



**Okech v Premier Bank Kenya Limited & another (Commercial Case E007 of 2024) [2025] KEHC 6173 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE E007 OF 2024**

**A MABEYA, J**

**MAY 16, 2025**

**BETWEEN**

**ALFRED AWUONDA OKECH ..... PLAINTIFF**

**AND**

**PREMIER BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MUGANDA WASULWA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling determines the application dated 8/10/2024. The same was brought under sections 1A, 1B & 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 40 Rules 2, 3, 4 & Order 51 Rules 1,2 & 3 of the Civil Procedure Rules 2010 as well as sections 90 and 96 of the *Land Act*.
2. The plaintiff seeks a temporary injunction to restrain the defendants and their agents and/or representatives from selling, alienating and/or interfering with the land known as Kisumu/Kogony/6069 and Kisumu/Pandpieri/2043 [“the suit properties”]all which are registered in his name.
3. The application was based on the grounds set out in the body of the Motion and his supporting and supplementary affidavits sworn on 8/10/2024 and 18/11/2024, respectively.
4. The plaintiff averred that the 1<sup>st</sup> defendant offered financial facilities to Ugambe Company Ltd which were secured by legal charges over the suit properties in the following terms;
  - i. Kshs. 4,500,000/- secured by a legal charge over Kisumu/Kogony/6069 registered on the 17/11/2016.
  - ii. Kshs. 4,900,000/- secured by a legal charge over Kisumu/Pandpieri/2043 registered on the 15/10/2019



5. That the aforementioned amounts were fully settled by Ugambe Company Ltd. Subsequently, the 1<sup>st</sup> defendant advanced further facilities to the said company amounting to Kshs. 19,725,000/- secured by a charge over land parcel Kisumu Municipality Block 12/232 owned by one Rose Akoth Otieno.
6. It was averred that Rose Akoth Otieno proceeded to court in Kisumu HCCOMM No. E004/2024 – Rose Akoth Otieno v Premier Bank Kenya Ltd, Ugambe Co Ltd & Muganda Wasulwa T/A Keysian Auctioneers alleging that the charge was fraudulently registered without her knowledge or consent and in a ruling dated 10/6/2024, the court stopped the intended sale of her property.
7. That following the court’s ruling of the 10/6/2024, the 1<sup>st</sup> defendant lumped the loan fraudulently charged to Kisumu Municipality Block 12/232 and owned by Rose Akoth Otieno to him and demanded the entire amount of Kshs. 23,395,161.23. It then instructed the 2<sup>nd</sup> defendant to advertise for sale the suit properties.
8. That on discussion with the 1<sup>st</sup> defendant on the additional loans, the plaintiff was informed by the 1<sup>st</sup> defendant to settle Kshs. 3,870,161.23 which was less the amount of Kshs. 19,725,000/- secured by the Charge over Ksm Municipality Block 12/232 owned by Rose Akoth Otieno. That in a bid to save his property he paid Kshs. 1,500,000/- in an effort to clear the Kshs. 3,870,161.23 he was alleged to owe.
9. He contended that no statutory notices were issued to him in the manner prescribed by sections 90 and 96 of the Land Act.
10. In response, the 1<sup>st</sup> defendant filed a replying affidavit sworn on the 18/11/2024 sworn by one Claris Ogombo, the 1<sup>st</sup> defendant’s Legal Manager. It was averred that following an application by Ugambe Company Limited, the 1<sup>st</sup> defendant a letter of offer dated 24/10/2016 for a facility of Kshs. 4,000,000/-. The same accepted by the Company and subsequently secured by a legal charge dated 14/11/2016 of Kshs. 4,500,000/- over title no. Kisumu/Kogony/6069.
11. That by a letter of offer dated 3/9/2019 the 1<sup>st</sup> defendant offered to advance to the Company a further facility of Kshs. 3,500,000/- that was secured by a legal charge of Kshs. 4,900,000/- over title no. Kisumu/Pandpieri/2043.
12. Subsequently, the Company applied for various facilities from the 1<sup>st</sup> defendant resting with accepted letters of offers dated 29/12/2020 and 29/03/2021 secured by the Charges dated 14/11/2016 and 14/11/2019, respectively over the suit properties as well as a Charge of Kshs. 16,000,000/- over the property known as Kisumu Municipality Block 12/232.
13. That in addition to the Charges cited above the plaintiff also executed Deeds of Guarantee and Indemnity guaranteeing the Company’s obligations to the 1<sup>st</sup> defendant.
14. The 1<sup>st</sup> defendant further deposed that vide a letter of offer dated 14/10/2022 that was accepted by the Company, it restructured the Company’s facilities with effect that there was to be a bullet payment of the principal amount within six [6] months after drawdown of the facilities.
15. That the Company severally defaulted on its repayment obligations and consequently it issued the Chargors and the Company the requisite ninety-day notice under section 56 [2] of the Land Registration Act and sections 90 and 96 of the Land Act informing them that they were in default of Kshs. 23,395,161.23 as at 17/8/2023. That following a failure by both the Company and the plaintiff to remedy the situation, it proceeded to instruct the 2<sup>nd</sup> defendant, vide a letter dated 6/2/2024, to sell the properties by way of public auction.



16. That Messrs. Accurate Valuers Limited were instructed to inspect the suit properties and advise on the current open market, forced sale and insurance value of the suit properties for purposes of the intended auction in compliance with provisions of the Land Act.
17. The properties were to be sold by way of public auction on 7/5/2024 but was halted by a court order obtained in Kisumu HCCOMM No. E004/2024 – Rose Akoth Otieno v Premier Bank Kenya Ltd & 2 Others specifically halting the sale of Ksm Municipality Block 12/232. That since the orders issued therein were only temporary, the allegations of fraud by the plaintiff are unfounded.
18. It was deposed that the plaintiff has failed to sufficiently satisfy the conditions for the grant of interim injunctive relief as enunciated in the case of Giella v Cassman-Brown. That at no time did the plaintiff ever reach out to the 1<sup>st</sup> defendant to be discharged from the several Deeds of Guarantee or given notice in writing to determine the several Deeds of Guarantee.
19. That the Company filed Kisumu MCCC No. E126 of 2024 and obtained ex-parte temporary injunctive relief. However, the same was subsequently dismissed on the 17/9/2024 for want of prosecution. That in that suit the Company tacitly admitted being in default of repayment obligations.
20. That the plaintiff had failed to demonstrate that he would suffer irreparable harm and loss not capable of being remedied by way of damages. And, that once property is used as collateral, the property becomes a commodity capable of being remedied by monetary damages.
21. I have considered the pleadings herein as well as the written submissions filed by both parties and note that the only issue for determination is whether the applicant merits the grant of the injunctive order sought.
22. This is an injunction application. The principles applicable were set out in the case of Giella v Cassman Brown & Company Limited [1973]EA 358. These are that; an applicant must show a prima facie case with a probability of success. Second, he must establish that he will suffer irreparable injury, which would not adequately be compensated by an award of damages. Third, if the court is in doubt, it will decide an application on the balance of convenience.
23. In Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal clarified that the three conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially.
24. As to what constitutes a prima facie case, the Court of Appeal in Mrao Ltd v First American Bank of Kenya Limited and 2 others [2003] eKLR, explained 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”
25. There is no doubt that the plaintiff and the 1<sup>st</sup> defendant had a financial relationship. The plaintiff challenges the 1<sup>st</sup> defendant’s exercise of its statutory right of sale on the account that there was fraud by the 1<sup>st</sup> defendant in lumping a loan initially charged to one Rose Akoth Otieno to him. Further that no statutory notices were issued to him by the 1<sup>st</sup> defendant in the manner prescribed by the relevant laws.



26. This court notes that allegations of fraud have been made. An allegation of fraud is a serious one which cannot be proved through affidavit evidence but by calling of evidence in the main trial. In *Urmilla W/O Mahendra Shah v Barclays Bank International Ltd & Another* [1979]KLR 76, it was held that: -
- “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”
27. In the present case, the plaintiff accused the 1<sup>st</sup> defendant of wrongly lumping the debt belonging to a 3<sup>rd</sup> party, Rose Akoth Otieno to that of the Company. That the Company had completed repayment of the loan the subject of the Charges over the suit properties.
28. On its part, the 1<sup>st</sup> defendant detailed how it complied with the law in issuing the requisite statutory notices to the plaintiff through his availed postal and email addresses. Copies of such notices were produced but the plaintiff did not in any way whatsoever challenge the same.
29. From the foregoing, it is clear that the grounds relied on by the plaintiff in his application remained unproven. In the premises, the plaintiff failed to establish a prima facie case with any probability of success.
30. There is a statutory requirement that a chargee ought to carry out a valuation of a charged property prior to exercising its statutory powers of sale. Pursuant to Section 97[2] of the *Land Act*;
- “A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”
31. The 1<sup>st</sup> defendant deposed that prior to the undertaking of the public auction, it instructed Messrs. Accurate Valuers Limited to inspect the suit properties and advise on the current open market, forced sale and insurance value of the suit properties for purposes of the intended auction in compliance with provisions of the *Land Act*.
32. The plaintiff has not averred that he stood to suffer substantial loss if the intended sale is allowed to proceed.
33. In his supporting affidavit, the applicant deposes that he is at risk of prejudice and irreparable loss if and when the respondent completes the sale. The affidavit is reticent on the nature of the irreparable loss; the plaintiff might otherwise suffer. Equally, the reliefs sought in the suit are all of a financial nature and have been quantified save for the declaration.
34. From the foregoing, it is decipherable that the plaintiff has failed to demonstrate on a balance of probabilities that the loss he is likely to suffer, if the injunctive relief he is seeking is not granted, would be irreparable.
35. In paragraph 739 of Halsbury’s Laws of England [3<sup>rd</sup> Edition] Vol. 21, the learned writers observe that: -
- “In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.”
36. Notwithstanding the foregoing, it must be noted that it is not debatable that a person who receives a loan from a Lender and who voluntarily and lawfully gives out his property as collateral or security for the loan is presumed to be fully aware that in the event of default, the Lender is at liberty to sell off the property to recover the money lent out.



37. In *Maltex Commercial Supplies Limited & Another v Euro Bank Limited* [In Liquidation), HCCC No. 82 of 2006), Warsame J [as he then was] observed that: -

“... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

38. In the circumstances, the second requirement has not been met.

39. On the third limb, it is this Court’s view that the balance of convenience tilt towards the 1<sup>st</sup> defendant recouping its outlay before the interest escalates and supersedes the value of the securities. In the premises, the Court holds that the applicant has failed to make out a case for the grant of a temporary injunction pending the hearing and determination of the suit.

40. Accordingly, the application dated 8/10/2024 is without merit and is therefore dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 16<sup>TH</sup> DAY OF MAY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

