

KENYA / JUDGMENT

ABSA Bank Kenya PLC v Owour

[2025] KEHC 4692 (KLR)

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COURT

High Court

BEFORE

PM Mulwa

CASE / FILE NUMBER

Civil Appeal E174 of 2024

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ABSA Bank Kenya PLC v Owour (Civil Appeal E174 of 2024) [2025] KEHC 4692 (KLR) (Commercial and Tax) (10 April 2025) (Judgment)

Neutral citation:

[2025] KEHC 4692 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts)

Commercial and Tax

Civil Appeal E174 of 2024

PM Mulwa, J

April 10, 2025

Between

ABSA Bank Kenya PLC

Appellant

and

Alex Owino Owour

Respondent

(Being an appeal from the Ruling and Order of the Chief Magistrate Court at Nairobi, Hon. C. K. Cheptoo, delivered in CMCC No. E4584 of 2023 on 5th April 2024)

Judgment

1. This is an appeal challenging the decision of the trial magistrate in granting a temporary injunction in favor of the Respondent. The Appellant contends that the trial magistrate misapplied the principles governing the issuance of an injunction and erred in exercising discretion in favor of the Respondent.

Brief background

2. The centre of the dispute is the Appellant's exercise of its statutory power of sale concerning the property known as L.R. No. Nairobi/Block 134/1297 over which a charge dated 17th November 2017 was created to secure the overdraft facility of Kshs. 2M and an invoice discounting for Kshs. 5M advanced to Starex Freighters Ltd (borrower) by the Appellant at the request of the Respondent who was the director.
3. The Respondent filed the plaint in the subordinate court, simultaneously with the Notice of Motion dated 12th October 2023, filed under a certificate of urgency which sought the main order that pending the hearing and determination of the suit, a temporary injunction be issued against the Appellant, its agents, servants, representative or any other person from acting under its instructions, barring them from issuing a demand notice, advertising for sale, selling or in any other way interfering with the Respondent's quiet enjoyment of his property known as Nairobi/Block 134/1297.
4. The application was opposed by the Appellant vide the Replying Affidavit dated 23rd November 2023, sworn by Samuel Njuguna and further affidavit of Joseph Muli sworn on 25th January 2024.
5. The application was heard through written submissions. The trial magistrate, having considered the application and the submissions by counsel delivered her ruling on 5th April 2024 allowing the application.
6. That ruling prompted this appeal in which the Appellant has raised five (5) grounds of appeal in seeking to have the ruling set aside and, instead, an order be made dismissing the Respondent's Notice of Motion dated 12th October 2023 with costs. These grounds are:1. That the learned trial magistrate erred in law and in fact in finding that the Respondent had established a prima facie case with a high probability of success and met the threshold for granting an injunction.2. That the trial magistrate erred in law and in fact by holding that because the Appellant confirmed that the Respondent had repaid a substantive amount of the facility, he had demonstrated that he has a prima facie case. By so holding, the learned trial magistrate erred in law in failing to appreciate that the amount due is not a reason to interfere with a chargee's right to realize a security where money is still due.3. That the learned magistrate erred in law and in fact by misdirecting herself and failing to consider and appreciate the laid down principles of granting temporary injunctions as set out in the case of *Giella vs Cassman Brown Ltd* 1973 EA 358 particularly on what constitutes a prima facie case.4. That the learned, magistrate erred in fact and in law in holding that the

Respondent would suffer irreparable loss if the suit property is sold by the Appellant using an incorrect report without any evidence and/ or legal justification for such a determination.a.This is despite the fact that the Appellant, by the further affidavit sworn by Joseph Muli, annexing a valuation report dated 1st September, 2023 thereby confirming that the appellant discharged its duty of care under Section 97 of the Land Act.b.By Holding so, the learned magistrate erred in law and in fact by failing to appreciate that a difference in values regarding the suit property was not a good enough reason to stop a chargee from exercising its statutory power of sale as the charger's loss would in any event be quantifiable.5. That the learned magistrate erroneously exercised her discretion in granting the injunction.

7. The appeal was heard by way of written submissions. The appellant filed submissions dated 9th December 2024, while the Respondent's submissions are dated 20th January 2025. I have considered the record of appeal and the submissions by counsel. The issue for consideration is whether the appeal is merited.
8. This Court is guided by the well-established principles of appellate intervention in discretionary decisions, as set out in the case of *Mbogo & Another v Shah* [1968] E.A. 93, that: "An Appellate Court will not interfere with the exercise of the trial Court's discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice."
9. The above position was reiterated in *Daima Bank Limited (In Liquidation) v David Musyimi Ndeti* [2018] eKLR, which quoted *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A. 898 where the Court of Appeal held that appellate interference is only warranted where the trial court misdirected itself in law, misapprehended the facts, considered irrelevant factors, failed to consider relevant factors or arrived at a plainly wrong decision.
10. The applicable principles governing the grant of an interlocutory injunction are well established in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, where it was held that: "The conditions for the grant of an interlocutory injunction are now, I think 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."
11. The trial magistrate acknowledged these principles and found that the Respondent had established a prima facie case based on partial repayment of the loan. The Appellant challenges this finding, arguing that partial repayment alone is insufficient to interfere with the chargee's statutory power of sale.

12. I agree with the Appellant that, as per Giella Case (supra), the test for a prima facie case requires proof of a right that has been infringed or is under threat of infringement. The Appellant contends that despite the partial payment, the Respondent is indebted to the tune of Kshs. 3,013,103. 90, which continues to accrue interest. On the other hand, the Respondent contends it has paid the full amount, by a letter dated 16th February 2021 to the Appellant, the Respondent proposed to settle the balance of the amount through monthly deposits of Kshs. 50,000/= this position, as averred by the Appellant, was not honored and this prompted the Appellant to issue the statutory notices. It is trite law that a dispute on the amount due is not a bar for the Chargor to exercise their statutory right.
13. It is thus my finding that the existence of an outstanding debt and the chargee's right to realize security indicate that the Respondent failed to meet this threshold.
14. The Courts have held that in the absence of a prima facie case, there is no need to consider the remaining elements of granting an injunction. Nevertheless, since the trial magistrate addressed them, I will examine them.
15. The trial court found that the Respondent would suffer irreparable harm if the property were sold at an undervaluation. The primary provision on forced sale valuation is Section 97(1) and (2) of the Land Act, which requires a chargee to obtain the best price reasonably obtainable and ensure a forced sale valuation is conducted.
16. There are two valuation reports on record. The first one dated 1st September 2023, prepared by Njihia Muoka Rashid & Co. Ltd, assigns a market value of Kshs. 6M and a forced sale value of 4. 5M. The second, dated 13th September 2017, conducted by Prestige Management Limited, indicates a market value of 6. 5M and a forced value of Kshs 4. 9M.
17. No explanation has been provided for the discrepancy in the valuation reports, particularly given the lapse of time between them. However, I am of the considered view that the difference of 400,000 in the forced sale value is insufficient to adequately settle the outstanding debt of Kshs. 3,013,103. 90.
18. The Respondent alleged that the property was grossly undervalued, thus violating Section 97 of the Land Act. It is not sufficient for the Respondent to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter valuation report. The Respondent must satisfactorily demonstrate why the valuation report that the Appellant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. Courts require cogent evidence to show prima facie undervaluation before interfering with a chargee's power of sale (See *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR).

19. In *Zum Zum Investments Limited v Habib Bank Limited* [2014] eKLR, the court held that a party challenging valuation must show that the valuer was unqualified, considered irrelevant factors, or conducted the valuation prematurely. In this case, the Respondent did not raise any issues regarding the competency of the Appellant's valuer or provide sufficient evidence of undervaluation.
20. Financial loss, even in the form of property loss, is compensable through damages (*Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR). Since the Appellant provided a valuation report, demonstrating compliance with Section 97 of the Land Act, the Respondent failed to prove that the valuation was incorrect.
21. The balance of convenience favors the Appellant, as the chargee has a contractual right to recover the debt through sale. Mere allegations of valuation discrepancies do not override this right, provided due process is followed.
22. In the circumstances, I find the trial magistrate erred in elevating partial loan repayment to the level of a prima facie case and in accepting unsubstantiated claims of irreparable harm. The dispute over the extent of indebtedness does not guarantee an injunction, as established in *Stars & Garters Restaurant & Another v National Bank of Kenya Limited - MLD HCCC No. 2 of 2018* [2019] eKLR.
23. Having considered the grounds of appeal and the applicable legal principles, I find that the appeal is meritorious. Accordingly, I make the following orders:
a. The appeal is allowed, and the ruling of the trial magistrate delivered on 5th April 2024 is set aside.
b. The Respondent's Notice of Motion dated 12th October 2023 is dismissed with costs to the Appellant.
c. The Appellant is at liberty to exercise its statutory power of sale, provided it complies with all legal requirements under the Land Act and the charge instrument.
It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF APRIL 2025. PETER M. MULWA JUDGE
In the presence of: Ms. Diru h/b for Ms. Muthee for appellant
Ms. Nekoye h/b for Mr. Ochieng for respondent
Court Assistant: Kadzo

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Prepared on 14 October 2026 · Esheria