



Mohammed v DIB Bank Kenya Limited & 3 others (Environment & Land Case E144 & E175 of 2023 (Consolidated)) [2025] KEELC 2849 (KLR) (25 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E144 & E175 OF 2023 (CONSOLIDATED)
CA OCHIENG, J
MARCH 25, 2025**

BETWEEN

HUSSEIN IBRAHIM MOHAMMED PLAINTIFF

AND

DIB BANK KENYA LIMITED 1ST DEFENDANT

ABDI SHARIFF MOHAMED 2ND DEFENDANT

ZAINABESHI HASSAN DEBEBE 3RD DEFENDANT

KEYSIAN AUCTIONERERS 4TH DEFENDANT

RULING

1. There are three applications which have not been dispensed with in the matter. These are the application dated the 17th August 2023 and 2nd August 2023 filed by the Defendant in ELC Case No. E175 of 2023 seeking to set aside formal proof hearing as well as leave to serve defence out of time. They are both spent following a consent order of 24th January 2024 allowing consolidation of the two suits and leave to the Defendant to file a defence out of time.
2. The third application is the Plaintiff's Notice of Motion dated the 1st November 2023 which is brought pursuant to Article 159(2)(d) of *the Constitution* of Kenya 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rule 1 as well as Order 51 Rule 1 of the Civil Procedure Rules.
3. The Plaintiff seeks the following Orders:
 - a. Spent.
 - b. Spent.
 - c. That pending hearing and determination of this suit, the 2nd and 3rd Defendants / Respondents either by themselves, their servants, agents and otherwise be and are hereby restrained from



interfering with the Plaintiff's peaceful possession of the suit property known as Title Number. Nairobi Block 104/389.

- d. Spent.
 - e. That pending hearing and determination of this suit, the 2nd Defendant/Respondent either by himself, his servants, agents and or otherwise be and are hereby restrained by an injunction from charging, offering for sale, transferring and trespassing into the Plaintiff/Applicant's property being Title Number Nairobi Block 104/389.
 - f. That pending hearing and determination of this suit, the 3rd Defendant be and is hereby compelled to make rental payments to court.
 - g. Spent
 - h. That the officer commanding Police station Pangani to ensure compliance of the order.
 - i. That costs of the application be in the cause.
4. The application is premised on the grounds on the face of it and the Plaintiff's supporting affidavit. The Plaintiff's case is that he is the sole proprietor of Title Number block 104/389 hereinafter referred to as the 'suit land' and that its title was Charged as security for a loan extended by the 1st Defendant, which he serviced until 9th October 2016 when the loan instalments were paid off by the proceeds from a tenancy agreement dated the 8th March 2019 between the 3rd Defendant and himself.
 5. He denied being informed of any default but claims in December 2021, the 2nd Defendant sent goons to the suit land to evict him alleging to have purchased the said land via a public auction allegedly conducted on 24th November 2021.
 6. He contends that if the alleged sale by auction took place, it was illegal for reasons; he was not served with a Notice to redeem any default, the property was not valued prior to the sale, suit land sold at an undervalue, there is no evidence of stamp duty payment, the alleged sale agreement does not contain Chargor's consent to sell, he was not served with the Statutory Notice of sale as per the provisions of the Land Act and the sale was contrary to provisions of the Auctioneers Act. Further, that the market value of the suit land is Kshs.107,700,000/= and has a forced value of Ksh.80,775,000/=.
 7. He claims that the 3rd Defendant has since stopped remitting rental income. Further, that the 1st Defendant has denied him a chance to redeem the loan. He states that there is an attempt by the 2nd Defendant to illegally Charge the suit land to Gulf African Bank Limited, which will cause him to suffer irreparable damages.
 8. The 1st Defendant opposed the instant application by filing a replying affidavit sworn by its manager, one James Karanja. He admits that the suit land was Charged to the 1st Defendant by the Plaintiff for a loan facility of ksh.26,800,000/=. He explains that following disbursement of the facility, the Plaintiff was consistently in breach of the terms of the Offer Letter by failing to make scheduled payments punctually of which, he duly acknowledged the default citing hard economic times and sought restructuring of the loans vide letters dated the 23rd December 2019, 26th March 2020 and in an email dated the 22nd April 2020, respectively. Further, that the 1st Defendant acceded to and structured the loans but the Plaintiff still failed to adhere to the terms of loan repayment.
 9. He contends that following consistent default, the 1st Defendant was constrained to exercise its statutory power of sale, and issued the Plaintiff with a Ninety (90) days statutory notice of its intention to auction the suit land to recover the outstanding loan arrears. He confirms that the said notice was



sent by messrs Gitonga Kimaiti & Kariaira advocates but failed to elicit any reaction from the Plaintiff, following which, the firm sent him a further forty (40) days' notice. He avers that the 1st Defendant then instructed the 4th Defendant, who issued a forty five (45) days auctioneers notice dated the 7th September 2021 and put up an advertisement in the Daily Nation Newspaper dated the 15th November 2021, about the sale of the suit land by public auction.

10. He confirms that in the auction, the 2nd Defendant was the highest bidder offering ksh.26,550,000/=, which bid was higher than the forced market value as contained in the valuation report dated the 3rd November 2021. Further, that the 2nd Defendant deposited the extra amounts to the Plaintiff after deducting loan arrears and the costs of auction. He reaffirms that the bank was discharged from any claim in Nairobi ELC No. 120 of 2020: Zainabesh Hassan Debebe v Hussein Ibrahim Mohammed & Another (DIB Bank Limited, Interested Party), a case which the Plaintiff later withdrew.
11. The 2nd and 3rd Defendants opposed the instant application vide their Notice of Preliminary Objection dated the 20th November 2023. They insist that the suit as against the 2nd Defendant offends the doctrine of sub judice by virtue of the Plaintiff and himself being parties in Nairobi ELC 175 of 2023, whose fulcrum revolves around ownership of the suit land. They aver that the court lacks jurisdiction to entertain the suit as between the Plaintiff and the 3rd Defendant in the nature of alleged breach of contract as a claim for nonpayment of rent is outside the jurisdiction of this court.
12. The 2nd Defendant also filed a replying affidavit contending that the Plaintiff's suit is an abuse of court process as he failed to disclose to the court the existence of Nairobi ELC E 175 of 2023, which he would not have filed if he intended to evict the Plaintiff. Further, that he is a purchaser for value at a public auction and is the current registered owner of the suit land and therefore cannot be restrained from dealing with it. He argues that as lawful proprietor of the suit land and since he has an active tenancy agreement with the 3rd Defendant, it would be injurious to compel the 3rd Defendant to pay rent to the Plaintiff.
13. The application is also opposed by the 4th Defendant who filed Grounds of Opposition dated the 21st February 2024. It contends that the Plaintiff has no cause of action, relief or claim capable of being granted by this Honourable Court.
14. The application was canvassed by way of written submissions.

Submissions

15. The Plaintiff in his submissions reiterates his averments as per the supporting affidavit and argues that he has met the conditions on injunction as set out in the case of *Giella v Cassman Brown and Co.Ltd* [1973]EA 358. He contends that he has established a prima facie case as he has invested money, time and energy on the suit land, cannot be compensated by way of damages and will suffer more inconvenience and loss if the orders sought are not granted.
16. In its submissions, the 1st Defendant contends that the Plaintiff has not met the threshold as set in *Giella v Cassman Brown and Co. Ltd* [1973] EA 358 as he was clearly in default of the terms of the agreement. Further, that he was served with statutory notices and he has failed to discharge the burden of proving that the property was sold at an undervalue. To support its arguments, he relied on the case of *Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others* [2006] eKLR. He insists that the Plaintiff has failed to establish that he will suffer irreparable injury because it is settled law that when property is charged, it becomes a commodity for sale like any other thus it can be quantified and no harm may be suffered.



17. It further submits that even on a balance of probability, the scales tilt in favour of the Defendants as the Plaintiff's letters seeking a restructure of the loans are a clear admission of his default to the facility. Further, that the Plaintiff has not disputed service of the statutory notices and is undeserving of orders as sought. To support this argument, it relied on the case *Caliph Properties Limited v Barbel Sharma & another* [2015] eKLR
18. The 2nd and 3rd Defendants in their submissions insist that the Plaintiff has not established a prima facie case to warrant the orders as sought. Further, that the nature of the prayer that the 3rd Defendant submits rent implies a mandatory injunction which cannot be granted at an interlocutory stage. To this end, the case of *Hezron Kamau Gichuru v Kianjoya Enterprises Ltd & another* [2022] eKLR is relied upon.
19. On its part, the 4th Defendant submits that it acted within the law as an agent of the 1st Defendant and that the Plaintiff cannot run away from his predicament. It contends that the Plaintiff is engaging in a game of chance by filing numerous suits, which amounts to abuse of court process. To support its averments, it relied on the following decisions: *Andrew Muriuki Wanjohi v Equity Building Society Limited & 2 Others* [2006] eKLR and *Agnes Muthoni Nyanjui & Others v Anna Nyambura & 3 Others* [2015] eKLR.

Analysis and Determination

20. Upon consideration of the instant Notice of Motion application including the Grounds of Opposition, Notice of Preliminary Objection, respective affidavits and rivaling submissions, the following are the issues for determination: Whether the Plaintiff is entitled to orders of interlocutory injunction as sought. Whether the 3rd Defendant should be compelled to pay rent to court.
21. In line with the principles espoused in the case of *Giella vs Cassman Brown* (1973) EA 358 as well as the description of a prima facie case as stated in the case of *Mrao Ltd v First American Bank Limited* (2003) eKLR, I will proceed to decipher if the Plaintiff has established a prima facie case to warrant the orders of interlocutory injunction as sought.
22. The Plaintiff claims that he is the registered proprietor of the suit land which was irregularly sold to the 2nd Defendant through a public auction, at an undervalue. He insists that he has established a prima facie case to warrant the orders as sought and will suffer irreparable harm including damage if injunctive orders are not granted. The Defendants have opposed the Plaintiff's claim, insisting that the Plaintiff failed to repay the loan he took with the 1st Defendant, was served with statutory notices and the suit land was legally sold to the 2nd Defendant, through a public auction and he is now its proprietor.
23. Looking at the documents presented by all the parties, I note the Plaintiff Charged the suit land to the 1st Defendant, sought to restructure the loan, and due to default, the 1st Defendant exercised its statutory power of sale and sold the said land to the 2nd Defendant through a public auction conducted by the 4th Defendant. Further, the 2nd Defendant is currently the registered proprietor of the suit land and is receiving rent from the 3rd Defendant who is a tenant therein.
24. In *Amazing Tours and Travel Limited v Housing Finance Company Limited & 2 Others* [2020] eKLR it was held that:

“I find that the Plaintiff's proprietary rights to the suit property were extinguished at the fall of the hammer during the auction. My humble view is that the case before this court is not whether the 3rd Defendant is the registered owner of the suit property but whether the 3rd Defendant validly purchased the said property at the auction.”



25. While in the case of Palmy Company Limited v Consolidated Bank of Kenya Limited ML HCCC No. 527 of 2013 [2014] eKLR, the court held inter alia:

“Needless to state that having an arguable point, as is the case here, is not sufficient to establish a prima facie case for the grant of an injunction especially in cases of exercise of the power of sale by a chargee who has shown that the Applicant has defaulted and continue to be in default. It should be known that, as long as it is lawfully exercised, the Statutory Power of Sale is not a favour that the chargor extends to the chargee or an infringement on the right of or a foreclosure of the chargor’s equity of redemption; it is a statutory remedy which is inextricably tied to the right of the chargee to recover its money-which is property guaranteed under Article 40 of *the Constitution*.”

26. Further, in Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] eKLR, it was held that:

“That section [99] now statutorily encompasses the right of the charger prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages...”

27. From this analysis, it is my considered view that since the suit land had already been sold to the 2nd Defendant, through a public auction and he has a title to it, he cannot be restrained from it. The Plaintiff has not denied that he Charged the suit land to the 1st Defendant and defaulted in repaying the loan. The only issue he is raising is that he was not properly served with statutory notices and that the suit land was sold at an undervalue. However, it is trite that once land is Charged as security, it becomes a commodity which can be sold in case of default. Further, if the land is sold through a public auction, if the owner disputes, he is entitled to damages. In the foregoing, I find that the Plaintiff has indeed not established a prima facie case as against the Defendants, to warrant the orders of temporary injunction as sought.

28. As to whether the 3rd Defendant should be compelled to pay rent to court. In the current scenario, the Plaintiff seeks orders to compel the 3rd Defendant who is a tenant of the 2nd Defendant to make rental payments from the suit land to court. As noted above, that it is the 2nd Defendant who is now the registered proprietor of the suit land, having purchased it, in an auction. Further, the issue of whether the auction was properly done and if statutory notices were issued can only be determined once viva voce evidence is adduced. However, from the facts before me, I opine that since the 2nd Defendant is the owner of the suit land, he is indeed entitled to receive rent from the suit land and I will hence decline to grant the orders as sought.

29. Further, in relying on the parameters set out in Nguruman Ltd. Vs. Jan Bonde Nielsen (2014) eKLR, where the Court of Appeal held that if a party fails to establish a prima facie case, then irreparable injury and balance of convenience need no consideration, I will decline to deal with the other two limbs on injunction.

30. In the circumstances, I find the Notice of Motion application dated the 1st November, 2023 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25th DAY OF MARCH 2025



CHRISTINE OCHIENG

JUDGE

In the presence of:

Kimanzi for Plaintiff

Mudanya for 4th Defendant

Ms Mwangi for 1st Defendant

Anmar for Ali for 2nd and 3rd Defendants

Court Assistant: Joan

