



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugo & another v Letshego Kenya Limited (Civil Appeal  
E078 of 2024) [2025] KEHC 3881 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3881 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E078 OF 2024  
JRA WANANDA, J  
MARCH 28, 2025**

**BETWEEN**

**RAHAB WAITHERA MUGO ..... 1<sup>ST</sup> APPELLANT**

**SAMKIZ COMPANY LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LETSHEGO KENYA LIMITED ..... RESPONDENT**

**RULING**

1. This Appeal was filed to challenge a Ruling delivered on 27/03/2024 in Eldoret Chief Magistrate's Court Civil Suit No. E355 of 2023. By the said Ruling, the Magistrate's Court declined to grant an interlocutory injunction to restrain the Respondent from exercising its statutory power of sale by auctioning the Appellant's property.
2. Pending hearing and determination of the Appeal, the Appellants also moved the Court vide the Notice of Motion dated 05/06/2024 drawn and filed in person. It seeks orders as follows:
  - i. Spent.
  - ii. Spent.
  - iii. That pending the hearing of this Appeal, an order of temporary injunction do issue restraining the Respondent, its agents/assigns from advertising for sale, offering for sale, selling by public auction or otherwise, and/or in any other manner interfering with the Applicants' use and occupation of land parcel No. Eldoret/Municipality Block 23 (Kingongo) 1903.
  - iv. That costs hereof be in the cause.
3. The Application is supported by the Affidavit sworn by one Samson Mugo, who described himself as one of the directors of the 2<sup>nd</sup> Applicant. In the Affidavit, he deponed that they filed Civil Suit No. 355



of 2023 together with an Application against the Respondent, and that on 27/03/2024 the trial Court rendered its decision. He urged that what was issue was the Statutory Notice dated 13/02/2019 (the only notice served so far) and which, according to him, was not in conformity with Section 90(1) and (2) of the *Land Act*, and that the loan amount disbursed was Kshs 5,000,000/- payable by a monthly instalment of Kshs 90,182/-. He deponed that he has been servicing the loan, and that the amount of Kshs 4,749,029.21 was in dispute, that he has a good appeal with high chances of success as the trial Court did not make any findings on the matters in issue, and that the Respondent will not be prejudiced as he is willing to repay the loan as per the Agreement.

4. In the end, he deponed that his right to redeem the property was compromised by the notice. He urged further that the Appeal shall be rendered nugatory if the property is sold, and that he will suffer substantial loss as the value of the property is in excess of Kshs 15 Million.
5. I may also mention that when the matter initially came up before me under Certificate of Urgency on or about 5/06/2024, I granted ex parte interim orders of injunction pending inter partes hearing thereof, and which orders have been extended on several occasions, and are still in force, to date.
6. It also appears that in the course of the matter, the law firm of Messrs Oscar Wachilonga & Advocates came on record for the Appellants, and thus took over conduct of the Appeal.
7. In opposition to the Application, the Respondent filed the Replying Affidavit sworn on 09/07/2024 by one Rita Njora who described herself as the Respondents' Legal Business Partner. The same was filed through Messrs Mburu Maina & Co. Advocates. The deponent stated that parties are bound by their pleadings, the subordinate Court legally exercised its jurisdiction in determining the application and that the trial Court should not be faulted for exercising its mandate and discretion. She contended further that vide the letter of offer dated 25/06/2018, the 1<sup>st</sup> Appellant voluntarily offered the suit property known as Title Eldoret Municipality/Block 23 (Kingongo)/1903 as security towards the grant of a further financial facility by the Respondent in the sum of Kshs 5,000,000/- repayable in 48 monthly instalments of Kshs 161,000/- at 14% interest per annum charged at a flat rate, but that in breach of its contractual obligations under the Letter of Offer, the 2<sup>nd</sup> Appellant defaulted in honouring its monthly repayment obligations, causing the facilities to fall into arrears to the detriment of the Respondent. She denied the allegation that the statutory notice dated 13/02/2019 was the only notice that has been issued so far and submitted that the Respondent, in compliance with Section 90 and 96 of the *Land Act*, issued the 3-month statutory notice dated 13/02/2019 and upon lapse of the 90 days, issued the 45 days statutory notice dated 16/05/2019.
8. She deponed further that upon expiry of the statutory notices, and as a result of the aforesaid unmitigated default, the Respondent issued instructions to its Auctioneers to recover the outstanding balance, who issued the Appellants with a Redemption Notice and Notification of Sale which were duly received by the Appellants. She denied that the Notice dated 13/02/2019 was under challenge in the trial Court, and submitted that the notice complied with the law as it informed the Appellants of the nature and extent of their default, remedy on how to solve the default and the consequences in the event the default persisted.
9. She also denied that the Respondent has encroached on any of the Appellant's rights and deponed that the Notices issued to the Appellants were prerequisites for the exercise of the statutory power of sale and were meant to give the Appellants ample and sufficient time to remedy the breach and consequently redeem the property but that the Appellants failed to exercise their equity of redemption. She averred that the 2<sup>nd</sup> Appellant applied for a restructuring of the loan which was accepted vide the letter dated 26/11/2020 to the effect that the loan balance of Kshs 3,988,797.91 would be repaid in 100



- monthly instalments of Kshs 90,182.71/- and a broken period interest to be paid on the 1<sup>st</sup> instalment, but despite the restructuring, the 2<sup>nd</sup> Appellant remained in breach of its contractual obligations.
10. She denied that the Appellants have been servicing the loan and deponed that as at 8/07/2024, the outstanding sum stood at Kshs 3,602,479.42/- which amount continues to accrue interest, that a chargee will ordinarily not be restrained from exercising its power of sale on the ground that the amount due is in dispute or because the chargor objects to the manner in which the sale is being arranged. She denied that the Respondent had clogged the 1<sup>st</sup> Appellant's equity of redemption, and urged that the Respondent ought to be allowed to proceed with the exercise of its statutory' power of sale to recover what is lawfully owed by the Appellants. The deponent averred further that the property was voluntarily offered as security to secure the repayment of the loan and was converted to a commodity for sale with a determinable value hence no prejudice, or irreparable loss or damage can be suffered by the Applicant. She urged further that the Respondent's right to exercise its power of sale over the property had crystallized, and that the Respondent stands to suffer irreparably if it is inhibited from exercising its power of sale as the outstanding amount is likely to outstrip the value of the property.
  11. With leave of the Court, the Appellants then filed the Supplementary Affidavit sworn on 19/09/2024 by the said Samson Mugo. The same was however filed through Messrs Marisio Luchivya & Co. Advocates, which however was a different law firm from Messrs Oscar Wachilonga & Associates, which as aforesaid, is the law firm that had taken over conduct of the Appeal. This new law firm was thus a stranger since no Notice of Change of Advocates had been filed. When his attention was brought to this irregularity, Counsel for the Appellant, on 23/09/2024, sought and obtained leave to withdraw the Supplementary Affidavit and to substitute it with a fresh one. Upon his request, he was granted 14 days to do so and serve the same, and to also file and serve written Submissions within the same period to enable the Respondent, upon service, to also file its Submissions.
  12. However, when the matter came up in Court 1 month later on 24/10/2024 for confirmation of compliance, and for fixing of a Ruling date, it was noted that the Respondent had only the day before (way outside the 14 days window granted), filed and served the Notice of Change of Advocates dated 18/10/2024 appointing Messrs Marisio Luchivya & Co. to formally come on record for the Appellant, a fresh Further Affidavit sworn on 18/10/2024, and Submissions dated 23/10/2024. It was also noted that the Respondent had, upon waiting for the said documents in vain, and upon expiry of the timelines given, proceeded to file its Submissions.
  13. In the circumstances, admitting the Appellant's fresh Supplementary Affidavit and Submissions out of time would have necessitated the Respondent being given leave to also file a Supplementary Replying Affidavit and Supplementary Submissions, and which would have unnecessarily convoluted the pleadings and delayed the matter further to the detriment of the Respondent, particularly considering that, as aforesaid, the Appellant was enjoying interim orders. There being no explanation given for the Appellant's late filing of the pleadings, the new pleadings filed out of time were disallowed and expunged from the record, and the Application fixed for Ruling. In the circumstances, only the Respondent's Submissions have been considered herein.

### **Respondents' Submissions**

14. Counsel for the Respondent, on the principles applicable in determining Applications for injunction, cited the decision in *Giella vs. Cassman Brown & Co. Ltd* (1973) EA 358 and recounted the principles. On the definition of a "prima facie" case, he cited the case of *Mrao Limited vs. First America Bank of Kenya Limited & 2 Others* and contended that the Application and the entire suit does not meet this first threshold as the Applicants have not established any "prima facie" case, that the 2<sup>nd</sup> Appellant clearly admits taken the loan facility from the Respondent which it secured with the suit land Eldoret/



Municipality Block 23 (King'ong'o) 1903 registered under the 1<sup>st</sup> Appellant's name, that regarding the Appellant's allegations that they have been servicing the loan, the same is unsubstantiated as no evidence has been exhibited and that the Respondent has, on the other hand, provided copies of the letter of offer and security agreement showing the conditions on how the facility was to be repaid and also attached the loan account statement which demonstrates the 2<sup>nd</sup> Appellant's breach of the repayment conditions by failing to pay the monthly instalments even after the restructure. He urged that the loan account statement confirmed that the outstanding amount was Kshs 3,602,479.42/- as at 8/07/2024 and which continues to accrue interest at the contracted rate.

15. He stated that consequent to the 2<sup>nd</sup> Appellant's breach of its contractual obligations, the Appellants do not deserve any orders of injunction. He cited the ease of Kenya Breweries Ltd vs Okeyo 2002 1 EA. Counsel submitted further that the Respondent's power of sale being a remedy provided in the contract, the Court ought not to interfere with its right to auction the land as such interference would be tantamount to amending the contract between the parties. He cited the case of National Bank of Kenya vs Pipelastic Smakolit (K) Ltd & Another. He then reiterated that the Respondent issued all necessary statutory notices in full compliance with Section 90 and 96 of the *Land Act* and cited the case of East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & another [2017] eKLR. He also cited the case of William Kanyi Hezekiah vs Equity Bank Ltd & Another [2017] eKLR and again, the case Mrao Ltd Vs First American Bank (supra). On "irreparable loss", he submitted that the Applicants have failed to show any injury which cannot be compensated by an award of damages. He reiterated that the Appellants voluntarily offered the suit land as security towards the grant of a financial facility and thus, were aware of the ramifications of default. He cited the case of Andrew Muriuki Wanjohi vs. Equity Building Society Ltd (2006) eKLR and the case of Nancy Wacici vs Kenya Women Micro Finance Bank Ltd [2017] eKLR.
16. He reiterated that the 2<sup>nd</sup> Appellant is still in default to date and the loan interests continues to accrue and soon the debt might overrun the value of the suit land which will be detrimental to the Respondent as it may not be able to recover the monies and thus suffer irreparable loss. In respect to the "balance of convenience", Counsel submitted that the same lies in favour of the Respondent for it has not breached any of the rights and obligations under the agreement or statute unlike the Appellants who have breached the same and have, in turn, breached the principle of equity that "he who comes to equity must come with clean hands". In the end, he cited the case of Maithya vs Housing Finance Co. of Kenya & Another [2003] 1 EA 133, in which, he submitted, Justice Nyamu addressed the common problem of debtors who persistently default in servicing loans.

### **Determination**

17. The one broad issue that arises for determination herein is "whether, pending hearing and determination of this Appeal, a temporary injunction should be granted restraining the Respondent from selling off the suit property by public Auction."
18. Generally, the law governing the grant or refusal of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides as follows:

"Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;  
or .....



- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit;

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

19. Specifically, this Court's power to grant an injunction pending Appeal is provided under Order 42 Rule 6(6) of the Civil Procedure Rules. The same is premised in the following terms:

"Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the 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 tribunal has been complied with."

20. The conditions for consideration in applications for injunctions were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358, in which the Court pronounced itself in the following terms:

"Firstly, 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."

21. The said test was also considered in the case of *American Cyanamid Co. v Ethicon Limited* (1975) AC 135 where the elements were broken down as follows:

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.

22. It is also settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact on the basis of the conflicting Affidavit evidence. In connection thereto, in *Mbuthia vs Jimba Credit Finance Corporation & Another* [1988] KLR 1, the Court of Appeal guided as follows:

"...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

### **Whether the Appellant has established a prima facie case**

23. Although as aforesaid, I should not delve deeply into determining substantive matters, to make a determination whether a prima facie case has been established, I must examine the facts deponed in the rival Affidavits and apply them to the law.



24. As to what amounts to a prima facie case, the Court of Appeal, in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 held as follows:
- “ A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
25. I have perused the impugned Ruling of the lower Court and note that the trial Court declined to grant the injunction on the ground that the “balance of convenience” tilted against granting it. The Learned Magistrate also observed that in any event, the particulars of the property in question as pleaded in the Application conflicted with the particulars contained in the rest of the documents before Court (Eldoret Municipality/B23/King'on'go/903, as opposed to Eldoret Municipality/B23/King'on'go 1903). In The Appellants now claim that for this reason, the Magistrate dismissed the Application on a technicality. This issue will be canvassed at the hearing of the Appealing but for now, I disagree that the wrong description of the property was the only reason why the Application was disallowed.
26. As stated above, the Magistrate also found that the balance of convenience favoured non-interference with the Lender’s exercise of its statutory power of sale. The Ruling was very brief and I agree that it may not have effectively dealt with each of the separate issues placed before the trial Court for determination. As aforesaid however, these substantive arguments will be canvassed at the hearing of the Appeal, not at this interlocutory stage. All I can say, at this stage, is that, in law, the Magistrate’s findings above are well within what would justify her refusal to grant the injunction.
27. The Appellants, in their wisdom, have not supplied copies of the pleadings filed in the lower Court and as such, I am unable to conclusively unravel what the exact issues placed before the trial Court were. Although I have seen a copy of the Ruling, as aforesaid, it was quite brief and does not also assist much in identifying the issues. The instant Application, the Affidavit in support thereof, and even the Memorandum of Appeal, too, are hazy and inadequate insofar as identifying the Appellant’s main grievance is concerned. I say so because the grievance alleged is simply said to be failure to comply with Section 90, 96 and 97 of the *Land Act*. There is no specificity nor particularization of the exact breaches alleged and it is also not clear whether it is the receipt of the notices that is being denied, or whether what is being alleged is that the Notices were defective. In the circumstances, the Court is left hanging.
28. I put much emphasis on the above because, in law, in exercising its statutory power of sale, a chargee is required to issue notices to the chargee as follows:
- a. 90 days’ statutory notice of default, pursuant to Section 90(1) and (2) of the *Land Act, 2012*.
  - b. 40 days’ notice of intention to sell, pursuant to Section 96(2) of the *Land Act, 2012*.
  - c. 45 days’ redemption notice pursuant to Rule 15(d) of the *Auctioneers’ Rules, 1997*.
  - d. 14 days’ notification of sale, pursuant to Rule 25(e) of the *Auctioneers’ Rules, 1997*.
29. As aforesaid, the material placed before this Court by the Appellants does not particularize or even specifically identify which of the process or processes above was or were not complied with. How then is the Court supposed to interrogate the grievances alleged by the Appellants?
30. In any case, upon perusing the rival Affidavits, I observe that the 1<sup>st</sup> Appellant does not deny giving out, sometime in July 2018, the property as security for the loan advanced to the 2<sup>nd</sup> Appellant. From the



Letter of Offer produced, the loan was repayable at an interest of 14% and in 48 monthly instalments. There is correspondence indicating that sometime in November 2020, the loan was restructured and in respect thereto, it was agreed that as at that date, the amount outstanding was Kshs 3,988,797.91 and which, it was agreed, would then be repaid in 100 monthly instalments. The Appellants, at least before me, have not denied or controverted these matters, and have also not alleged that they have now settled the said agreed amount, and if so, in what manner.

31. Further, the Respondent has produced before this Court, copies of several notices said to have been issued in compliance with the said Sections 90 and 96 of the Land Act cited above. There is no allegation that the postal addresses used to serve the notices were erroneous and in fact, there is actually no express or unequivocal denial of service.
32. For the above reasons. I have serious misgivings over the arguability of the Appellants' appeal and its strength and chances of success.
33. In the circumstances, my finding is that the Appellants have failed to demonstrate the existence of a prima facie case. Granting the injunction in the absence of a prima facie case would be tantamount to rewriting the parties' express contract. It is a settled principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite contracts. In *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR*, the Court of Appeal stated as follows:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
34. I therefore find that the evidence presented before this Court falls short of the threshold required to establish a finding of the existence of a prima facie case. My conclusion is therefore that no prima facie has been established.

**Whether the Appellant shall suffer irreparable loss and whether the balance of convenience favours grant of the injunction**

35. Having found that no prima facie case has been established, it is no longer necessary for me to consider the second and third limbs of the rule in *Giella vs Cassman Brown*. For this position, I refer to the case of *In Nguruman Limited v Jane Bonde Nielsen and 2 Others, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR*, where the Court of Appeal reiterated as follows:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86*). ..... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration .....”
36. Nevertheless, suffice to mention that even on these other two limbs, I still rule against the Appellants. Courts have on numerous occasions expressed their position regarding mortgages over property. For



instance, in the case of Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation), HCCC No. 82 of 2006), Warsame J (as he then was) observed as follows:

“..... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

37. In the instant suit, the trial Court will be entitled to order the Respondent to compensate the Appellants should they prove their claims and succeed before it. In any case, there is no allegation that the Respondent, a well-grounded financial institution, would be incapable of compensating the Appellants for any eventual loss or injury, if any.

38. On “balance of convenience”, my view is that the fact that a property is has a sentimental value or is highly valued does not stop it from being auctioned as long as the requisite procedures have been followed according to the law. When charging such property, the borrower is presumed to be fully aware of the consequences of default. In the circumstances, I find that the “balance of convenience”, too, tilts towards non-interference with the Respondent’s right to proceed with recovery. On this, I find company in the holding of F. Ochieng J (as he then was) in the case of Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR in which he stated the following:

“In my considered view if the 1<sup>st</sup> and 2<sup>nd</sup> defendants were restrained from selling off the suit property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property were sold, the plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1<sup>st</sup> and 2<sup>nd</sup> defendants would be able to compensate the plaintiff. In contrast, the stoppage of the intended sale by the chargor would result in the continued growth of debt, thus exposing them to potentially substantial irrecoverable losses. I therefore find that provided the chargee complies with all other legal requirements, he should be permitted to realise the security.”

39. For the above reasons, I find that the Appellants have not satisfied the principles guiding the grant of interlocutory injunctions pending Appeal. The Application therefore fails.

### **Final Orders**

40. In the premises, the Appellant’s Notice of Motion dated 5/06/2024 is hereby dismissed. with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 28<sup>TH</sup> DAY OF MARCH 2025**

.....

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

N/A for the Appellant

Ms. Terer for the Respondent

Court Assistant: Brian Kimathi

