



**Rikana Supermarkets Limited v Kenya Commercial Bank Limited (Commercial Case E205 of 2024) [2025] KEHC 2285 (KLR) (Commercial and Tax) (10 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2285 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E205 OF 2024  
JWW MONG'ARE, J  
FEBRUARY 10, 2025**

**BETWEEN**

**RIKANA SUPERMARKETS LIMITED ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff has moved this court by a Certificate of Urgency filed under a Notice of Motion application brought under Articles 40 and 159 of *the Constitution* of Kenya, Sections 3, 3A, and 63(c) of the *Civil Procedure Act*, Orders 40 Rules 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 89, 90(1) and 96(2) of the *Land Act* and Section 13 of the Environment and *Land Act* seeking the following Orders:-
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to issue a temporary Order of injunction restraining the Defendant/Respondent, its employees, agents, servants or otherwise from selling by public auction, private treaty, alienating, disposing of, transferring or otherwise in any way dealing with all those parcels of land known as L.R. No.209/8634-Lungalunga Industrialarea & L.r. No. Nrb/bl 82/656(bungalow No. 656) Sunrise Donholm to any person, body and / or entity pending the hearing and determination of the main suit filed herewith.
  - d. That the costs of this Application be provided for.
2. The application is supported by the grounds set on its face and the supporting affidavit of Jackylin Riki sworn on 19<sup>th</sup> April 2024. The Application is opposed and the Defendants have filed a replying



affidavit sworn by Francis Kiranga, the Defendants/ Respondent's Recovery Manager. Sworn on 10<sup>th</sup> July 2024.

3. When this matter was first considered by the court *ex parte* on 6<sup>th</sup> May 2024, the court issued a temporary order of injunction restraining the Defendant from dealing in any way and/or alienating the two parcels of land being L.R. No.209/8634-Lungalunga Industrialarea & L.r. No. Nrb/bl 82/656(bungalow No. 656) Sunrise Donholm pending the interparte hearing and determination of the present application. Parties were therefore directed to file a response and their written submissions and the matter was canvassed by way of written submissions.

### **Analysis And Determination**

4. Upon careful consideration of the application and the supporting affidavit as filed by the Plaintiff/Applicant and the replying affidavit by the Defendant's Recovery Manager and the rival submissions by the parties, I note that the only issue that this court is called to consider is whether the Applicant have met the threshold set out by law for a grant order of Interim Injunction pending the hearing and determination of the main suit.
5. Order 40 Rule 1 of the Civil Procedure Rules provides as follows:-
  - “ 1. Cases in which temporary injunction may be granted [Order 40, rule 1]  
Where in any suit it is proved by affidavit or otherwise—
    - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
    - (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
6. The premises upon which a court must consider before granting an order off injunction are well settled in law by the decision in the Locus Classica case of *Giella Vs. Cassman Brown & Co., Ltd.* [1973] E.A. 358 where a party seeking for injunctive relief ought to satisfy the court that it is deserving of the orders sought by demonstrating that it has a prima facie case with a probability of success and that it will suffer irreparable injury in which it would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience.
7. These conditions are to be applied as separate, distinct and as logical hurdles which the Plaintiff is expected to surmount sequentially which means that if the Applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration by the court. (see *Nguruman Limited v Jan Bonde Nielsen& 2 others* [2013] KECA 347 (KLR).



8. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) explained 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.”

9. A look at the pleadings and the supporting affidavit reveal that indeed the Plaintiffs obtained a loan facility from the Defendant and to secure the borrowing offered the two properties herein being L.R. No. 209/8634-LUNGALUNGA INDUSTRIALAREA & L.R. NO. NRB/BL 82/656(BUNGALOW NO. 656) SUNRISE DONHOLM as securities for the loan. The Plaintiff's admit that the said loan is in arrears and at the time of filing suit, the outstanding loan stood at Kshs.43,149,254.33/-. the Plaintiffs are opposed to the Defendants exercise of its statutory power of sale now commenced by issuance of the various statutory notices under the Land Act.

10. It is the case put forward by the Plaintiffs that the Defendant's have in the past allowed them to offer for sale by way of private sale its properties namely L.R No. 86 / 1645 and use the proceeds to reduce its indebtedness and also support its business. It is their position that the Defendant should allow them to sell the charged properties by private sale as they stand to realize a better price as opposed to disposing the same through a public auction as the Defendant has commenced the process through its agents, the Auctioneers. To the Plaintiff, the proposed sale by private sale will mutually benefit the parties and urge the court to restrain the Defendant from proceeding with the sale in the manner adopted by public auction.

11. In opposing the application, the Defendants argue that it has complied with the law and meticulously served the Applicant with the necessary Statutory Notices and therefore afforded the Applicant an opportunity to remedy the default position of its loans with them. The Defendant further contends that there is no evidence provided to confirm that offering the suit properties for sale by public auction will significantly fetch a lower price than if the Applicant is allowed to dispose the same by private sale and this position is speculative and not backed by any data or the law.

12. It is the Defendant's position that it has lawfully proceeded to exercise its statutory power of sale under the charges and that the Applicant has been at all times aware that the loan is in default and has failed and or neglected to redeem the same by paying the arrears and therefore leaving the Defendant with no alternative but to proceed with the intended sale to recover the loan.

13. I have carefully considered all the arguments put forward by the parties and note that the Plaintiff/Applicant admits to the loan and indeed confirms that the same is in arrears. I note that section 97(1) of that land Act places an obligation on a Chargee when exercising its statutory power of sale to act in the best interest of the Chargor. Section 97(1) provides as follows:-

“A charge who exercises a power to sell land, including the exercise of the power to sell pursuant of an order of a court, owes a duty of care to the charger, any guarantor of the whole or any part of the sums advanced to the charger, any charge under subsequent charge or under a lien to obtain the best price reasonably obtainable at the time.”



14. This was reinforced by the court in the case of Patrick Kangethe Edward v Co-operative Bank of Kenya Limited and another(2016) eKLR when it held that:-

“Section 97(1) of the Land Act now places a duty of care on a chargee while exercising its power of sale. That duty to this court includes the duty to ensure that the best achievable price is realized and further that the Chargor whose land is to be sold is not exposed to unnecessary and avoidable expense”.

15. It is not disputed that the Defendants in the past accorded the Plaintiff the opportunity to dispose of another property to offset the arrears in the loan facility. This act allowed the Plaintiffs to also access necessary working capital for its business. The Plaintiff has explained herein that it was due to illness brought about by the Covid-19 pandemic that impacted its business and occasioned the default on its loans with the Defendant. By having in the past allowed the Plaintiff an opportunity to privately dispose of one of its assets to offset the loan arrears, it is in my view that, the Defendant have created a legitimate expectation that such a request would not be turned down in the future.

16. I am therefore persuaded that the Plaintiff has made out a prima facie case to warrant this court grant the orders sought. As to whether damages would be an adequate remedy, I am persuaded that a sale by private treaty initiated by the Plaintiff would be mutually beneficial to the parties herein if allowed. Subsequently, I am persuaded that the balance of probability tilts in favour of granting the prayers sought.

17. I am alive to the rights created by the charge in favour of the Chargee and in order to balance the interest of the parties will limit the period within which this sale should take place to six(6) Months. If the Plaintiff is not able to identify a suitable buyer for its property as sought herein within the said period, the Defendants are at liberty to reissue the requisite statutory notices created by the charge and proceed to exercise its statutory power of sale.

18. In light of the above findings, I hold that the Plaintiff's application dated 19<sup>th</sup> April 2024 is merited. I allow the same as prayed subject to the Plaintiff within six (6) months concluding the intended sale by private treaty of its property to clear the outstanding loan. If the said sale remains uncompleted on the expiry of the period of 6 months from today, the Defendant is at liberty to proceed with its exercise of its statutory power of sale under the charge. Each party shall bear their own costs of this application. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF FEBRUARY 2025**

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**J.W.W. MONGARE**

**JUDGE**

In the Presence of:-

1. Mr. Ogutu for the Plaintiff/Applicant.
2. Mr. Jumba for the Defendant/Respondent.
3. Amos - Court Assistant

