



REPUBLIC OF KENYA



**Levi v Family Bank & another (Civil Suit E004 of 2025)
[2025] KEHC 4981 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL SUIT E004 OF 2025
S MBUNGI, J
APRIL 24, 2025**

BETWEEN

THOMAS SHIMANYULA LEVI PLAINTIFF

AND

FAMILY BANK 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

RULING

1. The Applicant herein filed a plaint dated 21st march, 2025 seeking
 - a. A declaration that the intended sale of Land parcel No. Butso/so/Shikoti/2866 is illegal for non-compliance with SS 90 (1)(2) and 96 (2) of the Land Act and Rule 15 of the auctioneer rules.
 - b. Costs.
2. The Applicant simultaneously filed a notice of motion dated 21st March, 2025 under certificate of urgency seeking among other prayers
 - a. That pending the hearing of this Application interpartes an order of temporary injunction do issue restraining the defendants, their agents and or assigns from selling by public auction land parcel No. Butso/so/Shikoti/2866 on 10.4.2025.
3. The application was placed before Judge Alice Bett on 24th of March, 2025 the Judge gave various directions and ordered that the file be placed before this court (me) for further directions on 3rd April, 2025.



4. On 3rd April, 2025, the file was placed before this court but when it was called out the parties and the advocate of the applicant were absent and the court fixed the matter for mention on 4th June, 2025 for further directions.
5. On the same day 3rd April, 2025 the applicant filed another notice of motion dated 3rd April, 2025 seeking the following prayers among others
 - a. That the orders of this court made on the 3rd day of April 2025, fixing this matter on the 4th day of June 2025, be set aside(spent)
 - b. That this court considers the application dated 21st March 2025 and grants prayer 2 thereof pending the hearing of the said application interparties
 - c. That in the alternative, pending the hearing of this application, a temporary order of injunction be issued restraining the defendants, their agents, and/or assigns from selling land parcel No. Butsotso/Shikoti/2866 on 10/4/2025
6. The Application was placed before this court on 4th April, 2025 , I certified the application as urgent and ordered the Applicant to serve the Respondent the response and fixed interpartes hearing on 8th April, 2025.
7. On 8th April, 2025 after hearing the counsels of both parties the court ordered the counsels to file written submissions to dispose off the Applications and ordered status quo be maintained meaning that the public auction which was to take place on the 10th April, 2025 would not proceed pending the ruling of this Application dated 3rd April, 2025.
8. I have looked at the supporting affidavit and replying affidavit filed by the 1st respondent and I have also looked at the submissions filed by the parties.
9. The counsels submitted on both Applications the one dated 3rd April, 2025 and the other one 21st March, 2025 but what was coming for ruling was application dated 3rd April, 2025.
10. The Applicant counsel in his submissions admitted that he joined the court through virtual link on 3rd April, 2025 late after the matter had been called and submitted that was an excusable mistake and urged the court to exercise its discretion and set aside the orders issue don 3rd April, 2025.
11. On the issue of court granting an order for stay pending the hearing on the application dated 21st March, 2025 the applicant submitted it was extremely necessary for the public auction of Land parcel No. Butsotso/Shikoti/2866 was slated for 10th April, 2025.
12. The 1st respondent in its submissions as whether to set aside orders of 3rd April, 2025 gave an history of various cases file din different courts seeking to stop the sale of the suit property through public auction and also disclosed that the court of appeal sitting at Kisumu on 8th of April, 2025 gave a temporary injunction to restrain the 1st Defendant from disposing off the suit property via the intended sale by public auction slated for 10th April, 2025 in Kisumu COACAPPL NO. E052 OF 2025 -Zenah makokha Mohammed and Another Vs Joyce Pacilishia Shimanyula, Family Bank limited and 2 others and Kisumu COAPAPPL No. E040 of 2025 -Zenah Makokha Mihammed and Another Vs Joyce Pacilisha Shimanyula, Thomas Shimanyula, Family Bank Limited and Pawaba Auctioneers.
13. The orders sought are discretion orders the court can decide to grant or not see COA Decision in CMCC Holding ltd -vs- Nzoia (2004)



14. The 1st issue to determine is whether the applicant has given a plausible reason to make this court exercise its discretion and set aside the orders of 3rd April, 2024.
15. The applicant admitted that he joined the court late via virtual link and found that matter had already been called out and to demonstrate his eagerness to prosecute the application he filed a certificate of urgency the same day, he regretted the mistake which he said was excusable and referred the court to the case of Philip Chemwolo and Another Vs Anistine Kubende 1982 -1988 KAR where the court observed

“blunder will continue to be made from time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error that cannot be put right by payment of costs. The court as it as it often says exists for the purpose of deciding the right of the parties and not the purpose of imposing discipline”
16. A human being is to error it appears the counsel for the applicant miscalculated the speed of the court it applied when it was going through the cause list of that day, it is normal for one to miscalculate, such a miscalculation is excusable if it was an honest miscalculation.
17. The speed at which the applicant counsel lodged the present application it clearly shows the miscalculation was honest and regrettable and therefore I have no reason not to exercise my discretion in his favor and do set aside the orders of 3rd April, 2025.
18. The 2nd issue to determine is whether to stay the public auction pending the hearing and determination of the Application dated 21st March, 2025.
19. I have considered the submissions by the counsels largely the counsels have submitted as if the court was determining the Application dated 21st March, 2025.
20. Following the disclosure by the 1st respondent advocate that the court of appeal has issued similar orders which this court is being requested to issue, I find that this court's hands are tied for even if this court had a different view it cannot issue orders contrary to the orders issued by the court of appeal for the orders relate to the same subject i.e the sale of Land parcel No. Butso/ Shikoti/2866 by public auction.
21. Therefore in view of the court of appeal order and also for the need to serve the suit subject I order that there be a stay of the sale of Land parcel No. Butso/ Shikoti/2866 by way of public auction pending the hearing and determination of the application dated 21st March, 2025.
22. The 1st respondent shall be at liberty to put a reply to the application dated 21st March, 2025 in the next 14 days and serve.
23. The Applicant shall have leave to put a further affidavit upon being served with the reply if it deems fit within the next 14 days upon being served.
24. Mention on 14th May, 2025 for further directions on the Application dated 21st March, 2025.
25. Costs shall be in cause.
26. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF APRIL, 2025



S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Albright Sunguti

