



**Meds Pharmaceuticals Limited v I & M Bank Limited & 2 others (Civil Case E581 of 2024) [2025] KEHC 6688 (KLR) (Commercial and Tax) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E581 OF 2024  
JWW MONG'ARE, J  
MAY 26, 2025**

**BETWEEN**

**MEDS PHARMACEUTICALS LIMITED ..... PLAINTIFF**

**AND**

**I & M BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CREDIT REFERENCE BUREAU AFRICA T/A TRANSUNION ... 2<sup>ND</sup>  
RESPONDENT**

**ANTIQUA AUCTIONS AGENCIES ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. What is before this Honourable Court is a Notice of Motion Application dated 25<sup>th</sup> September 2024 under a Certificate of Urgency and is brought under Order 40 Rule 2, 4 & 5 and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A, of the [Civil Procedure Act](#), Section 57 & 61 of the Consumer Protections Act and it seeks the following orders:-
  1. Spent
  2. Pending hearing and determination of this application, the 1<sup>st</sup> Respondent be and is hereby be ordered to suspend the terms of the Statutory Demand Notice dated 10<sup>th</sup> September 2024 as against the Plaintiff/Applicant.
  3. Pending hearing and determination of this application, the 2<sup>nd</sup> Respondent be and is hereby ordered to suspend and lift the listing of the Plaintiff as a loan defaulter.
  4. Pending hearing and determination of this application, the 3<sup>rd</sup> Respondent be and is hereby ordered to release motor vehicle KDE 766T to the Plaintiff/Applicant.



5. Spent
  6. Spent
  7. Pending hearing and determination of this suit, a temporary injunction to issue against the 1<sup>st</sup> Respondent by themselves, their servants or agents or any one authorized by them or claiming under them from in any manner or otherwise howsoever from auctioning, repossession, retaking, proclaiming, towing away any asset of the Plaintiff, storing, advertising, selling by private treaty or by public auction or otherwise, from transferring, disposing, charging, mortgaging, handling over, gifting or in any manner whatsoever from dealing and/or having any dealings with the Plaintiffs Motor vehicle KDE 766T.
  8. Pending hearing and determination of this suit, a temporary injunction to issue against the 1<sup>st</sup> Respondent by themselves, their servant or agents or any one authorized by them or claiming under them from in any manner or otherwise howsoever from auctioning, repossessing, retaking, proclaiming, towing away any asset of the Plaintiff, storing, advertising, selling by private treaty or by public auction or otherwise, from transferring, disposing, charging, mortgaging, handling over, gifting or in any manner whatsoever from dealing and/or having any dealings with the Plaintiffs Title Number Kajjado/Olekasasi/223.
  9. Costs of this application to be borne by the 1<sup>st</sup> Respondent and 3<sup>rd</sup> Respondent.
  10. Such further and/or other relief as the Court may deem fit and expedient so to grant.
2. The application is supported by the grounds set out on its face and the supporting and supplementary affidavits of Peter Ontomwa Nyamari Mogeni sworn on 25<sup>th</sup> September 2024 and 13<sup>th</sup> December 2024 respectively. The application is opposed and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have filed a replying affidavit sworn by Andrew K. Muchina on 12<sup>th</sup> December 2024. Both parties have filed written submissions which I have carefully considered.
  3. What emerges from the reading of the application and the supporting and supplementary affidavits thereto and responses filed by the Defendants alongside the rival submissions are two issues;- to wit; whether the affidavit sworn on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants in opposition to the Notice of Motion herein meets the legal threshold set by the law to be admitted in the proceedings herein; and secondly, whether the Applicant has established a case for grant of the orders sought.
  4. Because the Plaintiff has made heavy weather on the issue of the admissibility of the affidavit by the 1<sup>st</sup> and 3<sup>rd</sup> Defendant's representative, I will first and foremost consider the same before proceeding to consider the substantive issues as to whether the Plaintiff has made a case for grant of the orders sought. It is trite that section 4 of the [Oaths and Statutory Declarations Act](#) prohibits an Advocate appearing for a party in a suit from swearing or commissioning an affidavit in the same matter. Indeed Section 4 of the Oaths and Declaration Acts, Cap 15 Laws of Kenya provides as follows:-

“A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purposes of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate Court; provided that a commissioner for oaths shall not exercise any of the powers given by this section in any preceding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”



5. This principle was reinforced by the Courts in several cases including the holding in the of Kenya Federation of Labour & another v Attorney General & 2 others (2014) eKLR where the Court held that “A lawyer cannot commission a document drawn by his/her firm”. The Plaintiff has argued that the evidence that the advocate that commissioned the affidavit sworn by Andrew K. Muchina on 12<sup>th</sup> December 2024 was commissioned by an Advocate by the name of Grace W. Kimunya whose postal address of P.O. Box 22588 -00505- Nairobi which postal address is the same as the firm of Advocates appearing for the Defendants in the present suit and described as CM Advocates LLP....P.O. Box 22588-00505, Nairobi. To buttress this point, the Plaintiff has urged the court to be persuaded by the court’s decision in China Bente Industry (K) Ltd v Seline J Comen & Another (2022) eKLR where the Court observed and held that:-

“ 32. It is apparent and /or evident that the person, who bears the name Samson Nyama Masila, who commissioned the affidavit, is indeed the one practicing in the name and style of M/S S. N Nyamai & Co. Advocates. For clarity, this position has been underscored by the fact that even the postal address alluded to in the rubber stamp affixed at the foot of the supporting affidavit, corresponds with and or replicated the postal address shown at the fool of the instrument or subject pleadings.....35. owing to the foregoing, the question that then arises is whether an advocate who is acting for a party in respect for a particular matter, can commission and/or administer an oath in respect of any affidavit to be used in the matter, where such an advocate is acting and/or concerned in the instant case.....43. Based on the foregoing position, it is apparent that the subject application, is fatally incompetent and therefore devoid of any legal foundation, to the extent that the same is anchored on a void affidavit.”

6. I agree with the above finding. It is the law that an advocate representing a party before a court in a case should not commission an affidavit to be used as evidence in the same matter. However, in the present application before this court, I note that the Defendants are represented by a firm of advocates described as CM LLP Advocates. I note that the impugned affidavit has been commissioned by an advocate described as Grace W. Kimunya and the only common factor between the said advocate is a shared postal address being P.O. Box 22588-00505, NAIROBI. I find no evidence presented before this court that this makes the said Grace W Kimunya a partner in the firm of CM LLP Advocates or as the advocate practicing in the name and Style of CM LLP Advocates. If the Plaintiff wished to establish the relationship of Grace W. Kimunya as being in partnership in the firm described as CM LLP Advocates, the more accurate and tangible evidence would have been to provide evidence of the incorporation of the said CM LLP Advocates from the Companies Registry which is the custodian of all records of all incorporated persons. A shared postal address cannot be used in a court of law as evidence of partnership as it is not conclusive proof of the same. I find therefore that the affidavit sworn by Andrew K. Muchina on 12<sup>th</sup> December 2024 and commissioned by Grace W. Kimunya Advocate and Commissioner for oaths to be competent and properly before the court and I decline the invitation by the Plaintiff to strike it out.
7. The second challenge mounted by the Plaintiff on the affidavit by Andrew K. Muchina on 12<sup>th</sup> December 2024 is the fact that the deponent has not availed evidence to confirm that he is an employee or an officer of the Defendants or he has authority to swear the affidavit on their behalf. I have perused the said affidavit and note that at paragraph 1 of the said affidavit that Andrew K. Muchina avers that he is “the Assistant General Manager – Litigation and NPA of the Plaintiff/Applicant”. I however note that in the said affidavit, the deponent proceeds to annex documents drawn from the 1<sup>st</sup> Defendant and



which appear to be confidential and only available as such to the Bank and or its officers. I am satisfied upon perusal of the said material that the description in the affidavit as an officer of the Plaintiff can only have been a typo and the fact remains that the affidavit has been sworn to support the 1<sup>st</sup> and the 3<sup>rd</sup> Defendant's case and therefore the said Andrew K. Muchina is an employee of the 1<sup>st</sup> Defendant and not the Plaintiff. In arriving at this finding I am guided by the Constitutional dictates at Article 159 that has urged the courts to consider matters before them without due regard to technicalities and deliver substantive justice in the matters presented by parties before them. I find therefore the reference to the deponent being an employee of the Plaintiff and proceeding to produce records that can only be in the custody of the 1<sup>st</sup> Defendant not sufficient ground to strike out the affidavit.

8. This therefore leads to the second substantive issue as to whether the Plaintiff has established a case of the grant of the orders sought. I note herein that substantively, the Plaintiff seeks injunctive reliefs against the 1<sup>st</sup> Defendant to restrain it from disposing of motor vehicle KDE 766T and selling by public auction the land held under Land Title Number Kajiado/Olekasasi/223, which were charged to the 1<sup>st</sup> Defendant to secure the loans subject matter of the dispute before the courts.
9. I do not think it is in dispute that for an order of injunction to issue, the Plaintiff is required to satisfy the conditions set out in the case of *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 by demonstrating a prima facie case with a probability of success, that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR)).
10. The parties also agree that what constitutes "a prima facie case" was set out by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) as follows:-

A prima facie case in a civil application includes but is not confined to a

"genuine and arguable case." It is a case 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.

11. A prima facie case flows from what has been pleaded in the plaint. A perusal of the plaint reveals that the Plaintiff acknowledges its indebtedness to the 1<sup>st</sup> Defendant but argues that the 1<sup>st</sup> Defendant has by its conduct, including having its listed as a defaulter by the 2<sup>nd</sup> Defendant frustrated a takeover of the loan by Kenya Commercial Bank and denied it a facility with Equity Bank of Kshs.75,000,000.00/= and Kshs.10,000,000.00/= respectively.
12. The Plaintiff acknowledges having been served with the requisite statutory notices by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. I note that other than merely mentioning that it had negotiated a takeover of the loan facilities by Kenya Commercial Bank Limited, the Plaintiff has not availed to the court of the said commitment or correspondence from Kenya Commercial Bank evidencing the said discussions or negotiations. Nor has the letter of offer of Kshs.10,000,000.00/= loan from Equity Bank to the Plaintiff been made available to the court for consideration. It is therefore not possible for the court to confirm if such discussions or negotiations existed.



13. In any event, the Court notes that other than arguing that it has had other overtures by other financial institutions frustrated by the 1<sup>st</sup> Defendant, the Plaintiff has not provided evidence of how it intended to service the arrears of the facilities offered by the 1<sup>st</sup> Defendant or even provided evidence of its attempts to service the loan as it sourced cheaper capital. No explanation has been availed to this court as to what led the Plaintiff, which was advanced funds to use as operating capital by the 1<sup>st</sup> Defendant, to a situation of it been unable to service the loan or make good the loan arrears that were clearly set out in the documents availed to the Court by the 1<sup>st</sup> Defendant in the affidavit of Andrew K. Muchina. I am therefore not persuaded that the Plaintiff has established a prima facie case as set out in the Mrao case(supra). In line with the court of appeal directions in the Nguruman ltd(supra), I will not consider the other two parameters set out in the Giella v Cassman Brown(supra) for grant of orders of interim injunction.
14. The upshot of the above finding is that the application before this court is dismissed for want of merit. Costs of this application are awarded to the Defendant. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2025**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Ms. Chenger holding brief for Silas Biyogo for the Applicant/Plaintiff.

Mr. Waigwa for the Defendant/ Respondent.

Amos - Court Assistant

