



**Midland Emporium Limited v Prime Bank Limited & 3 others (Civil Suit E004 of 2022) [2022] KEHC 15806 (KLR) (29 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15806 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL SUIT E004 OF 2022  
JN KAMAU, J  
NOVEMBER 29, 2022**

**BETWEEN**

**MIDLAND EMPORIUM LIMITED ..... PLAINTIFF**

**AND**

**PRIME BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MIDLAND HAULIERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JOHNES OMBOTO ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH GIKONYO T/A GARAM AUCTIONEERS ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. In its notice of motion dated March 9, 2022 and filed on March 10, 2022, the plaintiff herein sought orders that an injunction do issue restraining the 4<sup>th</sup> defendant from executing and/or completing the memorandum of sale of LR No Kisumu Municipality/Block 7/69 (hereinafter referred to the subject property) situated in Kisumu county in favour of the 3<sup>rd</sup> defendant herein pending the hearing and determination of this suit.
2. He also sought that an order do issue restraining the 1<sup>st</sup> and 4<sup>th</sup> defendants from transferring the subject property to the 3<sup>rd</sup> defendant pending hearing and determination of the suit herein. Jayesh Prabhudas Kotecha, a director of the plaintiff and the 2<sup>nd</sup> defendant herein swore an affidavit in support of the said application.
3. In opposition to the said application, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendant filed a replying affidavit on March 30, 2022. The same was sworn by George Wachira Mathui, a Legal Manager at Prime Bank Limited on March 16, 2022.



4. The 3<sup>rd</sup> defendant swore a replying affidavit on March 16, 2022. The same was filed on even date.
5. In opposition to the defendants' replying affidavits, Jayesh Prabhudas Kotecha also swore a supplementary affidavit on April 1, 2022. The same was filed on April 5, 2022.
6. The plaintiff's written submissions were dated April 1, 2022 and filed on April 5, 2022. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants' written submissions were dated May 18, 2022 and filed on May 23, 2022 while those of the 3<sup>rd</sup> defendant were dated April 30, 2022 and filed on May 4, 2022. This ruling is based on the said written submissions which parties relied upon in their entirety.

### **The Plaintiff's Case**

7. The plaintiff was the registered proprietor of the subject property. In a valuation report dated October 2, 2018 by Chrisca Real Estate Limited, the said subject property was given an open market valuation of Kshs 110,000,000/= and a forced sale valuation of Kshs 83,000,000/=.
8. At the request of the 2<sup>nd</sup> defendant, on May 18, 2017, the 1<sup>st</sup> defendant restructured existing bank facilities and granted the 2<sup>nd</sup> defendant loan facility vii and loan facility viii in the sum of USD 5,100,000.00 and USD 397,500.00. The revised and restricted facilities were guaranteed by the deponent, the plaintiff herein and four (4) others guarantors.
9. The plaintiff was emphatic that it was a guarantor of the facility and not the borrower and that a legal charge for USD 400,000.00 was created over the said subject property which was the cap of its obligations. It asserted that the 1<sup>st</sup> defendant fraudulently designated it as a principal/primary debtor instead of a guarantor as was previously indicated in the letter of offer dated May 18, 2017.
10. It averred that on April 24, 2019, the 1<sup>st</sup> defendant appointed Mr P.V. Rao as the 2<sup>nd</sup> defendant's administrator and that since then, neither the 1<sup>st</sup> defendant nor the administrator had filed accounts of the operations of the 2<sup>nd</sup> defendant and that upon commissioning an audit by M/S Mabeya & Associates, it emerged that the 2<sup>nd</sup> defendant did not owe 1<sup>st</sup> defendant any monies.
11. It was emphatic that it did not owe the 1<sup>st</sup> defendant the sum of USD 6,679,504.69 demanded in the letter dated September 10, 2021 by M/S Macharia Mwangi & Njeru Advocates and in the notification of sale which indicated his liability as USD 6,679,509.69 and Kshs 6,835,853.74. It averred that it was evident that the said advocates had treated it as a principal /primary debtor and not as a guarantor.
12. The plaintiff further averred that the plaintiff's deponent's representative informed the deponent that no one bid at the auction that was advertised in the Standard Newspaper of January 13, 2022 and held between 10.30 am – 3.00pm and that he was therefore shocked when the 3<sup>rd</sup> defendant approached the said deponent and his brother with a promise to resell the subject property to the plaintiff if it reimbursed him the sum of Kshs 5,860,000/= being the ten (10%) per cent deposit of the purchase price plus a premium of Kshs 3,000,000/= giving a total of Kshs 8,686,000/=. It confirmed that the said subject property had indeed been sold.
13. It averred that although the 4<sup>th</sup> defendant paid the bidding deposit, the other bidders did not pay theirs and therefore the impugned public auction was unlawful for breach of the conditions of sale published by the 4<sup>th</sup> defendant.
14. It was also its contention that the defendants did not annex any letter or permit issued by Kisumu City authorities permitting it to hold a public auction and provision of security by the National Police Service or a receipt in respect of a fee payment or levy to Kisumu City and/or an invoice issued for the hire of outside broadcasting van/truck as proof of sale of the said public auction.



15. It pointed out that the comparative values of the two (2) valuation reports was compelling evidence that the defendant's valuer deliberately depressed the value of the subject property in order to stage manage the sale by public auction and that it was clear that the provisions of section 97 of the [Land Act](#) had been infringed on.
16. It asserted that the issues raised in its application were distinct from those in Nairobi HCCC No E399 of 2020 which did not mention the subject property and all other issues raised herein. It added that proceedings under that section 560 [Insolvency Act](#) No 18 of 2015 were in permissive terms and not mandatory.
17. It was categorical that there were several misdeeds, unlawful and erroneous demands beyond its obligation as set out in the letter of offer and charge and failure to comply with the provisions of section 90 of the [Land Act](#) No 6 of 2012. It averred that the person who allegedly conducted the impugned auction ought to have been a licenced auctioneer by virtue of the [Auctioneers Act](#), however, he had not sworn any affidavit challenging its assertions but left that task to the 1<sup>st</sup> defendant's advocate who did not indicate if he was present during the said auction.
18. It added that its advocates had prepared and placed before court the summons to enter appearance for action and that the fact that they had not been attended to was a matter beyond it and/or its advocates.
19. It therefore urged this court to grant it injunctive orders on a balance of convenience.

#### **The 1<sup>st</sup>, 2<sup>nd</sup> And 4<sup>th</sup> Defendants' Case**

20. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants' case was that the plaintiff's suit and the present application herein were *sub judice* as there were other cases to wit HCCC No E399 of 2020 *Milimani Comm Midland Investments (Ksm) Ltd v Prime Bank Ltd* and Insolvency Milimani Commercial Division petition No E012 of 2019 *In the matter of Midland Hauliers Limited (Under Administration)* that were pending in court and were yet to be determined. They also asserted that the present suit just as HCCC No E399 of 2020 *Midland Hauliers Ltd (under Administration) and Midland Emporium* [2021] eKLR, which was pending, involved all the parties to the lending consideration for the same amounts and hence was *res judicata*.
21. They contended that the plaintiff's deponent herein did not disclose the existence of the other suits contrary to order 4 rule 1(1), (2) and (6) of the [Civil Procedure Rules](#) and thus termed the present suit and application as sheer abuse of the court's process which ought to be rejected and struck out with costs.
22. They also asserted that the plaintiff's suit against the 2<sup>nd</sup> defendant herein was bad in law and incompetent for want of leave to bring the suit against it as provided in section 560 of the [Insolvency Act](#).
23. They added that their advocates issued a three (3) months' statutory notice dated May 20, 2021 demanding a sum of USD 400,000.00 and a forty (40) days' notice to sell dated September 10, 2021 and that the 3<sup>rd</sup> defendant issued a notification of sale and caused a valuation and advertisement of sale of the subject property to be done and hence the plaintiff was fully informed by the 3<sup>rd</sup> defendant that indeed a public auction took place.
24. It was their assertion that the said auction was successful as it was sold at a sum of Kshs 56, 860,000/= which exceeded the reserve price of Kshs 56, 250,000/= that was indicated in the valuation report dated November 4, 2021. They urged this court to disregard the valuation report of Chrisca Real Estate Limited.



25. They asserted that the ten (10%) per cent of the purchase price payable had been received by the 1<sup>st</sup> defendant bank and credited into the account held by the 2<sup>nd</sup> defendant. They were emphatic that prayers (b) and (d) of the application had been overtaken by events as the memorandum of sale dated January 28, 2022 had already been executed between the 3<sup>rd</sup> defendant and the 4<sup>th</sup> defendant.
26. They were emphatic that the bank could easily repay any damages that may be ordered payable by the 1<sup>st</sup> defendant if the sale that took place on January 28, 2022 was to be declared invalid for whatever reason which currently was not likely.

### **The 3<sup>rd</sup> Defendant's Case**

27. The 3<sup>rd</sup> defendant termed both the plaintiff's suit and application as fatally defective, an afterthought and an abuse of the court process on the grounds that no summons to enter appearance were ever taken and/or served upon him as required by law and that he was served with the present application without a hearing date. He asserted that it only took the intervention of his advocate to peruse the court file to confirm the hearing date.
28. He asserted that his attention was drawn to an advertisement in the Standard Newspaper on January 13, 2022 by the 4<sup>th</sup> defendant for sale of the subject property by public auction that was scheduled for January 28, 2022 at Central Square near Absa Bank PLC Kisumu City at 12.00 noon. He said that he attended the said public auction and bid for the subject property and that at the conclusion, his bid for Kshs 56,860,000/= emerged as the highest.
29. He pointed out that he paid a deposit of Kshs 5,686,000/= at the fall of the hammer and a receipt of the same issued to him. He was also issued with a certificate of sale and a memorandum of sale dated January 28, 2022 which both he and the 4<sup>th</sup> defendant executed as a result of which the plaintiff's equity of redemption was extinguished. He was emphatic that the orders the plaintiff's sought had been overtaken by events and/or that it had failed to demonstrate that it was entitled to the orders sought.

### **Legal Analysis**

30. After carefully analysing the parties' respective affidavit evidence and written submissions, it appeared to this court that the issues that had been placed before it were as follows:-
  - a. Whether or not the proceedings herein were res judicata and/or sub judice;
  - b. Whether or not the plaintiff ought to have sought leave to have filed the present proceedings against the 2<sup>nd</sup> defendant herein;
  - c. Whether or not the plaintiff had demonstrated that he had met the threshold of being granted injunctive orders as it had sought.
31. The court deemed it prudent to deal with the said issues under the following distinct and separate heads.

#### **I. Res judicata and sub judice**

32. The plaintiff did not submit on this issue. On their part, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants submitted that the plaintiff's cause of action was substantially in issue in separate proceedings before courts of competent jurisdiction and therefore, its suit and application ought to be dismissed with costs.
33. In this regard, they placed reliance on the case of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1996]eKLR where the court held that the plea of *res judicata* applies, except



in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and, which the parties exercising reasonable diligence, might have brought forward at the time.

34. They also relied on the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR where the court held that instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues or multiplicity of actions on the same matter between the same parties even where there existed a right to begin the action was an abuse of the judicial process.

35. The law pertaining to the doctrine of sub-judice is captured under the provisions of section 6 of the *Civil Procedure Act* cap 21 (Laws of Kenya) which states that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

36. Addressing the same issue in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR), the Supreme Court of Kenya stated as follows:-

“The term ‘sub-judice’ is defined in *Black’s Law Dictionary* 9th Edition as: “Before the court or judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter.”

37. A party that seeks to invoke the doctrine of sub-judice must therefore establish that there is more than one suit over the same subject matter, that one suit was instituted before the other, that both suits were pending before courts of competent jurisdiction and lastly, that the suits were between the same parties or their representatives. In such an instance, the matter that is filed subsequent to another ought to be stayed to await the determination to be made in the earlier suit.

38. On the other hand, the law pertaining to the doctrine of *res judicata* is captured under the provisions of section 7 of the *Civil Procedure Act* cap 21 (Laws of Kenya) which states that:-

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

39. In the case of *E.T v Attorney General & another* [2012] eKLR, the court stated that courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy. It further held that the test was whether the plaintiff in the second suit was trying to bring in another way, a new cause of action which had been resolved by a court of competent jurisdiction.



40. A reading of the pleadings of the *Midlands Investments (Ksm) Ltd v Prime Bank Limited & 2 others* (supra) showed that the parties were the same as those herein save for the plaintiff therein who was Midlands Investments (Ksm) Ltd.
41. The subject property in the said suit was LR No 209/16791 in Nairobi and title No Kisumu/Municipality/Block 6/22. Majanja J also determined that the plaintiff therein guaranteed the 2<sup>nd</sup> defendant herein.
42. Whereas the sums that were advanced to the 2<sup>nd</sup> defendant herein appeared to have been the same and the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants were parties in *Midlands Investments (Ksm) Ltd v Prime Bank Limited & 2 others* (supra), the subject property in the present application and suit was LR No Kisumu Municipality/Block 7/69. The question that was before it was also whether the 1<sup>st</sup> defendant deemed the plaintiff herein as the primary or principal debtor and not a guarantor and/or whether the 1<sup>st</sup> defendant had demanded for sums that were beyond the plaintiff's obligation contained in the letter of offer and the charge instrument.
43. This court was therefore persuaded to find and hold that as the subject matter of the application and suit herein was different from *Midlands Investments (Ksm) Ltd vs Prime Bank Limited & 2 others* (supra), the plaintiff's present application and suit were not sub judice and/ or *res judicata* and that this court was properly seized of the jurisdiction to hear and determine the same.

## II. Competence of the suit against the 2<sup>nd</sup> defendant

44. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants invoked section 560 (1) (d) of the *Insolvency Act*, 2015 and argued that the plaintiff's case as against the 2<sup>nd</sup> defendant was void *ab initio* for want of the necessary statutory approval or consent. They added that they had proved that the 2<sup>nd</sup> defendant's status was a company under administration and that the plaintiff had failed to present any evidence that it had sought the requisite consent or approval from the 2<sup>nd</sup> defendant's administrator or from the court to institute these proceedings against the 2<sup>nd</sup> defendant.
45. In that respect, they cited the case of *Hoggers Limited (In Administration) v John Lee Halamandres & 11 others* [2021] eKLR where the court held that administration was a tool meant to offer breathing space to financially distressed companies while ensuring that its creditors were placed in a better position than would be the case if the company was liquidated. They also placed reliance on the case of *Gerald Katana Mwamumba & 3 others v ARM Cement PLC (Under Receivership)* [2022] eKLR where the court held that it was bound by the provisions of the *Insolvency Act* that required consent or leave of court to do certain acts.
46. Section 560 (1) (d) of the *Insolvency Act* 2015 states as follows:-
  1.
    - (d) While a company is under administration, a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the court."
47. From the pleadings and submissions, it was not in dispute that the 2<sup>nd</sup> defendant was a company under administration. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants produced in evidence, the notice of appointment of administrator and letter of appointment to one P.V.R Rao as the administrator of the 2<sup>nd</sup> defendant and a gazette notice to that effect.



48. Although the plaintiff did not demonstrate that it obtained consent from the said administrator and/or leave of court to institute suit against the 2<sup>nd</sup> defendant, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants could not purport to ride on the back of the present said application in which the plaintiff had sought injunctive orders to have the 2<sup>nd</sup> defendant herein struck out from the proceedings herein as the same was irregular.
49. Indeed, the plaintiff had a right to fair trial as stipulated in article 50(3) of the Constitution of Kenya, 2010 to respond to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants' assertions. Allowing the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants' application at this juncture was tantamount to ambushing the plaintiff herein because the issue of striking out was first raised in 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendant's written submissions and it has not been given an opportunity to respond to the said assertions whether by way of affidavit evidence or points of law.
50. The most appropriate procedure was for the 2<sup>nd</sup> defendant to formally apply to be struck out from the proceedings herein.
51. This court therefore declined to strike out the 2<sup>nd</sup> defendant herein from the proceedings herein.

### III. Injunction

52. The plaintiff submitted that the defendants had not discharged the burden imposed on them by section 109 as read with section 112 of the Evidence Act for the reason that the 4<sup>th</sup> defendant did not swear any affidavit to controvert its complaint that no public auction took place and/or place on record evidence of arrangements that would ordinarily be made to complement an event like a public auction in a public facility.
53. It further argued that the subject property was sold at an undervalue which was a breach of the duty of care imposed on the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants by section 97(1) of the Land Act.
54. It was also its case that the amounts that had been demanded were unlawful and outside the contemplation of the letter of offer and the instrument of charge and were meant to refer to what was owed by the 2<sup>nd</sup> defendant. It further argued that the letter of offer and the instrument of charge did not reserve nor prescribe any interest.
55. In that regard, it placed reliance on the case of Mrao Limited v First American Bank of Kenya Limited & 2 others [2003]eKLR which cited the Halsbury's Laws of England Vol 32 (4<sup>th</sup> Edition) wherein it was stated that the mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has began a redemption action or because the mortgagor objects to the manner in which the sale is being arranged but will be restrained if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, on the terms of the mortgage or the claim is excessive.
56. It pointed out that the 1<sup>st</sup> and 4<sup>th</sup> defendant mixed up the issue whether it charged the subject property in its capacity as borrower or a guarantor.
57. It was also its submission that section 90 of the Land Act was unequivocal in requiring that before the exercise of the statutory power of sale, the defaulting chargor must be advised as to the nature and extent of default, the amount payable to rectify the default under the instrument of charge, the time within which the defaulting chargor must rectify the default, however, none of the defendants had shown that the aforesaid section was complied with.
58. It was therefore its case that it had established a *prima facie* case with a probability of success and was deserving of the prayers sought and that because the subject property was situated in a prime location and was not an ordinary commercial development, payment of damages could not adequately



- compensate it. It added that the balance of convenience tilted on its part as it stood to lose a prime asset in circumstances that were not only suspicious but a breach of the law and possibly a criminal act.
59. On the other hand, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants contended that the plaintiff had not demonstrated the breach of its rights and as such had failed to establish a prima facie case. They submitted that they had complied with the issuance of the notices under section 90 and section 96(2) of the *Land Act* and procured a valuation of the subject property as was required by section 97(2) of the *Land Act*.
  60. They contended that they had also proven that the public auction actually took place through the 4<sup>th</sup> defendant's auction attendance list, post-auction correspondence between the 1<sup>st</sup> and 4<sup>th</sup> defendant as well as other incidental and consequential documents. They added that the 3<sup>rd</sup> defendant had corroborated the said assertions in his affidavit and submissions.
  61. They pointed out that they had presented a letter from Chrisca Real Estate Limited which confirmed that the valuation report was not prepared on instruction from the bank. They were emphatic that the issues raised by the plaintiff surrounding the status of the charge vis-à-vis the letter of offer and the extent of the 2<sup>nd</sup> defendant's indebtedness to the 1<sup>st</sup> defendant were mere afterthoughts.
  62. To buttress their points, they relied on several cases amongst them the case of *Peter Ngungi Ng'ang'a v Family Bank Limited & another* [2021] eKLR where the court held that the mortgagor will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged.
  63. They argued that the plaintiff had failed to satisfy the limb of irreparable injury which could not be compensated by an award of damages. In this regard, they placed reliance on the case of *Peter Ngungi Ng'ang'a v Family Bank Limited & another* (supra) where the court in quoting the case of *Andrew Muriuki Wanjobi v Equity Building Society Ltd* [2006]eKLR held that by offering the suit properties as security, the chargor was equating them to a commodity which the chargee could dispose of so as to recover the loan together with interest thereon and that if the chargee were to sell of the properties, the chargor's loss could be calculable on the basis of the real market value of the said property.
  64. They were categorical that the 1<sup>st</sup> defendant being a licenced financial institution was capable of satisfying an award of damages to the plaintiff should its suit eventually succeed. They added that the balance of convenience tilted in their favour as the sale of the property had already been concluded. They reiterated that the plaintiff's equity of redemption had long been extinguished and the issuance of an order stopping the transfer of the property would be excessive and inordinate.
  65. In this respect, they relied on the case of *Bomet Beer Distributors Ltd & another v Kenya Commercial Bank Ltd & 4 others* [2005] eKLR where the court held that once a property has been knocked down and sold in a public auction by a charge in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished.
  66. They further asserted that the balance of convenience also heavily tilted in favour of the 1<sup>st</sup> defendant as there was a real risk that unless the security was realised, the debt would continue to accrue. They urged the court to take into account the significant delay by the plaintiff in approaching the court for the orders it sought. They added that the plaintiff's indolence in approaching the court close to four (4) months after the notification of sale was served upon it served as sufficient ground for a refusal to grant the order it sought.
  67. The 3<sup>rd</sup> defendant submitted that a litigant who seeks interim grant of an injunction must demonstrate the three (3) limbs as set out in the case of *Giella v Cassman Brown* [1975] EA 358 which were that an



- applicant must demonstrate a prima facie case, irreparable harm and that when the court was in doubt, it would rely on the balance of convenience.
68. He asserted that the plaintiff did not establish a prima facie case. In this regard, he relied on the case of *Mrao Ltd v First American Bank of Kenya Limited & 2 others* (supra) where the court held that a prima facie case was one on which the material presented to the court, a tribunal properly directing itself could conclude that there existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
  69. He further pointed out that the plaintiff had not placed before the court concrete material to conclude that there existed a right which apparently the defendants had infringed to call for an explanation or rebuttal from the latter.
  70. He relied on the cases of *Pecker Woods Limited v Bank of Africa Kenya Limited* [2021] eKLR and *Frenze Investment Limited v Kenya Way Limited* [2001] eKLR where the common thread was that a summons to enter appearance was an important document governing the timetable of pleadings and rules governing issuance and service thereof must be complied with for the pleadings to acquire legitimacy.
  71. He asserted that the plaintiff had no claim of breach on the part of the 3<sup>rd</sup> and 4<sup>th</sup> defendants and that the only issue was non-payment of a credit facility where the plaintiff failed to meet its obligations to the 1<sup>st</sup> defendant. He added that the plaintiff had not denied service of all the requisite statutory notices prior to the subject property being auctioned.
  72. He contended that in the aforesaid circumstances, the plaintiff could not benefit from an injunction order. In this respect, he relied on the case of Kisumu HCCC No 23 of 2006 *Hasika Enterprises Ltd v Margret Aloo Ochanji* (eKLR citation not given) where it was held that an order of the court could not be used to relieve a party of his obligations to pay his just and owing debt and that the court must be alert against inequitable and injunct orders which would render duties impossible to perform. It was further held that a contracting party who fails to perform its part of the contract cannot after defaulting seek and obtain an injunction to restrain a breach of a covenant by the other party while he himself swam through dirty waters to escape the pernicious acts of his own behaviour.
  73. He reiterated that the public auction did take place as averred in his affidavit and that of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants. He also averred that the plaintiff had not demonstrated the injury it was likely to suffer if the orders it had sought were not granted. He submitted that the balance of convenience tilted in favour of the defendants. He pointed out that the defendants would be at a loss in case the injunction was granted as the plaintiff would enjoy both the leverage of not paying back the 1<sup>st</sup> defendant's money which it was obligated to pay as per their loan agreement and usage of the suit property.
  74. He added that he would suffer double jeopardy as his purchase money would be stuck with the 1<sup>st</sup> defendant and at the same time be denied the suit property as the case was pending in court.
  75. Right at the outset, this court wished to point out that sale of a property in a public auction at an under value was not a ground for granting an injunction as was held in the case of *Palmy Company Limited v Consolidated Bank of Kenya* [2014] eKLR.
  76. Where the undervaluation was more than twenty five (25%) per cent, the chargor could apply for the sale to be voided. A plaintiff who had been so aggrieved also had a remedy of seeking damages as provided in section 97(3) of the *Land Act* which states that:-
3. If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market



- a. there shall be a rebuttable presumption that the charge is in breach of the duty imposed by subsection (1); and
  - b. the charger whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the charge at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the charge has complied with the duty imposed by subsection (1).”
77. The plaintiff had argued that the sale of the subject property at a sum of Kshs 56,250,000/= meant that the property had depreciated by thirty one (31%) per cent having been valued at a sum of Kshs 110,000,000/= on October 2, 2018.
78. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants’ arguments that Chrisca Real Estate Limited which had confirmed that the valuation report was not prepared on instruction from the 1<sup>st</sup> defendant had no legal basis as there was nothing in law that provides that only chargees have the monopoly to obtain valuation reports. Indeed, valuation reports are obtained for various reasons and any party can controvert its opponent’s case by tendering in evidence a valuation report. It is and has never been a preserve of the seller.
79. Indeed, rule 10 of the [Auctioneers Rules 1995](#) envisages that seized property can be valued by an independent valuer. It provides as follows:-
- A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.
80. Bearing in mind that the plaintiff obtained the valuation report way before the subject property was sold by public auction, it was necessary to test the veracity of the plaintiff’s evidence about the gross undervaluation during trial with a view to establishing whether or not the sale of the subject property contravened section 97(3)(b) of the [Land Act](#). However, this was a side issue and did not form the basis of the granting of an injunction.
81. Having said so, this court was also persuaded to find that the question of the extent of the plaintiff’s liability if at all was a pertinent question to be determined. The plaintiff was emphatic that its liability could not extend beyond USD 400,000.00. Indeed, in paragraph 18 of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants’ replying affidavit, they asserted that they had demanded a sum of USD 400,000.00 from the plaintiff as was evidenced in the three (3) months statutory notice and forty (40) days’ notice, which figure was evidenced in the certificate of mortgage dated June 26, 2018 and the charge dated June 13, 2018.
82. A perusal of the three (3) months’ statutory notice showed that the firm of M/s Macharia- Mwangi & Njeru Advocates dated May 20, 2021 demanded a sum of USD 400,000.00 from the plaintiff herein. The forty (40) days’ notice to sell issued under section 96(2) of the [Land Act](#) 2012 also demanded the sum of USD 400,000.00. The 4<sup>th</sup> defendant’s notification of sale also demanded the sum of USD 400,000.00.
83. Two (2) issues were evident in the said statutory notices. One was that it was clear that the principal sum did not appear to have been in dispute. Secondly, it was also clear that the 1<sup>st</sup> defendant duly served the plaintiff with all the statutory notices. Indeed, the plaintiff attached the same in its affidavit in support of the present application.
84. Notably, section 96(2) of the [Land Act](#) stipulates that:-
- “ Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the



sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell (emphasis court).”

85. Further, rule 15 (d) of the [Auctioneers Rules, 1997](#) which provides as follows:-

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

d. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

86. The auctioneer also has an obligation under rule 15 (e) not to sell the immovable property earlier than fourteen (14) days after the first advertisement of the sale of the property. It therefore means that beyond the forty five (45) days, the chargor has an advantage of a further fourteen (14) days.

87. In addition, rule 15 (e) of the [Auctioneers Rules](#) stipulates that:-

e. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement

88. The 1<sup>st</sup> and 4<sup>th</sup> defendants appeared to have complied with all the statutory notices in accordance with the law. Having said so, this court noted that the said statutory notice and forty (40) days’ notice both alluded to accrued and accruing interest at the rate of twenty two (22%) per cent in respect of the current accounts and fourteen (14%) per cent per annum in respect of the USD term loan and overdraft accounts subject to the 1<sup>st</sup> defendant’s prevailing interest from time to time until payment in full. The forty five (45) days’ notification of sale made reference to the said sum of USD 400,000.00 plus interest and recovery costs. In essence, all the notices indicated the sum USD 400,000.00 together with accrued and accruing interest at the stipulated rates commissions, bank charges, recovery costs and such other costs.

89. It is important to point out the amount the plaintiff was required to pay to redeem the subject property was amorphous. It had an element of accrued interest, accruing interest, bank charges and commissions which were not set out at all in the statutory notices.

90. Notably, section 90 (2) (a) of the [Land Act](#) stipulates that:-

“The notice required by subsection (1) shall adequately inform the recipient of the following matters— the nature and extent of the default by the charger (emphasis court);”

91. The essence of the statutory notice is to accord the debtor all the opportunity to be aware of the exact amount he or she must pay. It must be certain what he or she must do to salvage his charged property. Indeed, a debtor has a right of redemption until the last moment and must be able to ascertain what his or her obligation is to redeem his or her property.

92. The plaintiff had argued that its liability as a guarantor could not exceed USD 400,000.00. This was an arguable issue that could be determined by the court during trial to ascertain whether or not the intention of the parties was for the plaintiff to pay amounts that were over and above USD 400,000.00 on account of accrued and accruing interest, bank charges, commissions, recovery costs and other incidentals.

93. It was necessary to interrogate the extent of the plaintiff’s liability in view of the sums that were demanded in the three (3) months statutory notice and the notification of sale.



94. This court therefore found and held that although the 1<sup>st</sup> defendant had complied with the provisions of the law as far as issuing the statutory notices was concerned, the said notices were not valid for failure to indicate the exact sums the plaintiff was required to pay before the fall of the hammer at the public auction.
95. Going further, this court noted that in *Midlands Investments (Ksm) Ltd v Prime Bank Limited & 2 others* (supra) majanja j found that the directors of the plaintiff and the 2<sup>nd</sup> defendant herein were the same. He observed that the plaintiff herein had assigned its assets to the 2<sup>nd</sup> defendant and there was in place a deed of assignment dated May 10, 2010 between the plaintiff and the 2<sup>nd</sup> defendant.
96. In paragraph 38 of *Midlands Investments (Ksm) Ltd v Prime Bank Limited & 2 others* (supra), there was reference of the letter of offer dated May 18, 2017 in which it was stated as follows:-
- “Your request has been given due consideration and we are pleased to inform you that your existing facilities in Kenya shillings have been revised and you have been granted loan facility US\$ 5,100,000...and a loan facility vii US\$ 397,500...”
97. Although the subject properties was different in *Midlands Investments (Ksm) Ltd v Prime Bank Limited & 2 others* (supra), they were both dealing with the same letter of offer and details of facilities that have been referred to in paragraph 8 of the decision herein.
98. Bearing in mind that there were several courts cases and the matters were so intertwined and taking into consideration that there are insolvency proceedings against the 2<sup>nd</sup> defendant herein, to wit insolvency notice E008 of 2019 Re: Multiple Hauliers and insolvency petition No E012 of 2019 Re Midland Hauliers Limited, it was necessary to interrogate the facts herein with a view to answering the extent of the plaintiff’s liability of the 2<sup>nd</sup> defendant’s obligations to the 1<sup>st</sup> defendant herein, if at all and hence this court came to the firm conclusion that the balance of convenience titled in favour of an order for injunction being granted as contemplated the case of *Giella v Cassman Brown & Co Ltd* (supra). The fact that summons to enter appearance had not been taken out was not a ground to deny the plaintiff an injunction.

## Disposition

99. For the foregoing reasons, the upshot of this court’s decision was that the plaintiff’s notice of motion application dated March 9, 2022 and filed on March 10, 2022 was merited and the same be and is hereby allowed in terms of prayer No (e) therein.
100. It is hereby directed that the plaintiff files an undertaking as to damages within seven (7) days from the date hereof.
101. The plaintiff’s attention is hereby drawn to order 40 rule 6 of the [Civil Procedure Rules, 2010](#). To progress this matter further, it is hereby directed that:-
- a. The plaintiff to file and serve witness statements cross- referenced to its indexed and paginated bundle of documents by December 20, 2022.
  - b. The defendants to file and serve witness statements cross-referenced to their respective indexed and paginated bundle of documents by February 6, 2023.
  - c. The parties to file a joint statement of agreed issues by February 20, 2023.
  - d. In the event parties are unable to agree to agree on a joint statement of agreed issues, each party to file and serve its separate statement of agreed issues by February 27, 2023.



- e. Matter to be listed for pre-trial conference before the Deputy Registrar High Court Kisumu on February 28, 2023.
- f. Matter to be mentioned before this court on March 22, 2023 for further orders and/or directions.

102. Costs of the application will be in the cause.

103. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF NOVEMBER 2022**

**J. KAMAU**

**JUDGE**

