



REPUBLIC OF KENYA



KENYA LAW

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**Roy Hauliers Limited v I & M Bank Limited (Civil Case E535 of 2024)
[2025] KEHC 5765 (KLR) (Commercial and Tax) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E535 OF 2024**

PM MULWA, J

MAY 8, 2025

BETWEEN

ROY HAULIERS LIMITED PLAINTIFF

AND

I & M BANK LIMITED DEFENDANT

RULING

1. This ruling relates to the Notice of Motion dated 25th September 2024, brought under the provisions of Order 40 and 51 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 63(e) of the [Civil Procedure Act](#). The Applicant seeks, inter alia, the following substantive orders:
 - i. spent
 - ii. spent
 - iii. spent.
 - iv. That pending the hearing and determination of this suit, this honourable court be pleased to grant a temporary injunction restraining the defendant, whether by itself, employees, representatives and or agents, from calling on the plaintiff's guarantors, Ory investments limited, Omar Rahemiulla Omar Yakub, Sarfaraz Omar Yakub and Shemir Omar Yakub to settle the debt.
 - v. That pending the hearing and determination of this suit, this honourable court be pleased to grant a temporary injunction restraining the defendant, whether by itself, employees, representatives and or agents from applying to liquidate the plaintiff's company.
 - vi. The costs of the application be provided for.



2. The application is supported by the affidavit of Sarfaraz Omar Yakub, sworn on 25th September 2024. In the said affidavit, the deponent avers that the Plaintiff's business encountered significant financial difficulties, resulting in its inability to service the loan facility advanced by the Defendant. Consequently, the Defendant proceeded to realize its security by selling the motor vehicles financed under the facility. The Plaintiff alleges that the said vehicles were sold at a gross undervaluation, specifically at Kshs. 202,676,500/=. Following the said sale, the Defendant issued a statutory demand for Kshs 350,680,566. The Plaintiff disputes the quantum of the debt and contends that any further enforcement, including liquidation proceedings, would be unjust, oppressive and would effectively cripple the Plaintiff's ongoing operations.
3. The gist of the application is that the Plaintiff entered into a loan facility with the Defendant for the sum of USD 3,960,600 for the acquisition of 35 vehicles and 30 trailers. The facility was secured by guarantees from Ory Investments Limited, Omar Rahemiulla Omar Yakub, Sarfaraz Omar Yakub and Shemir Omar Yakub. However, the company experienced financial difficulties and was unable to repay the loan. Consequently, the Defendant exercised its rights under the security and sold the vehicles at what the Applicant claims was a gross undervalue. Following the sale, the Defendant issued a statutory demand for Kshs. 350,680,566/= which the Applicant disputes, contending that enforcement of the debt through liquidation and recourse to guarantors will cripple its business operations and is unjust.
4. The application is opposed. The Respondent filed a Preliminary Objection dated 24th October 2024 and a Replying Affidavit sworn by Mathew Muthoka on 22nd January 2025. The Respondent avers that the suit and application are res judicata, the issues having been conclusively determined in HCCOMM E492 of 2023 – Roy Hauliers Limited v I&M Bank Limited & Another, where a consent judgment was entered on 7th November 2023 for the sum of Kshs. 535,815,000/= plus interest.
5. He further asserts that the allegations of undervaluation are unsubstantiated and that the sale proceeds from 63 vehicles and properties known as L.R. No. 18995/14 and 15 were applied towards the settlement of the consent judgment, with a residual debt remaining. The bank issued a statutory demand on 8th August 2024 and intends to pursue insolvency proceedings as a lawful mode of execution.

Issues for determination

6. Having carefully considered the pleadings, affidavits and written submissions of the parties, the issues that fall for determination are:
 - i. Whether the suit and application are barred by the doctrine of res judicata; and
 - ii. Whether the Applicant has met the threshold for the grant of temporary injunctive relief.
7. The doctrine of res judicata is anchored in Section 7 of the *Civil Procedure Act* which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
8. The test for res judicata is well established in the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, where the Court held that for the doctrine to



- apply, the following elements must be satisfied; that is, there must have been a former suit or decision, between the same parties or parties claiming under them, involving the same subject matter and where the issue was directly and substantially in issue and heard and finally determined by a competent court.
9. Applying this test to the present case, I am not satisfied that all the elements have been met. While it is not in dispute that a former suit exists and that the parties in both matters are the same or substantially similar, the record reveals that the present application arises from new facts. Specifically, the application is predicated on the Respondent's apparent intention to liquidate the Plaintiff in execution of a decree. This development constitutes a fresh and continuing threat of harm which, from the evidence presented, was neither pleaded nor determined in the earlier proceedings. It is not sufficient for the Respondent to broadly assert that the subject matter is the same; the Court must be satisfied that the very issue now brought for determination was directly and substantially in issue in the earlier suit and was conclusively adjudicated.
 10. Moreover, the relief sought in the present motion is interlocutory and injunctive in nature. It is well settled that the principle of res judicata does not bar the Court from entertaining fresh applications for interim relief where a party alleges ongoing or newly emerging threats, particularly where such issues arise after the conclusion of earlier proceedings.
 11. I am further guided by the decision in *Mburu Kinyua v Gachini Tuti* [1978] KLR 69, where the Court stated:

“Res judicata should not be applied so rigidly as to bar legitimate claims merely because they are connected to issues previously litigated. The doctrine must be applied with caution and flexibility to ensure justice is done in the specific circumstances.”
 12. Consequently, I find that the doctrine of res judicata does not operate to bar the present application.
 13. The next issue is whether the Applicant has met the threshold for a temporary injunction.
 14. The principles of injunctions are as enunciated in the case of *Giella v Cassman Brown* (1973) EA 358 and as was reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [*CA No.77 of 2012*](#) (2014) eKLR where the Court of Appeal held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; (a) establishes his case only at a prima facie level, (b) demonstrates 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.”
 15. The three conditions are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.
 16. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, the Court defined a prima facie case as:

“... a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
 17. In the present case, the Applicant has demonstrated that despite the existence of a consent judgment, the Respondent proceeded to exercise its statutory power of sale and now threatens to commence liquidation proceedings without clear engagement of the guarantors or the court. These actions are



a plausible infringement of the Applicant's rights and could potentially extinguish the Plaintiff's corporate existence and defeat the purpose of the pending suit. Furthermore, liquidation may undermine the Plaintiff's pending claims, thereby impairing access to justice. These facts establish a prima facie case meriting trial.

18. On the second limb, the Applicant must show that it stands to suffer irreparable harm, which was described in *Nguruman* (supra) as harm that cannot be adequately compensated by damages. From the material before this Court, the Applicant is in active business employing several individuals and maintaining ongoing operations. If liquidation is permitted at this stage, the company would be dissolved and its employees rendered jobless. Moreover, the pending suit would be rendered moot. These consequences, in my view, go beyond monetary loss and amount to irreparable harm.
19. On the third limb, regarding the balance of convenience, I am persuaded that it lies in favour of preserving the status quo. The Defendant, being a financial institution, will not suffer irreparable harm if temporarily restrained from commencing liquidation. Conversely, the Applicant may suffer permanent harm should the company be wound up before the case is heard and determined. Preserving the corporate existence of the Applicant pending trial ensures that justice can be meaningfully dispensed, should the claim ultimately succeed.
20. In light of the foregoing analysis and the discretion granted to this Court under Order 40 of the Civil Procedure Rules, I find that the Applicant has met the threshold for the grant of interlocutory injunctive relief.
21. Consequently, the preliminary objection dated 24th October 2024 is without merit and is hereby dismissed. The Notice of Motion application dated 25th September 2024 is allowed.
22. Accordingly, I grant the following orders:
 - a. That pending the hearing and determination of this suit, a temporary injunction be and is hereby granted restraining the defendant, whether by itself, employees, representatives and or agents, from calling on the plaintiff's guarantors, Ory investments limited, Omar Rahemiulla Omar Yakub, Sarfaraz Omar Yakub and Shemir Omar Yakub to settle the debt.
 - b. That pending the hearing and determination of this suit, a temporary injunction be and is hereby granted restraining the defendant, whether by itself, employees, representatives and or agents from applying to liquidate the plaintiff's company.
 - c. The costs of this application shall be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Owiti & Ms. Masaki for Plaintiff/applicant

Mr. Wawire for Defendant/respondent

Court Assistant: Carlos

