Bwisa v Agricultural Fiance Coirportion (Civil Appeal E138 of 2023)
[2025] KEHC 11625 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E138 OF 2023

REA OUGO, J

JULY 30, 2025

BETWEEN

WANYONYI BWISA ..... APPELLANT

AND

AGRICULTURAL FIANCE COIRPORTION ..... RESPONDENT

(Being an Appeal from the Ruling at the Chief Magistrate's Court in Bungoma in CMCC No. 236 of 2023 delivered by Hon. C. Maundu, Chief Magistrate on 3rd October 2023.)

JUDGMENT

1. The Appellant filed a civil suit before the lower court vide Plaint dated 8th May 2023 seeking judgment against the Defendant/ Respondent as follows: -

    a. A declaration that the loan amount demanded by the Defendant as reflected in the Statutory Demand Notice dated the 22nd July 2022 is illegal, null and void as the same violated the mandatory provisions of Section 44 of the *Banking Act* on the in-duplum rule.

    b. A declaration that the Plaintiff has discharged his obligation towards the Defendant by repaying his loan facility in full.

    c. A permanent injunction restraining the Defendant, its servants, agents and/or employees from selling, advertising for sale or in any many whatsoever from interfering with the quiet possession, ownership and enjoyment of the Plaintiff's suit property being Land Reference No. Kimilili/Kibingei/2396.

    d. A mandatory order directing the defendant to immediately discharge the Plaintiff's property Land Reference No. Kimilili/Kibingei/2396 from the loan facility.

    e. Costs of the suit

f. Such other orders as the court would deem just and expedient.

2. Concurrently with the Plaint, the Appellant filed a Notice of Motion Application supported by his sworn affidavit both dated 8th May 2023 seeking the following Orders: -

    1. Spent

    2. Spent

    3. That pending the hearing and the determination of the substantive suit herein the honourable court be pleased to issue a temporary injunction restraining the Defendant/Respondent, its servants, agents, employees or any other person acting at its behest from interfering with the Plaintiff/Applicant's quiet possession and ownership of property known as Land Reference No. Kimilili/Kibingei/2396.

    4. That the honourable court be pleased to issue any such further orders its deems fit in the interests of justice.

    5. That costs of the Application be borne by the Defendant/Respondent.

3. The application was based on the grounds stated on the face of it, which the appellant reiterated in his sworn affidavit as follows: that the defendant/respondent had provided a loan facility of Kshs. 700,000/= with an interest rate of 10% per annum and equal monthly instalments of Kshs. 33,650/= for a period of 24 months, secured by his property, Land Reference No. Kimilili/Kibingei/2396; that he repaid part of the loan, amounting to Kshs. 290,000/=, before defaulting sometime in 2014, and was then issued with a Statutory Demand Notice on 13th May 2014 for Kshs. 944,343.33/=, along with an Auctioneer's 45-day notice to sell the charged property; that he paid a lump sum of Kshs. 650,000/= on 27th October 2016 after discussions with the respondent and continued to pay the remaining balance through monthly instalments of Kshs. 15,000/=, amounting to Kshs. 300,000/=. It was his case that, in a surprising turn of events, the respondent issued him another Statutory Demand Notice of Kshs. 845,599.38/= when he believed he had settled his loan and was now seeking to have his property discharged. He contended that the amount being claimed was illegal as it would violate the *in-duplum* rule under Section 44 of the *Banking Act*.

4. The Respondent filed a replying affidavit dated 9th June 2023 and sworn by their Legal Officer Mr. John Kithinji in opposing the application. The appellant then filed a further affidavit dated 1st July 2023 in response to the respondent's replying affidavit

5. The parties took directions to canvass the application by way of written submissions which were considered by the lower court and a Ruling delivered on 3rd October 2023 where the lower court dismissed the Application without costs on the basis that the Applicant had not demonstrated any effort to reduce the loan by making payments in settlement.

6. Aggrieved by this decision, the Appellant filed the present appeal against the Ruling vide a Memorandum of Appeal dated 18th October 2023 seeking to have the entire Ruling set aside and an Order of temporary injunction granted to restrain the Respondents from interfering with his quiet possession and ownership of land Reference No. Kimilili/Kibingei/2396 until the suit in the subordinate court was heard and determined, together with costs of the Appeal. He raised six (6) grounds as follows: -

    1. The Honourable Learned Magistrate erred in law and in fact when he failed to make a determination on whether the sums claimed by the Respondent were in violation of the in-duplum rule as provided for under Section 44 of the *Banking Act*.

2. The Honourable Learned Magistrate erred in law and in fact when he failed to appreciate that the Appellant's contention was that he had repaid his loan facility in full and therefore the issue of dispute on accounts did not arise.

3. The Honourable Learned Magistrate erred in law and in fact when he failed to make a finding that the Appellant had established a prima facie case and/or that he had satisfied the principles espoused in the case of *Giella vs. Cassman Brown* (1973) EA. 358 and was thus entitled to a temporary injunction pending the hearing and determination of the main suit.

4. The Honourable Learned Magistrate erred in fact when he made a finding that the Applicant had not repaid his loan as alleged when the Respondent had not at all refunded the claims by the Appellant that he had repaid to the tune of Kshs. 1,240,100/=.

5. The Honourable Learned Magistrate erred in law and in fact when he failed to consider whether the Applicant had sequentially met the three (3) principles as espoused in *Giella vs. Cassman Brown* (1973) EA 358.

6. The Honourable Learned Magistrate erred in law and in fact when he failed to appreciate the totality of the evidence adduced by the Appellant as well as his written submissions and thereby arriving at an erroneous decision.

7. The Appeal was admitted for hearing and the parties took directions to canvass it by way of written submissions. I note that only the Appellant's submissions are on record.

Appellant's Submissions

8. Counsel for the Appellant contended that the sole issue for the court to determine was whether the Appellant had met the threshold in *Giella v. Cassman Brown* (1973) EA 358 to justify the grant of temporary injunctive orders and, by extension, whether the appeal is justified.

9. Counsel argued that, on the first element of establishing a prima facie case as explained in the case of *Mrao vs. First American Bank of Kenya Ltd & Others* (2003) eKLR, the Applicant had repaid his loan in the total sum of Kshs. 1,240,100/=, a fact that was never challenged by the Respondent, thereby implying acceptance in accordance with the principles set out by the Court of Appeal in *Nicholas Randa Owano Ombija vs. Judges and Magistrate's Vetting Board* (2015) eKLR. It was an error for the Learned Magistrate to conclude that the Appellant's case involved a dispute over accounts, which is typically the case where indebtedness is recognised and only the amount and repayment method are contested. In the present case, the core issue was whether the loan had been fully repaid or not.

10. Counsel further argued that the outstanding amount, as stated by the Respondent in their response to the application, when combined with the amounts already paid by the Appellant and which were not in dispute, breached Section 44 of the *Banking Act* because the amount demanded would breach the in-duplum rule. Counsel cited the case of *Mugure vs. Higher Education Loans Board* Petition No. E002 of 2021 (2022) KEHC 11951 for support and stated that the Appellant had established a prima facie case with a reasonable chance of success. It was also argued that there was an imminent illegality likely to cause irreparable harm to the Applicant, which could not be remedied by damages, as held in the case of *Beatrice Wathanu Waithaka vs. Kenya Micro-Finance Limited & Another* (2019) eKLR.

11. On the third aspect of a balance of convenience, Counsel cited the cases of *Paul Gitonga Wanjau vs. Gathuthi Tea Factory Co. Ltd and 2 Others* (2016) eKLR and *Bakari Suing as the Administrator of the Estate of Zuhura Salim Ali [Deceased] vs. Gulf African Bank Limited & 2 Others*, Civil Appeal No. E047 of 2022 (2023) KEHC 2493 (KLR), where it was held that the courts should opt for the

lower risk and maintain the status quo regarding the subject matter of the suit. It was submitted that the balance of convenience tilted in favour of the Appellant, who had constructed a homestead on the said property, while the Respondent, if successful, would merely be inconvenienced by the delay in exercising its statutory power of sale, which could be compensated by damages. They urged the Court to allow the Appeal and grant the prayers outlined in the Application dated 8th May 2023.

Analysis and Determination

12. I am mindful of the duty of a first appellate court, which is to re-evaluate the evidence and reach its own conclusion, bearing in mind that it neither heard nor saw the witnesses.

13. I have considered the Record from the subordinate court, the grounds of appeal and the Appellant's written submissions. The main issue for my determination is whether the Appellant made out a case for the granting of injunctive orders.

14. The principles governing the granting of injunctive orders were set out in the case of *Giella v Cassman Brown* (1973) EA 358 and as were reiterated in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR by the Court of Appeal thus: -

> "In an interlocutory injunction application the applicant has to satisfy the triple requirements to
>
> a. establishes his case only at a prima facie level;
>
> b. demonstrates irreparable injury if a temporary injunction is not granted; and
>
> c. ally any doubts as to b, by showing that the balance of convenience is in his favour.
>
> 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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"

15. With respect to the first element, I refer to the case of *Mrao Ltd v. First American Bank Of Kenya Ltd* (2003) eKLR where the Court of Appeal held that on is a prima facie case:

> "…. in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

16. The Appellant's case is that he was granted a loan facility of Kshs. 700,000/=, of which he paid Kshs. 290,000/= before defaulting. Subsequently, he restructured the same loan with the Respondent, agreeing on a new repayment plan, where he deposited an additional lump sum of Kshs. 650,000/= and settled the remaining Kshs. 300,000/= through monthly instalments of Kshs. 15,000/=. He stated that the total amount paid was Kshs. 1,240,000/=, covering both the principal and interest. He criticised the Respondent's demand for an additional Kshs. 845,599.38/= through its Statutory Demand Notice of 22nd July 2022.

17. This Court is aware of its duty at this stage of a first appeal, especially regarding an interlocutory application, as was held in the case of *Silvester Momanyi Marube vs. Guizar Ahmed Motari & Another* (2012) eKLR, by Odunga J. (as he then was) thus: -

> " In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true."

18. Bearing the above in mind, together with the principles outlined in the case of *Mrao* (supra), I have examined the Record and found that there are bank statements and letters indicating that the Appellant made payments towards settling the loan and requested its restructuring, as he claimed. I also noted an untitled document dated 27th October 2016, drafted by one Rose Muriuki, in which the Respondent acknowledges receipt of Kshs. 650,000 and details the restructuring of the monthly instalments of Kshs. 15,000/=. This evidence supports the Appellant's assertion that he had been making repayments towards the loan. If the Respondent's demand were to be upheld, it could potentially breach the in-duplum rule, as the total repayments might exceed the original principal sum lent. While the trial court will need to consider evidence to determine which party's account to believe, I find that the Appellant's claims are plausible, and I am therefore satisfied that he has established a prima facie case.

19. On the second and third parameters of irreparable loss that cannot be compensated by damages and the balance of convenience respectively, I note that the Appellant has substantially developed the land serving as security for the loan advanced. His counsel submitted that he had constructed his homestead thereon. The Valuation Report on the Record also indicates a three-bedroom main house, a garage, and two pit latrines built there. My view is that if the Respondent is permitted to exercise its statutory power of sale before the main suit is heard and determined, the Appellant would suffer irreparable loss, as he would be displaced. His family will be destabilised if the suit is ultimately decided in his favour.

20. I also find it convenient to keep the status quo so that the issues before the trial court can be heard and decided. I state this because, if the matter is decided in favour of the Respondent, the only inconvenience they would face is a delay in receiving the monies owed to them. In any case, the Respondent's interest was already protected by an existing charge that gave them priority over the property used as security against the Appellant. Therefore, the balance of convenience favours the Appellant. In the case of *Amir Suleiman vs. Amboseli Resort Limited* (2004) eKLR, Prof. Ojwang J. (as he then was) explained what a "balance of convenience" entailed. He held thus:-

> " The Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice."

21. Based on the foregoing, I find that the Appellant's case meets the threshold established in the case of *Giella v. Cassman Brown* (supra) and therefore warrants the injunctive relief sought.

22. I therefore allow the Appeal and set aside the Ruling by the subordinate court dated 3rd October 2023. A temporary injunction is hereby issued against the Respondent, restraining them, their servants, employees, and/or agents from selling or in any way interfering with the Appellant's quiet possession and ownership of all that property known as Land Reference No. Kimilili/Kibingei/2396 pending the

hearing and determination of the suit before the subordinate court. The Appellant shall bear the costs of the Appeal. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JULY 2025.

R.E. OUGO

JUDGE

In the presence of:

Mr. Bulowa - For the Appellant

Respondent - Absent

Wilkister - C/A