



REPUBLIC OF KENYA



**Magnoy Communications Limited v Absa Bank Kenya Plc (Civil Suit E016 of 2025)
[2025] KEHC 599 (KLR) (Commercial and Tax) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E016 OF 2025
PM MULWA, J
JANUARY 30, 2025**

BETWEEN

MAGNOY COMMUNICATIONS LIMITED PLAINTIFF

AND

ABSA BANK KENYA PLC DEFENDANT

RULING

1. This ruling relates to the Applicant's Notice of Motion application dated 6th January 2025 brought under Order 40 Rules 1, 2, 3, 4, Order 51 Rule 1 of the Civil Procedure Rules and Section 3 and 3A of the *Civil Procedure Act*. The application seeks the following orders:
 - a. Spent
 - b. An injunction to restrain the Respondent, its servants, auctioneers (specifically M/s Regent Auctioneers (N) Limited), or agents from advertising, offering for sale, or dealing with the Applicant's property (L.R. No. Nairobi/Block 47/1704) pending the hearing of the application.
 - c. An injunction to prevent the Respondent or any of its agents from interfering with the management, status, or operations of the Applicant's property pending the hearing of the application.
 - d. A permanent injunction to prevent the Respondent, its servants, auctioneers, or agents from advertising, selling, or otherwise dealing with the Applicant's property during the ongoing suit.
 - e. A permanent injunction to prevent the Respondent and its agents from interfering with the management, status, or operations of the Applicant's property during the ongoing suit.



- f. The Applicant requests that the costs of the application be provided for.
2. The application is supported by the affidavit of Mohammed Hussein Ahmed sworn on 6th January 2025. He states that the applicant is the registered owner of the property known as L.R. No. Nairobi/Block 47/1704, located along Nandi Road, Karen Estate in Nairobi, which is charged to Absa Bank (the Respondent). Ahmed claims that he received a Notification of Sale dated 18th November 2024 from Regent Auctioneers, but asserts that the Applicant was not served with the required statutory notices. He argues that the Respondent's actions are illegal as their rights under the charge and debenture have not yet crystallized. It is contended that the Respondent has violated its statutory powers and that the impending auction will cause irreparable loss and damage to the applicant.
 3. In response, Samuel Njunguna, the Secured Lending Team Leader at Absa Bank Kenya PLC, filed a Replying Affidavit dated 27th January 2025 wherein he argues that the application is an attempt to prevent the Respondent from exercising its statutory power of sale. That the Applicant charged the property to secure a loan of Kshs. 117,500,000.00; but defaulted on repayment, prompting the Respondent to issue the necessary statutory notices. Subsequently, the Respondent instructed Regent Auctioneers who issued a redemption notice informing the Applicant of their right to redeem the property by paying the outstanding amount of Kshs. 139,227,343.80. Mr. Njunguna confirms that the applicant's current indebtedness, as of 27th January 2025 is Kshs. 144,983,318.90, and this amount is not disputed.
 4. The application was heard by way of oral submissions. Mr. Makori, counsel for the Applicant, urged the Court to be guided by principles of equity and contended that the Applicant would suffer prejudice if the injunction were not issued, particularly as the public auction is scheduled to take place on 31st January 2025. He requested that the Court permit the Applicant to deposit Kshs. 10 million in Court within 30 days as a demonstration of goodwill. Additionally, he urged the Court to allow the parties to engage in mediation.
 5. Mr. Deya, counsel for the Respondent, submitted that the Applicant has failed to satisfy the three conditions set out in *Giella v. Cassman Brown & Co. Ltd.* He argued that the mandatory statutory notices were properly served to the Applicant through their last known postal address, as provided in the charge document, and a certificate of postage was availed. Mr. Deya further asserted that the Applicant has approached the Court with unclean hands, emphasizing that a Court of equity cannot assist a party who is in default. He noted that no attempts had been made to settle the debt outside of Court.
 6. Mr. Deya continued, stating that the debt amount is substantial and that the Applicant would not suffer irreparable loss that cannot be compensated by damages. He further argued that the balance of convenience favors the Respondent and granting the injunction would cause the Respondent to continue incurring losses. Counsel contended that the proposal to pay Kshs. 10 million within 30 days was not made in good faith and urged the Court to dismiss the application.

Analysis and determination

7. The application before this Court is for an interlocutory injunction, a discretionary remedy that seeks to preserve the status quo pending the determination of a substantive matter. The principles that guide the exercise of this Court's discretion are well-settled in *Giella v Cassman Brown* [1973] EA 348. The applicants must satisfy three key requirements before the Court grants an interlocutory injunction: (i) they must establish that they have a prima facie case with a probability of success, (ii) demonstrate that they will suffer irreparable injury if the injunction is not granted, and (iii) if the Court is in doubt, show that the balance of convenience favors the granting of the injunction.



8. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR restated the Giella principles and emphasized that the applicant must surmount each of the three hurdles before being granted an injunction. The Court stated that if an applicant fails to establish a prima facie case, there is no need to consider the issues of irreparable injury or balance of convenience. Therefore, the determination of whether an injunction should be granted depends first and foremost on the establishment of a prima facie case, which must be addressed before considering the other conditions.
9. A 'prima facie case' is defined in the case of *Mrao Ltd v First American Bank of Kenya Limited & 2 Others* (2003) eKLR, as one in which, based on the material before the Court, a tribunal properly directing itself would conclude that there exists a right that has been infringed, and there is a need for explanation or rebuttal from the opposing party. The test for a prima facie case is not whether the applicant will ultimately succeed in the case, but whether there is a legitimate issue that warrants further investigation. The Court noted that the applicant need not prove their case conclusively at this stage; it is sufficient to show that there is a valid legal claim.
10. In the instant case, the debt owed to the Respondent is not disputed by the Applicant. What is in contention is whether the mandatory statutory notices were properly served on the Applicant. The Applicant asserts that the statutory notices were not served. The burden of proof lies with the Respondent to show compliance with the statutory requirements. In cases where service of statutory notices is in dispute, it is the responsibility of the party alleging service to prove it. In *National Bank of Kenya Limited v. Shimmers Plaza Limited* [2009] eKLR, the Court emphasized that statutory notices are a prerequisite to the exercise of the statutory power of sale.
11. In this matter, the Respondent has produced evidence of the 90-day statutory notice, dated 14th May 2024, demanding the payment of Kshs. 124,582,875.55 from the Applicant, failing which the Respondent would exercise its statutory power of sale. A certificate of posting confirms that this notice was sent to the Applicant on 16th May 2024. Furthermore, the Respondent has attached a 40-day notice to sell, as required under Section 96(2) of the *Land Act*, dated 29th August 2024, which was sent via registered post with a certificate of posting dated 3rd September 2024. These notices were issued in compliance with the provisions of the *Land Act*, which sets out the statutory requirements for the exercise of the power of sale by a lender.
12. Additionally, the Respondent instructed auctioneers to issue a 45-day notification of sale following the Auctioneers Rules. The Applicant admits to receiving this notification, which prompted the filing of the current application. The fact that the Applicant acknowledges receipt of this notice weakens its argument against the service of notices, further supporting the Respondent's position that all the necessary procedural requirements have been met.
13. The Respondent has therefore demonstrated that all statutory notices required under the *Land Act* and the Auctioneers Rules were duly served. Therefore, contention by the Applicant that the statutory notices were not served holds no ground.
14. The failure to serve statutory notices could only be rectified by challenging the validity of the notice in a substantive suit, and not by seeking an injunction to restrain the sale of the property. Since the Applicant has not demonstrated any valid challenge to the notices, there is no basis to grant an interlocutory injunction (see *Kenyatta University v The Attorney General & 3 Others* [2017] eKLR).
15. In conclusion, I find that the Applicant has failed to establish a prima facie case with a probability of success. The Applicant is indebted to the Bank, and as a result, the Bank is entitled to exercise its statutory power of sale. As held in the *Nguruman Case* (supra), if the applicant does not establish a prima facie case, the issue of whether damages would be sufficient to compensate the Plaintiff if the suit



succeeds is irrelevant. The Court does not need to consider the issue of irreparable injury or balance of convenience if the applicant fails to satisfy the first condition.

16. In light of the above, I find that the Notice of Motion dated January 6, 2025 is without merit and is dismissed with costs to the Respondent.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Makori h/b for Mr. Muasi for Plaintiff/Applicant

Mr. Oyeng' h/b for Mr. Deya Defendant/Respondent

Court Assistant: Carlos

