



**One Upperhill Towers Limited v Credit Bank Limited & 2 others; Jabavu Village Limited & another (Interested Parties) (Civil Suit E053 of 2025) [2025] KEHC 1888 (KLR) (Commercial and Tax) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1888 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E053 OF 2025  
PM MULWA, J  
FEBRUARY 24, 2025**

**BETWEEN**

**ONE UPPERHILL TOWERS LIMITED ..... PLAINTIFF**

**AND**

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

**PURPLE ROYAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**GARAM INVESTMENTS AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JABAVU VILLAGE LIMITED ..... INTERESTED PARTY**

**HASSCON PHARMACEUTICALS LTD ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of two applications. There is the main application dated 30<sup>th</sup> January 2025 that gave rise to the subsequent application dated 7<sup>th</sup> February 2025.
2. The applicant's Notice of Motion application dated 30<sup>th</sup> January 2025 was brought under Order 40 Rules 1, 2, 3 & 4, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the [Civil Procedure Act](#), and seeks the following orders:
  - a. Spent
  - b. That pending the hearing and determination of this application, the Honourable Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves,



their servants, agents or any person claiming through or under them from entering, selling, taking over, advertising, offering for sale or in any manner whatsoever interfering with that parcel of land known as Title No. Nairobi/block 31/219.

- c. That pending the hearing and determination of this suit, the Honourable Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their servants, agents or any person claiming through or under them from entering, selling, taking over, advertising, offering for sale or in any matter whatsoever interfering with that parcel of land known as Title No. Nairobi/block 31/219.
  - d. That costs of the application be provided for.
3. The application is supported by grounds on the face thereof and by the affidavit of Abdulkadir Hussein, the applicant's director sworn on 30<sup>th</sup> January 2025.
  4. The application is opposed by the 1<sup>st</sup> defendant/respondent vide a replying affidavit sworn on 12<sup>th</sup> February 2025.
  5. In response to the replying affidavit, the applicant filed a further affidavit sworn on 17<sup>th</sup> February 2025.
  6. The second application was filed by the applicant and is dated 7<sup>th</sup> February 2025 seeking the following orders:
    - a. Spent
    - b. Spent
    - c. That upon grant of prayer (2) above and pending the hearing and determination of the application dated 30<sup>th</sup> January 2025, the Honourable Court be pleased to grant a temporary injunction restraining the 3<sup>rd</sup> Respondent whether by itself, its servants, agents or any person claiming through or under them from entering, selling, taking over, advertising, offering for sale or in any matter whatsoever interfering with that parcel of land known as Title No. Nairobi/block 31/219.
    - d. That costs of the application be provided for.
  7. This second application is supported by the affidavit of Abdulkadir Hussein, sworn on 7<sup>th</sup> February 2025.
  8. The 3<sup>rd</sup> defendant/respondent and the interested parties have not participated in these proceedings despite proper service by the applicant.
  9. The court heard the applications by way of oral submissions.
  10. I have considered the applications, the supporting affidavits, the affidavit filed in opposition, the oral submissions by the rival parties, the law and case law relied on. I note that the outstanding prayer made vide the applications are those of temporary injunction.
  11. In deciding whether or not to grant the orders sought I am guided by the well-established principles enunciated in the locus classicus of *Giella v Cassman Brown* (1973) EA 358 wherein it was held that all the court was required to do was to satisfy itself if a party had shown a prima facie case with a probability of success and whether, if the temporary injunction was refused, the party seeking it stood to suffer irreparable harm for which damages would not be an adequate remedy. If in doubt, the court was to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lay with the applicant or with the respondent.



12. Courts have taken the position that it is not the role of the court, when considering the interim applications, to make a final determination on the conflicting affidavit evidence. Lord Diplock warned in *American Cyanamid Co. (No. 1) v Ethicon Ltd* [1975] UKHL 1 as follows:

“It is not part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”
13. Similarly, in *Mbuthia v Jimba Credit Finance Corporation & another* [1988] KLR 1 it was held that:

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”
14. Expounding on the principles in the *Giella* case (*supra*), the Court, in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, stated that:

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”
15. Having regard to the known principles of injunction as set out in the above cited cases, I will now turn to consider if the application meets the threshold set therein.
16. Firstly, the fundamental issue to consider is whether the plaintiff/applicant has made a prima facie case with a probability of success. In the case of *Mrao v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR 125, a prima facie case was well described as thus:

“A prima facie case in a civil application includes but not confined to “a genuine and arguable case”, it is a case which, on 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.”
17. It is not disputed that the interested parties obtained credit facilities from the 1<sup>st</sup> respondent which were granted vide letters of offers dated 5<sup>th</sup> May 2020 and 3<sup>rd</sup> March 2022. The bone of contention however, is in respect to non-compliance with service of requisite statutory notices before listing the charge property NAIROBI/BLOCK 31/219 for sale by way of public auction and that the charge property was being disposed of at an undervalue.
18. The applicant’s application is premised on the assertion that the 1<sup>st</sup> respondent did not serve them with the requisite statutory notices before commencing the process of realizing the security. They, in effect, posited that neither the Section 90 notice nor the notice envisaged under Section 96 of the *Land Act* were served.
19. Section 90 of the *Land Act* provides that:



- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
  - (2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters;
    - a) the nature and extent of the default by the chargor;
    - b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
    - c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
    - d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
    - e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
20. The 1<sup>st</sup> respondent exhibited a copy of the notice dated 6<sup>th</sup> September 2022 addressed to the applicant pursuant to the above provision (Annexure “FN-5”). It confirms that the notices were issued and sent via registered mail; that the plaintiffs were given three (3) months within which to rectify their default. The amount due at the time was also specified (Receipt No. M00100 – 09229982157 dated 7<sup>th</sup> September 2022 from Postal corporation of Kenya).
21. Likewise, the 1<sup>st</sup> respondent exhibited a copy of the Section 96 notice (Annexure to the replying affidavit dated 12<sup>th</sup> June 2023). It makes reference to the Section 90 notice aforementioned and further indicates that the applicant is thereby granted 40 days to rectify their default; failing which the charged property would be put up for auction (Receipts Nos. M00100 – 06230805987 and M00100 – 06230805981 all dated 15<sup>th</sup> June 2023 from Postal corporation of Kenya).
22. I find that the 1<sup>st</sup> respondent was in compliance with Section 96, which states that:
- (1) Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under Section 90(1), a chargee may exercise the power to sell the charged land.
  - (2) 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.
  - (3) A copy of the notice to sell served in accordance with Subsection (2) shall be served on-
    - (a) the Commission, if the charged land is public land;



- (b) the holder of the land out of which the lease has been granted, if the charged land is a lease;
- (c) a spouse of the chargor who had given the consent;
- (d) any lessee and sublessee of the charged land or of any building on the charged land;
- (e) any person who is a co-owner with the charger;
- (f) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
- (g) any guarantor of the money advanced under the charge;
- (h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
- (i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

23. Although the applicant denied service, the 1<sup>st</sup> respondent presented proof, vide the replying affidavit sworn by Francis Ngaruiya on 12<sup>th</sup> February 2025 showing that the documents were served on the applicant by registered post through the address given in the contractual documents. Copies of the Certificates of Posting were annexed as proof of service. It is therefore apparent, albeit on a prima facie basis, that service of the notices was effected in compliance with Sections 90 and 96 of the [Land Act](#).

24. In *Nyagilo Ochieng & Another v Phaniel B. Ochieng & 2 Others* [1996] eKLR, the Court of Appeal made it clear that:

“Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the [Interpretation and General Provisions Act](#).”

25. Section 3(5) of the [Interpretation and General Provisions Act](#), provides that:

“Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post.”

26. In the premises, the burden of proof is on the applicant to prove the contrary and there being no indication to the contrary, for the purposes of the instant applications, service in respect of Sections 90 and 96 notices herein is deemed to have been properly made.

27. In addition to the two notices aforementioned, the 2<sup>nd</sup> respondent was under duty to serve the auctioneer’s redemption notice upon receiving instructions from the 1<sup>st</sup> respondent to sell the charged property.

28. In this regard, Rule 15 of the Auctioneers Rules states that:

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



- (a) record the court warrant or letter of instruction in the register;
- (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
- (c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
- (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;
- (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.

29. The parties are in agreement that the redemption notice was duly issued by the 2<sup>nd</sup> respondent as averred in para. 5 by Abdulkadir Hussein in the supporting affidavit sworn on 30<sup>th</sup> January 2025. However, the applicant argues that the 1<sup>st</sup> respondent has grossly undervalued the charged property.

30. Section 97(2) of the *Land Act* requires that:

- (1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.
- (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 Chargee is in breach of the duty imposed by subsection (1); and
  - (b) The Chargor 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 Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).

31. There is no denying that there was indeed a valid valuation report prepared and that it was prepared before the sale; and therefore, there was conformity with the requirements of Section 97(2) of the *Land Act*. Moreover, Rule 11 of the Auctioneer rules make specific reference to the contents of a letter of instructions to an auctioneer. Whether or not the valuation is at an undervalue is a matter that is outside the bounds of the instant application and therefore does not fall for determination at this point.

32. In view of the foregoing, I am not satisfied that a prima facie case has been made out herein by the applicant to warrant the issuance of the injunctive order sought. In the premises, there would be no need to consider the question as to whether the plaintiff stands to suffer irreparable harm, or in whose favour the balance of convenience tilts.



33. In the Nguruman Limited case (supra) the Court of Appeal held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially...”

34. Consequently, the applicant’s motions dated 30<sup>th</sup> January 2025 and 7<sup>th</sup> February 2025 must fail. The same are hereby dismissed with an order that the costs thereof be in the cause. The 1<sup>st</sup> respondent is at liberty to proceed and exercise its statutory power of sale.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2025.**

**P.M. MULWA**

**JUDGE**

In the presence of:

Mr. Mutunga for Plaintiff/Applicant

Mr. Gakunga for 1<sup>st</sup> Defendant/Respondent

Court Assistant: Carlos

