



REPUBLIC OF KENYA



**Mohamed & another v Bamoto Distributors Ltd & 2 others (Civil Case  
E023 of 2025) [2025] KEHC 9190 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9190 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E023 OF 2025  
G MUTAI, J  
JUNE 16, 2025**

**BETWEEN**

**NAJMUDIN NOORALI MOHAMED ..... 1<sup>ST</sup> PLAINTIFF**

**ALIHUSSEIN ABDUL HUSSEIN TAYABALI, MOIZ ABDULHUSSEIN  
TAYABALI AND KUTUB ABDULHUSSEIN TAYABALI AKA KUTBUDIN  
ABDULHUSSEIN TAYABALI T/A HATIMI SERVICE STATION . 2<sup>ND</sup> PLAINTIFF**

**AND**

**BAMOTO DISTRIBUTORS LTD ..... 1<sup>ST</sup> DEFENDANT**

**I&M BANK LTD ..... 2<sup>ND</sup> DEFENDANT**

**PURPLE ROYAL AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application before the Court is the Notice of Motion dated 6<sup>th</sup> March 2025, vide which the Plaintiffs/Applicants seek several orders, to wit:-
  1. Spent;
  2. That this honourable Court be pleased to issue a temporary injunction restraining the defendants, whether by themselves their agents, servants, or, any other person acting on their behalf, from selling transferring, leasing, charging or in any other manner interfering with the plaintiff is quiet possessing and ownership of Title No Mombasa/Block XV/47 (Godown No.1) pending the hearing and determination of this suit;
  3. Spent;
  4. That in the alternative, this honourable Court be pleased to issue an order maintaining the status quo of the suit property pending the hearing and determination of this suit;



5. That any orders issued by the Court herein be implemented by the OCS Nyali Police Station; and
  6. That the costs of this application be provided for.
2. The basis upon which the application is brought, as stated in the affidavit of Najmudin Noorali Mohamedali, the 1<sup>st</sup> plaintiff/applicant herein, and the body of the application, is that the 1<sup>st</sup> Plaintiff/applicant is the owner of the suit promises, having acquired it in 1990 from one MA Tajbhai. The suit property was charged to the 2<sup>nd</sup> Defendant to secure a credit facility advanced to the 2<sup>nd</sup> Plaintiff/applicant who operates a petrol station called Hatimi Service Station. There was a default in servicing the loan on the part of the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Defendant commenced recovery action, which the Plaintiffs aver was unlawful. They contend that despite the issuance of Court orders, the auction sale took place.
  3. The 1<sup>st</sup> Defendant filed Mombasa Environment and Land Court Case No E003 of 2022 seeking to have the Plaintiffs evicted from the property. The Court agreed with the 1<sup>st</sup> Defendant and ordered the eviction of the plaintiffs from the suit property and awarded the 1<sup>st</sup> Defendant Kes.7,000,000.00 as general damages for trespass.
  4. The appeal by the Plaintiffs against the decisions of the Environment and Land Court is pending determination at the Court of Appeal. The Court of Appeal declined to issue a stay of execution of the said judgment pending appeal.
  5. The Plaintiffs state that the 2<sup>nd</sup> Defendant has issued a demand for the payment of Kes.37,920,204.00, being what they allege as the outstanding balance after reckoning the proceeds of the auction sale. The Plaintiffs contest the said sale and aver that the auction sale was fraudulent. They further aver that the 1<sup>st</sup> Defendant obtained the judgment in the Environment and Land Court through fraudulent and illegal means. It is urged that if the plaintiffs are evicted, they will suffer irreparable harm that an award of damages cannot compensate. It is also averred that the case filed herein has high chances of success.
  6. Upon being served, the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection dated 12<sup>th</sup> March 2025 vide which:-
    1. They contested the jurisdiction of this Court to hear and determine the matter on the ground that the application and the entire suit offends the mandatory provisions of Section 13 of the Environment & Land Court Act, 2011 and Article 165(5) of *the Constitution* of Kenya as read with Article 162(2) of the said Constitution;
    2. That the Court was functus officio;
    3. The matter was subjudice as the Court of Appeal Civil Appeal No E125 of 2024 was pending hearing and determination;
    4. The application and the entire suit were res judicata on account of the ruling of the Court in High Court Civil Suit No E093 of 2021 and the Environment and Land Court's judgment in Mombasa ELC No E003 of 2022 delivered on 5<sup>th</sup> June 2024; and
    5. That the Court had no jurisdiction to hear and determine the matter.
  7. On its part, the 2<sup>nd</sup> Defendant filed a replying affidavit sworn by Mr Andrew Muchina, its Legal Affairs Manager, sworn on 19<sup>th</sup> March 2025, in which the deponent accused the Plaintiffs/Applicant of misleading the Court. He prayed that the application dated 6<sup>th</sup> March 2025 be dismissed with costs.



8. Mr Muchina averred that the Court on 3<sup>rd</sup> February 2021 directed full compliance with statutory notice and ordered the plaintiff to put his house in order before the notice period expired. Subsequently, the 2<sup>nd</sup> Defendant issued another statutory notice on 17<sup>th</sup> February 2021. A further statutory notice was issued on 31<sup>st</sup> May 2021. A final statutory notice was issued on 13<sup>th</sup> July 2021. The sale took place on 16<sup>th</sup> September 2021. The successful bidder in the said sale, the 1<sup>st</sup> defendant, paid a sum Kes.3,750,000.00 at the fall of the hammer and Kes.10,950,000/- on 24<sup>th</sup> September 2021, in full settlement of the purchase price.
9. Mr Muchina averred that no case had been made for the grant of injunctive relief. He further urged that the plaintiffs had come to Court with unclean hands by deliberately lying and misleading the Court and that they were engaged in a game of forum shopping. He therefore prayed that the application be dismissed with costs.
10. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 12<sup>th</sup> March 2025 by the director of the 1<sup>st</sup> Defendant, Mr Rakish Hasit Shah, in which he averred that a permanent injunction has already been issued by Mombasa ELC Court in ELC NO E 003 of 2022 and that injunctive relief was therefore unavailable.
11. He contended that the suit and the application were an attempt by the plaintiff to reapply for a stay of execution of the judgment of the Environment and Land Court, and that the issues raised were about land, and therefore that this Court lacked jurisdiction to hear and determine it.
12. It was denied that the auction that took place on 16<sup>th</sup> September 2021 was done in disobedience of a Court order. He deposed that the 1<sup>st</sup> Defendant was now the registered proprietor of the suit premises, having been issued a certificate of title on 19<sup>th</sup> November 2021, without any protest from the Plaintiff/Applicants.
13. Mr Muchina, therefore, prayed that the application be dismissed with costs.
14. The Court directed that the application and the preliminary objection be considered together. Parties were directed to file written submissions, which this Court has considered.
15. The submissions of the plaintiff are dated 3<sup>rd</sup> April 2025. The submissions are in regard to the application dated 6<sup>th</sup> March 2025, which the submissions support, and in opposition to the Notice of Preliminary Objection dated 12<sup>th</sup> March 2025.
16. The plaintiffs' counsel submitted that contrary to what the 1<sup>st</sup> defendant contends, the suit and the application aren't res judicata. He urged that the Environment and Land Court lacked jurisdiction to make the determination it did, as the questions in dispute were those of chargee and chargor. The counsel for the plaintiffs relied on the court's decision in the following cases: Bank of Africa Kenya Ltd & another v TSS Investment Ltd & 2 others [2024] KECA 410 (KLR) and Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR).
17. The plaintiff's counsel urged that having been made by a Court without jurisdiction the decision of the Environment and Land Court was void and a nullity Mr. Gikandi referred the Court to the decision of Lord Denning in *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169 where the renown jurist expressed himself as follows:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every



proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

18. He submitted that an injunction ought to issue as serious questions of fraud had been alleged. In support of the said contention, counsel relied upon, among other cases, the decision of the Court in *Irene Chepkoech Chumo v David Kipleting Rugut & another* [2009]eKLR.
19. Counsel submitted that the fraudulent sale of the suit property at a throwaway price and the issuance of a fresh demand notice gave rise to a new cause of action.
20. It was urged that there was a case for the issuance of an order of injunction as there was a prima facie case with probability of success founded on the allegation of fraud. The Court was thus urged to allow the application for an injunction.
21. The 1<sup>st</sup> defendant filed two sets of submissions. The first submissions are dated 21<sup>st</sup> March 2025 in respect of the notice of preliminary objection. The 1<sup>st</sup> defendant argued that this Court lacked jurisdiction to hear and determine the matter, as the issue in dispute concerned the right to or title to land. It was argued that this suit is founded on an alleged intention to evict the plaintiffs from the property in question.
22. The learned counsel for the 1<sup>st</sup> defendant/respondent submitted that the High Court had previously determined that it had no jurisdiction to hear and determine HCCC NO E093 of 2021, which case was between the same parties. Reliance was placed in the decision of the Court in *George WM Omondi & another v National Bank of Kenya Ltd & 2 others* [2001]eKLR.
23. Counsel submitted that the matter was res judicata, as the Environment and Land Court in a matter between the parties had made final decisions that were pending judgment in the Court of Appeal.
24. The submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant are dated 8<sup>th</sup> April 2025. They aver that the plaintiffs rely on the allegation of fraud since it is the only ground left for them to raise.
25. It was urged that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants fully complied with the law and the sale was above board.
26. The learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants urged that an order of injunction could not issue in this case as the plaintiff could be compensated by an award of damages, as the value of the property can be ascertained.
27. Regarding the application dated 6<sup>th</sup> March 2025, the 1<sup>st</sup> Defendant urged that it should not be allowed. It was submitted that the 1<sup>st</sup> Defendant was a purchaser for value in an auction and that under section 99 of the *Land Act*, it had a good title. Reliance was placed on Rule 15 of the Auctioneers Rules, and the decision of the Court in *Jacob Ochieng Muganda v Housing Finance Company of Kenya Limited* [2008]eKLR and *David Situma Wekesa & Anne Wachisi Situma v I & M Bank Limited, Godfrey Githinji Kamiri t/a Westminster Commercial Auctioneers & Nairobi Reinsurance Brokers Limited* [2021] KEHC 6870 (KLR). It was thus urged that the application be dismissed.
28. In supplementary submissions dated 17<sup>th</sup> April 2025, the Plaintiffs/Applicants submitted that the mere fact that the purchaser was the registered owner of the property could not prevent the Court from interrogating the process under which the sale took place.
29. I have considered the application, the responses thereto, as well as the preliminary objection. I have also taken into account the submissions of the parties.
30. Since the notice of preliminary objection challenges the jurisdiction of the Court to hear and determine the matter, I am obliged to consider it first. I am guided by the decision of the Court of Appeal in the



case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, where Nyarangi, JA stated as follows:-

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

31. If I uphold the preliminary objection raised herein, there will be no need for me to consider the application on its merit, as the suit would have been struck out in its entirety, for I would have to down my tools straight away.
32. What amounts to a valid preliminary objection was discussed in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696. It was stated in the said case that:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the said case, Sir Charles Newbold P., stated that-

“..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop.”

33. In this case, the 1<sup>st</sup> Defendant has urged that this Court has no jurisdiction to hear the matter and that, in any case, the suit is either subjudice or res judicata. Is that the case?
34. Section 7 of the [Civil Procedure Act](#) provides that:-

“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.”



35. What amounts to res judicata was considered in the case of *In re Estate of Riungu Nkuuri (Deceased)* [2021] KEHC 6705 (KLR), where the Court stated as follows:-

“The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

36. In my view, this case is not res judicata, as new issues have been raised, including allegations of fraud and the right of the 2<sup>nd</sup> Defendant to claim further payment. These matters should be considered on their merits.

37. In a similar vein, the matter is also not res sub judice as the matter in the Court of Appeal is not directly and substantially in issue herein.

38. What of the jurisdiction of the Court? In my view, the High Court has the jurisdiction to consider and determine questions regarding the exercise of a statutory power of sale by a chargee. I am guided by the persuasive authority of the decision of the Environment and Land Court in the case of *Kinuthia v Kanyi & another* (Environment & Land Case E007 of 2023) [2024] KEELC 1625 (KLR) (20 March 2024) (Ruling) where E Obaga, J, faced with a similar objection, stated as follows:-

“In my view, the High Court will be the appropriate forum to ventilate the issues raised herein based on judicial precedents – see Angote J. in *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another* [2021] eKLR quoted with approval in *Keter v Ecobank Kenya Limited (Civil Case 16 of 2018)* [2022] KEHC 13352 (KLR) (28 September 2022) (Ruling): “The substratum of the suit relates to the legal charges and the subsequent statutory power of sale. The High Court has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the chargee. In *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another* [2021] eKLR the court held; The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

39. Given the foregoing, I find no merit in the notice of preliminary objection.



40. I will now turn to the application for injunction. The conditions under which an injunction may issue were considered in the case of *Giella v Cassman Brown & Company Limited* [1973] E A 358. The Court of Appeal for Eastern Africa expressed itself in the following terms:

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the 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.”

41. The above principles were expounded by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) where it was stated that:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate 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.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

42. I will then consider if the conditions have been met, in a sequential manner, without leapfrogging any of them. The first enquiry I must make is to establish if a prima facie case has been demonstrated.

43. What amounts to a Prima facie case was determined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123, where it was held 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 in 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.”



44. I have perused the application and the responses thereto. It would appear to me that the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant adhered to the provisions of the law and that the auction sale was conducted properly. The 1<sup>st</sup> plaintiff has admitted that he refused to repay the sum demanded as he derived no benefit from the loan.
45. Given that the plaintiffs conceded that they made no payment, it is hard to see how they could be deserving of an equitable remedy or indeed how it could be said that there is a prima facie case in this instance. I have warned myself that the case has not been heard on the merits and that all I am required to do at this point is to consider the matter on a prima facie basis.
46. In any case, this matter has been litigated in many other courts. It is hard to see how there could be new grounds.
47. Having found that there is no prima facie case, it is not necessary that I consider the other conditions.
48. In the circumstances, the orders that command themselves to me are the following:-
1. The Notice of Preliminary Objection dated 12<sup>th</sup> March 2025 is hereby dismissed; and
  2. The Notice of Motion dated 6<sup>th</sup> March 2025 is also dismissed.
49. I award the defendants the costs of this application.
50. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 16<sup>TH</sup> DAY OF JUNE 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of

Ms Kiptum holding brief for Mr Gikandi for the Applicants;

No appearance for the 1<sup>st</sup> Defendant;

Ms Maiga holding brief for Mr Matheka, for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants;

Arthur – Court Assistant.

