



REPUBLIC OF KENYA



Nikisuhi Investments Limited v African Banking Corporation Limited & another (Commercial Case E501 of 2023) [2025] KEHC 2788 (KLR) (Commercial and Tax) (7 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E501 OF 2023**

MN MWANGI, J

MARCH 7, 2025

BETWEEN

NIKISUHI INVESTMENTS LIMITED PLAINTIFF

AND

AFRICAN BANKING CORPORATION LIMITED 1ST DEFENDANT

ONESMS MACHARIA T/A WATT'S AUCTIONEERS 2ND DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 4th October 2023, pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Section 44 of the *Banking Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 40 of the *Constitution* of Kenya and other enabling provisions of law. The plaintiff seeks an order of temporary injunction restraining the defendants from advertising, selling, transferring, or dealing with Grant No. IR 10219 LR. No. 209/2860 Nairobi and preventing the defendants from charging any interest, penalties, or related fees on Loan Account No. 00840XXXXXXXXX85, pending the hearing and determination of this suit.
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 Mr. Ramesh Thakkar, the plaintiff's Director. The plaintiff's case is that it obtained a loan of Kshs.210,000,000/= from the 1st defendant on 1st October 2014, secured by a charge over Grant No. IR 10219 LR. No. 209/2860 Nairobi. He averred that the plaintiff adhered to the loan terms and paid a total of Kshs.417,981,290.10, exceeding the expected repayment amount of Kshs.337,925,280/=, but the 1st defendant still alleged that additional sums were due. Mr. Thakkar contended that upon scrutiny by IRAC, it was established that the plaintiff had overpaid by Kshs.23,533,176.03, yet the 1st defendant was demanding a further amount of Kshs.38,419,526.96.



3. He stated that despite the in duplum rule, which limits recoverable interest, the defendants threatened penalties and interest charges. He averred that the 2nd defendant issued a notification for a public auction of the secured property which is worth over Kshs.400,000,000/=, despite full compliance with the loan Agreement. Mr. Thakkar claimed that no statutory notices under the *Land Act* were issued, making the aforesaid auction invalid. He contended the defendants' actions are deemed unlawful as the loan was fully serviced, and an overpayment was identified.
4. In opposition to the application, the defendants filed a replying affidavit sworn on 29th April 2024 by Ms Deborah Muthoka, the 1st defendant's Recoveries Manager. She averred that on 1st October 2014, the 1st defendant advanced a loan of Kshs.210,000,000/= to the plaintiff, with a repayment period of 84 months at an interest rate of 14.75% per annum and a default interest of 36% per annum. She averred that the loan was secured by a charge over the suit property, rental income assignment, and personal guarantees from the plaintiff's Directors. She deposed that several amendments were made to the loan terms in 2015, 2016, 2017, and 2018, adjusting interest rates, repayment amounts, and moratorium periods. Ms Muthoka stated that the plaintiff defaulted on the said loan despite being granted moratoriums, and the 1st defendant issued it with a 90-day notice dated 15th August 2019, a 40-day notice dated 21st November 2019 and a 45-day redemption notice & auction notification dated 7th August 2020. She stated that the plaintiff did not comply with the said notices leading the 1st defendant to exercise its statutory power of sale over the suit property.
5. Ms Muthoka contended that in July 2023, the plaintiff claimed an overpayment of Kshs.25,000,000/=, citing an IRAC report which stated that they had repaid Kshs.413,881,399.00 against the principal amount of Kshs.210,000,000/=. She stated that the 1st defendant disputed the Report on grounds that IRAC misapplied interest rates, leading to discrepancies. She maintained that as at 29th April 2024, the plaintiff owed the 1st defendant Kshs.43,369,852.96, which continued to accrue normal and default interest at 16% p.a., and 24% p.a., respectively. Ms Muthoka averred that the plaintiff failed to clear the outstanding amounts despite being issued with a courtesy notice on 4th October 2023, notifying it of an auction scheduled for 16th November 2023. She emphasized that the 1st defendant followed legal procedures and was justified in advertising to sell the suit property by public auction due to persistent loan defaults.
6. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of J. M. Kariuki & Company Advocates on 13th September 2024, whereas the defendants' submissions were filed on 11th October 2024 by the law firm of Nyaanga & Mugisha Advocates.
7. Mr. Kimanthi, learned Counsel for the plaintiff relied on the case of Trustees of Maximum Miracle Centre v Equity Bank (K) Limited (Civil Case E055 of 2021) [2021] KEHC 237 (KLR) and the provisions of Section 44 of the *Banking Act*, in submitting that the interest rates imposed by the 1st defendant were excessive, thus unlawful and unjustified. He asserted that despite any Agreements between a lender and a borrower, banking institutions are subject to legal provisions that regulate interest rates, so as to prevent unfair lending practices and ensure that interest charges remain reasonable and within legal limits. He further relied on the case of Giella v Cassman Brown & Company Ltd [1973] E A 358, and asserted that the plaintiff had made out a case to warrant being granted of the orders sought herein.
8. Mr. Kimanthi cited the Court of Appeal case of Mrao Limited v First American Bank Limited & 2 others [2003] KLR 125, and stated that injunctions are generally not granted merely due to disputes over the amount owed or interest charged. He submitted that exceptions however exist if the claimed



amount is excessive, unconscionable, or the interest is un-contractual or illegal. He cited the Court of Appeal case of Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited) [2019] eKLR, and submitted that in this case, the IRAC's Report dated 31st August 2023 found the interest charged on the plaintiff's loan to be illegal and contrary to CBK guidelines. Further, that the 1st defendant added Kshs.235,495,360.08 in interest and Kshs.10,286,457.98 in banking charges on a principal loan of Kshs.210,000,000.00, thereby violating the in duplum rule and Sections 44A(1) & (2) of the Banking Act.

9. The above notwithstanding, Mr. Kimathi stated that the 1st defendant had failed to conduct a forced sale valuation of the charged property, contrary to Section 97(2) of the Land Act, which means that the 1st defendant's statutory power of sale had not crystallized, which makes the intended sale irregular and illegal. He relied on the case of Odhiambo v Mwananchi Credit & another (Civil Case E030 of 2022) [2022] KEHC 12570 (KLR), and submitted that the 1st defendant's attempt to exercise its statutory power of sale was riddled with illegalities and irregularities, warranting this Court's intervention. He emphasized that the sale of the suit property would cause the plaintiff irreparable harm, as it currently occupies the property and derives its livelihood from it. Counsel submitted that the balance of convenience tilts in favour of the plaintiff.
10. Mr. Dachi, learned Counsel for the defendants similarly relied the case of Giella v Cassman Brown & Company Limited (supra) and the Court of Appeal case of Mrao Limited v First American Bank Limited & 2 others (supra), and submitted that the plaintiff has neither established a prima facie case nor made out a case to warrant being granted the orders sought. He relied on the case of Blay Energy Limited & another v Barclays Bank of Kenya Limited & another (Civil Suit E418 of 2023) [2024] KEHC 4187 (KLR), and further submitted that the plaintiff is undeniably indebted to the 1st defendant, as confirmed by the IRAC Report. He contended that a dispute over the exact amount owed does not constitute a prima facie case to justify restraining debt recovery. It was stated by Counsel that while the plaintiff claims illegal overcharging of interest, all interest rate variations were CBK-approved under Legal Notice No. 35 of 2006.
11. Mr. Dachi clarified that the 4% interest rate cap under Section 33B (now repealed) only applied between 14th September 2016 and 7th November 2019, affecting only the 2017 and 2018 Loan Agreements, which complied with the cap. He contended that the plaintiff had failed to prove any illegal overcharging of interest. He relied on the Supreme Court case of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2015] eKLR, and urged this Court to take judicial notice of CBK base rates under Sections 59 & 60 of the Evidence Act, citing their publication in the Government Gazette and the CBK website. He referred to the Supreme Court case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, and argued that the interest rate cap under Section 33B (Repealed) of the Banking Act did not apply retroactively to loans issued before 14th September 2016. He stated that since legislation is not applied retrospectively unless expressly stated, the interest rates charged were reasonable and lawful, thus valid.
12. Counsel referred to the Court of Appeal case of Francis J. K. Ichatha v Housing Finance Company of Kenya Ltd [2005] eKLR, and argued that disputes over loan accounts and interest charges do not justify an injunction. In addition, he stated that the plaintiff was duly served with statutory notices. He further stated that the absence of a forced sale valuation does not invalidate the sale, as a valuation can still be conducted before the auction. Mr. Dachi stated that in any event, the plaintiff had not demonstrated any irreparable injury it would suffer in the event that the instant application was not allowed, as any potential loss can be quantified through valuation and be compensated by damages. He maintained that the balance of convenience tilted in favour of the defendant.



Analysis and Determination.

13. I have considered the application herein, the grounds the face of it and the affidavit in support thereof. I have also considered the replying affidavit by the defendants, and the written submissions by Counsel for the parties. The issue that arises for determination is if an order of an interlocutory injunction should be granted.
14. 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.
15. The locus classicus on matters interlocutory injunctions is the case of *Giella v Cassman Brown* (supra). The Court in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR when dealing with an application for injunction held that -
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. allay any doubts as to (b) by showing that the balance of convenience is in his favour.
16. 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) as follows -
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.
17. It is not in contestation that the 1st defendant advanced the plaintiff a loan facility of Kshs.210,000,000/= on 1st October 2014, secured by a charge over Grant No. IR 10219 LR. No. 209/2860 Nairobi. The plaintiff asserted that it fully adhered to the terms of the Loan Agreement between it and the 1st defendant and paid a total of Kshs.417,981,290.10, exceeding the expected repayment amount of Kshs.337,925,280.00. The plaintiff relied on an IRAC Report and maintained that it had overpaid



by Kshs.23,533,176.03, yet the 1st defendant was demanding a further Kshs.38,419,526.96. The 1st defendant on the other hand averred that the plaintiff defaulted on the said loan despite being granted moratoriums

18. The plaintiff stated that no statutory notices under the Land Act were issued, making the intended auction by the defendants invalid. The 1st defendant on its part asserted that the plaintiff defaulted on its loan repayments, and it issued the plaintiff with a 90-day notice dated 15th August 2019, a 40-day notice dated 21st November 2019 and a 45-day redemption notice & auction notification dated 7th August 2020, but the plaintiff did not comply with the said notices which led to 1st defendant to exercise its statutory power of sale over the suit property.
19. It then follows that the main issue for determination at the hearing of the suit will be whether the plaintiff has overpaid the loan advanced to it by the 1st defendant and/or whether the plaintiff is still indebted to the 1st defendant. In doing so, the Court will have to determine whether the normal and default interest rates charged on the plaintiff's loan account were valid. From the foregoing, it is evident that at this juncture it is impossible to ascertain whether or not the plaintiff is still indebted to the 1st defendant in view of the dispute on the debt, or if it overpaid.
20. On the issue of whether the 1st defendant issued the plaintiff with all the requisite statutory notices before exercising its statutory power of sale over the suit property I note on perusal of the 1st defendant's replying affidavit and the annexures thereto that the 1st defendant has demonstrated service of the 90-day notice dated 15th August 2019, a 40-day notice dated 21st November 2019 and a 45-day redemption notice & auction notification dated 7th August 2020, all sent via registered post. The 1st defendant has also demonstrated that the plaintiff in a letter dated 5th September 2019 acknowledged receipt of the 90-day notice dated 15th August 2019, which was sent to the same address as the 40-day notice dated 21st November 2019 and 45-day redemption notice & auction notification dated 7th August 2020.
21. In the premise, I am persuaded that the plaintiff was duly served with all the requisite statutory notices before the 1st defendant set out to exercise its statutory power of sale. I however note that the 1st defendant does not contest that it failed to conduct a forced sale valuation of the charged property, contrary to Section 97(2) of the Land Act. Nonetheless, it is now well settled that failure to comply with the provisions of Section 97(2) of the Land Act neither invalidates the sale nor does it mean that the 1st defendant's statutory power of sale does not crystallize.
22. In view of the fact that the plaintiff's debt to the 1st defendant is disputed, and the fact that there is no certainty as to whether or not the plaintiff is still indebted to the 1st defendant or if it overpaid the loan, it is my finding that the plaintiff has demonstrated a prima facie case with a probability of success.
23. As to whether the plaintiff stands to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed, it is my finding that having demonstrated that it has a prima facie case with a probability of success, in the event the instant application is not allowed, the suit property will be sold on an uncertainty, thus infringing on the plaintiff's right to property enshrined under Article 40 of the Constitution of Kenya. To this end, I am bound by the Court of Appeal's holding in the case of *Muiruri v Bank of Baroda (Kenya) LTD* [2000] K.L.R 183 cited by the Court in the case of *Peter Kimani Nene v Kenya Commercial Bank Limited* [2016] eKLR, where it was held as follows-

... disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.



24. I am live to the fact that Courts are reminded to consider the fact that selling of a person's property amounts to infringing on the person's right to own property as enshrined under Article 40 of the Constitution of Kenya, 2010 especially where an applicant has established a prima facie case with a probability of success. I further note that the suit property is still charged to the 1st defendant, which has not alleged that the outstanding loan amount, if any, has outstripped, or is in the verge of outstripping the value of the security, for this Court to conclude that the 1st defendant stands to be prejudiced in the event that the orders sought herein are granted. That being the case, I am persuaded that the plaintiff has demonstrated that in the event that the orders sought herein are not granted, it will suffer damages that cannot be adequately compensated by an award of damages.
25. The issue of the balance of convenience does not arise since the Court is not in doubt. Nevertheless, based on the above analysis, the balance of convenience tilts in favour of the plaintiff.
26. The upshot is that the instant application is merited. It is allowed in the following terms –
- i. I hereby grant an order of temporary injunction restraining the defendants from advertising, selling, transferring, or dealing with Grant No. IR 10219 LR. No. 209/2860 Nairobi, pending the hearing and determination of the suit;
 - ii. I hereby grant an order of temporary injunction preventing the defendants from charging any interest, penalties, or related fees on Loan Account No. 00840XXXXXXXXX85, pending the hearing and determination of the suit; and
 - iii. Costs of the application are awarded to the plaintiff.

It is so ordered.

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

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kimanthi h/b for the plaintiff/applicant

Mr. Omore h/b Mr. Dachi for the defendants/respondents

Ms B. Wokabi - Court Assistant.

NJOKI MWANGI, J.

