



REPUBLIC OF KENYA



KENYA LAW
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Gikonyo t/a Velma Memorial Center v Credit Bank Plc & another (Civil Case 2 of 2023) [2025] KEHC 1214 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL CASE 2 OF 2023
EM MURIITHI, J
FEBRUARY 27, 2025**

BETWEEN

WILSON MBUGUA GIKONYO T/A VELMA MEMORIAL CENTER PLAINTIFF

AND

**CREDIT BANK PLC 1ST DEFENDANT
BEALINE KENYA AUCTIONEERS 2ND DEFENDANT**

RULING

1. The applicant filed a Notice of Motion under a certificate of urgency dated 24th January, 2023 seeking the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the status quo relating to clinical equipment and Land Parcels numbers Kabare/Nyangati/7084,7085,7086,7346,7347,7348 & 7349, (herein referred to as the suit property') be maintained pending hearing and determination of the main suit.
 5. That cost of this Application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Wilson Mbugua Gikonyo.
3. The applicant deposed that he used his suit property title documents to secure a loan from the 1st Defendant /Respondent and they retained the same under their Custody as the security in order to advance some financial accommodation. That on the 14th April, 2023 he received a letter dated



- 12th April, 2023 from the 2nd Defendant/respondent indicating that they had repossessed some of his collateral without his knowledge/consent and on the same date he was served with Notification for sale of movable property dated 12th April, 2024 intending to sell his collateral scheduled on the 18th May, 2022; That on the 11th May, 2023 the 2nd defendant/respondent placed an advertisement in Standard Newspaper intending to sell his collateral. That on the 2nd defendant/respondent impounded his properties without his consent or knowledge and has threatened to sell against his rights.
4. The applicant avers he has been servicing the loan and had displayed strong willingness to repay the loan. That on 19th May, 2023 he filed a suit at Wang'uru Court, vide MCELC NO. 42 OF 2023 and obtained a temporary injunction dated 19th May 2023. That he has served the defendant/respondent with a demand letter intending to file a suit claiming for damages for violating my rights and those of his patients. Hence, the status quo on the suit property should be maintained.
 5. The respondent filed a Replying Affidavit dated 10th November, 2023 responding that the Plaintiff's only contention is that he has been settling the loan via Mpesa and that he has not defaulted in the loan, a position that is false as he still owes the bank; That on 9th April, 2020 the Bank granted a term loan facility and a construction facility totalling to Kshs.37,000,000 (Kenya Shillings Thirty-Seven Million). That the credit facilities were secured by the suit properties. That in September, 2021 the borrower defaulted in servicing the facility and this prompted the bank to issue a demand letter dated 5th October, 2021 with the borrower requesting for a restructure of the loan vide a letter of 20th December, 2021. That the Plaintiff's accounts with the Bank are in arrears and the Plaintiff's owe the Bank Kshs.39,921,596.43. That owing to the above arrears, the Bank has rightfully opted to exercise its statutory power of sale.
 6. The applicant deposed to a further affidavit dated 23rd November, 2023 and made further averments that he was servicing the loan facility with the little amount he got monthly without fail; That he has written a proposal to the Defendant Advocate to try and accommodate them since they are in a critical economic crisis and due to the lack of Hospital equipment's which were taken away by auctioneers which rendered the capacity of the facility to accommodate a few patients.
 7. That it's in the interest of justice that the injunctive orders are issued to preserve the property.

Applicant submissions

8. The applicant submits that the principles for the grant of a temporary injunction were observed by R. Mwongo in *Gichuki v Kabugwa & another* (2024)KEHC3246 (KLR) and contends that the suit properties are his source of livelihood and sale by public auction poses a threat to his income despite the fact that he has been repaying the loan.
9. It is urged that the balance of convenience tilts in the Applicants favour as he has established a prima facie case and that should this Honourable Court fail to grant the temporary injunction, he is bound to suffer irreparable injury. Being that the matter is at the interlocutory stage it is then prudent that the status quo be maintained by an injunction.
10. In *Park Road Nursing Home v National Land Commission of Kenya; National Healthcare Limited* (2023) KEELC 22354(KLR) Justice M.D. Mwangi, while citing *Odunga J in Republic v National Environment Tribunal* (2013) eKLR, elaborated the purpose of an order of status quo as an order that is meant to preserve the existing state of affairs. Once the is issued it is expected that the circumstances as at that time when the order is made must be maintained.
11. The circumstances at the time of filing the application and at the moment are that the Plaintiff/Applicant is in possession of the suit and is the registered owner of the suit properties. It is the Plaintiff/



Applicant's humble submissions that a status quo order be issued to preserve the subject matter, being the suit properties, and maintain the state of affairs pending the hearing and determination of the main suit.

12. The applicant submits that he has proved and demonstrated the set conditions for the grant of a status quo order by issuance of a temporary injunction pending the hearing and determination of the main suit.

Respondent submissions

13. They rely on the three considerations for the grant of a temporary injunction as laid out in *Giella vs Cassman Brown* (i) that they have a prima facie case with a probability of success and submit that the Plaintiff has not laid out any law that has been breached by the Defendant. The Plaintiff has also not pointed at any of their rights which have been breached by the Defendant. (ii) They shall suffer irreparable injury which cannot be compensated by damage as the injury suffered by the Plaintiff will be the loss of the properties and which property can be assessed in monetary terms.
14. In *Florence Khayanga Musanga v Transnational Bank Ltd & another* [2020] eKLR) that:

“The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never be adequate remedy.”
15. In this case, the injury suffered would be the loss of property. The value of the property being one that can be measured with reasonable accuracy, and further one that can be compensated with monetary compensation. The harm suffered would thus not be irreparable.
16. As regards (iii) balance of convenience if the court is in doubt, they submit that the balance of convenience tilts in favour of the Defendant who is rightfully and legally exercising its statutory power of sale.

Statutory power of sale

17. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court said:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”
18. It was submitted that no amounts have been paid by the Plaintiff with regard to the outstanding loan and for this reason, the orders as sought in the application cannot be granted.

Issue

19. The issues for determination by the Court are:



- a. Whether the Plaintiff/Applicant has met the threshold for the grant of temporary orders of the injunction sought and
- b. What orders should be made in this case.

Analysis

20. The Defendant has in response filed a Replying affidavit sworn by Wainaina Francis Ngaruiya dated 10th November, 2023. The Plaintiffs have filed a further affidavit dated 23rd November, 2023.
21. The Applicant is the owner of Velma Memorial Medical Centre whereby he secured the loan using the suit properties. The Applicant confirms that all the property attached was used as security. The Applicant's only contention is that he has been servicing his loan. The respondent denies the claim and intends to recover the unpaid loan balance by selling the suit properties by way of public auction.
22. The Plaintiff/Applicant's application is brought under Order 40 of the Civil Procedure Rules which provides, under Rule 1, that the court may order grant a temporary injunction for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of any property in dispute in a suit where such a property is in danger of being damaged, wasted, or alienated by any party to the suit.
23. The Court must consider the three considerations for the grant of a temporary injunction as laid out in *Giella vs Cassman Brown (1973) EA 358*.
24. The debt is acknowledged and default has also been admitted and blamed on bad economic environment. The applicant cannot show any prima facie case for the temporary injunction because as submitted by the defendant the Plaintiff has not shown breach of applicable law by the Defendant. The applicant has also demonstrated any of their rights which have been breached by the Defendants.
25. The plea by the applicant that he has been repaying the loan and that the suit properties are his source of livelihood and the sale poses a threat to his income despite an infringement of his ownership rights is merely a prayer for indulgence which the defendant is not compelled to grant.
26. The security for the loan remains just that and by offering it to secure the loan applicant must be taken to accept as an item which may be sold to realise the debt amount. If any loss were to occur in such circumstances, it must well be compensated by an award of damages as the loss of the properties and which property can be assessed in monetary terms.
27. The court being in no doubt as to the existence of a prima facie case and the possibility of recompense by an award of damages, there is no occasion for consideration of the test of balance of convenience.
28. On account, however, of the nature of the property subject of the sale as a hospital/health facility for use by members of the public, the Court will grant the applicant some limited reprieve to enable him negotiate an amicable settlement on the matter within a period of sixty (60) days
29. In the event of failure to secure some accommodation that halts the exercise of the defendant's statutory power of sale, the defendant may proceed to act in accordance with the law.
30. I should respectfully agree with Tuiyott, J. (as he then was) in *Saifudeen Abdullahi & 4 Others in Msa High Court Civil Cause No 11 of 2012* in his observations as to an order for status quo:

“In my view, an order [of] to status quo [to] be maintained is different from an order of injunction both in terms of the principles for grant and practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at



interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for preservation of the situation as it exists in relation to pending hearing and proceedings before determination thereof.”

31. In this case, the Court will make an order for status to be maintained for period appointed by the Court to facilitate any negotiation for accommodation, loan restructuring or settlement of the issues in dispute.

Orders

32. Accordingly, for the reasons set out above, the Court makes an order for status quo prevailing as at the date of this ruling to be maintained for a limited period of sixty (60) only.

33. Costs in the cause.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Magara for the Plaintiff.

Ms. Maitai for the Defendants.

