



Tana Group Limited v Kenya Development Corporation & another (Civil Case E004 of 2025) [2025] KEHC 5435 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL CASE E004 OF 2025
EM MURIITHI, J
APRIL 30, 2025**

BETWEEN

TANA GROUP LIMITED PLAINTIFF

AND

KENYA DEVELOPMENT CORPORATION 1ST DEFENDANT

JOYLAND AUCTIONEERS 2ND DEFENDANT

RULING

1. Upon hearing the application for injunction pending hearing and determination of the suit in the absence of the Defendant respondents who had been duly served, the Court takes the view that the applicant has on the test of *Giella v. Casman Brown Co. Limited* [1973] EA 358 established a prima facie case with probability of success; that damages are not adequate compensation and the balance of convenience tilts in favour of granting the injunction pending hearing of the suit as prayed.

Prima facie case

Issue of Statutory Notice

2. Particularly, the court finds a prima facie case on the issue of statutory notice which the defendant was required to give to its borrower before seeking to realise its security under section 90 of the [Land Act](#), which provides as follows:

Remedies of a chargee.

90. (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one



month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - a. the nature and extent of the default by the chargor;
 - b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified; (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
- (3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—
 - a. sue the chargor for any money due and owing under the charge;
 - b. appoint a receiver of the income of the charged land;
 - c. lease the charged land, or if the charge is of a lease, sublease the land;
 - d. enter into possession of the charged land; or
 - e. sell the charged land;
- (4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may —
 - d. appoint a receiver of the income of the charged land; 63 No. 6 Land 2012
 - e. apply to the court for an order to—
 - i. lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;
 - ii. sell the charged land to any person or group of persons referred to in the law relating to community land.
- (5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section. Chargee's action for money secured by charge.

3. Because of the statutory requirement under the contents of a statutory notice under section 90(1) (a) and (b) of the [Land Act](#) to contain the extent and nature of the default and there is, in the respectful



view of this court, a need to renew the statutory notice in the event of a default occurring after the defaulter has regularised the default payment. It would appear that the reason for this requirement is that the borrower must at all times when a notice is issued be given the figure of default the payment of which is called and upon which payment the default will have been cured. After the payment of premiums under the recommencement of the servicing of the loan the loan account must have been affected, and the second default from August 2024 should have attracted a renewed and updated statutory notice setting out in accordance with subsection 90 (1) (a) and (b) the Act. Therein lies a prima facie case with probability of success.

4. The default in giving fresh statutory notice in this regard raises a prima facie case within the meaning of *Giella v. Casman Brown Co. Ltd* [1973] EA 358.

Irreparable damage

5. As to whether damages would be adequate compensation or whether the applicant would suffer irreparable loss if the injunction is not granted, in *Margaret Njeri Muiruri (Being the Administrator of the Estate of Joseph Muiruri (Deceased)) v Bank of Baroda (Kenya) Ltd* [2001] eKLR, a decision where this court was the successful counsel, the Court in not too dissimilar facts held as follows:

- i. “Besides, section 69A(1)(a) requires a formal notice to be given to the mortgagor, by the mortgagee before it can realise its security. It is arguable whether a formal notice should also not be given under section 69A(1)(b) notifying the mortgagor that interest had fallen due and remained unpaid for at least two months, before the mortgagee can exercise its statutory power of sale for unpaid interest. The foregoing are matters which, if the trial judge, had addressed his mind to, would have led him to find that a prima facie case with the probability of success had been made out. We appreciate the fact that the jurisdiction of the trial court under order 39 rule 1, the Civil Procedure Rules, under which the appellant’s application was brought, is discretionary, and that in cases which concern the exercise of discretionary jurisdiction an appellate court should be slow to interfere unless it is shown that the Court below erred in principle. However, as we have endeavoured to show the trial judge failed to consider certain relevant matters and thus exercised his judicial discretion wrongly. Consequently, he erred in principle.
- ii. But will the appellant suffer such damage as may not be compensated in damages unless she is granted an injunction. The suit property is land. Mr Nyamu submitted before us that the said property is commercial and therefore its loss is compensatable in damages. We have no clear evidence on the status of the land. Consequently, there is no proper basis for holding that it is commercial property. Besides disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.
- iii. This apart, the evidence before us shows that a relatively small amount of money was borrowed. What is being claimed from the appellant presently is a whopping Kshs 90 million odd. The appellant complains that the respondent is charging, what, in ordinary parlance, appears to be usurious interest rate. In the circumstances, the balance of convenience favours the grant of an injunction to maintain the status quo, so as to give the appellant an opportunity of proving her case. We appreciate that parties to a contract may, as here, agree on the interest chargeable in a financial transaction. It is however, arguable whether it is fair for a party to such an agreement to arbitrarily vary upwards such rate of interest without prior notice to the other party or parties to the agreement.”



6. The statement of the Court in *Margaret Muiruri Gachoka v. Bank of Baroda* case, supra, is instructive that where the property is not clearly an item for sale as a commercial building, but the applicant may have additional interest in the property, substantial loss may be inferred. However, even a property may be said to be an item for sale as security the loss thereof in a situation where no statutory notice, and therefore opportunity, for redemption is given clearly engenders an irreparable and unnecessary loss, and court must act to protect the eventuality.

Balance of Convenience

7. The balance of convenience, if this court any doubt as to the merits of the case would be in favour of maintaining the status quo to allow for the consideration and determination of the borrower's complaint. There is no indication that lapse of time has led or is likely to lead to an unconscionable loss in the recoverable value of the security as to dictate against any deferral of the exercise of the power of sale.

Orders

8. Accordingly, for the reasons set out above, the Court grants the application for injunction pending the hearing and determination of the suit as prayed in Prayer No. 3 of the Notice of Motion dated 11/4/2025.
9. The Costs of the application shall be costs in the cause.
10. Mention for pre-trial directions as to hearing on 29/5/2025.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Kanyoni for the Plaintiff/Applicant

No Appearance for the Defendant/ Respondent.

