Muriuki & 2 others v ABSA Bank Kenya PLC (Civil Case E009 of 2024) [2025] KEHC 11831 (KLR) (8 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL CASE E009 OF 2024

MA ODERO, J

AUGUST 8, 2025

BETWEEN

JOSEPHINE WANJIRU MURIUKI ..... 1ST APPLICANT

FRANCIS MURIUKI MURAGURI ..... 2ND APPLICANT

LASTING GRACE SUPERMARKET LTD ..... 3RD APPLICANT

AND

ABSA BANK KENYA PLC ..... RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 25th September 2024 by which the Applicants Josephine Wanjiru Muriuki, Francis Muriuki Muraguri and Lasting Grace Supermarket Ltd seek the following orders:-

> " 1. SPENT
>
> 2. SPENT
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> 3. That pending the hearing and determination of the instant suit, a temporary order to issue suspending the Statutory Notice dated 22/05/2024 as issued to the Applicants by the Respondent's bank.
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> 4. That pending the hearing and determination of the instant suit, an order to issue for taking of accounts of all the loan facilities advanced to the 1st and 3rd Applicants.
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> 5. That pending the hearing and determination of the instant suit independent audit of the all loan facilities advanced to the 1st and 3rd Applicants to the extent

of the amounts paid by the Applicants towards the principal sums as well as the interest so far paid thereto.

6. That the court be pleased to issue an order that pending the hearing and determination of the instant suit, the 1st and 3rd Applicants to continue repaying the monthly instalments on the loan facilities as advanced to them by the Respondent.

7. That the costs of this application be provided for in any event.

2. The application which was premised upon Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* 2010, Order 51 Rule (1), Order 40 Rules 1(a) (2) and (3) of the Civil Procedure Rules and all other enabling provisions of the law, was supported by the affidavit of even date sworn by the 1st Applicant.

3. The Respondents ABSA BANK KENYA PLC, opposed the application through the Replying affidavit dated 28th February 2025 sworn by SAMUEL NJUGUNA the secured lending Team leader at Absa Bank.

4. The application was canvassed by way of written submissions. The Applicants filed the written submissions dated 23rd June 2025 whilst the Respondents relied upon their written submissions dated 23rd April 2025.

Background

5. The 1st and 3rd Applicants took out a loan facility in the amount of Kshs. 4.0 million with the Respondent bank vide a legal charge dated 27th July 2017 over the property Title No. KIINE/THIGIRICHI/2570 registered in the name of the 2nd Applicant.

6. The 1st and 3rd Applicants took out a second loan facility for Kshs. 8,850,000 from the same bank vide the legal charge dated 19th December 2018 over Title No. KARATINA MUNICIPALITY/BLOCK 1/60 registered in the name of the 2nd Applicant.

7. Finally the 1st and 3rd Applicants took out a third loan facility for vide a legal charge dated 14th December 2020 over Title No. KARATINA MUNICIPALITY/BLOCK 1/60 registered in the name of the 2nd Applicant.

8. The Applicants then embarked on servicing the said loan facilities and it is averred that they have to date repaid an amount of Kshs. 9,800,070, towards both the principal sums and interest thereon.

9. However the Applicants concede that in April 2024 they fell into arrears. The Bank then issued the 1st and 2nd Applicants with a statutory notice dated 22nd May 2024 demanding immediate payment of Kshs. 7,877,781.75, Kshs. 11,922,720.10 and Kshs. 1,693,197.70 in respect of the said facilities. Thus the total demand was for Kshs. 25,150,000 (Twenty five million one hundred fifty thousand).

10. The Applicants then filed suit against the Respondent by way of the plaints dated 25th September 2024 seeking inter alia a permanent injunction to restrain the Bank from selling by public auction the secured properties and seeking that the court be order the taking of accounts in respect of the facilities taken by the Applicants.

11. Simultaneously with the filing of said suit the Applicants filed the present application seeking the orders to suspend the statutory notice issued by the Bank.

12. As stated earlier the application was opposed. The Respondents position was that where a valid charge exists and default is admitted injunctive orders cannot in law issue.

Analysis And Determination

13. I have considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties.

14. The Applicants are seeking temporary orders to suspend the statutory notice dated 22nd May 2024 pending the hearing and determination of the main suit. In effect the Applicants are seeking that the court issue a temporary injunction in their favour.

15. Order 40 Rule 1 of the Civil Procedure Rules 2010 provides for the issuance of temporary injunctions as follows:-

> " (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 decree; or
>
> b. .....
>
> 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"

16. The grounds upon which an interlocutory injunction may be granted were set out in the case of GIELLA -VS- CAMAN BROWN [1973] EA as follows;-

> " 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 on application on the balance of convenience."

17. The definition of a Prima Facie Case was given in the case of Mrao Ltd -vs- First American Bank Of Kenya Ltd & 2 Others [2003] eKLR as follows:-

> " 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 but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. This is clearly a standard which is higher than an arguable case."

18. This is a case in which the Applicants readily admit to having sought and obtained the stated loan facilities from the Respondent Bank - Equally the Applicants readily concede that they fell into arrears of the loan repayments in April 2024.

19. Following default by the Applicants the Respondent did in accordance with the law issue a statutory notice dated 22nd May 2024 giving notice of the Banks intention to exercise its statutory power of sale.

A copy of the said statutory notice appears as Annexture 'JWM 2' to the Supporting Affidavit dated 25th September 2024.

20. The Applicants admit to having received the said statutory notice and they do not challenge the legality of the same.

21. Given the above set of circumstances I fail to see how the Applicants can be said to have established a prima facie case. In New Age Developers & Construction Co. Ltd -vs- Jamii Bora Bank Ltd [2017] eKLR the Honourable Lady Justice C. Onyango in dismissing an application on grounds that the debt was admitted stated as follows:-

> " The Court notes that the Plaintiff has admitted its indebtedness to the Defendant and requests for time to repay the loan. The plaintiff however does not say how much he intends to pay nor the period of repayment.
>
> I am persuaded by the case of Labelle International Ltd And Anotehr -vs- Fidelity Commercial Bank & Another, Civil Case No. 786 Of 2002 where it established that ".....when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction." It is hence the Court's finding that in the instant case the Defendant cannot be restrained from realizing the security since the plaintiff already admitted its indebtedness to the bank price]" [Own emphasis]

22. In the case of Benjamin Kaburi Kamuruci -vs- Stanbic Bank [2014] eKLR it was held that

> " A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong for the plaintiff seeks this court to protect him from his own default."

23. In order to merit the grant of injunctive orders the Applicants must show that they stand to suffer irreparable harm. Halburys Laws Of England, 3rd Edition Volume 21, Paragraph 739 page 352 provides as follows:-

> " It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question."
>
> In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured."

24. As stated earlier the Applicants voluntarily offered up their property to be charged by the bank. They were fully aware that in event of a default the charged property stood to be sold by way of auction. The fact that the Applicants dispute the accounts is not valid grounds on which to grant temporary injunction.

25. By their own admission the Applicants fell into arrears in April 2024. They received the statutory notice from the Bank in May 2024. The Applicants were supplied regularly with statements of Account. Indeed they have annexed to this Notice of Motion copies of said statements (Annexture 'JWM 1'). I note that the statement runs from September 2022. Therefore the Applicants had ample time to contest their accounts. In any event the fact that the Applicants had queries over their loan account is not a valid justification for their failure to service said loan accounts.

26. Where the plaintiffs admit existence of a debt, a dispute over the exact amount owed does not qualify as ground to establish existence of a prima facie. In Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd and 2 Others, NBI CA No. Nai 227 of 1995 (108/95 V. R) (UR), the Court of Appeal held:-

> Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagor from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage - see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A."

27. Similarly in the case of Francis J. K. Ichatha -vs- Housing Finance Company Of Kenya Ltd [2005] eKLR, the Court of Appeal in dismissing a prayer for injunction based on a contestation for Accounts held as follows:-

> " the learned counsel for the applicant told us that there is no dispute that there was default and that the dispute is on the illegal charges and that the arrears the debt are admitted. The dispute is essentially on the quantum of the arrears and of the loan at the time the statutory notice was issued. The applicant recognized in the plaint that the dispute was of "Mathematical nature." Thus, this is truly a dispute on the accounts. The existence of such a dispute is not a valid ground for restraining the respondent from exercising its statutory power of sale."
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> [Own emphasis]

28. The circumstances in which a mortgagor or chargee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725 as follows:-

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

29. It is not in any doubt that the Applicants owe the Respondents a substantial amount of money. A chargee cannot be restrained from exercising its power of sale merely because there exists a dispute over the amount due and owing. It can only be restrained where the amount claimed is paid into court, or the amount is excessive or unconscionable. Neither has not been demonstrated in the present case.

30. In the case of Andrew Muriuki Wanjohi -vs- Equity Building Society Limited & 2 Others [2006] eKLR in which Justice Fred Ochieng held:-

> " Whenever the Applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the charger could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the charge with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.
>
> By offering the suit property as security the chargor was equating it to a commodity which the charge may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property. In a nutshell, sentimental attachment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great sentimental value to any property, he should never offer it as security.
>
> Therefore, on the basis of the material presented by the plaintiff, I find that he has not persuaded the court that if the court declined to grant an injunction to stop the sale of the suit property, he would suffer irreparable loss." [Own emphasis]

31. It cannot be argued that the Respondent a Bank of international repute would lack the capacity to compensate the Applicants in the event that the suit is decided in their favour. As stated earlier the general rule is that where the value of a property can be determined then damages would be sufficient compensation.

32. Finally I find no merit in this application. The Notice of Motion dated 25th September 2024 is hereby dismissed in its entirety. Costs will be met by the Applicants.

DATED IN NYERI THIS 8TH DAY OF AUGUST 2025

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MAUREEN A. ODERO

JUDGE