



REPUBLIC OF KENYA



**Macharia v ABSA Bank Kenya Limited & another (Commercial Case E222 of 2025)  
[2025] KEHC 4029 (KLR) (Commercial and Tax) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4029 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E222 OF 2025**

**PM MULWA, J**

**MARCH 27, 2025**

**BETWEEN**

**DAVID MAINA MACHARIA ..... PLAINTIFF**

**AND**

**ABSA BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ANTIQUA AUCTION AGENCIES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to the Notice of Motion dated 28<sup>th</sup> February 2025 brought under a certificate of urgency. It is anchored on Order 40 Rules 1, 2 and 3, Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Sections 90, 96, 103 and 104 of the Land Act and Article 159 (2) of the Constitution of Kenya. The Applicant seeks the following orders:
  - i. Spent
  - ii. Spent
  - iii. That a temporary injunction does issue restraining the Respondents whether by themselves, their agents and/or their servants from selling, dealing, interfering, alienating, disposing of, advertising for sale by way of public auction or private treaty all that parcel of land known as Nairobi Block 129/311 pending the hearing and determination of this suit.
  - iv. That a declaration that the intended sale of the suit property by the 2<sup>nd</sup> Defendant by public auction scheduled for 2<sup>nd</sup> April 2025 is premature and illegal for lack of statutory and mandatory notices under sections 90 and 96 respectively of the Land Act and the amount due and owing is in dispute.



- v. That in the alternative, the court exercises power under section 104(2) of the Land Act, to allow the Plaintiff to dispose of the property under the supervision of the 1<sup>st</sup> Defendant through a private treaty.
- vi. The costs of this application will be provided.
2. The application is premised on the grounds set out on its face and further supported by the affidavit of David Maina Macharia, sworn on 28<sup>th</sup> February 2025. The Applicant challenges the exercise of the 1<sup>st</sup> Respondent's statutory power of sale, asserting that the statutory notice issued was defective as it was addressed to a deceased person. Additionally, the mandatory 40-day notice required under the Land Act was not served.
3. The Applicant further contends that the subject property was significantly undervalued. Moreover, the 1<sup>st</sup> Respondent allegedly imposed unfair terms, excessive interest and punitive penalties on the loan facility. The Respondents also failed to acknowledge the spousal interest of the Applicant's deceased's wife.
4. Furthermore, the Applicant was not informed of the transfer of the loan facility from Barclays Bank to Absa Bank. Given these circumstances, the balance of convenience tilts in favour of the Applicant, it is averred.
5. The Respondent opposes the application through an affidavit by Samuel Njuguna, a Lending Team Leader at Absa Bank Kenya. He states that Barclays Bank (now Absa) advanced multiple loans to the Plaintiff between 2014 and 2021, secured by a charge over Nairobi Block 129/311.
6. Due to the Plaintiff's default in repayment, the 1<sup>st</sup> Respondent issued a 90-day notice on August 1, 2024. After its expiry, a 40-day notice was issued on December 2, 2024, followed by a 45-day redemption notice.
7. The 1<sup>st</sup> Respondent argues that the change of name from Barclays to Absa does not affect the Plaintiff's contractual obligations. A current valuation report to the property has been availed. The Respondent maintains that no prima facie case has been established, as the Plaintiff remains indebted to the bank.
8. The application was heard by way of oral arguments by counsel. Having considered the application, the Respondent's replying affidavit and the rival submissions the main issue for consideration is whether the Applicant is entitled to the orders sought.
9. An injunction is a discretionary remedy by the court based on the facts of each case. The Applicant has the burden of proving he has met the threshold of granting an injunction as outlined in the case of *Giella v Cassman Brown and Company Limited* [1973] EA 385, at page 360 where the court held as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well-settled in East Africa. First, 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.”
10. These principles were reaffirmed in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, where the Court of Appeal emphasized that all three elements must be satisfied sequentially.



11. The first consideration is whether a prima facie case has been established. A prima facie case is defined in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as:

“ a case 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.”
12. The court at this stage is not required to determine the merits and demerits of the applicant’s claim. The court is only required to determine whether the applicant has established a prima facie case (see *Nguruman Limited v Jan Bonde* - supra).
13. In the present case, it is undisputed that the Applicant was granted a credit facility, which was secured by a charge created over the property known as Nairobi/Block 129/311. The 1<sup>st</sup> Respondent asserts that the total outstanding debt amounts to Kshs. 15,043,400.00. As the Applicant has allegedly failed to settle the outstanding amount, the 1<sup>st</sup> Respondent proceeded to issue statutory notices demanding payment of the arrears in accordance with the law.
14. The core contention by the Applicant is that the statutory power of sale has not arisen due to non-compliance with Section 96(2) of the *Land Act*, which requires the issuance of a 40-day notice before the lender can proceed with the sale of the charged property. The Applicant argues that this crucial notice was not issued, thereby invalidating any attempts by the 1<sup>st</sup> Respondent to exercise its statutory power of sale.
15. Conversely, the Respondents maintain that they have fully complied with all statutory requirements governing the exercise of the chargee’s power of sale. They assert that they duly served the Applicant with the requisite notices.
16. In *Nyagilo Ochieng & Another v Kenya Commercial Bank Limited* [1996] eKLR the Court of Appeal when dealing with the issue of service of notices made the following observation:

“...Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap2, Laws of Kenya.”
17. In this case, the 1<sup>st</sup> Respondent has exhibited documents in its replying affidavit, including certificates of posting, strongly indicating that indeed the notices were all served.
18. The Applicant disputes the address used for postage. However, upon examination, the court notes that the notices were sent to P.O. Box 9097-00300, Nairobi, which is the same address the Applicant provided in the charge document. Additionally, the notices were also dispatched to the company’s address at P.O. Box 735, Garissa. This further supports the Respondents’ assertion that proper service was effected.
19. On the issue of undervaluation, Section 97(2) of the *Land Act* imposes a duty on the chargee to obtain a valuation report before the sale and to secure the best reasonably obtainable price for the property. In compliance with this requirement, the Respondent has produced a valuation report dated 11<sup>th</sup> December 2024, which assesses the market value at Kshs. 6,200,000.00 and sets a reserve price of Kshs. 4,700,000.00. Courts have consistently held that allegations of undervaluation must be substantiated with cogent evidence. The Applicant has failed to provide any such report to challenge



- the 1<sup>st</sup> Respondent's valuation. In the absence of contrary evidence, the court finds no basis to interfere with the sale process on the grounds of undervaluation.
20. The Applicant further contends that the 1<sup>st</sup> Respondent imposed unfair loan terms, interest and penalties. However, it is trite law that courts will not interfere with contractual terms that parties freely enter into unless there is evidence of illegality, fraud or unconscionability (see Court of Appeal decision in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another*, [2001] eKLR).
  21. The Applicant has not demonstrated how the interest rates or penalties imposed by the 1<sup>st</sup> Respondent were unlawful or outside the agreed contractual framework. In the absence of such evidence, this ground fails.
  22. On the issue of the bank's name change, I agree with the 1<sup>st</sup> Respondent that a change in a financial institution's name or corporate structure does not extinguish the obligations of a borrower under an existing loan agreement. The Respondent correctly asserts that the Applicant's debt remains payable despite the transition from Barclays Bank to Absa Bank.
  23. The Applicant also argues that the Respondents failed to recognize the spousal interest of the Applicant's deceased's wife. While spousal consent is a requirement under the *Land Act*, the Applicant has not provided specific details or evidence to show how this right was violated. The charge was properly executed with spousal consent at the time of the loan transaction, and as such this argument would not suffice to invalidate the sale.
  24. Given these facts, the court finds that the Applicant has failed to establish a prima facie case.
  25. In the absence of a prima facie case there is no need to consider the second and third limb of the rule in *Giella v Cassman Brown* as reiterated in the case of *Nguruman Limited v Jane Bonde* (supra) where the Court of Appeal stated thus:

“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...”
  26. Even though this court need not delve into the other limbs for granting an injunction, it is important to mention that the Applicant, having voluntarily offered the property as security for the loan, thereby accepted the inherent risk that it could be sold in the event of default. The outstanding debt continues to accrue interest, and the Applicant has not demonstrated any concrete efforts to repay the loan. Meanwhile, the 1<sup>st</sup> Respondent continues to suffer financial detriment due to the Applicant's persistent default.
  27. Furthermore, if the Applicant were to suffer any injustice as a result of the sale, the 1<sup>st</sup> Respondent, being a well-established financial institution, would be in a position to compensate the Applicant should the need arise.
  28. For the above reasons, the court finds that the Applicant has not satisfied the principles guiding the grant of interlocutory injunctions. Accordingly, the application fails.
  29. In the premises, the application dated 28<sup>th</sup> February 2025 is dismissed with costs to the Respondents. It is so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI**

**THIS 27<sup>TH</sup> DAY OF MARCH 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Ms. Mugo for Plaintiff/Applicant

Mr. Ndegwa h/b for Mr. Kiplagat for Defendants/Respondents

Court Assistant: Carlos

