



REPUBLIC OF KENYA



Mturi & another v Diamond Trust Bank Kenya Limited & another (Commercial Suit E003 of 2025) [2025] KEHC 4005 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL SUIT E003 OF 2025
F WANGARI, J
MARCH 13, 2025**

BETWEEN

JONATHAN ANIEL MTURI 1ST PLAINTIFF

PATIENCE SIKUKU MTURI 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED 1ST DEFENDANT

**STEPHEN KARANJA KANG'ETHE T/A DALALI TRADERS
AUCTIONEERS 2ND DEFENDANT**

RULING

1. This ruling relates to a Notice of Motion dated 31/01/2025 which sought for the following orders in summary;
 - a. Spent;
 - b. Spent;
 - c. That a Temporarily Injunction do issue restraining the Defendants/ Respondents, by themselves, or agents from receiving the purchase price, transfer, disposal or any dealings on the property known as C.R 18746, Subdivision No. 4112, Section 1, Mainland North Mombasa, measuring approximately 0.4133 ha pending hearing and determination of this suit.
 - d. That Temporary injunction d issue to the above parties from trespassing the above mentioned property pending the hearing and determination of the application and suit.
 - e. That pending the hearing and determination of the suit, the matter be referred for mediation.
 - f. That the costs of this application be provided for.



2. The Applicants stated they are the registered proprietors of the suit property which was charged in favour of the 1st Defendant after it advanced Kshs. 70,000,000 to Quantum Petroleum Limited, and to which they were guarantors. The borrower serviced the loan in 'less frequent intervals' due to severe financial constraints.
3. The 1st Plaintiff engaged the 1st Defendant on negotiations on settlement of the outstanding loan balance as a sign of good will. The Plaintiffs disclosed that there was another intended auction off the suit property and was stopped by the Malindi ELC Court in Case No. E054 of 2023 since the 1st Defendant statutory power of sale had not crystalized. The court had to down its tools as it had no jurisdiction to deal with the matter.
4. Despite the negotiations, the 1st Defendant caused the 2nd Defendant to advertise of the auction of the suit property on 13/12/2024. The auction took place on 23/01/2025. The Plaintiffs deponed that the auction was fought with irregularities in the auction process thus rendering it void ab initio, hence depriving the Plaintiffs their Constitutional right to own property under Article 40 of *the Constitution*.
5. The Defendants are said to have denied the plaintiffs the first right of redemption by failing to issue the 90 days' demand notice, issue and serve the statutory notice to sell upon the Plaintiffs or the occupants of the suit property. The Defendants are also accused of failing to discharge their duty of care owed to the Plaintiffs as guarantors by failing to disclose the auction sale price and furnishing the valuation report for purposes of determining forced sale value of the property.
6. The 2nd Defendant was accused of failing to carry out the auction as provided for by the Auctioneer Rules hence lacking transparency and integrity I the auction process. The Plaintiffs prayed that the application be allowed with costs.
7. The application was opposed. The Respondents filed a Replying Affidavit dated 20/02/2025. The Defendants gave a history from the time the loan facility was advanced to the Borrower, where the Plaintiffs were guarantors and that was back in year 2009, the defaults in payment by the Borrower, the several attempts made to sell the suit property and the suits filed in the matter, up to when this matter was filed. It was deponed that the Plaintiffs had been notified of the recovery proceedings and their right to redemption had been extinguished at the fall of the hammer.
8. The application was disposed of by way of written submissions. The parties complied by filing submissions together with various authorities in support of the parties' rival positions.

Analysis and Determination

9. I have considered the application, responses, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination
 - a. Whether the Applicant has made out a case for grant of orders of injunction;
 - b. If the answer to (a) above is in the affirmative, what orders should issue?
 - c. Who bears the costs of the application?
10. Turning to the substance of the application, the facts are not in dispute. The Applicants were guarantors where the borrower was advanced a loan facility of Kshs. 70,000,000 and the suit property charged as the security. Due to diminishing the financial capacity to service the loan advanced, the Applicants engaged the 1st Respondent with a view of settling the loan balance.



11. It is also not in dispute that the Borrower was unable to pay the loan balance despite the negotiations. It had been disclosed by the parties in the pleadings that that the bank commenced recovery proceedings by way of the sale of the suit property via auction. The Borrower in Mombasa HCCC No. 97 of 2015, Quantum Petroleum Limited v Diamond Trust Bank Kenya Limited challenged the bank's exercise of its statutory power of sale, and temporary injunction granted on interim basis.
12. The application for injunction was later dismissed via ruling dated 31/03/2017. The Borrower sought further stay in an application dated 19/12/2017 where it was ordered that the Borrower do pay the loan arrears of Kshs. 10,000,000 as a condition for stay. Aggrieved by the said order, the Borrower filed an appeal in Malindi Court of Appeal Misc. App No. 68 of 2018, Quantum Petroleum Limited v Diamond Trust Bank Kenya Limited, seeking leave to appeal and a stay for sale. The application was dismissed on 16/07/2019. The Borrower did not prosecute the suit in the High Court and the suit was dismissed for want of prosecution on 10/12/2019.
13. The bank still made attempts to sell the suit property by way of auction. The guarantors (the Plaintiffs herein) now filed a suit in Malindi ELC Case No. E054 of 2023, Jonathan Daniel Mturi & Patience Shikuku Mturi v Diamond Trust Bank Kenya Limited where the bank's attempt to auction the property was challenged. The suit was dismissed via ruling dated 26/09/2024 and the bank proceeded to advertise the auction on 13/12/2024 and eventually sold the suit property on 23/01/2025, hence the filing of this application.
14. Despite the findings of the court which are against the Plaintiffs and the Borrower, the Plaintiffs still keep on filing suits in order to stop the sale of the suit property, and in this case, to stop the finalization of the auction process by giving an injunction against the Defendants from receiving the sale proceeds and trespassing the suit property.
15. I do concur with the submissions by the Defendants that this suit is res judicata by virtue of Section 6 and 7 of the *Civil Procedure Act*. The suits as listed herein above and whose pleadings and findings of the court i.e. the High Court, the Court of Appeal and in the Environment & Land Court, are well within the parties' knowledge involved the same parties and same subject matter as in this suit.
16. Even though the Plaintiffs submitted that in the above named suits, the subject matter was not determined on merits, I do differ with the said submissions as the courts in the rulings as stated above save for the ELC matter gave their determination on merits on the applications for injunction and stay of recovery proceedings, and which determination paved way for the bank to proceed with the recovery proceedings.
17. This being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal restated the law as follows:

“...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

 - (a) establish his case only at a prima facie level,
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.



18. The issue is whether the Plaintiffs have established prima facie case? In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, prima facie case was defined as follows: -

“...In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter...”

19. The purpose of an order of injunction is to preserve the substratum of the suit. The suit property has already been sold. The Plaintiffs are seeking to have the proceeds of sale not released to the Defendants as the auction process was flawed. The Plaintiffs state that the statutory notices were not issued and served as stated herein above.

20. The coming into force of the *Land Act*, 2012 and for purposes of this matter, the requirement of the issuance of the requisite statutory notices as demanded by sections 90, 96, 97 and 98 of the Act, is to ensure that a party has a chance to redeem its property before a sale is conducted. The question is whether the Plaintiffs had been made aware by the 1st Defendant that it intends to recover the outstanding loan amount by selling the suit property.

21. It is not in dispute that the Bank issued and served the Statutory Notice to the Plaintiffs and the Borrower that the bank would be exercising its Statutory Power of Sale via the notice dated 10/03/2014. After the Borrower failed to settle the arrears within the 90 days’ period, the Bank issued a Notification of Sale dated 26/03/2015 and a Redemption Notice dated 22/07/2014 was also issued.

22. It is as a result of the above recovery process that the Borrower moved this court in Mombasa HCCC No. 97 of 2015. After the court’s proceedings as stated herein above, the Bank was given the go ahead to proceed with the recovery process in default of payment of the outstanding loan arrears and the amount continues to accrue.

23. I find that the Bank needed not give notices afresh as the Plaintiffs had already been made aware of the impending recovery proceedings and attempts made to sell the suit property before the Plaintiffs/ Borrower getting temporary injunction against the Defendants over the same. The Plaintiff’s right to redeem the suit property had already been extinguished as at the time the auction took place.

24. It is also on record, a fact which has not been disputed that the Borrower last made its payment towards the loan in year 2022 and only Kshs. 50,0000 was paid towards the loan arrears. No efforts have been made thereafter to make any payments for about 3 years now. I find that the Plaintiffs have failed to establish a prima facie case in the matter.

25. Even though the Applicant has failed to establish a prima facie case, I shall consider if the Applicant would suffer irreparable damage if this court declines to grant the orders as prayed. The Court of Appeal in the *Nguruman* (supra) case expressed itself thus: -

“...The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.” (Emphasis added)



26. In Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR, Warsame, J (as he then was) held as follows: -

“...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction...”

27. The Plaintiff claimed that the forced value of the suit property and the proceeds of the sale had not been disclosed. From the Replying Affidavit, the Respondents stated that Kshs. 72,000,000 was realised from the auction, being the amount given by the highest bidder. The Respondents were careful not to mention about the current forced sale value of the property.

28. No valuation report was produced. The Bank as the chargee had the obligation to conduct a current valuation report before conducting the auction sale as demanded by Section 97 (2) of the Land Act.

29. Considering that the Plaintiffs interest in getting the best value for the auctioned property, I find it necessary to have the current report indicating the forced sale value. This would caution the Plaintiffs in the event it is found that the Defendants sold the property way below the current forced sale value to the detriment of the Plaintiffs. If any injury is suffered, the same is reparable.

30. In regard to the balance of convenience, it tilts in favour of the Respondent as per the definition given in the case of Chebii Kipkoech vs. Barnabas Tuitoek Bargaroria & Another [2019] eKLR, as follows: -

“...the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed...”

31. I find no merits in the orders sought.

32. On the issue of costs, it is settled that the same follows the event. Having considered the fact that this is an interlocutory application, it would be onerous to award costs to any party at this stage. Therefore, I direct that costs shall await the final orders of the court.

33. Based on the above discourse, I make the following orders: -

- a. The application dated 31/01/2025 has no merits and the same is hereby dismissed.
- b. Considering the interests of the Plaintiffs, it is hereby ordered that pending the final orders of the court, both parties to agree on a property valuer for purposes of carrying out a valuation report.
- c. In the event the above is not agreed upon, a government valuer to prepare the report.
- d. The above be carried out with the next 21 days. Valuation fees be shared by both parties.
- e. No orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MARCH, 2025.

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F. WANGARI

JUDGE

In the presence of;

M/S Ikengu Advocate for the Plaintiffs/Applicants

Mr. Kisinga Advocate the Defendant/ Respondent

M/S Salwa, Court Assistant

