



**Steel Formers Limited & another v Kenya Development Corporation & 2 others
(Commercial Case E010 of 2024) [2025] KEHC 3349 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE E010 OF 2024
A MSHILA, J
MARCH 14, 2025**

BETWEEN

STEEL FORMERS LIMITED 1ST PLAINTIFF

JAMES KAMAU MWAURA 2ND PLAINTIFF

AND

KENYA DEVELOPMENT CORPORATION 1ST DEFENDANT

BASELINE AUCTIONEERS 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Before court is an application by way of Notice of Motion dated on 4th July, 2024 and brought under Article 40, 159 of the *Constitution*, Sections 3A and 3B of the *Civil Procedure Act*, Order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The 1st and 2nd Plaintiffs/Applicants sought for orders:-
 - a. Spent
 - b. That this Honourable Court issues a stay of execution pending hearing and determination of this application and the intended auction of the parcel of land belonging and registered in the names of the 2nd Applicant known as Karai/Gikambura/3663, Karai/Gikambura/3650, Karai/Gikambura/3649, Kikuyu/Kikuyu/Block 1/1251, Kikuyu/Kikuyu/Block 1/1252.
 - c. That this Honourable Court grants the 1st and 2nd Applicants an injunctive relief against the Respondents, its agents, employees or servants from advertising for sale, selling whether by public auction or private treaty disposing of or otherwise completing by conveyance or transfer of any sale concluded by private treaty or public auction of property known as Karai/



Gikambura/3663, Karai/Gikambura/3650, Karai/Gikambura/3649, Kikuyu/Kikuyu/Block 1/1251, Kikuyu/Kikuyu/Block 1/1252.

2. The application is premised on the grounds that the 2nd Respondent under the instructions of the 1st Respondent intends to illegally sell the property of the 2nd Applicant to settle debts of the 1st Applicant where the intended sale violates the right to property as a result of which the 2nd Applicant stands to suffer irreparable harm. There exists the principle of separate legal entities between the Applicants as such the court should stay the intended sale so as to safeguard and protect the rights of the 2nd Applicant.
3. James Kamau Mwaura the 2nd Applicant herein and a director of the 1st Applicant deposed that the 1st Applicant took out a loan of Kshs. 65,977,361.60 with the 1st Respondent for a period of 72 months. The 1st Respondent further took a loan of Kshs.20,000,000.00. He averred that the 2nd Respondent acting on the instructions of the 1st Respondent served the 1st Applicant a letter and notification of sale of intention to sell by auction his property known as Karai/Gikambura/3663, Karai/Gikambura/3650, Karai/Gikambura/3649, Kikuyu/Kikuyu/Block 1/1251, Kikuyu/Kikuyu/Block 1/1252 which properties are registered in his name to settle the loan obligations of the 1st Applicant. The 1st Applicant was said to be experiencing hard times due to government policies. Despite the 1st Applicant being a distinct legal entity separate from its owners, the 1st Respondent has sought to attach the property of the 2nd Applicant in total disregard of the doctrine of separate legal personality as such the intended sale violates his right to property. He contended that he stands to suffer irreparable harm as well as the 1st Applicant whose premises are built on Karai/Gikambura/3663 registered in the name of the 2nd Applicant. Thirty-Eight (38) employees also stand to lose their jobs if the property is auctioned. There being no prejudice that will be suffered by the Respondents the court was urged to allow the application.
4. Stephen Ndege Obura the 1st Respondent's Senior Portfolio Management Officer filed his replying affidavit dated 25th September, 2024. He deposed that the 2nd Applicant executed a first legal charge in his capacity as a Chargor and not as a director of the 1st Applicant and put his properties being Karai/Gikambura/3650, Karai/Gikambura/3649, Kikuyu/Kikuyu/Block 1/1251, Kikuyu/Kikuyu/Block 1/1252. Together with Damaris Mwaura they executed the deed of guarantee and indemnity in which they offered surety to the 1st Applicant. He stated that the suit as filed does not illustrate any damage as a result of the Respondents' actions and that the Applicants have not challenged the 1st Respondents right to exercise the statutory power of sale to recover the secured amount. In any case, the Applicants were said to have a remedy in form of damages against the person exercising their power of sale. The court was therefore, urged to dismiss the application with costs.
5. The parties were directed to canvass the application by way of written submissions.

Applicants' Submissions

6. The Applicants submit that the harm that would occur if the sale proceeds is that the 1st Applicant's premises are built on part of the suit property which would lead to shutting down of the company and 38 employees would be rendered jobless which harm may not be remedied by way of damages. The 2nd Respondent was accused of failing to provide the forced sale value of Kikuyu/Kikuyu/Block 1/1251 and 1252 in his valuation report which consequences were said to have potential to void any potential sale. Reliance was placed in the case of Kitho Civil and Engineering Company Limited vs National Bank of Kenya (2021) KEHC 7652 (KLR). The Respondents were said to have breached their duty as the market value of the suit property was said to be Kshs. 132,200,000/= and the forced value was



Kshs.62,400,000/= as such the difference of Kshs.69,800,000/= is more than half the value of the property as such the sale should be voided as a prima facie has been established against the respondents.

Respondents' Submissions

7. The Respondents submit that it is not disputed that the 2nd Applicant voluntarily executed the charge securing a loan and not as a director of the 1st Applicant where he put up his properties as security. The Respondent's right to exercise its statutory power of sale has not been challenged by the Applicants. Further, it was submitted that the Applicants have introduced new issues in their submissions where they allege that the Respondents failed to carry out a forced sale valuation as such the statutory power of sale has been illegally exercised. Parties are bound by their proceedings. Reliance was placed Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd. (2018) eKLR. It was submitted that the Applicants have admitted to being in default as such they have not established that they have a prima facie case. Reliance was placed in the case of Yusuf Abdi Ali Co. Ltd. Vs Family Bank Limited (2015) KEHC 2800 (KLR). The Respondents submit that the Applicants claim for irreparable injury is speculative as they have not produced any evidence that the employees are solely reliant on the job offered by the Applicants. It was submitted that if the Applicant is found to have a prima facie case, the remedy is not an injunction but an order for the requisite statutory notices to be properly issued. Reliance was placed in the case of George Town Travel & Tour Limited vs SBM Bank (Kenya) Limited & 2 others (2022) KECA 1310 (KLR). Lastly, it was submitted that should the 1st Respondent's debt remains unpaid, the same continues to accrue interest and may in the end, become unpayable should the injunction be granted as such the balance of convenience was said to be in favour of the Respondents.

Issues for Determination

8. Having considered the application by the Applicants, the replying affidavit and the rival submissions, the main issue arising for determination is whether the Applicants are deserving of the order for injunction sought.

Analysis

9. The law regarding grant of injunctions is found in Order 40 Rule 1 of the Civil Procedure Rules which provide as follows:
 - “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;
 - (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 order.”
11. The Applicants sought for an injunctive relief against the Respondents from selling by public auction the suit properties herein.



12. The conditions for grant of interim injunctions are well settled in the case of *Giella v Cassman Brown & Co. Ltd (1973) E.A 358* where it was held that: -

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, 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.”

13. The 1st Applicant claims that the business premises are built on part of the suit property which would lead to shutting down of the company and Thirty-Eight (38) employees would be rendered jobless which harm may not be remedied by way of damages. The 2nd Respondent was accused of failing to provide the forced sale value of Kikuyu/Kikuyu/Block 1/1251 and 1252 in his valuation report.
14. The Respondents contended that it is not disputed that the 2nd Applicant voluntarily executed the where he put up his properties as security. the Respondent’s right to exercise its statutory power of sale was said to be unchallenged by the Applicants. The allegation that the Respondents failed to carry out a forced sale valuation were said to be new issues being introduced by the Applicants while it is trite law that parties are bound by their proceedings.
15. The fact that the Applicants have admitted to being in default was said to demonstrate that they have not established that they have a prima facie case. The Respondents contend that if the Applicants are found to have a prima facie case, the remedy should not be an injunction but an order for the requisite statutory notices to be properly issued. If the 1st Respondent’s debt remains unpaid, the same continues to accrue interest and may in the end, become unpayable should the injunction be granted as such the balance of convenience was said to be in favour of the Respondents.
16. There is need to preserve property that is subject to court proceedings so as to protect the court from giving orders in vain upon hearing and determining a suit. Order 40, *Civil Procedure Act* gives the court discretion to issue orders which are in the nature of an injunction restraining dealings on property pending further orders by the court.
17. The court in the instant application is required to satisfy itself that there is a prima facie case established. In the case of *Silvester Momanyi Marube –Vs- Guizar Ahmed Motari & Another (2012) eKLR*, Odunga J. held that:-

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively.”

13. The court at this stage is not required to determine the merits and demerits of the Applicants’ claim. The court is only required to determine whether the Applicants have established a prima facie case.
14. The 2nd Applicant herein aver that the 1st Applicant is facing hard financial times due to government policies touching on their business. That the sale would cause the company to shut down while also rendering Thirty-Eight (38) employees jobless. The Respondents were also said to have failed to conduct a forced sale valuation before exercising their right of sale. In the circumstances, the Applicants claim to have established a prima facie case.



15. It is not disputed that the Applicants are in default, the issue arising is that the Respondents failed to carry out a forced sale valuation thereby invalidating the pending sale.
16. In the circumstances and bearing the above, this Court finds that the Applicants have established a prima facie case.
17. With regard to irreparable harm, the Applicants urge the court to preserve the company as the sale would cause it to shut down and Thirty-Eight (38) employees would be rendered jobless. The Respondents contend that the loan continues to accrue interest which might be unpayable in the end.
18. It is not in dispute that the Applicants are in default of the loan amount as such the 1st Respondent's statutory power of sale has crystalized. What is in contention is the fact that the 1st Respondent did not provide the forced sale valuation of two properties in its valuation report.
19. In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR irreparable loss was discussed thus;-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. 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.”

13. This Court is therefore, inclined to find that the Applicants have satisfied this condition.
14. In the circumstances, this court finds that the balance of convenience tilts in favour of the Applicants as they stand to suffer the greater harm if the application is disallowed.
15. Reference is made to the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR where it was held that:-

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

Findings and Determination

13. For the forgoing reasons this court makes the following findings and determinations



- i. The application dated 4th July,2024 is found to have merit and the Applicants are found to have satisfied the conditions for the grant of injunctive orders; the application is hereby allowed;
 - ii. The Respondents, by themselves, their agents, servants and/or employees be and are hereby restrained by injunction from advertising for the sale of Kikuyu/Kikuyu/Block 1/1251 and 1252 pending the hearing and determination of the suit.
 - iii. The Applicants to bear the costs of this application.
 - iv. Letter of undertaking as security for damages and costs be filed within seven (7) days.
 - v. The Applicants to deposit Kshs.15 million with the Respondent within thirty (30) days.
 - vi. In default the injunctive orders shall stand discharged.
 - vii. Mention 28/05/2025 before the Deputy Registrar for compliance and pre-trial conference
- Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 14TH DAY OF MARCH, 2025.

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

Mwaura for the 1st and 2nd Applicants

Miss Mwaura for the 1st & 2nd Defendants

