



**Geepak Limited & 2 others v Equity Bank Kenya Limited & another (Civil Suit E026 of 2024) [2025] KEHC 437 (KLR) (Commercial and Tax) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 437 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E026 OF 2024  
PM MULWA, J  
JANUARY 23, 2025**

**BETWEEN**

**GEEPAK LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
PARKSONS PACKAGING EA LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
GRACE WAMUYU MATHENGE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**EQUITY BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT  
PURPLE ROYAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application for consideration is the plaintiffs' Notice of Motion dated 25<sup>th</sup> January 2024 brought under Order 40 Rules 1, 2(2), 3, 4, 8 and 10, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The main prayer is an order of injunction seeking to restrain the defendants by themselves, their assigns, agents, servants and/or any other person whomsoever working on their authority from taking possession, alienating, disposing of, leasing, transferring, charging or taking any further steps consequential to the auction of 25<sup>th</sup> January 2024 or otherwise in any manner whatsoever interfering with all that property comprising land property Title No. Nairobi/Block/83/1980.
3. The application is based on the grounds on the face of it and supported by the affidavit sworn on 25<sup>th</sup> January 2024 by the 3<sup>rd</sup> plaintiff, Grace Wamuyu Mathenge. She deposes that the plaintiffs secured credit facilities from the 1<sup>st</sup> defendant and for which she offered a personal guarantee supported by a legal charge over the parcel of land comprising Property Title No. Nairobi/Block/83/1980. That the plaintiffs diligently serviced the loan but fell into arrears due to harsh economic times and this



prompted the 1<sup>st</sup> defendant to issue a statutory notice in exercise of its statutory right of sale under Section 90 of the Land Act.

4. It was averred that pursuant to an engagement between the parties the notice of statutory sale was withdrawn and the plaintiffs granted a grace period to rectify the default. The plaintiffs contend that despite efforts to partially service the loan, several proclamation notices were served upon them which culminated in the auction of 25<sup>th</sup> January 2024. It is argued that the 1<sup>st</sup> defendant did not serve another statutory notice before the auction after withdrawing the earlier one in June 2022.
5. In response, the defendants filed grounds of opposition dated 16<sup>th</sup> February 2024 and a replying affidavit sworn by Roy Akubu the 1<sup>st</sup> defendant's Legal Services Manager sworn on 16<sup>th</sup> February 2024. It is argued by the defendants that due to the plaintiffs' continued default and adamant refusal to service the loan, coupled with acts of open hostility and frustrations directed towards the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant was left with no choice but to exercise its statutory power of sale over the suit property.
6. The defendants in addition filed a Notice of Preliminary Objection dated 16<sup>th</sup> February 2024. In summary, the preliminary objection raises the issue of sub judice; that there is in existence a suit between the same parties touching on the same subject matter and based on similar facts, to wit Milimani HCCOMM No. E033 of 2023.
7. The application and the notice of preliminary objection were canvassed by way of written submissions, which both parties filed. The plaintiffs' written submissions are dated 10<sup>th</sup> July 2024 and those by the defendants are dated 29<sup>th</sup> July 2024.
8. After going through the rival pleadings and submissions, I will first deal with the PO as to whether or not the application and the suit is sub judice.
9. Pursuant to the provisions of Order 2 Rule 9 of the Civil Procedure Rules, a preliminary objection should be raised on a pure point of law, which if argued may dispose of the suit (See *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* 1969 EA 696).
10. The doctrine of sub-judice is to prevent a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially similar to a matter previously instituted in another court of competent jurisdiction (Section 6 of the Civil Procedure Act).
11. From the above provision the doctrine of sub-judice applies where; there are two or more suits filed consecutively, the matter in issue is similar and/or directly and substantially the same, and the parties must be the same or litigating under the same title.
12. I have perused the pleadings filed in HCCOMM No. E033 of 2023, and note that the parties are similar to the parties herein. Equally, the orders sought, in the latter suit, challenge the exercise of the 1<sup>st</sup> defendant's statutory power of sale. Thus, the issues in the two suits are directly and substantially similar. It is noteworthy though, that the suit in HCCOMM No. E033 of 2023 was wholly marked as withdrawn pursuant to the adoption by the court of a Notice of Withdrawal dated 8<sup>th</sup> April 2024. And the only pending issue is that of costs.
13. In my view, therefore, the withdrawal of HCCOMM No. E033 OF 2023 means that there exists no chance that two courts may render inconsistent decisions about the same relief. The fundamental goal of sub-judice is to stop courts with concurrent jurisdiction from concurrently hearing and ruling on two parallel lawsuits involving the same cause of action, same subject matter and similar relief. Consequently, the PO herein is deemed as spent, and the rests.



14. I will now turn to the issue of whether or not the prayers sought in the motion dated 25<sup>th</sup> January 2024 are merited.
15. The plaintiffs contend that whilst they were served with a proclamation notice intimating the defendants' intention to sell the suit property by auction, they were not served with a statutory notice under the Land Act. That due to administrative processes affecting the court system, a temporary injunction was granted after the auction sale had been concluded on 25<sup>th</sup> January 2024. That the plaintiffs were denied the opportunity to redeem the property which is now at the risk of being transferred to a third party and occasion them irreparable loss.
16. They claim that they diligently serviced the loan in a bid to salvage the charged property but due to financial constraints, the payments were irregular. That the defendants failed to avail them the requisite 90-day notice and an opportunity to redeem themselves as well as the charged property. And further that the plaintiffs will be prejudiced irreparably should the suit property be transferred to a third party. They sought that the application be allowed so as not to defeat the purpose for which the interim orders were issued. And that this application has been brought without undue delay.
17. According to the defendants the plaintiffs have not satisfied any of the conditions necessary for grant of the orders sought, the suit property having been sold through a public auction the court cannot issue injunctive or conservatory orders over that which has already happened, the equity of redemption was lost at the fall of the hammer at the public auction sale and deposit paid by the purchaser and that by virtue of Section 99(4) of the Land Act, the only available remedy to the plaintiffs would be to file a suit for damages.
18. The defendants submit that the 3<sup>rd</sup> plaintiff was issued with a demand notice on 10<sup>th</sup> December 2021 and a statutory notice on 6<sup>th</sup> June 2022 for payment of the outstanding arrears. Additionally, on 22<sup>nd</sup> November 2022, the 2<sup>nd</sup> defendant issued a courtesy notice of sale and re-advertisement for the sale of the charged property.
19. The defendants are apprehensive that if the order of injunction is granted, it would inflict greater hardship than it would avoid as the plaintiffs had already demonstrated their unwillingness to pay the debt and their intention to frustrate recovery thereof.
20. From the foregoing, it is crystal clear that a debt was owing. The only thing the plaintiffs dispute was the failure to issue fresh statutory notice after the 1<sup>st</sup> defendant withdrew the one for June 2022 to give the plaintiffs a chance to regularize the default. There is however, evidence that a notice of sale of the charged property was served on the plaintiffs on 28<sup>th</sup> November 2023 and the sale advertised on 10<sup>th</sup> January 2024, and these were ignored.
21. Failure to issue a fresh statutory notice, in the instant case, cannot be a basis for granting an injunction. From the record, the plaintiffs benefitted from a loan facility, failed to meet their part of the bargain and defaulted in repayment of the same. They have come to court with unclean hands against the equity maxim of he who comes to equity must come with clean hands. The sale by public auction has already taken place and therefore the plaintiffs' equity of redemption was extinguished at the fall of the hammer (*Kamulu Academy Limited & Anor v British American Insurance (k) Ltd & 2 Others* (2018) eKLR).
22. To succeed in a claim for injunctive relief the applicant must satisfy the conditions set out in *Giella v Cassman Brown & Co. Ltd* (1973) E. A. 385. First, they must show a prima facie case with a probability of success. Second, they must establish that they will suffer irreparable injury, which would not adequately be compensated by an award of damages. Third, if the court is in doubt, it will decide an application on the balance of convenience.



23. The applicant is required to establish a prima facie case. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited & 2 others* (2003) eKLR elaborates what constitutes a prima facie case as follows:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

24. In this case, on the basis of my observation above, the Court finds that the plaintiff has not established a prima facie case with a probability of success. The plaintiffs were issued with a statutory notice of sale in June 2022, which was withheld to give a chance to redeem the default, but due to their unwillingness the 1<sup>st</sup> defendant proceeded to exercise their statutory right of sale and the property sold to a third party.

25. As a consequence, the application dated 25<sup>th</sup> January 2024 is found to lack merit and is dismissed with costs to the defendants.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**P.M. MULWA**

**JUDGE**

In the presence of:

Mr. Kipkorir for Plaintiffs/Applicants

Ms. Moturi h/b for Mr. Njuguna for Defendants/Respondents

Court Assistant: Carlos

