



**Mayanda Kimoon Engineering Company Limited v Baraka Credit Limited
(Civil Suit E022 of 2024) [2025] KEHC 7131 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E022 OF 2024
E OMINDE, J
MAY 28, 2025**

**BETWEEN
MAYANDA KIMOON ENGINEERING COMPANY LIMITED APPLICANT
AND
BARAKA CREDIT LIMITED RESPONDENT**

RULING

1. The Applicant filed the Notice of Motion Application dated 18/09/2024 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable court be pleased to grant an order of injunction restraining the defendant Respondent whether by itself, or its authorized agents, auctioneers and or any of them or otherwise from offering for sale, selling by public auction or private treaty of that parcel of land namely L.R NO. Pioneer/Ngerla/Block 1 (EATEC)1853 and Motor Vehicle Reg. No. KCL 718N and KCS 090N pending the hearing and the inter parties hearing of this application inter-parties and thereafter the main suit.
 - d. That costs of this application be provided for.
2. Additionally, the Applicant filed a Plaint together with the Application seeking similar orders to wit, an injunction restraining the Respondent from exercising Statutory Power of Sale or clogging the Plaintiffs 'exercise of equity of redemption.
3. The Application is expressed to be brought under Order 40 Rules 1,2,9 and Order 50 Rule 1 of the 'ELC Procedure Rules, as read with Sections 1A, 1B, 3A, 63(e) of the 'ELC Procedure Act' and 'all other enabling provisions of the law'.



4. It is further premised on the grounds on the face of it and the contents of the Supporting Affidavit sworn by Ekai Lokiria, the Applicants' Director. In the Supporting Affidavit, he stated that in the year 2023, he approached the Respondent for a loan facility for purpose of working capital. The Respondent approved the application and as security the Applicant offered that parcel of land namely Pioneer Ngerla Block 1 (EATEC) 1853 and Motor Vehicles Reg. No. KCL 718N and KCS 090N. The loan amount approved was Kshs. 18,000,000/- as the loan amount, but the loan amount credited into their account after five months was Kshs. 14,800,000/= only. He urged that he made frantic efforts to have the loan enhanced and the Respondent charged them with unconscionable, untenable interest rate of 7% per month contrary to the set-out rules under the Credit Bank rules.
5. The Deponent averred that he has made various payments to the Respondent and notwithstanding the payments, the Respondent still claims a colossal sum of Kshs. 26,800,000/= . Further, that the Respondent has issued a Notices to sell the suit land by public auction but did not issue a Statutory Notice or a Notification of Sale as required by law. Further, that unless the Respondent is temporarily restrained by an order of this court, he will suffer irreparable and irreversible loss and damages. He intimated that he is willing to clear the outstanding balance once the accounts are reconciled in reasonable monthly instalments. He urged the court to allow the Application as prayed as he had met the threshold.

Respondents' Replying affidavit

6. The Respondent opposed the Application vide a Replying Affidavit dated 01/10/2024. In his affidavit, he averred that this Court lacks jurisdiction to hear and determine this matter as the cause of action arose in Nairobi where the subject contract was signed and, the Defendant is also domiciled in Nairobi where it carries on its business. He urged the court to strike out the Application and entire suit in limine.
7. The Deponent stated that the Applicant applied for a loan facility of Kshs 10,000,000/- which was approved vide an offer letter dated 25th July 2023. Further, that the loan was disbursed on diverse dates to wit; Kshs. 4,300,000/- on 26th July 2023, Kshs. 700,000/- on 31st July 2023, Kshs. 3,500,000 on 4th September and Kshs. 1,500,000/- on 5th September 2023. He annexed copies of the loan application form, the offer letter and the loan disbursement memo, marked as annexure SKK-1. He further deponed from the said loan, Kshs. 300, 000/= was utilized to cater for the costs of loan processing/ credit evaluation fees, while Kshs. 700, 000/= was deducted for loan repayment upfront, as per the Contract.
8. The Deponent stated that the facility was secured by Motor Vehicle Reg No. KCL 718N and KCS 090N and title deed Pioneer Ngeria Block 1 (EATEC) 1853 and, that it was a term of the agreement that the interest charged on the loan would be at a flat rate of 7% per month. That it was a further term of the Agreement that the loan was to be repaid within a period of six (6) months and an advance payment of Kshs. 2, 366, 667/= was to be paid directly to the Respondent with effect from the first month of drawdown, until the loan is paid in full.
9. Subsequently, and while the first loan was running, the Applicant applied for a follow up facility of Kshs. 8,000,000/- which loan was again disbursed on diverse dates less the mandatory evaluation fees as follows; on 21st September, 2023 Kshs, 2, 240, 000/ =, 30th September, 2023 Kshs. 640, 000/ =, 17th October, 2023 Kshs. 1, 000, 000/= , 25th October, 2023 Kshs. 1, 400, 000/ = and on 30th November, 2023 Kshs. 1, 800, 000/ = . Additionally, the sum of Kshs. 240,000/ = was applied to cater for loan processing/credit evaluation fees and the sum of Kshs. 550, 000/= was retained to cater for loan repayment upfront, again as per the contract, He annexed and marked, as SKK-2, copies of the



loan application form, the offer letter and the loan disbursement memo. He further deponed that the top up loan was secured by the same securities as the first loan and interest was similar as well. It was a further term of the Agreement that the loan was to be repaid within a period of six (6) months and an advance payment of Kshs. 1, 893, 333 was to be paid directly to the Respondent.

10. The Deponent averred that the securities were perfected and a charge registered against the suit property. Annexed to the affidavit, and marked SKK-3 were copies of the title deed and the charge instrument. He then pointed out that the Applicant defaulted in repaying the loan and despite several demands, continued being in default, causing severe economic loss to the company. He stated that the Applicant was first served with a first formal demand letter dated 30 January, 2024 which was annexed and marked as Annexure SKK-4, but she refused to regularize the facility.
11. He urged that in exercise of statutory powers to realize the security, the Respondent served the Applicant with the mandatory Statutory Notice of three months dated 9th May, 2024 and which period lapsed on 10th August, 2024. Copies of the Notices were annexed and marked Annexure SKK-5. Further, that upon expiry of the notice period, the Applicant was served with the 40 days redemption notice dated 12th August, 2024, but before the said period could lapse and without making any attempt to redeem the security, the Applicant rushed to court and filed this application. Annexed and marked as SKK-6 was a copy of the said notice.
12. The Deponent stated that on the first loan, the Applicant has not serviced the loan since January, 2024 and the outstanding loan arrears as at 23rd September, 2024 is Kshs. 16, 965, 000/=. He Annexed and marked as SKK-7, a copy of the loan statement. Further, that on the second loan, the Applicant has not serviced the loan since October, 2023 and the outstanding loan arrears as at 23rd September, 2024 is Kshs. 13, 600, 000/=. He annexed and marked a copy of the loan statement as SKK-8. He denied having taken any steps to proclaim or advertise the securities for sale and urged that the Application be dismissed with costs for lack of merit.

Applicants Submissions

13. The Applicant submitted that this court has Jurisdiction to handle this matter. He cited the case of Owners of the Motor Vessel 'Lilian S' v Caltex Kenya Limited [1989] KLR 1 on jurisdiction and urged that the jurisdiction of the High Court in civil matters is unlimited by virtue of Article 165 (3) of *the Constitution*. Additionally, he cited the case of Kaigi General Contractors Ltd v National Irrigation Authority (Civil Suit E009 of 2021) [2023] 1 KEHC 3396 KLR in support of these submissions.
14. Counsel submitted that a close scrutiny of the contract between the Applicant and the Respondent indicates that it was executed in Eldoret as evidenced by the Applicant's business stamp. Further, that where the contract was executed is not a nullity of the court's jurisdiction to handle the present matter.
15. Counsel urged that the law on injunctions has been laid down under Order 40 of the Civil Procedure Rules 2010 and submitted that the Applicant has demonstrated that he has a prima facie case. Additionally, that the Respondents' intended sale is illegal as due process was not followed in proclaiming the suit parcels with an intention to offer for sale. Further, that the Respondent is in breach of Section 96 (2) of the *Land Act* as there is no evidence that the defendant carried out any valuation of the suit property. He submitted that the defendant did not issue the required notices, statutory notices or the auctioneer's notification of sale as required by law. Therefore, if the intended sale is allowed to take place, the Applicant shall suffer great loss.
16. Counsel submitted that it is not disputed that the Applicant was offered a loan facility by the Respondent which approved Kshs. 18,000,000/- and disbursed Kshs 14,800,000/-. That the Applicant has been paying the said loan but the defendant is claiming an amount of Kshs.



26,800,000/-. He urged that the Respondent is in breach of the law to wit; the In Duplum Rule, pointing out that the rule is imported via enactment of Section 44 (a) of the *Banking Act*, 2007, and cited the holding of the Court of Appeal in Kenya Hotels Ltd - - Oriental Commercial Bank Ltd (2019) eKLR on the same.

17. Counsel submitted that the Respondent has failed to give a detailed account of the total amount due and reiterated that he has been paying the said loan faithfully. Further, that having demonstrated a prima facie case, the court do allow the application as prayed.

Respondents Submissions

18. Learned counsel for the Respondent submitted that conditions for grant of injunction were well settled in the celebrated case of Giella . Cassman Brown & Co. Ltd (1973) EA 358.
19. Counsel reproduced the contents of the Replying Affidavit with regards to the application for and disbursement of loans and as the same has been summarized above, there is no need to reproduce the same once more. Additionally, he urged that the Applicant's allegation that they only received Kshs. 14,800,000/= out of the Kshs. 18,000,000/= applied for is false and misleading.
20. On interest, Counsel urged that the Respondent is not a bank and therefore not regulated by the *Banking Act*. That the relationship between the Applicant and the Respondent is bound by the two contract documents dated 25th July, 2023 and 6th September 2023. He stated that the Applicant voluntarily entered into this contract and further, that it is trite law that parties are bound by their contract and the court cannot be invited to rewrite the same. He cited the case of Barons Estate Limited v Atticon Limited & 5 others [2020] eKLR in this regard. Counsel stated that the Respondent has not breached the in duplum rule at all, highlighting that Section 44A of the *Banking Act* provides a statutory application of the rule to the banking sector, which rule basically provides that interest stops running when the unpaid interest equals the outstanding capital amount. In this case, according to the terms of the contract, the first loan was Kshs. 10, 000, 000/=, the outstanding arrears is Kshs. 16, 965, 000/= while the 2nd loan was Kshs. 8, 000, 000/=, the outstanding arrears is Kshs. 13, 600, 000/ =. Counsel urged that in simple arithmetic, the loan has not gone beyond the in duplum rule.
21. On the question of Statutory Notices, Counsel urged that the Respondent has clearly demonstrated, in their Replying Affidavit, that the Applicant was duly served with all the mandatory Statutory Notices. He reiterated that the Applicant rushed to court upon receipt of the 90 days statutory notice and even before the 90 days period expired. That this was fortified by the subsequent application filed by the Applicant on 25th November, 2024 when they were served with the Notification of Sale. He cited the provisions of Section 90 (1) and 90(2) of the *Land Act* No. 6 of 2012 urging that the Respondent served the Applicant with a Statutory Notice in compliance with the provisions therein. Additionally, he reiterated that the Statutory Notices were duly served under section 96 of the *Land Act* 2012.
22. Counsel cited the case of Andrew Muriuki Wanjohi Equity Building Society Limited & 2 others (2006) eKLR , urging that the orders sought herein are equitable remedies and that the laws of equity demand that, he who comes to equity must come with clean hands and he who seeks equity must do equity. He submitted that the Applicant has not approached this court with clean hands as it confirms that they are in arrears. In this regard, he cited the cases of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Prof Samson K Ongeru [2001] eKLR and the case of Joel Maingi Kirigia v African Banking Cooperation Ltd & another [2018] eKLR.
23. Counsel also intimated to the court that it was important to note that the suit Motor Vehicles have never been proclaimed or repossessed. That the Applicant removed or switched off the tracking devices



fixed on the said vehicles at the time of taking the loan and the Respondent is unable to trace the Motor Vehicles to date. he urged the court to dismiss the application with costs.

Analysis & Determination

24. Having considered the pleadings in the Application and the Submissions made by Counsel with respect to the Application as above summarised, it is my considered opinion that the sole issue that arises for determination is; Whether the Plaintiff has sufficiently demonstrated that it warrants the orders for a temporary injunction.
25. Before delving into the issue of the temporary injunction, I note that the Respondent raised the issue of jurisdiction of the court based on where the document was executed. A cursory look at the loan application form reveals that the physical location of the Applicants' business and the immovable property used as security are both within Eldoret. It follows therefore that the issue of jurisdiction is moot as this court is vested with the jurisdiction to handle the application and the suit.

Whether the Plaintiff has sufficiently demonstrated that it warrants the orders for a temporary injunction.

26. Injunctions are generally governed by the provisions of Order 40 Rule 1 of the Civil Procedure Rules. Rule 1 thereof provides as:

“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;
- (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 order.”

27. The case of *Giella v Cassman Brown & Co. Ltd* [1973] E.A 358 set out the following conditions which an Applicant is required to demonstrate for the grant of a temporary injunction: -

“The conditions for the grant of an interlocutory injunction are 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.”

Prima facie case

28. In the case of *Mrao Limited v First American Bank of Kenya Limited* [2003] KLR 125, the Court described a prima facie case as below;

‘In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter.....”“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

29. Sections 90 and 92 of the *Land Act* 2012 are the relevant statutory provisions to the issues raised in this application and they provide as hereunder in so far as the said sections are relevant to the matter at hand; Section 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 in 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)
 - (b) appoint a receiver of the income of the charged land;

Section 92.

- (1) It shall be an implied condition in every charge that the chargee shall have the power to appoint a receiver of the income of the charged land.
- (2) Before appointing a receiver under this section, the chargee shall serve a notice in the prescribed form on the chargor and shall not proceed with the appointment until a period of thirty days, from the date of the service of that notice, has elapsed.



30. It is the Applicant's contention the Respondent did not issue them with the ninety (90) days and then a sixty (60) days as required by the law as herein above cited before proceeding to issue a Notice to sell the suit land by public auction. The Respondent in its Replying Affidavit deposed that the said Notices were indeed issued. The issue of service of Statutory Notices was very well articulated by the Court of Appeal in *Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others* [1995-1998] 2 EA 260 as follows:

“The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements.... That burden is not in any manner on the chargor.

Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. It must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting.

...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*, Cap 2, Laws of Kenya....”

31. From the evidence of record, the first statutory notice was allegedly issued vide a letter dated 30th January 2024. However, there is no evidence as to whether the notice was served on the Applicant. There is no certificate of postage or a copy of the letter stamped as received by the applicant. In light of the above, the Court on a balance of probabilities finds in favour of the Applicant that the demand letter dated 30/10/2024 was not served on the Applicant. The same applies to the Respondents' contention that they served the Notices under Section 90 and 96(2) of the *Land Act* 2012. The Applicant did not provide any proof of service of either of the Statutory notices. I therefore find that the same were not served on the Applicant.

32. Given my above findings, it is my finding that the Applicant has sufficiently established a prima facie case as described in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, by demonstrating to the satisfaction of the Court that they do have a right which right has apparently been infringed by the Respondent to warrant for an explanation or rebuttal from the latter. In this regard, I find that the Applicant has established a prima facie case as set out in the case of *Giella Cassman Brown* [1973] EA 358 and that the Application by the Applicant also meets the requirements for grant of a temporary injunction as set out in Order 40 Rule 2 of the Civil Procedure Rules upon which the Application is premised.

Irreparable Injury

33. In the case of *Nguruman Limited Jan Bonde Nielsen & 2 Others* Civil Appeal Number 77 of 2012 the Court of Appeal observed that it is established that the three conditions and stages set out in the case of *Giella v Cassman Brown* 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).

34. The Court held that if the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In the instant case, the Applicant has not mentioned anything with regards to the irreparable injury they stand to suffer. It would appear that their application is solely pegged on the establishment of a prima facie case. In this



regard, the Court notes the decision of the Court of Appeal in the case of Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR where the Court held that

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

Balance of Convenience

35. Balance of convenience was defined in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.”

36. The Applicant, in its supporting affidavit, mentioned that the sale of the offered securities would cause the plaintiff to suffer irreparable and irreversible loss and damages. The Respondent, on its part, stated that the continuous default has caused severe loss to the company. I noted that both parties barely submitted or spoke about the issue of balance of convenience and did not go into too much detail on the same.

37. I have considered the outstanding loan arrears for both loans and the sum therein, though disputed, is colossal. In my view, there would be substantial loss occasioned on the applicant if the orders sought are not granted. Further, it is evident that the Respondent failed to comply with the statutory provisions for issuance of the notices under the *Land Act* and therefore, the Applicant has established a Prima Facie case. As to whether there is a probability of success, to determine the same at this juncture would be premature.

38. The upshot is that I find merit in the Application dated 16th November 2023 and I allow the same as follows;

- i. That an order of injunction be and is hereby issued restraining the defendant Respondent whether by itself, or its authorized agents, auctioneers and or any of them or otherwise from offering for sale, selling by public auction or private treaty of that parcel of land namely L.R NO. Pioneer/Ngeria Block 1 (EATEC) 1853 and Motor Vehicle Reg. No. KCL 718N and KCS 090N pending the hearing and determination of the main suit.
- ii. The Respondents shall bear the costs of the Application.

READ DATED AND SIGNED AT ELDORET ON 28TH MAY 2025

E. OMINDE

JUDGE

