



Top Fuels Limited & 2 others v I&M Bank Kenya Limited (Commercial Case E021 of 2024) [2025] KEHC 9234 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEHC 9234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE E021 OF 2024
DO CHEPKWONY, J
MAY 9, 2025**

BETWEEN

TOP FUELS LIMITED 1ST PLAINTIFF

BYTEWISE LIMITED 2ND PLAINTIFF

VIPOOL PRABHUDAS THAKKER 3RD PLAINTIFF

AND

I&M BANK KENYA LIMITED DEFENDANT

RULING

1. This ruling determines the Plaintiffs' Notice of Motion Application dated the 7th November, 2024 under the provisions of Sections 1A, 1B, 3, 3A & 63(e) all of the [Civil Procedure Act](#), and Order 40 Rule 1&2 of the [Civil Procedure Rules](#). In that application, the Plaintiff/Applicants seek the following: -
 - a. Spent.
 - b. Spent.
 - c. There be a temporary injunction, pending the hearing and determination of this suit, restraining the Defendant, its agents, servants, or employees from taking any enforcement actions against the 1st, 2nd and the 3rd Plaintiffs, including appointing any receiver or administrator or selling LR. No. 7882/10 (Original No. 7882/9), on the strength of the letters of offer dated 28th April 2021. 10th August, 2023, and 8th April, 2024, the debenture dated 11th April, 2022, and the Charge dated 11th April, 2022.
 - d. The Defendant be directed to provide to the Plaintiffs and the court the approval granted by the Cabinet Secretary under Section 44 of the [Banking Act](#) Cap 488 authorizing the change



in the rate of interest to those contained in the letters of offer dated the 28th April, 2021. 10th August, 2023, and 8th April, 2024.

- e. In the absence of any approval by the Cabinet Secretary under Section 44 of the *Banking Act* Cap 488, the Defendant be directed to recalculate the amounts due under the letters of offer dated 28th April, 2021. 10th August, 2023, and 8th April, 2024 excluding all such rates of interest indicated in the said letters of offer.
 - f. The Cost of the Application be awarded to the Plaintiffs.
2. The application is supported by the grounds set out on its face and further amplified by the supporting affidavit sworn on 7th November, 2024 by Mr. Vipool Prabhudas Thakker, the 3rd Plaintiff, who is also a director of the 1st Plaintiff, Top Fuels Limited. He depones that pursuant to a letter of offer dated 28th April, 2021, the Defendant extended a term loan of Kshs.180,000,000 and an overdraft facility of Kshs.20,000,000 to the 1st Plaintiff. These facilities were secured by a debenture over the assets of the 1st Plaintiff and further by a legal charge over LR. No. 7882/10 (Original No. 7882/9), a property registered in the name of the 3rd Plaintiff.
 3. It is asserted that the 1st Plaintiff commenced repayment of the facilities but encountered financial constraints attributable to prevailing harsh economic conditions. As a result, the Plaintiffs initiated discussions with the Defendant aimed at restructuring the debt. This engagement culminated in a revised arrangement under which the initial facility was bifurcated and a new loan of Kshs.53,000,000.00 advanced to Byewise Limited (2nd Plaintiff), through a letter of offer dated 10th August, 2023, to offset the arrears under the initial loan. That both loans were to be amortized over a seven-year period in equal monthly instalments.
 4. However, upon receiving the letter of offer dated 10th August 2023, the Plaintiffs found that the document had erroneously indicated a repayment period of five (5) years instead of the agreed seven (7) years. Further, the processing fee was misstated as 1.5% instead of the agreed 0.5%. These discrepancies were promptly communicated to the Defendant through a covering letter dated 30th August, 2023 when the offer letter was returned, with the expectation that the necessary corrections would be effected. The Defendant, however, failed to rectify the same.
 5. Moreover, the Plaintiffs contend that the Defendant did not apply the Kshs.53,000,000 advanced under the second offer letter towards the repayment of the arrears under the initial facility, as had been agreed. This necessitated further engagement, culminating in yet another restructuring under a third offer letter dated 8th April, 2024, pursuant to which the Plaintiffs resumed making monthly payments.
 6. Notwithstanding the Plaintiffs' efforts and continued payments, the Defendant issued a three-month Statutory Notice dated 8th May, 2024, invoking its statutory power of sale over the charged property. The Plaintiffs avers that through a letter dated 9th July, 2024, they requested withdrawal of the statutory notice, but their plea was declined via the Defendant's response in a letter dated 23rd August, 2024. Nonetheless, the Defendant proceeded to instruct auctioneers, who thereafter issued a Notification of sale and a redemption notice, both dated 18th October, 2024.
 7. The Plaintiffs challenge is on the legality of the Defendant's actions on several grounds. First, they assert that the Defendant applied interest rates of 16% per annum under the second offer letter and subsequently 19.7% per annum, without securing the mandatory approval from the Cabinet Secretary as required under Section 44 of the *Banking Act*. They further allege that the Defendant, without any notification to the chargor, imposed a punitive interest rate of 32% per annum, in contravention of



- Section 84(1) of the *Land Act*, which mandates that any variation in interest rates must be preceded by at least thirty (30) days' Notice to the chargor.
8. The Plaintiffs also contend that the statutory notices issued under Sections 90(1) and 96(2) & (3) of the *Land Act* were either premature or procedurally defective, given that there was no formal occurrence of default, and no proper Notices were served prior to the intended realization of the security.
 9. Furthermore, the Plaintiffs argue that the Defendant's conduct offends the Plaintiffs' consumer rights under Section 3 of the *Consumer Protection Act*, particularly the imposition of exorbitant interest rates without notice, consent, or legal sanction. They submit that the bank's conduct is not only unconscionable but also amounts to enforcement of an illegal contract, and that any realization of the security would cause irreparable harm to the Plaintiffs, including the loss of a valuable property and the possible collapse of their business.
 10. In light of the foregoing, the Plaintiffs urge the Court to intervene by granting the injunctive reliefs sought to preserve the substratum of the suit and forestall any adverse action by the Defendant pending the hearing and final determination of the suit.
 11. The Defendant has opposed the application through a replying affidavit sworn on 29th January, 2025 by its Senior Legal Manager, Mr. Andrew Muchina. In his affidavit, Mr. Muchina contends that the application is devoid of merit and ought to be dismissed in limine. He sets out two primary grounds for this position: Firstly, that the application is predicated upon a disputed sum allegedly owed to the Defendant by the Plaintiffs, and that such a dispute over indebtedness cannot form the basis for the grant of injunctive relief; and secondly, that Prayers No.(4) and (5) of the application are final in nature and, as such, can only be considered and granted upon a full hearing of the matter on its merits.
 12. Notwithstanding its opposition to the application, the Defendant has proceeded to clarify the nature of the facilities granted to the Plaintiffs. It has explained that the loan of Kshs.180,000,000.00 referenced in the initial offer letter was intended to settle an existing facility held by the 1st Plaintiff with Kenya Commercial Bank Limited, while a separate overdraft facility of Kshs.20,000,000.00 was extended to support the 1st Plaintiff's working capital needs.
 13. Furthermore, the Defendant avers that through a subsequent offer letter dated 8th April, 2024, it agreed to advance the 1st Plaintiff an additional overdraft facility of Kshs.20,000,000.00, with a stipulated repayment deadline of 31st October, 2024. However, the Plaintiffs allegedly failed to honour their repayment obligations or regularize their loan accounts and as at 15th January, 2024, the outstanding default indebtedness stood at Kshs.90,169,353.38.
 14. Owing to this continued default, the Defendant issued the Plaintiffs with a Statutory Notice of 90 days pursuant to the *Land Act*. When the Plaintiffs still failed to remedy the default, a further 40-days Statutory Notice was issued, and the Defendant subsequently instructed Messrs. Direct "O" Auctioneers to initiate the process of realizing the charged property. In accordance with the Auctioneers Rules, the auctioneers issued a 45-day Notice and commissioned a valuation of the secured property.
 15. The Defendant has further explained that an additional facility of Kshs.53,000,000.00 was extended to the Plaintiffs under an offer letter dated 10th August, 2023 but emphasized that this facility was to be repaid over a 60-month period. According to the Defendant this facility was applied, contrary to the Plaintiffs' assertions, to offset part of the initial loan. However, the Plaintiffs similarly defaulted in the repayment of this facility, and as of 14th August, 2024, the amount outstanding had risen to Kshs.55,713,246.57.



16. Mr. Muchina has further deposed that the Defendant never restructured the loan facilities, contrary to what the Plaintiffs allege in their supporting affidavit. He emphasized that the alleged restructuring proposals referred to by the Plaintiffs were merely suggestions initiated by them, which the Defendant never accepted or acted upon.
17. Regarding the Plaintiffs' claim that the offer letter dated 10th August, 2023 contained errors in the repayment terms and processing fees, the Defendant has denied any misrepresentation and asserted that the Plaintiffs voluntarily signed the said offer letter with full knowledge of its contents. It has further averred that the agreed interest rates were clearly stipulated in the respective letters of offer and duly accepted by the Plaintiffs at the time of execution, thereby estopping them from challenging those terms at this stage.
18. The Defendant has also pointed out that the Plaintiffs have not denied being in arrears or having received the Statutory Notices; therefore, these admissions militate against the grant of the injunctive orders sought. Moreover, the Defendant has stated that it had communicated the intention to apply revised interest rates via email correspondence and maintained that it was legally entitled to exercise its statutory power of sale upon default, which it did lawfully and procedurally.
19. In response to the averments in the Replying Affidavit, the 3rd Plaintiff swore and filed a Supplementary Affidavit on 24th February, 2025. He has reiterated that although the Defendant insists the interest rates imposed were lawful, there is no evidence demonstrating that the requisite approval of the Cabinet Secretary was obtained prior to their imposition, as required under the *Banking Act* and related regulations. He has further disputed the Defendant's contention that the Kshs.53,000,000.00 facility was applied to offset the earlier facility under the initial offer letter. The 3rd Plaintiff argued that if that had indeed occurred, the outstanding debt demanded by the Defendant, being Kshs.196,263,710.62, would not reflect such a high figure. He has also denied ever receiving the 40-day Statutory Notice for the sale of the charged property, asserting that it was sent to an incorrect postal address, and thus he was not afforded a proper opportunity to respond.
20. Pursuant to court's directions, the application was canvassed by way of written submissions. Both parties duly complied with the court's directions and filed their respective submissions, which are on record. While I will not reproduce the submissions verbatim, I have carefully read and considered them, and will refer to the relevant parts of each submission in the course of my analysis below.

Analysis and Determination

21. In considering the application, I have carefully read and analysed the Supporting and Replying affidavits, the supplementary affidavit, alongside the annexures attached thereto, and the parties' respective written submissions, I find the main questions which arise for determination are:-
 - a. Whether the Plaintiffs have satisfied the threshold for the grant of temporary injunctive relief, and
 - b. In the circumstances, what relief should the court grant in the interest of justice.
22. The principles governing the grant of interlocutory injunctions are now firmly settled in our jurisprudence, as was first enunciated in the celebrated case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. The court in that case set out the three key considerations, namely:-
 - a. That the Applicant must establish a prima facie case with a probability of success;



- b. That the Applicant must show that he will suffer irreparable injury if the injunction is not granted;
- c. That where the court is in doubt, it will decide the application on a balance of convenience.
23. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR further clarified that the three limbs are sequential and not conjunctive, such that if a prima facie case is not established, the court need not proceed to consider the other limbs.
24. Now applying those principles to the present case, it is not in dispute that the Plaintiffs have not denied the existence of the loan facilities or the fact that they are in arrears. The Plaintiffs have instead challenged the application of interest rates and the validity of the Statutory Notices.
25. However, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal defined a prima facie case as one based on material evidence showing a right that has been infringed and is deserving of protection. As such this Court agrees with the Defendant's submissions that a mere dispute as to the amount due does not in itself negate the chargee's statutory power of sale and neither does not serve the basis for granting an injunction. That is to say, even where the interest rates applied result to a dispute over the exact amount due under a facility, this does not bar the chargee from exercising its statutory power of sale, for as so long as a debt is admitted and there is default.
26. Having admitted the arrears and not denying the disbursement or receipt of the funds, the Plaintiffs cannot be said to have established a prima facie case in alleging the discrepancies in the interests charged as basis for restraining the Defendant from exercising its statutory rights.
27. The other ground relied upon by the Plaintiff to establish a prima facie case is the lack of proper service of the statutory notices. It is the Plaintiff's submission that the Statutory Notices and the Notification of Sale were not served as required by the law hence the purported exercise of the statutory power of sale by the Defendant is irregular. The Plaintiffs have categorically denied receipt of the 40-day notice required under Section 96(3)(h) of the *Land Act*, as well as the 45-days redemption notice and notification of sale. They contend that this failure infringes on their fundamental right of redemption, which is safeguarded under Section 89 of the *Land Act*, 2012.
28. On the other hand, the Defendant contends that it issued all the requisite notices starting with the 90-days statutory demand issued under Section 90(1) of the *Land Act*, notifying the Plaintiff of the default and of its intention to exercise the statutory power of sale. This Notice is annexed to the Replying Affidavit as "AM-2". A 40-days notice of intention to sell under Section 96(2) of the *Land Act*, annexed as to the Replying Affidavit as "AM-3" and a 45-days redemption notice and notification of sale, pursuant to Rule 15(d) of the *Auctioneers Rules*, annexed as "AM-4".
29. The Court has carefully examined the documents annexed to the Defendant's Replying Affidavit in support of the alleged service of these notices. Notably, the only document evidencing actual dispatch is a single postal receipt dated 18th October, 2024, found at Page 23 of the Defendant's bundle of documents. Beyond this, there are no other receipts or certificates of posting to confirm the alleged service of the 40-day notice or the 45-days redemption notice.
30. It is trite law that where the service of statutory notices is contested, the burden of proof shifts to the chargee (in this case the Defendant) to demonstrate that each statutory notice was not only issued but properly served upon the chargor in accordance with the law. In this regard, mere assertions or blanket statements of service are insufficient. There must be tangible and contemporaneous documentary



evidence such as separate postal receipts or certificates of posting for each notice, bearing corresponding dates.

31. In the case of *Trust Bank Ltd v Eros Chemists Ltd* [2000] 2 EA 550, the Court of Appeal emphasized that the service of statutory notices is a mandatory legal requirement and must be personally effected or dispatched to the correct and current address of the chargor. It is not enough to merely generate and file the notices; proof of service is paramount. Similarly, in the case of *Nyagilo Ochieng & Another v Phina Osebe* [1996]eKLR, it was held that service of the statutory notice is not deemed complete merely upon posting; the chargee must provide adequate proof of actual service or dispatch to rebut denial by the chargor.
32. In the present case, the Defendant has failed to attach any evidence showing that the 40-days statutory notice or the 45-days redemption notice and notification of sale were served upon the Plaintiffs separately and properly. There is no indication that the notices were sent to each of the Plaintiffs individually, nor that the address used was correct and current. Given the Plaintiffs' specific denial of service, and in the absence of sufficient proof of posting, this Court finds that the Defendant has not discharged its burden to demonstrate that it complied with the mandatory requirements of the law.
33. The service of a notification of sale and the other statutory notices is not a mere formality. These notices serve a protective function, ensuring that the chargor's equity of redemption, as recognized under Section 89 of the *Land Act*, is not unjustly extinguished without due notice. This right of redemption continues until the property is legally transferred through a valid sale. Denial of the opportunity to redeem the property due to improper notice defeats this equity, and courts have routinely intervened to protect this right.
34. The importance of proper service was aptly captured in the case of *Kensington Housing Ltd v Delta Resources Ltd & Another* [2008] eKLR, where the Court held that "a sale based on defective or unserved notices amounts to a nullity". Furthermore, in the case of *Patrick Waweru Mwangi & Another v Housing Finance Co. of Kenya Ltd* [2013] eKLR, the Court held that non-service or improper service of Statutory Notices entitles the chargor to injunctive relief and requires the chargee to issue fresh notices before any further action can be taken.
35. Accordingly, the failure to serve the required statutory notices in the prescribed manner not only amounts to a procedural irregularity, but also constitutes a substantive violation of the Plaintiffs' rights under the *Land Act*. This failure renders the Defendant's proposed exercise of its statutory power of sale irregular and unlawful, thereby establishing a prima facie case with a probability of success.
36. Secondly, in applications for interlocutory injunctions, one of the key principles a court must consider is whether the Applicant has demonstrated that they will suffer irreparable harm that cannot be adequately compensated by an award of damages. This principle is well established in the case of *Giella v Cassman Brown & co. Limited* [1973] EA 358, and was reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, where the Court of Appeal emphasized that:-

"If a party does not establish a prima facie case, then irreparable harm and balance of convenience are not for consideration. But if a prima facie case is established, the court must then consider whether the Applicant will suffer irreparable harm if the injunction is denied".
37. In the present case, the Plaintiffs have presented sufficient evidence and persuasive reasoning to demonstrate that they will suffer irreparable harm if injunctive relief is not granted. They have shown that the Statutory Notices were not properly served, and this Court is therefore further persuaded that any sale of the charged property, being Land Reference No.7882/10, without strict adherence to the prescribed legal procedure, would not only be prejudicial but would also lead to the permanent loss of



a unique and valuable asset central to their business operations. Such a loss, in the Court's view, cannot be adequately remedied through an award of damages.

38. In addition to challenging the validity of the Statutory Notices issued under Sections 90 and 96 of the *Land Act*, the Plaintiffs also dispute the outstanding loan balances and contend that part of the facility was not disbursed or applied as agreed. These allegations raise substantial questions about the legitimacy of the Defendant's enforcement actions. Should the auction proceed under these contested circumstances, the Plaintiffs face the risk of irreparable harm including the permanent deprivation of their property, the potential collapse of their businesses, reputation damage, and the loss of future income, all of which cannot be sufficiently compensated by monetary damages.
39. In the resultant, while the Defendant is not to be permanently restrained from exercising its Statutory Power of Sale to realise the charged security, this Court finds that there is no conclusive proof of service of Statutory Notices and that the Plaintiffs have demonstrated circumstances pointing to a likelihood of suffering irreparable loss. The court is therefore persuaded that the balance of convenience tilts in favour of the Plaintiffs. If the injunction is denied and the sale proceeds, the Plaintiffs will suffer the permanent loss of a prime commercial property integral to their operations, which outcome cannot be undone even if they ultimately succeed at trial. Conversely, granting the injunction would only delay the Defendant's realization of its security, a delay that can be mitigated by the continued accrual of interest or further orders of the court.
40. Moreover, the Plaintiffs have raised serious and arguable issues regarding the legality of the interest charged, the accuracy of the loan balances and the validity of the statutory notices. These are matters that warrant full consideration of trial before any irreversible enforcement action is taken. In light of the foregoing, it is just and equitable to preserve the status quo and protect the Plaintiff's proprietary and commercial interests pending the hearing and determination of the suit.
41. In the circumstances, the application dated 7th November, 2024 is hereby allowed in terms of the following orders:-
 - a. That an order of temporary injunction be and is hereby issued restraining the Defendant, its agents, servants, employees or assigns from advertising for sale, selling by public auction or private treaty, transferring, taking possession of, appointing a receiver or administrator over, or in any other manner disposing of or interfering with the Plaintiff's ownership, possession, or interest in the property known as Land Reference No.7882/10 (Original No.7882/9), pending the hearing and determination of this suit.
 - b. The costs of this application shall be in the cause.
 - c. That all other issues raised in the application shall be considered at the full hearing of the suit.
 - d. Mention on 23rd June, 2025 before the Deputy Registrar for parties for Pre-trial Conference and further directions.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 9TH DAY OF MAY, 2025.

D. O. CHEPKWONY

JUDGE

