



**Obege v Diamond Trust Bank & another (Commercial Case E238 of 2024)
[2025] KEHC 1988 (KLR) (Commercial and Tax) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E238 OF 2024
MN MWANGI, J
FEBRUARY 7, 2025**

BETWEEN

JOAN SYLVIA OBEGE APPLICANT

AND

DIAMOND TRUST BANK 1ST RESPONDENT

DALALI TRADERS AUCTIONEERS 2ND RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 21st August 2024 filed by the plaintiff/applicant under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 42 Rules 6(1) & (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant seeks an order for stay of the intended auction of the applicant's house, Town House No. 908 on L.R NO. 10209/4 Great Valley Villas, Karen, Nairobi pending determination of the suit herein.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Joan Sylvia Obege, the applicant herein. The applicant's case is that she filed suit seeking to protect her matrimonial home, being Town House No. 908 erected on LR NO. 10209/4 Great Valley Villas, Karen, Nairobi, which suit is yet to be determined. She averred that the said suit was prompted by the 1st respondent's refusal to disclose details about the financial facility secured by the aforesaid property.
3. Ms. Obege averred that on 25th July 2024 and 6th August 2024, the 2nd respondent advertised the suit property for auction in the Daily Nation and Standard Newspapers, respectively. She claimed not to have been served with any auction notice to date. She deposed that in the event the instant application is disallowed, there is an imminent threat of the suit property being auctioned, which will render this suit meaningless and cause irreparable harm and destitution.



4. In opposition to the application, the 1st respondent file a Notice of Preliminary Objection dated 23rd September 2024 on the ground that –
 - i. The applicant lacks locus standi to commence legal proceedings for and on behalf of an estate which she has not obtained judicial authority of administration over by way of grant of letters of administration ad litem and the proceedings herein can therefore not be sustained in the prevailing circumstances.
5. The instant application was canvassed by way of written submissions. The applicant’s submissions were filed by the law firm of Edward C. Asitiba & Associates Advocates on 20th September 2024. The respondents had not filed any submissions by 23rd October 2024 when this matter was reserved for ruling.
6. Mr. Edward Asitiba, learned Counsel for the applicant submitted that a chargee’s statutory power of sale allows a lender to sell charged land upon a chargor’s default without the Court’s intervention, but upon compliance with inter alia, the provisions of Section 90 of the *Land Act* which require a chargee to issue a 90-day notice to the chargor to rectify the default by paying the owed amount or fulfilling terms of the Agreement, and Section 96(2) of the *Land Act* that mandates a 40-day Notice to Sell to be issued to the chargor and the spouse who provided spousal consent for the property to be charged, as is the case herein. Mr. Edward Asitiba asserted that the 1st respondent did not comply with any of the aforesaid provisions. To buttress the said submissions, he relied on the decisions made in *Albert Mario Cordeiro & another v Vishram Shamji* [2015] eKLR and *Yusuf Abdi Ali Co. Ltd v Family Bank Ltd* [2015] eKLR.

Analysis And Determination.

7. Upon consideration of the instant application, the affidavit filed in support thereof, the Notice of Preliminary Objection by the 1st respondent and the written submissions by Counsel for the applicant, the issues that arise for determination are –
 - i. Whether the 1st respondent’s Notice of Preliminary Objection should be sustained;
 - ii. Whether the instant application is merited.

Whether the 1st respondent’s Notice of Preliminary Objection should be sustained.

8. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696 at p.700, the Court defined what a Preliminary Objection is, and discussed its application in the following words-

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing



but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

9. The 1st respondent claims that the applicant lacks the requisite locus standi to file the suit and the instant application between the parties herein on behalf of the estate of the deceased, for want of judicial authority having been granted to her by way of grant of letters of administration ad litem. The 1st respondent contends that the proceedings herein cannot be sustained.
10. It is not disputed that the applicant's husband (now deceased) was a customer of the 1st respondent, and had taken out a financial facility that was secured by the suit property which the applicant claims is their matrimonial home. The applicant contends that at the time when her husband (now deceased) was procuring the said financial facility, she executed a spousal consent signifying her consent for the suit property to be charged. She explained that the respondents advertised the suit property for sale by public auction without first serving her with her a Notification of Sale as provided for under Section 96(2) of the Land Act. The said provisions state that—
 1. Where a chargor 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...
11. In filing the instant application, the applicant is challenging the intended auction of the suit property for want of compliance with the provisions of Section 96 of the Land Act, which placed an obligation on the 1st respondent to serve her with a 40-days' Notice of Sale before exercising its statutory power of sale over the suit property.
12. From the circumstances of this case, I am not persuaded that the applicant needs any judicial authority to be granted to her by way of grant of letters of administration ad litem in order for her to pursue the instant application, as she is pursuing the same on her own behalf and not on behalf of the estate of her deceased husband, as she had given spousal consent.
13. In the premise, I dismiss the 1st respondent's Notice of Preliminary Objection for being unmeritorious.

Whether the instant application is merited.

14. The instant application has been brought pursuant to the provisions of Order 42 Rules 6(1) & (2) of the Civil Procedure Rules, 2010. The applicant is seeking an order for stay of the intended auction of the suit property. I am cognizant of the fact that Order 42 Rule 6 of the Civil Procedure Rules, 2010 grants Courts the discretion to issue an order for stay pending appeal. In this case, the applicant has neither alleged nor demonstrated the existence of an appeal from a decision of a Subordinate Court and/or a Tribunal, to warrant this Court to invoke its discretion and entertain the application herein.



15. In the premise, this Court finds that the application as drafted in regard to the prayer for stay of execution cannot be entertained, and the orders sought cannot be granted. A perusal of the pleadings filed reveals that the applicant ought to have filed an application for injunction pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010, and not an application for stay of the intended auction.
16. As a consequence thereof, I find that the instant application is fatally defective. I hereby strike it out. Each party shall bear its own costs as both the 1st defendant and the applicant have lost in their respective applications.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Asitiba for the plaintiff/applicant

Mr. Ngamiya h/b for Mr. Angwenyi for the 1st defendant/respondent

Ms B. Wokabi - Court Assistant.

