



**Stanbic Bank Kenya Limited & another v Wanjala (Civil Appeal E237 of 2023)
[2025] KEHC 3848 (KLR) (Commercial and Tax) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E237 OF 2023
BK NJOROGE, J
MARCH 27, 2025**

BETWEEN

STANBIC BANK KENYA LIMITED 1ST APPELLANT

STARTRUCK AUCTIONEERS 2ND APPELLANT

AND

CLARA NEKESA WANJALA RESPONDENT

JUDGMENT

1. This is an appeal against the Ruling delivered in Milimani Chief Magistrate's Court Miscellaneous Application No. E584 of 2023. It is a decision by Hon. Rawlings Liluma delivered on 1st September, 2023.
2. The Trial Court after considering the Applicant's application by way of a Notice of Motion dated 25th April, 2023, made the following orders;
 - a. That the Preliminary Objection dated 20th April, 2023 by the Respondent be and is hereby dismissed.
 - b. That an injunction order be and is hereby issued restraining the sale of the Applicant's immovable property registered as Ngong/Ngong/27938 by the Respondents, their agents or servants.
 - c. That costs shall be in the cause.



Background Facts

3. Appellants are the original Respondents before the trial court. The Respondent in the original Applicant.
4. The facts of the case are fairly clear. The Respondent is the wife to one Stephen Gachiri Mbugua. They jointly own the property known as Ngong/Ngong/27938. Stephen Gachiri Mbugua utilized the property as security to borrow a sum of Ksh.5,000,000 from the 1st Appellant, Stanbic Bank Limited.
5. The Respondent as a guarantor to the loan, consented to the property being used as security.
6. As a result of default on the part of Stephen Gachiri Mbugua, the bank put into motion steps to release the security. The property was advertised for sale on 27th April, 2023.
7. The Respondent moved the Court vide a Miscellaneous application in which she filed a Notice of Motion dated 25th April, 2023.
8. The Motion sought injunction orders to stop the exercise of the statutory powers for sale by the Appellants. The 2nd Appellant is the Auctioneer who has advertised the property for auction.
9. The Appellants responded to the suit by filing a Notice of Preliminary Objection dated 10th May, 2023.
10. They also filed a Replying Affidavit sworn on 11th May, 2023 by one Stella Nelima.
11. On 29th May, 2023, Hon. R.L. Musiega (SRM) gave directions that the Notice of Preliminary Objection be heard first. This is by way of written submissions. Counsel for the parties did file their written submissions.
12. The Trial Court after considering the Notice of Preliminary Objection and the submissions filed, dismissed the Preliminary Objection.
13. The Trial Court thereafter proceeded to allow the Notice of Motion dated 25th April, 2023. In effect allowing the injunction sought. The costs were to abide the cause.
14. It is this Ruling that has triggered this Appeal.
15. Directions were issued that this appeal be disposed of by way of written submissions. The Court has seen and read the Appellant's written submissions dated 17th June, 2024 with authorities cited. The Court has equally read the Respondent's written submissions dated 10th July, 2024 and the authorities attached.

he Appellant's Case

16. It is the Appellant's argument before this Court that there was no proper suit before the Trial Court. That a Notice of Motion in a Miscellaneous Application cannot originate a suit. The Court was referred to Section 19 of the *Civil Procedure Act* and Order 3 Rule 1 of the Civil Procedure Rules Cap 21 of the Laws of Kenya. It was submitted that a suit can only be originated by way of a Plaint or an Originating Summons. The Court was referred to Rajab Kosgei Magut -vs- Nuru Jepleting Choge [2020] eKLR, Geoffrey Ndungu Theuri -vs- Law Society of Kenya [1986] eKLR, Scope Telematics International Sales Limited -vs- Stoic Company Limited & Another [2017] eKLR. This Court's attention was drawn to the Court of Appeal's pronouncement on the manner of instituting suits before the court.



17. On whether an injunction should have been granted, the Appellant submits that no prima facie case with a probability of success was proved. That the Respondent had not demonstrated a genuine grievance on the bank's exercise of its statutory power of sale. The charge was valid, there was default and the processes for recovery had been followed. The Court was referred to *Mrao -vs- First American Bank of Kenya Limited & 2 others* (2003) KLR 125, *Giella -vs- Cassman Brown* (1973) EA 358, *American Cynamid -vs- Eshicon Limited* [1975] AC 396, *Okiya Omtata Okoiti -vs- Attorney General & 5 others* [2020] eKLR, *Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society* (2001) 1EA 86 and *Joshua Miriti Ntarichia -vs- Isaack M'nkinkaibua & Another* [2009] eKLR.
18. It was further submitted that the Respondent had not demonstrated any irreparable damage that it would suffer, unless the injunction was granted. It was submitted that the dispute was financial in nature. That the Appellant being a financial institution, it had the muscles to offer compensation. This is in the event it was later found that the Bank was proceeding on the wrong basis. The amount in dispute was not only calculable, but the amount demanded was clearly stated. The Court was referred to *George Muritu Gathecha -vs- Family Bank Limited* [2017] eKLR, *Amina Karama -vs- Njagi Gachangua & 3 others* [2020] eKLR and *Joseph Kipkorir Cheruiyot & another -vs- Equity Bank (K) Ltd & Another* [2017] eKLR.
19. It was also submitted that the balance of convenience tilted in favour of the Appellant. The funds advanced to the Respondent by the bank were public funds. That having received the amount advanced, the Respondent had a corresponding duty to repay. The Court was referred to *National Bank of Kenya Ltd -vs- Isaac A. Ogettah* [1999] eKLR.
20. The Court was urged to allow the Appeal with costs.

The Respondent's Case

21. The Respondent submits that the Trial Court properly exercised its mind in dismissing the Notice of Preliminary Objection raised by the Appellant herein.
22. She referred the Court to the provisions of Order 3 Rule 1 (1) of the Civil Procedure rules, to wit that every suit shall be instituted by presenting a Plaint to Court, or in such other manner as may be presented. It was submitted that this called for exercise of discretion since the word "may" was used by the rules.
23. The Court was also referred to Order 51 Rule 1 of the Civil Procedure Rules. Hence it was argued that the Motion before the Court prescribed to the rules.
24. Further, it was submitted that whereas Section 19 of the *Civil Procedure Act* Cap 21 states that every suit shall be instituted by Plaint, the section also stipulated "or in such a manner as may be prescribed". Hence an application under Order 51 Rule 1, by way of a Notice of Motion, falls within such a prescription by statute. The court was referred to *Joseph Kibowen Chemjor -vs- William C. Kisera* (2013) eKLR.
25. The Respondent also relied on Article 159(2) of *the Constitution* of Kenya. That the Court should administer justice without undue regard to technicalities. The Court was referred to the decisions in *Salat v Independent Electoral and Boundaries Commission & 7 others* (Petition 23 of 2014) [2015] KESC 31 (KLR) (Election Petitions) (19 October 2015) (Judgment) and *Lemaken Aramat -vs- Harun Meitamei Lempaka & 2 others* [2014] eKLR.
26. For good measure, the Respondent relied upon Article 50 of *the Constitution*, Section 1A of the *Civil Procedure Act* and Order 51 Rule 10 (2) of the Civil Procedure Rules. The Court was urged that in



exercise of its jurisdiction to strike out suits, it should do so with a lot of caution. Reference was made to Samuel Mbugua Githere -vs- Kimungu [1984] eKLR and Kamani -vs- Kenya Anti-Corruption Commission & 3 others [2010] eKLR.

27. It was submitted that the ingredients for granting an injunction had been met.
28. This Court was urged to dismiss the Appeal with costs.

Issues for Determination

29. Having read the Memorandum of Appeal, the Record of Appeal and the submissions by the parties, two (2) issues fall for determination in this Appeal.
 - a. Whether the Appeal has any merits
 - b. What orders should lie in this appeal?

Analysis

30. This is a first Appeal. The Court is therefore duty bound to re-look, re-consider and re-evaluate the evidence presented before the Trial Court afresh. Then this Court has to reach its own conclusions. However, this Court has to bear in mind that it neither saw nor heard the witnesses, and should make allowances for such. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] E.A 123.
31. When it comes to interfering with the exercise of judicial discretion, the Court turns to the case of *Mbogo & another Vs. Shah* [1960] E.A. 93. Issuance of injunction orders is exercise of discretion. The Appellate Court will not interfere unless the Trial Court misdirected itself and has clearly been wrong in exercise of the discretion, that there has been a resultant injustice.
32. The Court proceeds to consider the two (2) issues framed as follows;

Whether the Appeal has any Merits

33. The Court notes and warns itself that this is an interlocutory appeal from the decision of the Trial Court. As matters stand, there is still a suit pending before the Magistrate's Court. The Court should therefore proceed with caution before making any orders that may prejudice the fair hearing of the matter before the lower court. Having said so, the Court should act boldly and make determinations on merits, on those issues falling for determination in this Appeal. This is more so whether the Court can do so with clarity and decisively. It is therefore a balance that the Court is called upon to exercise.
34. To this court this Appeal turns on the facts as to whether there was a competent suit before the Trial Court.

Can a Suit be Instituted by Way of a Notice of Motion?

35. It is not in dispute that no Complaint or an Originating Summons was filed before the Trial Court.
36. The Court was confronted with a Notice of Motion and an affidavit in support.
37. Section 19 of the *Civil Procedure Act* states as follows;

Institution of Suits

19. Institution of suits

Every suit shall be instituted in such manner as may be prescribed by rules.



38. Order 40 of the Civil Procedure Rules states as follows;

Cases in which temporary injunction may be granted [Order 40, rule 1.]

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 orders.

39. The now famous case of *Giella -vs- Cassman Brown E.A (1973) E.A 350* states that an Applicant has to prove a prima facie case with a probability of success.

40. To this Court it is clear that the prima facie case to be proved would be the substance in the suit, the subject of the interlocutory application. An application for an injunction cannot survive on the basis of an application alone. It has to be based on a claim by way of a suit, seeking substantive reliefs.

41. The Court refers to the decision in *Cresta Investments Limited v Gulf African Bank Limited & another [2020] eKLR and Mbugua & another v Mbugua & 4 others (Miscellaneous Application E064 of 2023) [2024] KEHC 2405 (KLR) (16 January 2024) (Ruling)* in support of this finding.

“Moreover, an application for injunction under Order 40 of the Civil Procedure Rules is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all.”

42. It follows therefore that the Notice of Preliminary Objection was well taken. An injunction cannot be sought in absence of a suit. A Motion cannot properly form the basis of the suit contemplated in the proceedings before the Trial Court.

Whether the Injunction was Properly Granted

43. The Court notes that after the Trial Court dismissed the Notice of Preliminary Objection, it proceeded to allow the Notice of Motion and granted the injunction sought.

44. Yet on 29th May, 2023, the Trial Court had given the following directions;

“Court – the preliminary objection shall be disposed of first. The Defendant to file and serve 14 days. The Plaintiff to file his submissions within 14 days. Mention on 19th July, 2023”

45. A look at the submissions filed by the Counsel before Trial Court shows they addressed themselves to the Notice of Preliminary Objection only.

46. When the Trial Court proceeded to determine the Notice of Motion, it fell afoul of its own directions in the matter. It denied the Appellant a chance to submit on the prayers for injunction.



47. This is a matter where this Court is entitled to interfere with the discretion of the Trial Court. The Court applied the wrong principles by hearing and determining the entire application. This was contrary to its earlier directions, that it would only determine the Notice of Preliminary Objection. It therefore arrived at the wrong decision. The Court refers to *Mrao -vs- First American Bank of Kenya Limited & 2 others* (2003) KLR 125.

What Orders Should Lie in the Appeal

48. It is unfair to maintain the injunction or for that matter the Notice of Motion in absence of a substantive suit. The Respondent may have genuine grievances against the Appellants, but they have moved the Trial Court in an improper manner.

49. The Court is minded to allow the appeal.

50. As to costs, they should follow the event.

Determination

51. The Appeal herein is allowed in the following terms.

- a. The Ruling by Honourable R. L. Musiega (SRM) dated 1st September, 2023 is hereby set aside together with the consequential order of injunction which is hereby quashed.
- b. The Notice of Preliminary Objection dated 10th May, 2023 is upheld and the Notice of Motion dated 25th April, 2023 is hereby struck out with costs.

52. The costs of this Appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MARCH, 2025

NJOROGE BENJAMIN K

JUDGE

In the presence of;

Mr Mumu for the Appellant

Mr Mullomi for the Respondent

Mr. Luyai – Court Assistant

