



**Dari Limited (In Receivership) & another v East African
Development Bank & another (Commercial Case E573 of 2024)
[2024] KEHC 11681 (KLR) (Commercial and Tax) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E573 OF 2024
MN MWANGI, J
SEPTEMBER 30, 2024**

BETWEEN

**DARI LIMITED (IN RECEIVERSHIP) 1ST APPLICANT
RAPHAEL TUJU 2ND APPLICANT**

AND

**EAST AFRICAN DEVELOPMENT BANK 1ST DEFENDANT
GARAM INVESTMENT AUCTIONEERS 2ND DEFENDANT**

RULING

1. Vide a Notice of Motion dated 24th September, 2024 brought under certificate of urgency pursuant to the provisions Articles 22, 23, 40(1) and 159(2)(d) of *the Constitution* of Kenya, 2010, Sections 1A, 3 and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Sections 86, 90 and 96 of the *Land Act*, and Order 40 Rule 2, Order 51 Rule 1 of Procedure Rules, 2010, the plaintiffs/applicants seek the following orders
 - i. Spent;
 - ii. That pending the hearing and determination of this application, this Honourable Court be pleased to issue an order of temporary injunction restraining the defendants/respondents herein, whether by themselves, their employees, servants, Auctioneer, agents and/or assignees from disposing of, transferring and/or selling by public auction of 1st October, 2024 or any other date of the plaintiffs/applicants' properties being LR No.11320/3, Entim Sidai Wellnes Sanctuary, Off Tree Lane, Karen and LR No. 1055/165, Tamarind Karen and Dari Business Park, off Ngong, Karen, Nairobi City County (hereinafter referred to as "properties");



- iii. That pending the hearing and determination of the suit, this Court be pleased to issue an order of temporary injunction restraining the defendants/respondents herein, whether by themselves, their employees, servants, Auctioneer, agents And/or assignees from disposing of, transferring and/or selling by public auction of 1st October, 2024, or any other date of the plaintiffs/applicants' properties being LR No.11320/3, Entim Sidai Wellness Sanctuary, off Tree Lane, Karen and LR No.1055/165, Tamarind Karen and Dari Business Park, off Ngong Road, Karen, Nairobi City County (hereafter after referred to as "properties").
 - iv. That this Honourable Court be pleased to issue an order staying the Garnishee Proceedings commenced by the 1st defendant/1st respondent in High Court Civil Case (OS) No. 1 of 2020 seeking to recover USD 35,051,622.14 from the plaintiffs/applicants, pending the hearing and determination of this application;
 - v. That this Honourable Court be pleased to issue an order staying the Garnishee Proceedings commenced by the 1st defendant/1st respondent in High Court Civil Case (OS) No. 1 of 2020 seeking to recover USD 35,051,622.14 from the plaintiffs/applicants, pending the hearing and determination of this suit;
 - vi. That this Honourable Court be pleased to issue an order holding High Court Civil Case (OS) No. 1 of 2020, Insolvency Cause E001 of 2020, Insolvency Cause E002 of 2020, Insolvency Cause E003 of 2020, Insolvency Cause No. E004 of 2020, High Court Commercial Cause No. E304 of 2022, High Court Commercial Cause No. E 469 of 2019 and High Court Commercial Cause E100 in abeyance till the hearing and determination of this suit;
 - vii. That this Honourable Court be pleased to make such further orders as it deems fit so as to meet the ends of justice; and
 - viii. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn on 24th September, 2024 by Raphael Tuju, the 2nd plaintiff herein and a Director of the 1st plaintiff. He deposes that the 1st defendant through the 2nd defendant has unlawfully issued notifications of sale and has subsequently advertised to dispose of the plaintiffs' properties namely, LR No.11320/3, Entim Sidai Wellness Sanctuary, off Tree Lane, Karen and LR No.1055/165, Tamarind Karen and Dari Business Park, off Ngong Road, Karen, Nairobi City County (properties in issue) by way of sale in a public auction on 1st October, 2024 at 11.00 a.m., at Western Heights Building 5th floor, Karuna Road Westlands.
 3. In the said affidavit, the applicants have disclosed several cases that have been determined and others that are still pending determination, one of them being High Court Commercial Cause No. 1 of 2020 (OS), wherein the 1st defendant instituted garnishee proceedings seeking to recover USD 35,057,622.14, which amount is identical to the amount it wants to recover from the sale of the suit properties through public auction.
 4. The applicants aver that the 1st defendant is unlawfully seeking to recover the monies owed under the facility agreement concurrently, and not consecutively as required by law.
 5. Other issues raised by the plaintiffs is that there are status quo orders in place given on 22nd November, 2023 in HCCOMM No. E469 of 2019 pending determination of an application dated 8th November, 2023, and that the import of the status quo orders granted by the Court was to protect the sanctity of the Court proceedings and to ensure that there is fair administration of justice to the parties.



6. The plaintiffs contend that they have never been served with a Statutory Notice under Section 90 of the Land Act.
7. Further, that no valuation of the suit properties was done prior to the advertisement for sale by way of public auction.
8. I note that Page 12 of the applicants' documents was not uploaded on the CTS Portal and as such, paragraphs 4 to 6 of the supporting affidavit are missing from the documents filed by the applicants.
9. It is apparent from the grounds in support of the application that the plaintiffs have brought forth the argument that they face the impending danger of them being illegally deprived of their properties contrary to Article 40 of the Constitution.
10. The plaintiffs contend that the 1st defendant is seeking recover from the plaintiffs USD 35,057,622.14, which amount has accrued interest exceeding the alleged principal amount lent to the 1st plaintiff contrary to the provisions of Section 44 of the Banking Act as read with Article 46 of the Constitution of Kenya.
11. The application is opposed by the 1st defendant vide a replying affidavit sworn on 28th September, 2024 by Carol Luwanga, the 1st defendant's Senior Legal Officer. She deposes that the dispute between the applicants and the bank arising from the facility agreement has been conclusively determined and the suit is res judicata.
12. She also avers that the plaintiffs were served with all relevant notices, as outlined in paragraph 17 of the 1st defendant's affidavit, and that the bank's statutory power of sale has therefore crystallized.
13. She further avers that the Supreme Court (of Kenya) allowed the bank to proceed with recovery proceedings against the applicant, and in doing so, the said Court confirmed that the Bank is a reputable international financial institution and would be able to repay the applicants should the appeal succeed.
14. The 1st defendant contends that the plaintiffs are in contempt of two High Court Orders and are therefore undeserving of the equitable relief being sought herein.
15. In regard to the alleged unconstitutionality of the impending sale by public auction of the properties in issue, the 1st defendant states that from the evidence on record, the plaintiffs have admitted the debt, and that they had earlier sought a mediation mechanism to supervise its payment.
16. Further to the above factors, the 1st defendant contends that the plaintiffs have not demonstrated what clear right, if any, has been infringed or is in danger of being infringed by the bank, with the result that they have failed to establish a prima facie case with a probability of success.
17. The 1st defendant states that Knight Frank valued the charged properties on 15th July, 2024. That the properties were advertised for sale in the Daily Nation so as to obtain the best possible price. The 1st defendant contends that there are no status quo orders in place, as the orders granted on 22nd November, 2023 lapsed on 26th June, 2024 as confirmed by Judge Mabeya in his ruling of 26th September, 2024.
18. The 1st defendant avers that Statutory Notices were issued between December, 2019 and July 2021, well before the status quo orders were issued, and a Notification of Sale was issued on 25th July, 2024 after the status quo orders had lapsed.



19. The 1st defendant reiterated that the plaintiffs are in contempt of Court Orders which is a matter that should be dealt with in limine.
20. The 1st defendant deposes that the garnishee proceedings were dismissed by Judge Mabeya on 26th September, 2024.
21. On the issue of irreparable loss, the 1st defendant states that none will be suffered by the plaintiffs as the charged properties can be realized at any time upon default, and the plaintiffs have not illustrated that damages are an inadequate remedy, with the plaintiffs being bound by the terms of their security documents, and cannot resile from their contractual obligation.

Analysis And Determination.

22. I have considered the application dated 24th September, 2024, the affidavit in support thereof, the replying affidavit and the oral submissions made by the Advocates for the parties.
23. The issues for determination are-
 - (i) If the Preliminary Objection raised by the 1st defendant should be sustained; and
 - ii. If a temporary injunction should issue.
24. The defendant's Notice of Preliminary Objection is dated 28th September, 2024. It raises the following issues –
 - i. In Petition 15 of 2020 Bia Tosha Distributors limited v KBL & others, the Supreme Court held that the issue of contempt is supposed to be determined as a preliminary issue, to be determined in limine as soon as it arises;
 - ii. The Directors of the first applicant including the second applicant, are in contempt of 2 orders issued by this Honourable Court on 2nd March, 2020 and 13th March, 2020 in HCCC E469 of 2019;
 - iii. Accordingly, this Court should first address the contempt before allowing the applicants an audience;
 - iv. Further, the matters raised in the suit and application are res judicata.
25. Dr. Fred Ojiambo (SC) has urged this Court to determine the preliminary issues raised in the Notice of Preliminary Objection in limine. I however deemed it necessary to give the parties' Advocates an opportunity to address me on both the Preliminary Objection and the application dated 24th September, 2024, because if the Preliminary Objection is found to be wanting, then I should determine the application on its merits.
26. What constitutes a Preliminary Objection was well defined in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd. [1969] E.A. 696. The Court therein held that in order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts. pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In this instance, the 1st defendant's Counsel has referred me to two instances where it is said that orders were granted by the High Court (differently constituted), which orders have been disobeyed by the plaintiffs.
27. In order for me to determine if the plaintiffs are in contempt of Court Orders in HCCC E469 of 2019, I would have to probe evidence arising from another Court's proceedings and rulings delivered therein,



and the current state of affairs in the said case. As such, the ground raised by the 1st defendant of the plaintiffs being in contempt of Court Orders made in the said case cannot be a pure point of law but is a factual issue. It fails the test of a Preliminary Objection. Secondly, it is also moot if this Court can deny audience to a litigant because he/she/it was found to be guilty of contempt by another Court in a different case, as I have been asked to do.

28. As to the claim that the suit and application herein are res judicata due to previously decided suits, that too cannot be a pure point of law as this Court would have to peruse the pleadings filed in the other Courts and the rulings arising therefrom in order to determine if the present suit and application is res judicata. Therefore, the ground raised in the Preliminary Objection that the instant application and the suit herein are res judicata, has no merits.
29. The 1st defendant in its replying affidavit however raised the issue of the suit and application herein being res judicata two other suits, namely, Civil Suit No. E191 of 2021 Dari Limited & another vs East Africa Development Bank & 2 others and HCC No. 1 of 2020 East Africa Development Bank vs Dari Limited & 5 others. Copies of the pleadings and a ruling dated 21st October, 2022 delivered by Judge Mshila, in the first suit are annexed to the replying affidavit. A copy of a ruling delivered on 26th September, 2024 by Judge Mabeya, in the second suit is also attached to the said affidavit.
30. As was submitted by Mr. Muite (SC), the suit before me was filed because the 1st plaintiff was served with a notification of sale of the properties in issue, which have been advertised for sale on 1st October, 2024.
31. Needless to say, execution is a lawful process and from the time the Court in England entered judgment in favour of the 1st defendant, the plaintiffs were put on notice that their charged property or the guarantees given by the plaintiffs would be called up if the 1st plaintiff failed to pay up the facilities advanced to it.
32. In the case of John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport & Infrastructure & 3 others [2015] eKLR, the Court of Appeal sitting in Malindi set out the ingredients of res judicata as follows –

“from the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties or parties under whom they at any of them claim, litigating under the same tither and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (See Karia & another vs Attorney General & others [2005] IEA 83. (Emphasis added).
33. As to whether the present suit and application are res judicata Civil Suit No. E191 of 2021 Dari Limited & another vs East Africa Development Bank & 2 others and HCC No. 1 of 2020 East Africa Development Bank vs Dari Limited & 5 others, having perused the documents for the two cases as annexed to the replying affidavit, and having considered the prayers being sought in the present suit and application dated 24th September, 2024, it is evident that the plaintiffs have not contravened the doctrine of res judicata under the provisions of Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya.
34. I am not persuaded that in the said cases, the plaintiffs sought orders that are similar to the ones being sought in the present suit and application, or that the prayers sought in the other 2 suits were substantially similar to those being sought herein. If anything, they are completely different. The



similarity in parties to the three suits and applications are Dari Limited, Raphael Tuju and the East African Development Bank. The other thing that remains constant is the properties in issue. The 2nd defendant in the suit and application herein has never been a party in the other 2 suits. It is therefore my finding that the contention of the present suit and application being res judicata as deposed to in the 1st defendant's replying affidavit fails.

35. In their supporting affidavit, the plaintiffs contend that there are status quo orders in place in High Court Commercial Cause No. E469 of 2019 granted on 22nd November, 2023. Dr. Ojiambo (SC) submitted that Judge Mabeya in his ruling of 26th September, 2024 found that the status quo orders of 22nd November, 2023 lapsed on 26th June, 2024, when Counsel for the judgment debtors failed to attend Court, and apply for extension of the said orders. I have perused the said judgment and confirmed that is the position. As such, there can be no status quo orders in place. See paragraph 45 of the ruling by Judge Mabeya dated 26th September, 2024 in HCC No. 1 of 2020 Nairobi Commercial & Tax Division.
36. The plaintiffs have raised the issue of the impending sale being unconstitutional as the said sale seeks to deprive the plaintiffs of their property. At this interim stage of the proceedings, this Court's finding is that the issue of the constitutionality of the sale scheduled for 1st October, 2024 is being raised too late in the day as the plaintiffs have for a number of years now filed a multiplicity of suits and the said issue as was correctly submitted on by Dr. Ojiambo (SC), was not raised in HCC No. 1 of 2020 East African Development Bank v Dari Limited & 5 others by the plaintiffs before Judge W. Okwany, when an application was made for recognition and enforcement of the judgment from the Court in England in Claim No. CL -2018-000720 - In the High Court of Justice Business & Property Courts of England and Wales Queens Bench Division, Commercial Court Between: East African Development Bank vs Dari Limited, Raphael Tuju, Yma Tuju, Mano Tuju & SAM Company Limited. At the outset, faced with the rulings and judgments that have been made by various Courts, from the High Court in England, the Court of Appeal in England, the High Court in Kenya, the Court of Appeal in Kenya and the Supreme Court of Kenya, the contestation now being raised that the impending sale of the properties in issue is unconstitutional cannot stop this Court from declining to grant the orders being sought if the application dated 24th September, 2024 is found to be without merits.
37. Further, the Supreme Court of Kenya found that the 1st defendant remains a reputable international bank that should have no difficulty compensating the applicants if they succeeded in their claim.
38. As to the issue of Statutory Notices not having been served as required under the Land Act, the said issue has been controverted by the 1st defendant in paragraph 17 of its affidavit, wherein it sets out the dates when Statutory Notices were issued, up to the date when the Auctioneers 45 days' Notification of Sale under the Auctioneer's Act was served by the 2nd defendant on 24th July, 2024.
39. At this prima facie stage, I am satisfied that the plaintiffs were served with all the requisite Statutory Notices under the Land Act.
40. The leading case in an application such as the one before me is *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, which laid out the three conditions to be met in an application for an injunction. Order 40 Rule 1 of the Civil Procedure Rules, 2010 also applies.
41. In the case of *American Cyanamid Co. vs Ethicon Limited* [1975] AC 135, three elements were noted to be of great importance in applications seeking orders for injunction. Namely-
 - i. There must be a serious/fair issue to be tried;
 - ii. Damages are not an adequate remedy;



- iii. The balance of convenience is in favour of granting or refusing the application.
42. A similar holding was made in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR. Of critical importance in the circumstances of this case, is the Court of Appeal's definition of what constitutes a prima facie case as was held in the case of *Mrao vs First American Bank of Kenya Ltd. & 2 others* [2003] eKLR. The Court said Court held as follows-
- “So what is prima facie case? I would say that 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 right which has apparently been infringed by the opposite party as 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. That is clearly a standard which is higher than an arguable case” (Emphasis added).
43. Having considered all the facts put before me by the parties, the submissions made, and the applicable law, I am of the finding that the plaintiffs have not established a prima facie case with a probability of success. The 1st defendant via sale by public auction scheduled for 1st October, 2024 seeks to enforce the judgment of the Court in England. The said judgment has not been successfully appealed against, or set aside. The 1st plaintiff does not deny owing the 1st defendant the amount that was adjudged by the Court in England.
44. The plaintiffs contend in their supporting affidavit that the interest charged by the 1st defendant contravenes the provisions of Section 44 of the *Banking Act* and Article 46 of *the Constitution* of Kenya, as the 1st defendant is seeking to recover USD 35,057,622.14, which amount has accrued interest exceeding the alleged principal loan amount lent to the 1st plaintiff.
45. The Supreme Court of Kenya in the case of *Dari Limited & 5 others vs East Africa Development Bank (petition) Application E012 of 2023* & Application E017 of 2023 (consolidated) 2023 KESC 90, although not addressing the issue of Section 44 of the *Banking Act*, had the following to say on the issue of balance of probability –
- “Matching the competing arguments under the circumstances, the balance of probability favours the respondent. We say so because, though the respondent currently holds securities, being charges over LR No. 1055/165 and LR No.11320/3 which are located in a suburb area in Nairobi in their favour, as well as the security of Kshs.50,000,000.00 deposited in the joint names of the parties' Advocates in an interest earning account; the amount owed to the respondent is colossal with a decretal sum of USD 15,162,520.95 that continues accruing interest.” (Emphasis added).
46. As earlier stated, the plaintiffs have from the material placed before me failed the first hurdle of establishing a prima facie case with a probability of success.
47. As to whether the plaintiff stands to suffer irreparable injury that cannot be compensated by an award of damages, they do not. The properties in issue were charged in advancement of the facilities from the 1st defendant. The 1st defendant is therefore entitled to call up the said facilities, more so, in the face of the 1st plaintiff making no effort to settle the facilities. The 1st defendant in its affidavit states that only an amount of USD 10,000 has been paid since September 2016, and that that the applicants owed the bank an undisputed sum of USD 15,162,320.95 as at 19th June, 2019, on which interest continues to accrue.



48. As was stated by the Supreme Court of Kenya *Dari Limited & 5 others vs East Africa Development Bank (petition) (supra)*, the 1st defendant is a reputable international bank that should have no difficulty compensating the applicants if the applicants succeed in their appeal.
49. On the issue of the valuation of properties in issue which was raised by the plaintiffs, the 1st defendant deposes that the suit properties were valued by Knight Frank on 15th July, 2024. Based on the said fact, it is my finding that the value of the said properties is therefore known and can be ascertained. As such, if the sale process is found to be wanting, the plaintiffs can institute legal proceedings against the 1st defendant.
50. In the case of *Shimmers Plaza Limited vs National Bank of Kenya Limited [2013] eKLR*, the Court of Appeal held that damages could be an adequate compensation as the appellants guaranteed security therein had been converted to a commodity for sale upon the same being charged to the respondent. It is my considered view that the holding in the foregoing case applies to this case.
51. As to the dispute that the accrued interest has exceeded the alleged principal loan amount, that argument on its own is not a good cause to grant an order for an injunction. See the case of *Jim Kennedy Kiriro Njeru vs Equity Bank (K) Ltd. [2019] eKLR*, where the Court held that a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a chargee from exercising its statutory power of sale.
52. From the foregoing summation, I have said enough to demonstrate that in the circumstances of this case, the balance of convenience tilts in favour of the 1st defendant which should recoup the facility it advanced to the 1st plaintiff.
53. In the result, the Notice of Preliminary Objection dated 28th September, 2024 is dismissed with costs to the plaintiffs. The Notice of Motion dated 24th September, 2024 is dismissed with costs to the defendants.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Nyamodi for the plaintiffs/applicants

Dr. Fred Ojiambo (SC) appearing with Mrs. Opiyo and Mr. Kahura for
the defendants/respondents

Ms B. Wokabi – Court Assistant.

