



REPUBLIC OF KENYA



Troy Medicare Pharmacy Limited v Equity Bank Kenya Ltd & another (Commercial Case E016 of 2024) [2025] KEHC 7351 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL CASE E016 OF 2024
FN MUCHEMI, J
MAY 22, 2025**

BETWEEN

TROY MEDICARE PHARMACY LIMITED PLAINTIFF

AND

EQUITY BANK KENYA LTD 1ST DEFENDANT

PHILIPS INTERNATIONAL AUCTIONEERS 2ND DEFENDANT

RULING

1. The application for determination dated 10th December 2024 seeks for orders of injunction restraining the defendants, their servants and/or agents from selling, auctioning or transferring or otherwise disposing of land parcel LR. No. Ruiru East Block 5/253 (Grey Terrace – off Thika Superhighway Kahawa Wendani, Kiambu County) until the hearing and determination of the suit. The applicant further seeks for a reasonable time of 180 days to redeem the suit property.
2. In opposition to the application, the 1st respondent filed a Replying Affidavit dated 27th February 2025.

The Applicant's Case.

3. The applicant avers that it is the registered proprietor of LR. No. Ruiru East Block 5/253 Grey Terrace situate at Kahawa Wendani, Kiambu County which has been charged to the 1st respondent as security for financial facilities advanced to it.
4. The applicant avers that on various occasions, it applied for and was advanced credit facilities by the 1st respondent to facilitate its commercial operations, including leasing and partitioning of properties and working capital. The facilities extended by the 1st respondent include Kshs. 9,000,000/- advanced on 19th April 2018 for the purchase of property known as LR. No. 12715/7906; Kshs. 5,000,000/- advanced on 5th July 2018 for portioning business premises; Kshs. 105,000,000/- advanced on 27th August 2019 for the purchase of property known as LR. No. Ruiru East Block 5/253 and other



loans totalling to Kshs. 135,000,000/- advanced between 2020 and 2022 for leasing, portioning and consolidation purposes. Further, the credit facilities were secured with a legal charge over the suit property to the tune of Kshs. 105,000,000/-, a personal guarantee executed by Rosemary Muthu Muathe and Dishon Musisyo and a deed of assignment of rental income derived from the suit property and two leased properties namely LR No. 209/1742 and LR No. 209/1829 in favour of the 1st respondent.

5. The applicant avers that it faithfully serviced the loan facility until it was forcibly and unlawfully evicted from the leased properties due to the actions of the lessors rendering it incapable of collecting rental income which was a primary source of repayment of the loans.
6. The applicant states that it is actively pursuing legal redress against the lessors of the two properties in two separate pending suits, seeking the enforcement of its contractual and proprietary rights in ELC Suit No. E235 of 2023 and ELC Suit No. E236 of 2023 (referred to arbitration). The applicant further states that the lessors have instituted frivolous and vexatious criminal proceedings against it through proxies in MCCR/E954/2024. Consequently, the applicant states that it defaulted on loan repayments.
7. The applicant avers that the 1st respondent through its agent, the 2nd respondent has commenced the process of auctioning the suit property to recover the loan balances with the auction scheduled for 13th December 2024 pursuant to a Notification of Sale dated 10th July 2024 and a newspaper advertisement published on 25th November 2024 in the Daily Nation.
8. The applicant argues that the said auction is premature and unlawful as the 1st respondent has failed to comply with the statutory requirements under Sections 90 and 96 of the *Land Act*. The valuation of the suit property as indicated in the Notification of Sale is grossly understated with the property being valued at a market value of Kshs. 120,000,000/-, a mortgage value of Kshs. 96,000,000/- and a forced sale value of Kshs. 90,000,000/-. The applicant avers that it acquired the subject property for a consideration of Kshs. 150,000,000/- as per the sale agreement dated 30th May 2019 with Eve & Doe Company Limited. Since the acquisition, it has implemented a series of enhancements to the property, contributing to its appreciation value which increase has been further influenced by prevailing market dynamics, as real estate assets continue to experience a significant valuation growth.
9. The applicant argues that the undervaluation of the suit property by the 1st respondent is further substantiated by a prior independent valuation conducted by Tysons Limited on 19th July 2019. The valuation determined the market value of the suit property to be Kshs. 130,000,000/-, with a forced sale value of Kshs. 100,000,000/- and a mortgage value of Kshs. 115,000,000/-.
10. The applicant further states that the valuation report by Kenstate Valuers Limited relied upon by the respondents was conducted on 2nd February 2024, a period exceeding 10 months prior to the scheduled auction date of 13th December 2024 rendering it outdated and non compliant with the provisions of Section 97(2) of the *Land Act*.
11. The applicant is apprehensive that the respondents' actions will lead to the disposal of the suit property at a throw away price causing irreparable harm to it. The applicant avers that it requires time to redeem the suit property by settling the outstanding loan balances in a manner agreed upon with the 1st respondent.

The 1st Respondent's Case.

12. The 1st respondent states that it advanced various credit facilities to the applicant between April 2018 and September 2022 namely a loan facility for Kshs. 9,000,000/- for the purchase of LR. No.



- 12715/7906; loan facility for Kshs. 5,000,000/- for portioning of business premises; a commercial mortgage facility for Kshs. 105,000,000/- for the purchase of parcel number LR. No. Ruiru East Block 5/253; a development loan for Kshs. 20,000,000/- to finance the leasing and portioning of LR No. 209/1742; a development loan and a business overdraft for Kshs. 30,000,000/- and Kshs. 50,000,000/- respectively with the development loan financing the leasing and portioning of LR. No. 209/1829 and business overdraft for working capital; a development loan for Kshs. 15,000,000/- to finance outstanding works for partitioning of LR. No. 209/1829; a development loan for Kshs. 60,000,000/- to consolidate the outstanding balances in the loan account numbers 0470580366516, 0470580564303, 0470581294756, 0470577374583 and 0470577581208 and a business loan for Kshs. 5,000,000/- to convert the overdraft facility in account number 0470291454262 to a term loan. The 1st respondent avers that the following credit facilities are existing and still outstanding IPF Retail facility of Kshs. 471,158/-, project finance facility of Kshs. 60,000,000/- and commercial mortgage of Kshs. 105,000,000/-.
13. The 1st respondent states that as it continued to advance the said credit facilities to the applicant, it ensured that each successive facility letter indicated the facilities that were outstanding from the applicant.
 14. The 1st respondent further states that it was an express term of the facility letter dated 27th August 2019 that it would be secured by a charge of Kshs. 105,000,000/- over LR No. Ruiru East Block 5/253. The subsequent facility letters dated 4th December 2020, 4th February 2021, 9th September 2021, 16th March 2022 and 19th September 2022 all indicated that the charge created over the suit property continues forming part of the security for the credit facilities advanced to the applicant. Pursuant to the facility letters, the applicant created a charge dated 26th November 2019 over the suit property.
 15. The 1st respondent avers that the applicant failed to repay all sums due under the various credit facilities advanced to the applicant by the bank. By a letter dated 23rd June 2023, the 1st respondent issued a statutory notice pursuant to Section 90 of the [Land Act](#) where it demanded payment of the outstanding arrears and informed the applicant that it would proceed to exercise its power of sale if payment is not received within 3 months. The applicant was also informed of its right to apply to court for relief under Section 90(2)(e) of the [Land Act](#).
 16. The 1st respondent states that the applicant did not make payment of the arrears within the time set out in the statutory notice dated 23rd June 2023. The 1st respondent states that it proceeded to issue the statutory notice dated 17th January 2024 under Section 96 of the [Land Act](#) and the Notice to sell giving the applicant 40 days to settle the outstanding debt owed.
 17. The 1st respondent argues that it sent the notice under Section 96 of the Act through certificate of posting. Thereafter the 1st respondent states that it engaged Kenstate Valuers Limited to conduct a valuation of the suit property who prepared a report dated 2nd February 2024. Further, the 1st respondent states that the applicant has admitted that it was aware of the valuation conducted by Kenstate Valuers Limited and that it did not write to the bank challenging the said valuation before it instituted the current proceedings.
 18. The 1st respondent argues that the suit property is not grossly undervalued. The report dated 2nd February 2024 was prepared by duly licenced valuers and their practicing certificates for the period of 1st January 2024 to 31st December 2024 were annexed to the valuation report thus the bank complied with the requirements in Section 97(2) of the [Land Act](#). The 1st respondent avers that as of the date of the intended auction on 13th December 2024, the valuation report dated 2nd February 2024 was less



- than 12 months old and therefore valid. Further, the 1st respondent states that it will ensure that an up to date valuation is conducted before proceeding with any subsequent auction of the charged property.
19. The 1st respondent argues that the report prepared by Tysons Limited was prepared more than 4 years before the valuation report by Kenstate Valuers Limited. Further, the figures in the two valuation reports do not differ substantially as the market and forced sale value in the Tysons Limited valuation is Kshs 130,000,000/- and Kshs. 100,000,000/- respectively while in the Kenstate Valuers Limited it is Kshs. 120,000,000/- and Kshs. 90,000,000/- respectively. The 1st respondent states that in the event the court finds that the values in the Tysons Limited report are the correct values, the bank will be able to compensate the applicant with the difference in value.
20. The 1st respondent states that it instructed the 2nd respondent to put up the charged property for sale when the applicant failed to make payment of the outstanding amounts.
21. The 1st respondent argues that the applicant has never challenged the amounts set out in the statutory notices dated 23rd June 2023 and 17th January 2024.
22. The 1st respondent states that in the applicant's email of 23rd October 2024, the applicant informed it that it shall be able to fast track settlement of the outstanding facilities in less than a month but the applicant failed to settle the outstanding facilities within the said period as he had promised. Further, the applicant has indicated that it is unable to settle its credit facilities due to ongoing disputes with its former landlords. The 1st respondent states that the applicant's disputes with third parties is no reason for the applicant to fail to honour its obligations under the credit facilities and stop the bank from exercising its power of sale.
23. The 1st respondent states that it has repeatedly accommodated the applicant by restructuring the credit facilities advanced to it but the applicant has failed to give any reasonable proposal to settle the outstanding debt owed to the bank and remains in default.
24. The 1st respondent states that as at 24th February 2025, the total outstanding debt owed by the applicant is Kshs. 199,043,768/- which sums continue to accrue interest.
25. The applicant filed a Further Affidavit dated 11th March 2025 and avers that the notice under Section 96 of the *Land Act* was not served as required under Section 96(3)(a-j) of the *Land Act* which provides for personal service. The applicant avers that the 1st respondent feigned service by certificate of postage but never thought of serving the emails to it or its guarantor through their registered phone numbers, WhatsApp or physically pin a copy to the gate of the charged property or to any of the tenants in the property.
26. The applicant argues that the respondents are under a strict duty of care to the chargor and its guarantors to obtain the best price reasonably obtainable at the time of sale which begins with a valid valuation of the suit property by a valuer before exercising the right of sale pursuant to Section 97 of the *Land Act*.
27. The applicant argues that the 1st respondent admits that the valuation is incorrect and not up to date and the applicant shall stand to suffer gross undervalue if the 1st respondent is not stopped from the intended sale by way of a lawful injunction.
28. The applicant states that the 1st respondent never notified it of the date the valuers were meant to come and assess the suit property which is a requirement of the law and it has a right to see them and inspect



and conduct the valuation so that they can correctly assess the true market value and forced sale value thereof. The applicant argues that the valuer has grossly undervalued the suit premises and the bank intends to sell at a gross undervalue.

29. The applicant states that the undervaluation is a devious scheme to forcefully and unjustly take over its hard earned property without any justification, colour of right through a rushed process intended to strangle and wrestle the same from it yet the property is valued at a sum of Kshs. 22,000,000/-.
30. The applicant avers that the notices were not correctly served and they only came to know of them after time to comply had passed forcing them to chase the bank relationship manager to seek time to comply which fell on deaf ears.
31. The applicant states that they notified the 1st respondent to seek favourable loan term adjustments to take into account several issues due to some challenges the bank was always made aware of on time and they promised to accommodate them favourably since they had been repaying the loan for a long time, in mid 2020, they began facing challenges due to the impact of the covid 19 pandemic.
32. Parties disposed of the application by way of written submissions.

The Plaintiff's/Applicant's Submissions.

33. The applicant submits that the intended sale by public auction will lead to the unfortunate collapse of its operations, coupled with the significant reputational harm that would be incurred should the reliefs sought not be granted. The applicant submits that it is offering to pay a sum of Kshs. 500,000/- per month for the next two years in a bid to approach the court with clean hands whilst seeking an equitable relief. The applicant relies on the case of *Giella vs Cassman Brown & Company Ltd (1973) EA 358* and submits that it has met the threshold for the grant of an injunction.

The 1st Defendant's/1st Respondent's Submissions.

34. The 1st respondent relies on the case of *Nguruman Limited vs Jan Bonde Nielson & 2 Others [2014] eKLR* and *Mrao Ltd vs First American Bank of Kenya & 2 Others (2003) KLR 123* and submit that the applicant has not established a prima facie case with high chances of success as it has failed to demonstrate that it has infringed any of its rights. The 1st respondent submits that the applicant has failed to particularise the statutory requirements that have not been complied with and further that there is no requirement in the *Land Act* that the statutory notices required under Section 90 and 96 of the *Land Act* have to be served on the chargor personally. The 1st respondent submits that Section 151 of the *Land Act* provides for substituted service where a notice cannot be served personally or by post which demonstrates that service by post is one of the recognised means of effecting service under the Act. To support its contentions, the 1st respondent relies on the case of *Margaret Wangui Gachara vs Bank of India Limited [2008] KEHC 957 (KLR)*. The 1st respondent submits that it has produced the statutory notices required under Section 90 and 96 of the *Land Act* that were served by registered post and further produced certificates of posting. Thus there is no basis for the applicant's argument that the statutory notices were not served.
35. The 1st respondent submits that the valuation report by Kenstate Valuers Limited was conducted on 2nd February 2024 demonstrating that it complied with the requirement to ensure that a forced sale valuation is undertaken in accordance with Section 97(2) of the *Land Act*. Further, the valuation was conducted less than 12 months from the date of the intended auction which was 13th December 2024 in accordance with Rule 11(1)(b)(x) of the Auctioneers Rules.



36. The 1st respondent submits that the applicant's allegations that the charged property has been undervalued is untenable as the valuation report by Tysons Limited is dated 15th August 2019 which is more than 5 years old thus outdated and does not give an accurate value of the charged property. Further, the difference in the value given to the charged property in the Tysons Limited report and the Kenstate Valuers Limited report is not significant as the forced sale value in the former is Kshs. 100,000,000/- while in the latter it is Kshs. 90,000,000/-. Thus there is no basis for the claim that the charged property has been grossly undervalued. The 1st respondent further argues that the slight difference in the values in the two valuation reports is not sufficient to assert that there has been an undervaluation of the charged property. The 1st respondent refers to the case of *Zubaida vs Hargreaves* [1995] 1 EGLR 127 and submits that valuation is not an exact science. It involves questions of judgment on which experts may differ without forfeiting their claim to professional competence.
37. The 1st respondent refers to the case of *Cedarwood Hotels & Resorts Investment Company vs Kenya Commercial Bank Limited & Another* (Civil Case E008 of 2022) [2022] KEHC 15000 (KLR) (10 November 2022) (Ruling) and argues that an allegation that a charged property has been undervalued alone is not sufficient to warrant the grant of an interlocutory injunction. The 1st respondent further argues that the applicant has not challenged the qualifications or the competence of Kenstate Valuers Limited who prepared the valuation report of the charged property. Further the applicant has not alleged that irrelevant factors were considered as part of the valuation and thus there is no basis for alleging that they undervalued the charged property.
38. The 1st respondent submits that the applicant's disputes with its landlords and the alleged eviction of the applicant from the leased properties have nothing to do with the applicant's obligations to the bank under the agreements entered into between the applicant and the bank. The 1st respondent refers to the case of *Agriculture Finance Corporation vs Lengetia Limited* [1985] KLR 765 and submits that a contract only affects the parties to the contract. The 1st respondent argues that it is not a party to the contracts between the applicant and its landlords and the disputes referred to by the applicant.
39. Further, the 1st respondent submits that the contracts between it and the applicant are separate contracts and are not dependent on the contracts of the applicant and its landlord. Thus there is no justification for restraining it from exercising its statutory power of sale. The 1st respondent argues that the applicant does not have a prima facie case and thus the injunction should fail on that ground alone.
40. The 1st respondent refers to the case of *John Kingori Kioni vs Sidian Bank & Another* [2020] eKLR and submits that the charged property became a commodity of sale that can be sold to recover the debts owed. Pursuant to Section 99(4) of the *Land Act*, any loss that the applicant could suffer as a result of the charged property can be compensated by an award of damages.
41. The 1st respondent submits that it is a tier 1 bank and there is no suggestion that it would be unable to compensate the applicant in the event it is successful at trial. Thus the 1st respondent argues that it should not be stopped from exercising its power of sale to recover the outstanding debt.
42. The 1st respondent submits that the balance of convenience tilts in favour of dismissing the instant application as the outstanding debt is Kshs. 199,043,768/- which sum continues to accrue interest. The outstanding amount exceeds the market value of the charged property regardless of the valuation report that is considered which means that it is under secured and will not be able to recover the entire outstanding debt from the sale of the charged property.



43. The 1st respondent relies on the case of Andrew Muriuki Wanjohi vs Equity Building Society Ltd & 2 Others [2006] eKLR and submits that in cases where the value of the outstanding debt is higher than the value of the security, the balance of convenience tilts in favour of allowing the chargee to exercise its power of sale.

Issue for determination.

44. The main issue for determination is whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

The Law

Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

45. The principles of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs Trufoods [1972]EA 420 and Giella vs Cassman Brown & Co. Ltd [1973]EA 358. Restating the said principles, Ringera J, (as he then was) in Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002 set them out as follows:-

- a. A prima facie case with a probability of success at trial;
- b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;
- c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
- d. The conduct of the applicant meets the approval of the court of equity.

46. Similarly, in Dr. Simon Waiharo Chege vs Paramount Bank of Kenya Ltd Nairobi (Milimani) HCCC No. 360 of 2001, Ringera J, (as he then was) held:-

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not

issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity.”

A prima facie case with a probability of success at trial.

47. What then constitutes a prima facie case? In the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless an 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....A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a suitable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal

burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently being infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly, a standard, which is higher than an arguable case.”

48. It is not disputed that applicant took various credit facilities with the 1st respondent between April 2018 and September 2022. Further, the applicant does not dispute that they are in arrears of the said loan facilities. The applicant’s bone of contention is that the 1st respondent did not serve them with the requisite notices, that the 1st respondent has grossly undervalued the suit property and the applicant has been hindered in honouring its obligations under the credit facility agreements due to an unlawful eviction from two leased properties which generated income which was used for the loan repayment.
49. Section 90(1) of the *Land Act* 2012 provides:-
If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any
charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the charge may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
50. Section 96(1) of the *Land Act* 2012, states as follows:-
1. Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargee under section 90(1), a charger may exercise the power to sell the charged land.
51. Once the chargee has decided to exercise its statutory power of sale, section 96(2) of the *Land Act* puts another caveat that:
2. Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale



of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

52. It is trite law that service of the statutory notices on a chargor is mandatory before the exercise of the power of sale. It is only upon service that a chargor is notified of default of obligation under the charge and given the opportunity to exercise its right of redemption. The issue of service was articulated by the Court of Appeal in *Nyagilo Ochieng & Another vs Fanule Ochieng & 2 Others* [1995-1998] 2 EA 260 as follows:-

The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the charge to make sure that there is compliance with the requirements. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. It must be understood that in the face of denial of receipt of statutory notice or notices, it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer of the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya. It is quite possible that such notices were sent but that fact in the face of the denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the “villain in the matter”. In absence of proof of such posting the Court is constrained to hold that the sale by auction was void.

53. On perusal of the documents, the three-month statutory notice under Section 90(1) and (2) dated 23rd June 2023 was addressed to the applicant vide a postal address P. O. Box 54127-00200 Nairobi. The 1st respondent however failed to prove service to the applicant as they did not annex any certificate of posting. The forty days’ notice to sell under Section 96(2) of the *Land Act* dated 17th January 2024, was addressed to the applicant vide postal address P.O. Box 54127-00200 Nairobi and an advance copy sent by email to the email address troymedicarepharmacy@gmail.com and muatherosemary@yahoo.com. The certificate of posting shows that the said notice was sent to the applicant on a similar address.
54. The 1st respondent has not attached the 45 days redemption notice and notification of sale and neither has the 2nd respondent sworn an affidavit to show that they served the applicant with the said notices.
55. The Letters of Offer dated 19th April 2018, 5th July 2018, 27th August 2019, 4th December 2020, 4th February 2021, 9th September 2021, 16th March 2022 and 19th September 2022 provide in Clause 17 and 14 that:-

Any notice by the Bank under this letter shall be deemed to have been properly served on the Borrower if delivered:

- a. By hand or sent by registered post, telex or facsimile at the address of the Borrower notified to the Bank or at the registered offices or any of the principal places of business of the Borrower in Kenya. The notice is deemed to have been delivered if sent by registered post seven (7) days after the date of posting (notwithstanding that it be undelivered or returned undelivered) or if sent by telex or fax on the completion of transmission; or



- b. By personalized electronic media including phone, SMS, email, internet or other convenient means as notified to the Bank by the Borrower or;
- c. Through print media by a notice published in two local dailies of nationwide circulation in Kenya.

56. The Charge indicates in Clause 42 that:-

Any notice or demand required or authorized by law or by this Charge to be served by the Bank on the Chargor shall without prejudice to any other effective mode of making the same to be deemed to have been properly served on the Chargor if served on the Chargor or the personal representative of the Chargor personally or if left for the Chargor at the Chargor's last known postal address in Kenya or if served in any of the above mentioned ways on an attorney holding a power of attorney where under such power of attorney the attorney is authorized to accept such service or if left in a conspicuous place on the charged property. Where the addressee is a company any notice required or authorized by law or by this Charge shall also be deemed to have been properly served by the Bank if served on any one of the Directors or the Secretary of the addressee or if delivered or sent by registered post or any of its principal places of business in Kenya. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by post four days after posting (notwithstanding that it be undelivered or returned undelivered save where there is express statutory provision to the contrary) or if sent by facsimile on the completion of transmission. Where a notice or demand is sent by registered post it shall be sufficient to prove that the notice or demand was properly addressed and posted.

57. In light of the above it is evident that the 1st respondent did not effectively serve the statutory notices upon the applicant. The 1st respondent did not prove by certificate of posting that the 2nd respondent served the 45 days redemption notice and notification of sale upon the borrower. Further, the 1st respondent did not avail proof of service of the statutory notice under Section 90 of the Land Act. It is therefore my considered opinion that based on failure to serve the 90 days statutory notice under Section 90 of the Act, the 45 days redemption notice and notification of sale the applicant has demonstrated a prima facie case. Having found that the requisite notices were not served upon the applicant, it is my considered view that the 1st respondent could not exercise its power to sell the charged property as the right to sell had not accrued.

58. The applicants have further submitted that the 1st respondent did not comply with Section 97 of the Land Act as it grossly undervalued the suit property.

59. Pursuant to Section 97 of the Land Act, a chargee owes a duty of care to a chargor to obtain the best price reasonable at the time of selling the charged property. It provides:-

1. A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any charge under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of the sale.
2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.



60. The importance of undertaking a forced valuation was explained in the case of Koileken Ole Kipolonka Orumos vs Mellech Engineering & Construction Limited & 2 Others (2018) eKLR where Gikonyo J. held that:

“..the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers.”

61. The applicant in the present case argues that the 1st respondent did not discharge its duty under Section 97 of the Land Act because it grossly undervalued the suit property pursuant to the 1st respondent’s valuation report dated 2/2/2024 by Kenstate Valuers Limited. The applicant argues that previous valuation report made on the suit property in 2019 by Tysons Limited placed the market value of the charged property at Kshs. 130,000,000/-. The applicant further argues that the 1st respondent, for purposes of sale by public auction, instructed a valuer to value the suit property which returned a market value of Kshs. 120,000,000/- and a forced sale value of Kshs. 90,000,000/-. The 1st respondent on the other hand argues that the report by Kenstate Valuers Limited was done 12 months from the date of the intended auction and thus gives an accurate value of the charged property as opposed to the one conducted by Tysons Limited. The 1st respondent further argues that the difference in value is not sufficient to assert that there has been an undervaluation of the charged property.

62. The principles that guide courts in determining whether or not to order an independent valuation have been discussed in the case of Zum Investments Limited vs Habib Bank Limited (2014) eKLR where the court held that:-

It is not sufficient for the applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter valuation report. The applicant must satisfactorily demonstrate why the valuation report that the respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.....The applicant needs to show, for instance, that the respondent’s valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale.

63. Similarly in the case of Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR the court held:-

The onus of establishing on prima facie basis, that the applicant’s right has been infringed by the respondent by failing to discharge the duty of care under Section 97(1) of the Land Act lies on the applicant...The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of Section 97(2) of the Land Act by the respondent as to entitle the court to call for an explanation or rebuttal from the respondent.

64. Guided by the principles set out in the foregoing cases, it is my considered view that the applicant has not offered evidence to show that the valuation done was a complete undervaluation of the suit property. The applicant has not demonstrated that the valuer Kenstate Valuers Limited were unqualified. Furthermore, the applicant did not outline any irrelevant factors considered by the valuers in undertaking their valuation. The court further notes that the valuation was done by the applicant’s valuers in the year 2019 just before the covid 19 pandemic which negatively impacted the economy



which would explain the discrepancy in the market values. Furthermore, the valuation was carried out ten months before the date scheduled for public auction in line with Rule 11(b)(x) of the Auctioneers Rules. Therefore, it is my considered view that the 1st respondent complied with Section 97(2) of the [Land Act](#).

65. The applicant's disputes with its landlords and the eviction of the applicant from the leased properties do not touch on the applicant's obligations to the 1st respondent. The applicant and the 1st respondent are the parties who entered into the various loan facilities agreements and thus the actions by third parties upon the applicant do not affect the 1st respondent.
66. Based on the failure to effect proper service upon the applicant, it is my considered opinion that the applicant has established a prima facie case.

Irreparable Injury

67. In *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016]eKLR the court considered Halsbury's Laws of England on what irreparable loss is and stated that:-

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

68. Similarly, in *Maithya vs Housing Finance Co. of Kenya & Another* [2003] 1 EA 133 at 139 where Honourable Nyamu J, stated as follows:-

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities....Loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the respondent cannot pay damages should it become necessary.”

69. Therefore, has the applicant demonstrated that it will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? The applicant submits that the respondents will dispose off the suit property at a throw away price thus causing it irreparable harm. The 1st respondent submits that once property is charged it becomes a commodity of sale and in any event, any damage that the applicant alleges it shall suffer can be compensated by way of damages.
70. I have perused the two reports and noted the difference in value in the applicant's and 1st respondent's reports. However, it was held in *Olkasasi Limited vs Equity Bank Limited* [2015] eKLR that:-

It should be known that the fact that the latest valuation by the applicant places a valuation which is significantly higher than that by the valuer appointed by the bank does not mean



the respondent undervalued the suit property. The report must be dislodged on real items, terms and legal parameters which are acceptable in the practice and profession of valuers.

71. The applicant in the instant case has not shown that the 1st respondent's valuation is incompetent. It is trite law that any loss suffered due on irregular exercise of statutory power by the charge shall be remedied by way of damages. Any undervaluation if any is not a good ground to grant an interlocutory injunction against the chargee. It is further not in doubt that the 1st respondent has the capacity to pay any damages in case of any loss due to undervaluation. It is therefore my considered view that the applicant has not demonstrated any irreparable loss. However, since the court has established that the respondents did not serve the applicants with the requisite notices, if the sale were to proceed, that would cause irreparable harm to the applicant.

Balance of Convenience Test.

72. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

73. In light of the above, it is my considered opinion that the balance of convenience tilts in favour of the applicant because the inconvenience caused to it will be much greater than that caused to the respondents if the court upon trial finds that the respondents did not serve the requisite notices before the 1st respondent exercised its statutory power of sale. Thus the balance of convenience tilts in favour of the applicant.

Conclusion.

74. I thus opine that the applicants herein have met the threshold as set out in the case of Giella vs Cassman Brown and therefore an injunction ought to issue in their favour. Consequently, the application dated 10th December 2024 has merit and is allowed on the following terms: -
- a. That an interlocutory injunction do issue restraining the 1st and 2nd Defendants/Respondents from auctioning or otherwise dealing with the plaintiff/applicant's property L.R. No. Ruiru East Block/253 (Grey Terrace off Thika Superhighway, Kahawa Wendani, Kiambu County) pending determination of this suit.
 - b. That Bearing in mind that the loan is still outstanding and the plaintiff shall continue to service the loan at a monthly rate of KSh.600,000 per month pending the hearing and determination of this case or such a time as the plaintiff/applicant redeems the security as per prayer 4 of the application.
 - c. That costs of this application do abide in the suit.



It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE

