



REPUBLIC OF KENYA



KENYA LAW

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**Kihara & another v Credit Bank Limited & 2 others (Commercial Case E300 of 2022)
[2023] KEHC 24562 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E300 OF 2022
MN MWANGI, J
SEPTEMBER 29, 2023**

BETWEEN

**WATSON WAIYAKI KIHARA 1ST PLAINTIFF
JENNIFER WANGARI WAIYAKI 2ND PLAINTIFF**

AND

**CREDIT BANK LIMITED 1ST DEFENDANT
REGENT AUCTIONEERS 2ND DEFENDANT
KENNETH KIURA NJORA 3RD DEFENDANT**

RULING

1. Before me is a Notice of Motion application dated 11th October, 2022 brought under the provisions of Order 1 Rule 3, Order 8 Rule 3 & Order 40 Rule 1 of the Civil Procedure Rules, 2010, Sections 3A & 63(e) of the *Civil Procedure Act*, the inherent powers of the Court and all enabling provisions of the law. The plaintiffs/applicants seek the following orders -
 - i. Spent;
 - ii. That leave be and is hereby granted to the plaintiffs to join Kenneth Kiura Njora as the 3rd defendant in this matter;
 - iii. Spent;
 - iv. Spent;
 - v. That there be an injunction restraining the defendants/respondents by itself, its agents (sic) employees, or anyone claiming under it from transferring or registering any interest in favour of



the proposed 3rd respondent relating to suit property described as L.R No. 12948/291 (House No. 69) Mountain View Estate, Nairobi City County pending the hearing and determination of this suit; and

- vi. That costs be reserved.
2. The application is anchored on the grounds on the face of the Motion and is supported by an affidavit sworn on 11th October, 2022 by Jennifer Wangari Waiyaki, the 2nd plaintiff herein. In opposition thereto, the 1st and 2nd defendants relied on a replying affidavit sworn on 22nd August, 2022 by Wainaina Francis Ngaruiya the 1st defendant's Head of Legal Department. They also filed grounds of opposition dated 28th October, 2022 raising the following grounds –
 - i. The application is misguided as the plaintiff has no cause of action against the proposed defendant by virtue of Sections 99(2) and Section 99(3) of the Land Act, 2012;
 - ii. The proposed defendant is protected by virtue of Section 99(2) and 99(3) of the Land Act, 2012 and the plaintiffs' remedy as laid out in Section 99(4) of the Land Act lies in damages against the 1st defendant; and
 - iii. The application is unnecessary, mischievous and misguided in light of Order 8 of the Civil Procedure Rules, 2010.
3. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed on 20th April, 2023 by the law firm of C.M. Ngugi Rebiro & Company Advocates, whereas the 1st and 2nd defendants' submissions were filed on 22nd December, 2022 and 24th April, 2023 by the law firm of Maitai Nyawira & Associates Advocates.
4. Mr. Ngugi, learned Counsel for the plaintiffs cited Order 1 Rule 3 of the Civil Procedure Rules, 2010, Section 99(3) of the Land Act, No. 6 of 2012 and the case of Thrift Estates Limited & another v Equatorial Commercial Bank Limited [2016] eKLR and submitted that there was dishonest conduct on the part of the chargee. This is because the suit property was undervalued and sold to the proposed 3rd defendant. In addition, the proposed 3rd defendant was aware that the suit property was sold to him below value. Counsel further submitted that the 1st and 2nd defendants have admitted that they are seeking to transfer the suit property to the proposed 3rd defendant and in order to ensure restitution integrum, the suit property must be preserved.
5. Counsel for the plaintiffs referred to the provisions of Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010, the case of Giella v Cassman Brown & Company Limited [1973] EA 358 where the Court laid down the guiding principles in granting an order for injunction and the case of Mrao Ltd v First American Bank of Kenya and 2 others [2003] KLR 125, where the Court defined what constitutes a prima facie case in support of the plaintiffs' submissions. He asserted that the plaintiffs acquired a credit facility from the 1st defendant and the suit property was charged in favour of the 1st defendant
6. He submitted that the suit property was valued by Transcounty Valuers Limited and a report dated 15th November, 2016 was prepared, and from the said valuation, the market value of the suit property was assessed at Kshs.45,000,000/=, mortgage value at Kshs.40,500,000/= and forced sale value at Kshs.33,750,000/=. Mr. Ngugi stated that a second valuation was carried out on the suit property in the year 2019 at the instance of the 1st defendant by Fortune Realtors Limited, and a valuation report dated 12th February, 2019 was prepared. He further stated that the second valuation report placed the market value of the suit property at Kshs.45,900,000/=, mortgage value at Kshs.36,500,000/= and forced sale value at Kshs.36,350,000/=.



7. It was stated by Counsel that a third valuation was done by Transcounty Valuers Limited and a valuation report dated 16th December, 2020 was prepared. The said valuation assessed the market value of the suit property at Kshs.46,000,000/= and forced sale value at Kshs.34,500,000/=. He further stated that a fourth valuation was carried out by Regent Auctioneers and a valuation report dated 30th March, 2022 was prepared. The said valuation placed the market value of the suit property at Kshs.42,000,000/= and a forced sale value at Kshs.31,500,000/=. Mr. Ngugi relied on the provisions of Section 97(1) of the Land Act and submitted that the chargee owed the plaintiffs a duty of care to obtain the best price possible for the suit property obtainable at the time of sale.
8. He further submitted that it is a well known fact that land continues to appreciate in value over time but it is evident from the valuations done on the suit property that the value of the suit property has continued to depreciate and no plausible explanation has been offered as to why that is so. For this reason, Mr. Ngugi contended that the undervaluation of the suit property is an act of fraud thus the sale of the said property by the public auction conducted on 20th July, 2022 is null and void. He relied on the case of *Levi House Construction and Engineering Ltd v ABC Bank Limited & another* [2021] eKLR and stated that the plaintiffs shall seek leave of Court to conduct an independent valuation of the suit property as they stand to suffer irreparable loss and damage in the loss of their home which loss cannot be compensated by an award of damages.
9. Counsel further stated that the valuers that conducted the valuations on the suit property did not consider the developments on the property and on surrounding properties which could drastically affect the property over time. He relied on the holding by the Court in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR and submitted that the forced sale value listed in the current valuation is not enough to satisfy the outstanding loan balance thus the plaintiffs will have to seek alternative source of funds in order to pay the balance and the plaintiffs stand to suffer irreparable harm if an order of injunction is not issued. Mr. Ngugi referred to the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others* [2016] eKLR and expressed the view that the balance of convenience tilts in favour of the plaintiffs.
10. Ms. Maitai, learned Counsel for the 1st & 2nd defendants cited the provisions of Order 1 Rule 3 of the Civil Procedure Rules, 2010, Section 99 of the Land Act, 2012, the cases of *BWK (Of unsound mind suing through the next friend CMK) v Samuel Maina Kung'u & 4 Others* [2021] eKLR and *Joyce Wairimu Karanja v James Mburu Ngure & 3 Others* [2018] eKLR and submitted that the proposed 3rd defendant does not qualify to be a party in the suit herein because there is no right to relief that he owes the plaintiffs in law and fact. She further submitted that the plaintiffs cannot claim anything from the proposed 3rd defendant since he is a purchaser by public auction thus he is protected under Section 99 of the Land Act, 2012.
11. In stating that at the time of institution of this suit the property in issue had already been sold at an auction on the 20th July, 2022, thus the plaintiffs' right of redemption had already been extinguished, Counsel relied on the case of *David Limo Bundotich v Housing Finance Company of Kenya Limited* [2022] eKLR, where the right of redemption was defined by the Court and the case of *Kamulu Academy Limited & Another v British American Insurance (K) Limited & 2 Others* [2018] eKLR, where the Court in discussing at what point the right of redemption is extinguished held that the Equity of redemption is extinguished at the fall of the hammer.
12. Ms. Maitai contended that it is not disputed that the plaintiffs have been in default of payment from the year 2019 prompting the 1st defendant to exercise its statutory power of sale resulting in the auction challenged herein. She referred to the case of *Beatrice Atieno Onyango v Housing Finance Company Limited & 3 Others* [2020] eKLR where the Court quoted the case of *Moses Kibiego Yator v Eco Bank*



Kenya Limited [2014] eKLR and submitted that it is not disputed that all the relevant statutory notices under law were served upon the plaintiffs. The 3 months' statutory notice as required under Section 90(3) of the Land Act dated 24th April, 2020 was served upon the plaintiffs in person and by registered post on 30th April, 2022.

13. That after the elapse of three months, the 1st defendant issued the plaintiffs a 40-day Notice to sell dated 14th August, 2020 as provided for under Section 96 (2) of the Land Act, 2012, which notice was dispatched by registered mail on 19th August, 2020. She stated that the 1st defendant thereafter issued instructions to the 2nd defendant who in compliance with the provisions of Rule 15 of the Auctioneers Rules issued the plaintiffs a 45-days' Redemption Notice dated 8th January, 2021 which was served by registered post on the same day. Counsel for the 1st and 2nd defendants stated that the public auction where the suit property was sold to the proposed 3rd defendant was conducted in accordance with the law. Ms. Maitai posited that the plaintiffs do not have a prima facie case with probability of success since they have not shown any illegality leading up to and after the auction. Therefore the instant application is only meant to frustrate the sale of the suit property.
14. Counsel referred to the decisions in Mohamed Bashir Abdulaziz v Monarch Developers Limited & 2 Others [2022] eKLR and Peter Kairu Gitu v KCB Bank Kenya Limited & Another [2021] eKLR, Section 26 of the Auctioneers Act and Section 99(4) of the Land Act 2012 and submitted that a Chargor would be entitled to damages in the event that it is proven that an auction was illegally conducted. Ms. Maitai further submitted that the plaintiffs will not suffer any irreparable damage since the 1st defendant is a Bank and is financially capable of paying damages to the plaintiffs in the event the suit herein is determined in their favour. She also stated that there is a monetary valuation of the suit property which means that any damage would be repairable since the value of the property is quantifiable in currency. For this reason, Counsel contended that the plaintiffs would not suffer irreparable damage.
15. In submitting that the balance of convenience tilts in favour of the 1st and 2nd defendants, Counsel cited the decisions in Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR and Jim Kennedy Kiro NJeru v Equity Bank (K) Limited [2019] eKLR. She further submitted that the 1st defendant has various financial obligations to meet. In addition, there is a number of people whose daily lives are dependent on the Bank's liquidity hence the inconvenience of the Bank's Power of Sale being disrupted through injunctions blocking transfer of property rightfully sold by the defendants will create a legal and economic disaster completely nullifying the essence of securities under charges.
16. In the 1st and 2nd defendants' further submissions Ms. Maitai submitted that, the plaintiff has attempted to introduce new facts, evidence, grounds and prayers at paragraph 11, 17, 18, 19, 20, 23 and 24 of their submissions. She further submitted that the plaintiffs' application makes no mention of the proposed 3rd defendant being aware of any alleged undervaluation of the property. That it does not mention any valuation and no valuation reports have been annexed to the application herein. Counsel contended that only one ground has been advanced in support of the prayer to join the proposed 3rd defendant, which is the fact that the plaintiffs cannot enforce orders against the proposed 3rd defendant unless he is a party to the suit. She stated that at paragraphs 25, 26, 27, 28, 30 and 36 of the plaintiffs' submissions, the plaintiffs' Counsel not only adduces additional facts and grounds not found in the instant application, but also seeks to introduce a new prayer.
17. Ms Maitai contended that the plaintiffs' Counsel is attempting to adduce new facts and grounds in support of the application herein vide submissions. She stated that the submissions by the plaintiffs' Counsel amount to trial by ambush with Counsel illegally testifying from the bar. She urged this Court



to disregard the aforementioned paragraphs since they were not captured in the application herein thus denying the 1st and 2nd defendants a chance to peruse the documents relied on and respond to the same.

Analysis And Determination.

18. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit and grounds of opposition by the 1st and 2nd defendants and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the proposed 3rd defendant should be joined as a party to this suit; and
 - ii. Whether the 1st and 2nd defendants should be restrained from transferring the suit property to the proposed 3rd defendant.
19. In the affidavit filed by the plaintiffs, the 2nd plaintiff deposed that the plaintiffs are joint registered proprietors of the suit property and the proposed 3rd defendant is the alleged auction purchaser of the suit property. The plaintiffs brought a suit against the 1st and 2nd defendants for conducting an illegal auction and seeking to transfer the suit property to the proposed 3rd defendant.
20. She averred that the 1st and 2nd defendants are seeking to effect transfer of the suit property to the proposed 3rd defendant since there are no orders barring them from doing so. She further averred that they cannot obtain orders against the proposed 3rd defendant unless he is joined as a party in the suit.
21. It was stated by the 2nd plaintiff that joining the proposed 3rd defendant is necessary for the determination of the real issues in controversy in this suit. She further stated that if transfer of the suit property to the proposed 3rd defendant is allowed to proceed, the substratum of the application and the suit will be defeated
22. The 1st defendant in its replying affidavit deposed that the bank extended credit facilities to the plaintiffs which facilities were secured by a legal charge over L.R No. 12948/291. That vide a letter dated 12th October, 2017, the 1st defendant restructured the said credit facilities at the plaintiffs' request.
23. The 1st defendant averred that the plaintiffs failed to adhere to the agreed payment structure as per the letter of offer dated 12th October, 2017 and the 1st defendant acceded to yet another restructure of the credit facilities vide a letter of offer dated 26th February, 2019. Counsel further averred that the plaintiffs still did not honour their repayment obligations hence prompting the bank to exercise its statutory power of sale.
24. Counsel stated that the bank proceeded to issue the plaintiffs with the requisite statutory notices in accordance with the law. That vide a letter received on 13th November, 2020 and in March 2021, the plaintiffs requested the bank to restructure the credit facilities again but the bank declined to grant them any further accommodation
25. The 1st defendant indicated that the property was advertised for sale by public auction on 31st March, 2021 but no acceptable bids were received. He stated that a recent valuation was conducted on the suit property in March 2022 and another unsuccessful auction was conducted on 11th March, 2022. Counsel contended that the suit property was advertised again for sale on 5th July, 2022 with an auction date being set for 20th July, 2022 and on this day a bid of Kshs. 31,500,000/= was received and accepted. The amount paid by the highest bidder has since been deposited into the plaintiff's account.
26. The 1st defendant deposed that the plaintiffs' accounts with the 1st defendant are in arrears of Kshs.49,442,565.75 as at 8th August, 2022. It asserted that there were no irregularities in the sale of



the suit property and said that the plaintiffs' remedy in law lies in damages should they prove that the auction was not conducted in accordance with the law.

Whether the proposed 3rd defendant should be joined as a party to this suit.

27. Order 1 Rule 3 of the Civil Procedure Rules, 2010 provides for the persons who may be joined as defendants. It states the following –

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

28. In the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR Odunga. J (as he then was) in allowing a similar application held as follows –

“The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of Kingori vs. Chege & 3 Others [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”

29. The plaintiffs averred that the proposed 3rd defendant should be joined as a party to this suit since he is a necessary party for the determination of the real issues in controversy in this suit, and the plaintiffs cannot obtain orders against him unless he is joined to the suit as a party. In their submissions, the plaintiffs submitted that the suit property was undervalued and sold to the proposed 3rd defendant, who was fully aware that the land was sold to him below value. The 1st and 2nd defendants on the other hand submitted that pursuant to the provisions of Order 1 Rule 3 of the Civil Procedure Rules, 2010, the proposed 3rd defendant does not qualify to be one as there is no right or relief owed to the plaintiffs by him. They also stated that since the proposed 3rd defendant is a purchaser at a public auction, he is protected under Section 99 of the [Land Act](#), 2012.

30. The proposed 3rd defendant purchased the suit property at a public auction that was held on 20th July, 2022. Section 99 of the [Land Act](#), 2012 provides for protection of a purchaser and states as hereunder –

- “ 1) This section applies to-
- a. a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or



- b. a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.
- 2) A person to whom this section applies-
 - a. is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
 - b. is not obliged to see to the application of the purchase price;
 - c. is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
 - 3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
 - 4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

31. From the above provisions, it is evident that a purchaser of land at a public auction is protected at the fall of the hammer except in cases of fraud, misrepresentation or any other dishonest conduct on the part of the chargee, of which purchaser has actual or constructive notice. The Court of Appeal in the case of *Etrade limited & another v Thrift Estates Limited & 2 others* [2019] eKLR, cited the case of *Joyce Wairimu Karanja v James Mburu Ngure & 3 others* [2018] eKLR, where Ngugi. J (as he then was), stated thus-

“In my view, there is little reason to belabour the point. Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise of the statutory power of sale is immunized from suit under section 99 of the *Land Act*. Thirdly, a mortgagor’s equity of redemption is extinguished upon the fall of the hammer in a public auction. Fourthly, there is no requirement in law or equity that a mortgagor re-issues the statutory notice if a planned auction is temporarily stopped by the Court and then permitted to proceed through the lifting of the temporary orders.”

32. In this case all that the plaintiffs have done is to contend that the proposed 3rd defendant who is also the purchaser of the suit property at the public auction that was held on 20th July, 2020 was fully aware that the land was sold to him below value thus he is guilty of fraud. It is trite that he who alleges must prove. This maxim is founded on the provisions of Sections 107 and 108 of the *Evidence Act*, Cap 80 Laws of Kenya. The allegation against the proposed 3rd defendant is not captured in the plaintiffs’ application and/or supporting affidavit and the plaintiffs have not tendered any evidence in support of



the said contention. For this reason, the submission by the plaintiffs that the proposed 3rd defendant was fully aware that the land was sold to him below value has no probative value to this application, as it is not supported by evidence.

33. I agree with Counsel for the 1st and 2nd defendants that there is no right or relief owed to the plaintiffs by the proposed 3rd defendant in the plaint, since there are no reliefs sought against him in the said plaint. Furthermore, in the absence of proof of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the proposed 3rd defendant had actual or constructive notice, the proposed 3rd defendant is protected under the provisions of Section 99 of the Land Act, 2012 by virtue of being a purchaser of land at a public auction.
34. From the foregoing, it is my finding that the proposed 3rd defendant does not qualify to be joined as a defendant under the provisions of Order 1 Rule 3 of the Civil Procedure Rules, 2010. In addition, the plaintiffs have not made out a case for him to be joined as a defendant in the main suit.

Whether the 1st and 2nd defendants should be restrained from transferring the suit property to the proposed 3rd defendant.

35. The test for granting of an interlocutory injunction was considered in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR where the Court held as hereunder –

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

36. On the issue of whether the plaintiff has established a prima facie case with a probability of success. I am bound by the Court of Appeal decision in the case of Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR where it discussed what constitutes a prima facie case as hereunder –

“So, what is a 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.”

37. The plaintiffs’ suit against the 1st and 2nd defendants is that the latter conducted an illegal auction over the suit property where the proposed 3rd defendant purchased the said property and they are now seeking to transfer the said property to the proposed 3rd defendant. As explained in the foregoing analysis and findings in the absence of proof of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser has actual or constructive notice, a purchaser of land at a public auction is protected under the provisions of Section 99 of the Land Act, 2012. This Court has already held that in this application there is no evidence on record to prove fraud or collusion between the 1st defendant and the proposed 3rd defendant.



38. It was submitted by the plaintiffs that there was dishonest conduct on the part of the chargee since the suit property was undervalued and sold to the proposed 3rd defendant, and as such, the undervaluation of the suit property is an act of fraud which makes the sale of the suit property by public auction conducted on 20th July, 2022 null and void. It is worth of note that inasmuch as the plaintiffs submitted that the suit property was undervalued, this fact was not captured in their application or in the affidavit in support of the instant application. The plaintiffs also failed to exhibit in their affidavit, the valuation reports they referred to in their submissions so as to give the 1st and 2nd defendants an opportunity to go through them and respond to them.
39. It is also noteworthy that the plaintiffs did not submit a valuation report of the suit property carried out by a Valuer of their choice so that the Court could have an opportunity to consider and compare the two valuation reports and determine whether indeed the suit property was sold to the proposed 3rd defendant below value. For this reason, I find that the plaintiffs did not discharge their burden of proof as provided for under Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya. This Court finds that the plaintiffs have not demonstrated a prima facie case against the 1st and 2nd defendants with a probability of success.
40. On whether the plaintiffs shall suffer irreparable injury in the event the instant application is not allowed, my understanding of the provisions of Section 99(4) of the Land Act, 2012, is that in the event the plaintiffs suffer any loss, damage or prejudice as a result of an improper or irregular exercise of the statutory power of sale by the 1st defendant, their remedy lies in an action for damages.
41. Based on the foregoing, the balance of convenience tilts in favour of the 1st and 2nd defendants since the plaintiffs can always be compensated by an award of damages in the event the suit herein is determined in their favour. To this end, I am persuaded by the Court's holding in case of *Bomet Beer Distributors Limited & another v Kenya Commercial Bank Limited & 4 others* [2005] eKLR affirmed by the Court of Appeal in *Etrade Limited & another v Thrift Estates Limited & 2 others* (supra) where the Court when faced with an issue similar to the one before this Court held as hereunder -

“In the present case, the chargee in exercise of its powers of sale under a charge sold the suit properties in a public auction. The plaintiffs are now complaining that the said sale was irregularly conducted. They are seeking injunctive orders of this court to restrain the said property from being transferred to the transferee who purchased the said properties in a public auction. The principles for the grant of interlocutory injunction are now well established. In the landmark case of *Giella – versus- Cassman Brown* [1973] EA 358 it was held that an injunction would be granted where an applicant establishes a prima facie case. The applicant is further required to establish that he would suffer irreparable loss which may not be compensated by an award of damages. If the court fails to decide the case on the two principles stated above, then it would decide whether or not to grant the injunction based on a balance of convenience.

In the present application, the plaintiffs have not established a prima facie case. The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie prove that they were are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages. The plaintiffs cannot therefore say that they would suffer irreparable loss which cannot be compensated by damages if the order of injunction is not granted. Damages will be adequate compensation to them. Further, the balance of convenience tilts in favour of the 5th defendant who purchased the property in the public auction. He has invested his



financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction. In the premises therefore and for the reasons stated, the application for injunction must fail. It lacks merit. It is hereby dismissed with costs to the defendants.”

42. The upshot is that the application dated 11th October, 2022 is not merited. It is dismissed with costs to the 1st and 2nd defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms. Mwangi h/b for Mrs Ngugi for plaintiffs/applicants

Ms. Maitai for the 1st & 2nd defendants/respondents

