by the bank were unfair, created under economic duress, and lacked proper consideration. Furthermore, the appellants accused the respondent of deliberately scheming to

frustrate their redemption rights and seeking to dispose of their properties without justification. They asserted that they had a strong prima facie case with high chances of success. That given that some of the properties were prime and if sold as threatened, compensation by an award of damages would not suffice. They concluded by asserting that the balance of convenience favoured them, and that granting an injunction would not unduly prejudice the respondent.

9. In opposition to the application, the respondent filed a replying affidavit sworn by Charles Amanga, it's Recoveries Manager on 25th July, 2018. He reaffirmed the appellants' indebtedness to the respondent and defended the respondent's right to exercise its statutory power of sale. He confirmed that as at 17th May, 2018, the appellants owed the respondent an aggregate sum of Kshs.239,643,924.88, inclusive of accrued interest. He deposed that the appellants had failed to meet their repayment obligations, despite multiple loan restructurings, moratoriums, escrow account arrangements and or accommodations granted by the respondent.

10. The respondent further contended that the statutory notices issued were valid and compliant with the *Land Act*, specifically Section 90, thereof which sets out the chargee's rights in cases of default. He maintained that the respondent had fulfilled all legal requirements before initiating the auction process, including issuing the three-month statutory notice and the 40-day sale notice. He asserted that the appellants had ample opportunity to rectify the default but had failed to do so, leaving the respondent with no choice but to proceed with the auction.

11. He emphasized that the appellants had not demonstrated any legal basis for preventing the auction, nor had they provided sufficient evidence to support their claim that the statutory notices were defective. He dismissed the appellants' argument regarding the Tourism Finance Corporation loan, stating that the respondent was under no obligation to release its charge over the South C property unless the appellants fully settled their outstanding debt.

12. In conclusion, the respondent urged the court to dismiss the application and set aside the interim injunction initially issued, to allow the respondent to proceed with the sale of the charged properties in accordance with its statutory rights. The respondent maintained that the appellants' claims were unsubstantiated, and that granting the injunction would prejudice the respondent's ability to recover its funds, thereby undermining the principles of commercial lending and secured transactions.

13. The trial court carefully evaluated the application and reached the following determinations that: the statutory notices were properly issued and served on the respondent; the statutory notices adequately informed the chargee of the default and the exact amount involved being of Kshs.235,166,969.48. Next, the court examined whether the respondent contributed to the appellants' default and concluded that the appellants had not provided any evidence proving that they were coerced or misled into signing the documents and could not therefore retroactively claim that supplementary conditions were unconscionable;

14. On redemption rights, the court found that the respondent had followed due process, regularly informed the appellants of their indebtedness through account statements, and acted within its rights. The court therefore dismissed the appellants' contention that the respondent had schemed to defeat their redemption rights; the court also analyzed whether the security properties had been undervalued and found that the respondent had conducted the necessary valuation as required under Section 97(2) of the *Land Act*. It ruled that any sale below 25% of market value would entitle the appellants to a remedy under Section 97(3) of the *Land Act*, thus rejecting claims of undervaluation; in determining whether an injunction should issue, the court reverted to the principles established in the case of Giella vs Cassman Brown [1973] EA 358, being that, the applicant must establish a prima facie case with a reasonable probability of success, prove that he would suffer irreparable harm if the injunction was not

granted, harm that cannot be adequately compensated by an award of damages and lastly, the balance of convenience. It then determined that there was undisputed evidence that the 1st appellant was truly indebted and had defaulted on loan obligations to the respondent. Consequently, no prima facie case could be established in the circumstances, and that the respondent's action to recover its monies was legally justified. Furthermore, the court found that no irreparable harm would result from the auction, as the properties had been pledged as commercial security. Finally, since the first two tests had not been met, the balance of convenience favoured the respondent, leading the court to decline issuing the various injunctions sought with the consequence that the application was dismissed with costs and the interim exparte injunction initially issued and in place was lifted.

15. The appellants being dissatisfied with the ruling and order, filed this appeal on grounds that the learned judge failed: to properly consider their submissions; ignored a dispositive point of law, namely the respondent's failure to file a defence to the plaint for over two years; acting in excess of her powers and jurisdiction by misinterpreting and rewriting clause 9.1(ii) of the loan offer letter dated 12th May 2014; misapprehending the law on privity of contracts; misapplying the legal principles governing the grant of injunctions; making premature substantive determinations on disputed factual issues at the interlocutory stage; exercising her discretion improperly and disregarding relevant factors, while prioritizing irrelevant considerations, ultimately resulting in an erroneous ruling.

16. When the appeal came up for hearing on 14th May, 2025, learned counsel Mr. Awele, appeared for the appellants whereas learned counsel Mr. Mwangi, appeared for the respondent.

17. Mr. Awele, submitted that the trial court misapplied the law and erroneously dismissed the application for injunctive reliefs. He contended that the decision unjustly restricted the appellants' right to redeem the suit properties and failed to consider fundamental legal principles governing chargees' statutory power of sale. Counsel argued that the trial court ought to have granted the injunction based on the well-established criteria outlined in the case of Giella vs Cassman Brown (supra).

18. Counsel relying on the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, contended that a prima facie case was established when the materials presented before the trial court by the appellants demonstrated infringement of their rights that required a rebuttal from the respondent. He argued that the respondent's failure to discharge the charge over the South C property, despite the appellants having fulfilled the necessary conditions, constituted a clear violation of their equity of redemption. He further cited the case of David Ngugi Ngaari vs Kenya Commercial Bank Ltd [2015] eKLR, to support the contention that the statutory notice issued by the respondent contained conflicting figures of the amounts due, thereby failing to adequately inform the appellants of the outstanding amount and effectively obstructing their ability to exercise their equity of redemption.

19. It was submitted that the trial court failed to recognize the economic duress exerted by the respondent in its dealings with the appellants. Reliance was placed on the following cases, Madhupaper International Ltd & Another vs Kenya Commercial Bank Ltd & 2 Others [2003] eKLR and LTI Kisii Safari Inns Ltd & 2 Others vs Deutsche Investitions- Und Entwicklungsgesellschaft ('Deg') & Others [2011] eKLR, in arguing that economic pressure, which is illegitimate and coercive in nature, renders contractual agreements unenforceable. That the court in the case of Madhupaper International Ltd (supra) defined economic duress as an act where pressure exerted on a party leaves him with no other reasonable alternative but to comply, and that in the case of LTI Kisii Safari Inns Ltd (supra), this Court held that illegitimate economic pressure that offends standards of commercial morality can vitiate a contract. Counsel contended that the respondent's imposition of supplemental agreements with onerous repayment conditions, despite prior assurances of additional funding, amounted to economic duress.

20. Furthermore, counsel emphasized the uniqueness and value of the Kisumu property, highlighting that it was strategically located in a prime waterfront area near the Central Business District of Kisumu City. He cited the case of Banana Hill Investments Ltd vs Pan African Bank Ltd & 2 Others LLR No. 1370 (CAK), in which this Court held that where a property is of high value and difficult to replace, damages may not be adequate compensation. It was therefore submitted that allowing the forced sale of the Kisumu property would cause irreparable harm, as its unique attributes could not be sufficiently compensated through an award of damages.

21. On balance of convenience, counsel referred to the case of Alice Awino Akello vs Trust Bank Ltd & Another LLR No. 625 (CCK), where the court held that serious doubts regarding the validity of a statutory notice typically favour the chargee in an application for injunctive relief. He argued that the respondent's failure to comply with statutory notice requirements, coupled with its refusal to discharge the South C property despite contractual obligations, raised substantial doubts about the propriety of its actions.

22. In conclusion, counsel submitted that the trial court misinterpreted Clause 9.1(ii) of the loan agreement, thereby wrongly restricting the appellants' right of redemption. He maintained that the trial court prematurely determined substantive legal issues at the interlocutory stage, thereby depriving them of a fair hearing. In the result counsel prayed for the appeal to be allowed as prayed.

23. In opposing the appeal, Mr. Mwangi maintained that the appeal lacked merit and should be dismissed. He contended that the appellants had obtained credit facilities amounting to Kshs.220 million by way of a term loan and an overdraft facility of Kshs.10 million. These facilities were secured through legal charges over the Kisumu and South C properties.

24. He emphasized that the security for the loan facilities was not in dispute, and the appellants had executed all relevant charge documents, confirming their obligations under the loan agreement. He further submitted that the loans were disbursed in accordance with the agreement, and the appellants subsequently sought restructuring of the facilities on multiple occasions. However, despite numerous accommodations, the appellants defaulted on their repayment obligations, leading to the issuance of statutory notices.

25. Counsel acknowledged that there had initially been errors in the statutory notices, which were later corrected and re-issued in compliance with legal requirements. Counsel pointed out that despite being given ample time to regularize their loan repayments, the appellants failed to do so. Instead, they claimed to have obtained financing from Tourism Finance Corporation to redeem their debt, an assertion the respondent argued was misleading, as the alleged financing was insufficient to fully clear the outstanding loan balance.

26. Further, counsel submitted that the appellants abused court processes by obtaining an ex parte mandatory injunction, which compelled the respondent to provide a written undertaking that it would release its charge over the South C property upon fulfillment of certain conditions. It was contended that this order was granted without affording them an opportunity to be heard, leading them to file an application seeking to discharge the ex parte injunction. In a subsequent ruling, the trial court allowed the application thereby setting aside the mandatory injunction granted and thereby permitting the respondent to proceed with the sale of the charged property.

27. To support their position, the respondent cited several authorities, including the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [supra], where this Court held that a borrower who has admitted to owing money and defaulting on payments cannot seek equitable relief of injunction. Counsel also relied on the case of Orion East Africa Ltd v Ecobank Kenya Ltd & Another [2015]

eKLR, which reinforced the principle that a chargee's statutory power of sale should not be interfered with when the debtor has failed to redeem the security.

28. It was submitted that the appellants had failed to prove they would suffer irreparable harm if the properties were sold. That the charged properties were pledged as commercial security, meaning that the appellants could be adequately compensated in monetary terms, if necessary. In support of this argument, counsel cited the case of John Nduati Kariuki T/A Johester Merchants v National Bank of Kenya Ltd [2006] eKLR, which held that once a property is pledged as security, it becomes a commercial asset, and sentimental attachment to it cannot be invoked to prevent its sale.

29. Counsel further pointed out that in Kisumu Civil Application No. 128 of 2020, the appellants had, regarding the same dispute, obtained an order of injunction against the respondent on condition that they remit Kshs.25 million within 45 days. However, the appellants failed to comply with this condition, thereby causing the injunction to lapse, allowing the respondent to exercise its rights under the charge.

30. In conclusion, counsel submitted that the appellants' appeal lacked any legal foundation and was primarily aimed at frustrating the respondent's efforts to recover its funds. That the appellants had continuously delayed loan repayment while unfairly restraining the respondent from realizing its securities.

31. As already stated at the beginning of this judgment, this is an interlocutory appeal, and therefore restraint is imperative in order to avoid pre-empting life issues that will be comprehensively addressed during the substantive hearing of the pending suit. Interlocutory appeals primarily serve procedural and provisional purposes, ensuring that no irreversible damage or prejudice occurs to any of the parties to the suit before the substantive trial is concluded. This Court in David Kamau Gakuru v National Industrial Credit Bank Ltd [2006] eKLR underscored the necessity of limiting determinations in interlocutory appeals, stating:

> "An appellate court hearing an interlocutory appeal must exercise caution so as not to embarrass or prejudge the substantive dispute yet to be fully heard and determined."

32. In the present case, the issues raised such as the validity of statutory notices, the equity of redemption, interpretation of contractual provisions, coercion and or valuation of the charged properties, are integral to the main suit, which remains pending before the trial court. Addressing them conclusively at this stage could encroach upon the trial court's jurisdiction and undermine the final adjudication of the dispute.

33. The entry point in the determination of this appeal is the fact that whether or not to grant injunctive reliefs is an exercise in discretion by the trial court, but based on well founded and time honoured and tested principles succinctly set out in the famous case of Giella vs Cassman Brown (supra). It is obvious that in this appeal, the appellants are challenging the exercise of that discretion by the trial court. The case of Shah v Mbogo [1968] EA 93, teaches us that this Court can only impugn the exercise of discretion by the trial court on the grounds that it misapprehended the facts, considered irrelevant factors, failed to consider relevant ones, did so capriciously or whimsically or at worst the decision was blatantly and plainly wrong and erroneous. It has not been demonstrated to our satisfaction that in reaching its decision the trial court was guilty of any of the above indiscretions. Nor has it been suggested that it failed to take into account the settled principles for granting injunctive reliefs. We are therefore satisfied that the trial court properly exercised its discretion in denying the appellants the various injunctive reliefs sought.

34. We however hasten to add that the trial court in the course of making some of the determinations went a bit too far, and in some cases prematurely reached final conclusions an interlocutory stage on some of the issues that could have best left to be determined at the trial court following plenary hearing. We have in mind trial court's holdings on the validity of the notices, the loan amount due, right of redemption etc. The complaint by the appellants on this aspect is therefore valid. However, in that trajectory, the trial court did not substantively depart from the well-established principles regarding the grant of interim injunctive reliefs. The trial court went through one by one the well settled considerations for the grant of interim injunctions and returned a verdict on each so that the digression aforesaid did not really and materially affect the final outcome.

35. We reiterate that the test for granting an injunction was set out in Giella vs Cassman Brown [supra] which requires that the applicant demonstrate a prima facie case with a probability of success, irreparable harm that cannot be compensated by damages, and that the balance of convenience favours the applicant. A prima facie case was defined in Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (supra) as a case which, on the face of it, demonstrates an infringement of a right requiring a rebuttal from the opposite party. In assessing whether the appellants established a prima facie case, we note that they did not dispute the existence of the loan agreement, on which basis financial accommodation was extended to them and their subsequent default. They also admitted to receiving the statutory notices. As to whether they were valid or not, is for the court to determine at the substantive hearing of the suit. The reality, however, is that the necessary notices required were served. Ordinarily, one would have expected a reaction of sorts from the appellants, even attempts to make even the outstanding amount or a portion thereof that was not disputed. This never came to pass. The trial court, applying these tests, correctly found, in our view, that no prima facie case was established.

36. How about demonstration of irreparable harm to appellants that cannot be adequately compensated by an award of damages if the injunction sought is denied? In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, this Court clarified that an injunction should not be granted where damages provide an adequate remedy. The applicant must show harm beyond financial loss. The appellants argued that the Kisumu property was unique and pristine whose loss may not be compensetable by an award of damages. However, in the case of John Nduati Kariuki v National Bank of Kenya Ltd (supra), this Court held that properties pledged as security in commercial transactions become marketable commodities and are subject to lawful sale. Sentimental value cannot override commercial obligations. Since the appellants offered the properties as security for commercial loans, they assumed the risk of sale upon default, making damages an adequate remedy. The trial court therefore correctly found no irreparable harm warranting injunctive relief.

37. There is no doubt that the amount owed to the respondent continues to accumulate interest. It is very possible that the amount may get to a level that it may well not be recoverable to the detriment of the respondent. On the other hand, in the event that the auction is eventually impugned, the appellants would be entitled to damages. The appellants have not claimed that the respondent would not be in a position to be pay such damages. Accordingly, the balance of convenience tilted in favour of the respondent. To our mind therefore, the trial court correctly applied the established principles in denying the appellants the injunction sought.

38. Again, an injunction is an equitable remedy, granted to those who seek it with clean hands and prepared to do equity. Looking at the entire history of the dispute and the accommodations availed to the appellants by the respondent at their request, we doubt whether the appellants' conduct was anything but equitable.

39. In the end we find the appeal devoid of merit which is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR