



REPUBLIC OF KENYA



**Maluki & another v Absa Bank Kenya PLC & another; Dawood (Interested Party) (Miscellaneous Case E087 of 2024) [2025] KEHC 3281 (KLR) (Commercial and Tax) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3281 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CASE E087 OF 2024**

**MN MWANGI, J**

**MARCH 7, 2025**

**BETWEEN**

**ISAAC MUTUNGA MALUKI ..... 1<sup>ST</sup> PLAINTIFF**

**CAROLYNE MUTHEU MUTUNGA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ABSA BANK KENYA PLC ..... 1<sup>ST</sup> DEFENDANT**

**REGENT AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**YUSUF ADAN DAWOOD ..... INTERESTED PARTY**

**RULING**

1. Before me is a Notice of Motion application dated 6<sup>th</sup> February 2024 filed by the plaintiffs/applicants pursuant to the provisions of Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 2, 3A & 63 of the *Civil Procedure Act*, Sections 96 & 97 of the *Land Act*, Rules 10 & 11 of the Auctioneers Rules and all enabling provisions of the law. The plaintiffs seek an order of temporary injunction restraining the defendants and the interested party along with their servants, employees or agents from interfering with, transferring, disposing of, alienating, leasing, selling, or evicting the plaintiffs and their associates from land parcel No. 37/254/6 (IR No. 12626/1) pending the hearing and determination of the suit amongst the parties herein.
2. The application is premised on the grounds on the face of the Motion, and it is supported by affidavits sworn on 5<sup>th</sup> February 2024 and 7<sup>th</sup> December 2024 by Mr. Isaac Mutunga Maluki, the 1<sup>st</sup> defendant herein. He averred that on 20<sup>th</sup> September 2021, they entered into a mortgage Agreement for Kshs.49,500,000/= to purchase land parcel No. 37/254/6 (IR No. 12626/1) in Nairobi. He



- stated that it was agreed between the plaintiffs and the 1<sup>st</sup> defendant that the loan was to be repaid by the plaintiffs making 262 monthly instalments of Kshs.530,888.00, and partial repayments were made. He further stated that a valuation conducted before the loan set the property's market value at Kshs.70,000,000/=, but they improved the property, thereby increasing its value.
3. Mr. Maluki stated that due to financial difficulties, they defaulted on the loan, leading the 1<sup>st</sup> defendant to exercise its statutory power of sale over the suit property through the 2<sup>nd</sup> defendant. He claimed that in June 2023 and January 2024, valuations confirmed the suit property's market value at Kshs.75,000,000/=, but on 14<sup>th</sup> November 2023, the 2<sup>nd</sup> defendant auctioned it for Kshs.49,000,000/=, which was significantly below its market value. He contended that the aforesaid sale was tainted with bad faith, fraud, and misrepresentation and averred that the defendants breached their duty of care by undervaluing the property, causing the plaintiffs to suffer losses.
  4. In opposition to the application, the defendants filed a replying affidavit sworn on 14<sup>th</sup> February 2024 by Mr. Samuel Njuguna, the 1<sup>st</sup> defendant's Legal Officer. He averred that the plaintiffs secured a loan of Kshs.49,500,000/= secured by a charge over the suit property, which granted the 1<sup>st</sup> defendant the right to sell the property in case of default. He contended that the plaintiffs fell into arrears of Kshs.50,375,608.90 by November 2022, prompting the 1<sup>st</sup> defendant to issue them with a 90-days' notice dated 4<sup>th</sup> November 2022, a 40-days' notice dated 14<sup>th</sup> February 2023, and a 45-days' redemption notice dated 13<sup>th</sup> April 2023, all of which were ignored. Mr. Njuguna stated that after an unsuccessful first auction, a revised valuation was conducted, setting the market value of the suit property at Kshs.65,500,000/= and the forced sale value at Kshs.49,200,000/=. He averred that the suit property was sold at an auction on 14<sup>th</sup> November 2023, for Kshs.49,310,000 to the interested party. He claimed that the aforesaid sale was lawful, since due process was followed and the plaintiffs failed to take timely action.
  5. In response to the plaintiffs' application, the interested party filed a replying affidavit and a supplementary affidavit sworn on 22<sup>nd</sup> February 2024 and 15<sup>th</sup> April 2024, respectively, by Mr. Yusuf Adan Dawood, the interested party herein. He deposed that he came across an advertisement in the national newspaper for the sale of the suit property by way of public auction. That he instructed his Advocates to conduct due diligence on the property after which they ascertained that the procedure before the auction was properly followed subject to the ruling in HCCOMM No. E283 of 2023. He averred that he made a payment of Kshs.500,000/= as a pre-condition to qualify for bidding and at the fall of the hammer, he was declared the highest bidder and the purchaser of the suit property at Kshs.49,210,000/=.
  6. He averred that he then made the required 25% deposit, and completed the full payment in instalments by 12<sup>th</sup> February 2024. That thereafter, the 1<sup>st</sup> defendant released the original title documents, and the property was transferred to his nominee, Lul Abdirahman Sheikhadan, who took possession of the suit property. Mr. Dawood asserted that as an innocent purchaser for value, they are protected under Section 99 of the *Land Act*. He stated that any dispute regarding the aforesaid sale should be pursued against the 1<sup>st</sup> defendant in the form of damages, as determined in HCCOMM NO. E283 of 2023. Mr. Dawood emphasized that he acquired a good title legally, and that he intends to develop high-rise apartments, but he is suffering financial loss due to the ongoing dispute. He averred that since the premises have been demolished, the plaintiffs' request for relief is unavailable.
  7. In a rejoinder, the plaintiffs filed a further affidavit sworn on 7<sup>th</sup> December 2024 by Mr. Isaac Mutunga Maluki, the 1<sup>st</sup> defendant herein. He stated that despite Court orders issued on 15<sup>th</sup>, 19<sup>th</sup> & 26<sup>th</sup> February 2024 prohibiting title transfer, eviction, or interference with the suit property, the interested party hired individuals who forcibly evicted the plaintiffs and begun demolition in contempt of the said



orders. The plaintiffs denied having received an order requiring them to vacate the premises. The plaintiffs disputed claims that the loan was fully paid by 12<sup>th</sup> February 2024, citing a certified bank statement showing an outstanding balance of Kshs.30,858,710.00 as at 1<sup>st</sup> March 2024. Mr. Maluki averred that this case differs from HCCOMM No. E283 of 2023, as it addresses breaches of statutory duty, unlawful entry, and other legal violations, whereas in the other suit the plaintiffs sought to stop the 1<sup>st</sup> defendant's statutory power of sale.

8. The instant application was canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Mwakio, Kirwa & Company Advocates on 26<sup>th</sup> April 2024. The defendants' submissions were filed on 25<sup>th</sup> April 2024 by the law firm of Karanja-Njenga Advocates and the interested party's submissions were filed on 26<sup>th</sup> April 2024 by the law firm of Wetangula Adan & Company Advocates.
9. Mr. Kirwa, learned Counsel for the plaintiffs relied on the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 and the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358, and submitted that a temporary injunction preserves the subject matter of a suit until it is determined, ensuring that a Court's judgment remains enforceable. He referred to the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, and further submitted that the defendants sold the suit property below its market and forced sale value, violating the plaintiffs rights to secure the best price, thus establishing an arguable case.
10. On irreparable damage, Counsel cited the case of *Aikman v Muchoki* [1984] KLR 353, and argued that the Court will only consider this factor if a prima facie case with a probability of success has been established, which is not the case herein. He asserted that the balance of convenience tilts in favour of granting the orders sought.
11. Mr. Kimiti, learned Counsel for the defendants submitted that the plaintiffs relied on a flawed valuation report from LIPAK Consultants Limited dated 15<sup>th</sup> January 2024, concerning LR No. 37/354/6. He asserted that the said report confirmed that the plaintiffs were not the rightful property owners, as the said property was registered under Francis Kingoo Kilonzo and John Wambua Ngaluka as tenants in common, which suggests that the plaintiffs attempted to mislead the Court to challenge the 1<sup>st</sup> defendant's valuations. He relied on the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (supra), and further submitted that the plaintiffs admitted to being indebted to the 1<sup>st</sup> defendant and defaulting on payments but claim that the auctioned property was undervalued, potentially violating Section 97(2) of the *Land Act*.
12. Mr. Kimiti cited the case of *Palmy Company Limited v Consolidated Bank of Kenya Limited* ML [2014] eKLR, and stated that in order to challenge a professional valuation, the plaintiffs must provide clear evidence proving its inaccuracy or raising doubts about its correctness, but in this case, the plaintiffs have failed to justify why the Court should disregard the 1<sup>st</sup> defendant's Valuation Report. He further stated that simply presenting a conflicting Report is insufficient, as the plaintiffs must demonstrate issues such as the Valuer's qualifications, methodology, or timing. He stated that since the defendants followed all statutory requirements before the auction and no professional misconduct was proved, the 1<sup>st</sup> defendant's valuation remains valid, meaning that the plaintiffs have not established a prima facie case.
13. He relied on the case of *Mwangangi Mutula Mutua v Equity Bank Limited & 2 others* [2019] eKLR, and stated that since the suit property has already been sold, this Court cannot restrain the 1<sup>st</sup> defendant from transferring it to the interested party under Section 99 of the *Land Act*, which provides that



damages, rather than an injunction, are the appropriate remedy for any irregular sale. Mr. Kimiti submitted that the balance of convenience tilts in favour of the defendants.

14. Mr. Mubea, learned Counsel for the interested party relied on the case of *Zum Zum Investments Limited v Habib Bank Limited* [2014] eKLR, and submitted that the plaintiff lacks a prima facie case, having defaulted on loan repayment, which justified the chargee's lawful exercise of its statutory power of sale. He stated that the public auction was conducted legally, and the interested party acquired the property for Kshs.49,210,000/=, a price above the forced sale value, hence the plaintiffs' claim lacks merits. He cited the case of *David Mburu Githere v Jamii Bora Bank Limited* [2017] eKLR, and argued that the plaintiffs have not shown that they will suffer irreparable harm if the orders sought are not granted. Instead, he asserted that the interested party is incurring significant financial losses due to delays in developing the suit property.

#### **ANALYSIS AND DETERMINATION.**

15. I have considered the application herein, the grounds on the face of it, and the affidavits in support thereof. I have also considered the replying affidavits filed by the defendants and the interested party, the supplementary replying affidavit by the interested party and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant application is merited.

16. Temporary injunctions are provided for under Order 40 Rules 1(a) & (b) of the Civil Procedure Rules, 2010 which states that -

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.

17. An order for an interlocutory injunction is a discretionary remedy that is granted on the basis of evidence and sound legal principles. Further, in an application for an interlocutory injunction the onus is on the applicant to satisfy the Court that it should grant an injunction in the applicant's favour. The conditions to be considered when dealing with an application for temporary injunction were settled by the Court in the case of *Giella v Cassman Brown & Company Limited* (supra), as follows -

Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

18. What constitutes a prima facie case was considered by the Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* (supra) where it was held that-

...“So what is a prima facie case” I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

19. Upon perusal of the pleadings filed by the parties herein, it is noteworthy that the plaintiffs do not dispute that they are indebted to the 1<sup>st</sup> defendant and that they defaulted in their loan repayment obligations, leading to issuance of all the requisite statutory notices by the 1<sup>st</sup> defendant. The plaintiffs however challenge the sale of the suit property solely on the ground that it was sold at a value way below its market and forced sale value, thereby being grossly undervalued. The plaintiffs contend that the sale of the suit property was tainted with bad faith, fraud, and misrepresentation. They assert that the 1<sup>st</sup> defendant defaulted in its duty of care by undervaluing the suit property, causing them to suffer losses.
20. The 1<sup>st</sup> defendant on the other hand contends that a revised valuation was conducted, setting the market value of the suit property at Kshs.65,500,000/= and the forced sale value at Kshs.49,200,000/= . That subsequently, the suit property was sold at an auction on 14<sup>th</sup> November 2023, for Kshs.49,310,000/= to the interested party. As a result, they averred that the aforesaid sale was lawful thus valid.
21. In opposition to the instant application, the defendants and the interested party have heavily relied on the provisions of Section 99(4) of the Land Act, 2012 which provides that –

A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

22. The interested party avers that after coming across an advertisement in the national newspaper for the sale of the suit property in a public auction, together with his Advocates, they conducted due diligence on the suit property before purchasing it at an auction and ascertained that the procedure and/or all legal prerequisites before the auction were properly followed. The Court of Appeal in the case of Nancy Kahoya Amadiva v Expert Credit Limited & another [2015] eKLR, in addressing the extent of due diligence to be exercised by a purchaser held as follows -

The 2<sup>nd</sup> respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser" In Captain Patrick Kanyagia and Another -v- Damaris Wangeci and others, this court held that there is no duty cast in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR. In Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported), this court held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the appellant has not demonstrated that the 2<sup>nd</sup> respondent had any notice of irregular exercise of the statutory power of sale by the 1<sup>st</sup> respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 2<sup>nd</sup> respondent before the trial court, the 2<sup>nd</sup> respondent's action to purchase was based on the advertisement for sale advertised in the newspaper. The 2<sup>nd</sup> respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of



sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security.

23. From the pleadings filed, the plaintiffs have neither alleged any fraud on the part of the interested party who purchased the suit property and/or that the interested party had any notice of the 1<sup>st</sup> defendant's improper and irregular exercise of its statutory power of sale, if any. Given the said circumstances, it is my finding that the interested party is a bonafide purchaser for value of the suit property without notice. That being the case, the plaintiffs only recourse if any, is against the 1<sup>st</sup> defendant for an action in damages. I therefore find that the plaintiffs have not established a prima facie case with a probability of success.
24. As to whether the plaintiffs will suffer irreparable injury, I am not persuaded that is the case. That is especially so because having found that the interested party is a bonafide purchaser for value of the suit property without notice, if the plaintiffs were to suffer or have suffered any damages as a result of the 1<sup>st</sup> defendant's actions, they can be adequately compensated by an award of damages as provided for under Section 99(4) of the Land Act. As such, the issue of balance of convenience does not arise since I am not in doubt, and in any event, it tilts in favour of disallowing the application herein.
25. In the result, it is my finding that the instant application is devoid of merits. It is hereby dismissed with costs to the defendants and the interested party.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF MARCH 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Kirwa for the plaintiffs/applicants

Mr. Mbira h/b for Mr. Kimiti for the defendants/respondents

Ms Abdulrashid h/b for Ms Noor for the interested party

Ms B. Wokabi – Court Assistant.

