



REPUBLIC OF KENYA



**Suleiman Enterprises Limited & another v Dubai Bank Kenya Limited
(In Liquidation) & 3 others (Commercial Civil Suit E597 of 2023)
[2025] KEHC 387 (KLR) (Commercial and Tax) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E597 OF 2023**

**PM MULWA, J
JANUARY 23, 2025**

BETWEEN

**SULEIMAN ENTERPRISES LIMITED 1ST PLAINTIFF
KEMUSALT PACKERS PRODUCTION LIMITED (IN RECEIVERSHIP) 2ND
PLAINTIFF**

AND

**DUBAI BANK KENYA LIMITED (IN LIQUIDATION) 1ST DEFENDANT
KENYA DEPOSIT INSURANCE CORPORATION 2ND DEFENDANT
KENSALT LIMITED 3RD DEFENDANT
BASELINE AUCTIONEERS 4TH DEFENDANT**

RULING

1. The motion dated 5th December 2023 brought by the Plaintiff seeks the following reliefs:
 - i. Leave to institute suit against the 1st defendant, Dubai Bank of Kenya Limited (in liquidation).
 - ii. That upon granting of the leave, this court be pleased to order that the proceedings herein against the 1st Defendant be deemed as proper, regular and duly filed.
 - iii. An injunctive relief restraining the respondents, themselves, their agents, servants, assignees or any other person from entering, encroaching, taking possession, disposing, selling, encumbering, transferring, charging in any other way interfering with LR. No. 21918(Grant Number 28301) measuring 1140 hectares, LR. No. 21983 (Grant number CR 28443) measuring 819.7 hectares and L.R. No. 22138 (Grant no CR. 28851) measuring 1575 hectares



- iv. An order setting aside and cancellation of the sale of transfer LR No. 21918 (Grant Number 28301) LR. No. 21983 (Grant number CR 28443) and L.R. No. 22138 (Grant no CR. 28851)
 - v. An order of accounts with regard to the sale and disposal of LR No. 21918 (Grant Number 28301) LR. No. 21983 (Grant number CR 28443) and L.R. No. 22138 (Grant no CR. 28851)
 - vi. Any other further orders
 - vii. The costs of the application be provided for.
2. The motion, is premised on the grounds on the face of it and supported by Ahmed Hassan's affidavit dated 5th December 2023 and 17th July 2024. He contests the sale and transfer of the suit's properties to the 3rd Defendant. The 1st and 2nd Respondents filed their replying affidavit sworn by John Ombasa a senior Resolution Officer and employee of the 2nd Defendant on 20th June 2024 while the 3rd Respondent's director Perry Mansukh Kansagra's affidavit is dated 28th March 2024.
 3. The application was heard through written submissions.

Background

4. In brief summary, the 1st Applicant, a limited liability company, owns LR Nos. 21918 and 21983, while the 2nd Applicant (currently in receivership) owns LR No. 22138. The 2nd Applicant had a loan agreement with East African Development Bank (EADB) in 1999, secured by the 1st Applicant's properties. Due to default by Kemu-Salt Packers Production Ltd, the properties were sold at a public auction by the 1st Defendant to the 3rd Defendant.
5. I have carefully considered the pleadings and the rival submissions made by the parties. The central issue for determination is whether the Applicants have made out a case for granting the reliefs sought.
6. The first relief sought pertains to the Applicants' request for leave to institute proceedings against the 1st Defendant, Dubai Bank Kenya Limited, which is currently under liquidation. The Applicants argue that the 1st Defendant's action of disposing of its property violates its constitutional right to own property and challenges how the loan facility with EADB was transferred to the 1st Defendant.
7. On the other hand, the 2nd Defendant argues that the facilities charged to EADB were legally transferred to the 1st Defendant and form part of the assets of Dubai Bank. It submits that its appointment was intended to protect the assets of the 1st Defendant in liquidation, and that the Applicants have failed to demonstrate that the suit has merit.
8. In considering the relief sought, reference must be made to the statutory framework under which the liquidation of the 1st Defendant is governed. Specifically, Section 56(2) of the [*Kenya Deposit Insurance Act*, 2012](#), provides:

“No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the court.”
9. This provision is central to the issue at hand. It requires that no civil action can be brought or continued against a financial institution under liquidation without first obtaining the sanction of the court. While this provision establishes a procedural barrier, it simultaneously recognizes that courts can grant permission to proceed when circumstances warrant such an action.



10. The liquidation of the 1st Defendant does not, in itself, extinguish the Applicants' right to seek legal remedies. As such, the relief sought is not merely a procedural formality, but an essential step to ensure that the 1st Defendant's liquidation status does not hinder the Applicants' right to a fair hearing. In *Bisai & Another v Kenya Commercial Bank Ltd & Others* [2002] 2 EA 346, the court stated that:

“To commence any action or proceedings against a company in liquidation, the plaintiffs are obliged, and mandatorily so by law, *Companies Act*, to obtain leave from the Court since a company in liquidation is under the supervision of the Court and whatever the liquidator does or any other party wishes to bring along as an action or proceeding against the company, must have the sanction of the Court first. The learned judge further held that the leave ought to be sought before bringing an action or proceeding and not after...”
11. Similarly, in *Rashik Kumar Punja Shah & Another v Chase Bank Limited (In Liquidation) & Another* [2021] eKLR, the court emphasized that leave is intended to filter out frivolous or meritless applications and ensure that any claim has a reasonable chance of success.
12. I am tasked with determining whether the Applicants have demonstrated sufficient grounds to justify the leave sought. The primary objective is to ensure that any legal claims arising during the liquidation process can be pursued in accordance with the law to safeguard the Applicants' interests. To meet this threshold, the Applicants must demonstrate that they have a valid claim to proceed with the litigation.
13. In the present case, the Applicant challenges the manner in which the suit properties were sold through auction and the subsequent transfer process. Specifically, they argue that the auction was conducted improperly, citing procedural irregularities that they claim rendered the sale defective. Additionally, the Applicants allege that the properties were significantly undervalued during the auction, thereby causing substantial financial prejudice. These allegations raise serious questions about the legality and fairness of the auction and transfer process, warranting further scrutiny by the Court.
14. Upon reviewing the material presented, I find that the Applicants have demonstrated a reasonable cause of action. This conclusion aligns with the principles outlined in *Kwanza Estates v Dubai Bank of Kenya Ltd & Another* (2016) eKLR, the court noted that the leave to institute proceedings can be granted when the Applicants have demonstrated that they have a valid claim.
15. The Applicants' assertions in this case meet the required threshold, as they highlight specific irregularities and potential violations of the law that merit judicial intervention.
16. The sanction sought is not intended to hinder the liquidation process but to enable the Applicants pursue legitimate legal claims that have arisen from the institution's operations, either prior to or during the liquidation process. I note that the present application was filed following the appointment of the 2nd Respondent as the liquidator of the 1st Respondent.
17. It is within the Court's discretion to grant the leave sought, provided it is satisfied that a prima facie case has been established. Upon review, I find that the Applicants have demonstrated a reasonable cause of action. In these circumstances, the Applicants have shown that they have a valid claim against the Respondents, which justifies the granting of the orders sought.
18. The next issue for consideration is whether this court ought to issue the injunctive reliefs as sought. In order to succeed, the applicants must satisfy the conditions set in the celebrated case of *Giella v Cassman Brown & Company Ltd* (1973) EA. These conditions require the applicant to demonstrate a prima facie case, irreparable harm that would not be adequately compensated by an award of damages, and if the court is in doubt it ought to decide on a balance of convenience.



19. These conditions must be met sequentially. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2013] KECA 347 (KLR), the court held that where a prima facie case is not established, the court need not consider the second and third conditions. That is to say, that the Applicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, it will consider the balance of convenience. Finally, where no prima facie case is established, the court need not look into the question of irreparable loss or balance of convenience.
20. The Applicants argue that they have established a prima facie case, citing *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR, where the Court of Appeal stated that: “A prima facie case is one where, on the material presented, a tribunal would conclude that there is an infringement of a legal right that warrants an explanation or rebuttal.” The applicants argue that the properties were under valued and that no valuation was conducted prior to the sale of the properties.
21. Given the allegations regarding the undervaluation of the properties, the court must address whether the sale of the properties to the 3rd Defendant complied with the law. The Plaintiffs have raised a legitimate concern regarding the significant disparity between the prior valuation of the properties, which was Kshs. 991,212,500.00 in 2011, and the final sale price of Kshs 320 million in 2023. The applicants assert that this sharp decrease in value suggests that the sale was not conducted at a fair market value, potentially violating their constitutional right to property under *the Constitution* of Kenya.
22. The principle of fair market value is essential when selling charged property. In situations where property is sold under statutory powers of sale, the chargee must act in good faith to ensure the property is sold at a reasonable price that reflects its true value. A failure to uphold this principle could lead to an unjust deprivation of the chargor's property, infringing upon their constitutional rights.
23. As noted in the submissions, the stark difference between the 2011 valuation and the 2023 sale price raises serious concerns regarding the transparency and fairness of the valuation process. The fact that the properties were sold for much less than their earlier valuation suggests that the sale may not have been conducted at a competitive market price, a responsibility that lies with the chargee. The failure to determine the true market value of the property's casts doubt on the credibility of the sale process and could potentially invalidate the sale if it is found that the applicants were unfairly deprived of their assets.
24. The court finds that the applicants' claims regarding the lack of transparency in the valuation process have merit. The assertion that the properties were valued at Kshs. 991 million in 2011 and subsequently sold for Kshs. 320 million in 2023 raises doubts about whether the chargee acted in good faith and complied with the legal requirements for a fair sale. In light of this, the court is inclined to intervene and consider the applicants' request for relief.
25. In considering the relief sought, the court must carefully balance the interests of the Plaintiffs and the 3rd Defendant, weighing the potential harm caused by an undervalued sale against the applicants' constitutional rights to own and enjoy their property. This requires a detailed review of the valuation process and whether it was conducted in accordance with legal requirements and established procedures.
26. In exercising the Statutory Right of Sale, a chargee owes the chargor a duty to ensure transparency throughout the entire process. This duty is critical to protect the chargor's interests, safeguard their constitutional right to property, and ensure that the sale is fair and just.



27. Transparency begins with the issuance of the statutory notice. It should be accurately addressed, properly dispatched and received by the chargor to notify them of the default and the potential sale of the property. The notice must clearly state the amount owed and the consequences of failing to remedy the default, ensuring that the chargor has adequate time to respond.
28. Furthermore, the chargee must advertise the sale in a manner that ensures maximum visibility. The advertisement should include full and accurate details about the property being sold, such as its location, description and any relevant legal information. This ensures that the sale is not only properly publicized but also conducted in a manner that reflects the property's true market value, preventing the property from being undervalued or sold in an unfair manner.
29. In this regard, the court has a duty to ensure that the chargee has adhered to all the necessary procedural requirements and that the sale was conducted transparently. If there is evidence suggesting that the sale did not follow the prescribed process, including concerns about undervaluation or insufficient public notice, the court may, in determining the main suit, intervene to protect the chargor's interests.
30. While the issue of accounts is relevant, it cannot be the sole basis for issuing an injunction. The court should allow for the reconciliation of accounts to take place during the full hearing of the case. This approach ensures that the determination of any outstanding financial matters occur within the appropriate procedural context, where both parties have the opportunity to present their case and supporting documentation. The court will allow for the proper reconciliation of accounts to occur during the proceedings.
31. Consequently, the application dated 5th December 2023 succeeds to the extent that:
 - i. Leave is granted to the applicants to initiate legal proceedings against the 1st defendant.
 - ii. The proceedings filed against the 1st defendant are deemed duly filed.
 - iii. An order of injunction against Respondents, themselves, their agents, servants, assignees or any other person from entering, encroaching, taking possession, disposing, selling, encumbering, transferring, charging in any other way interfering with LR. No. 21918 (Grant Number 28301) measuring 1140 hectares, LR. No. 21983 (Grant Number CR 28443) measuring 819.7 hectares and L.R. No. 22138 (Grant Number CR. 28851) measuring 1575 hectares pending hearing and determination of the suit.
 - iv. The 1st Defendant shall within 21 days avail to the Plaintiffs/Applicants a full account of all transactions related to the sale and disposal of LR No. 21918 (Grant Number 28301), LR No. 21983 (Grant Number CR 28443), and LR No. 22138 (Grant Number CR 28851).
 - v. The costs of the application shall be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Munyua Ezekiel for Plaintiff/applicant

Mr. Chepkwony h/b for Ms. Lubano for 1st & 2nd Defendants

Ms. Oruta h/b for Ms. Akwana for 3rd Defendant



Court Assistant: Carlos

