Njuca Consolidated Company Ltd v Commercial International Bank & 2 others (Civil Case E001 of 2023) [2025] KEHC 8927 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8927 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL CASE E001 OF 2023

FN MUCHEMI, J

JUNE 19, 2025

BETWEEN

NJUCA CONSOLIDATED COMPANY LTD ..... PLAINTIFF

AND

COMMERCIAL INTERNATIONAL BANK ..... 1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES ..... 2ND DEFENDANT

NJIHIA MUOKA RASHID CO. LTD ..... 3RD DEFENDANT

RULING

Brief facts

1. The application dated 27th October 2023 seeks for orders of injunction restraining the defendants, their servants and/or agents from selling, alienating, auctioning and disposing in any way whatsoever of land parcel numbers LR No. MN/1/2209, Title Number CR 61755, LR No. 5025/768, 5025/612, 5025/613, 5025/611, 5025/614, 5025/615, 5025/616, 5025/769, 5025/772, 5025/773, 5025/774, 5025/775, Title No. CR 46457 LR No. 5025/307, Title Number CR 47049 LR No. 5026/305, Title Number 47051 LR No. 5025/308, Kwale/Marenje/74, Kwale/Marenje/479, Kwale/Funzi Island/337, Grant Number CR 53628, LR No. Group V/1046, Grant Number CR 53629, LR No. Group V/1045, Grant Number CR 53630, LR No. Group V/1044, Grant Number CR 53631, LR No. Group V/1042, Grant Number CR 53633, LR No. Group V/1041, Grant Number CR 53708, LR No. Group V/1030, Grant Number CR 53709, LR No. Group V/1031, Grant Number CR 53737 LR No. Group V/1024, Grant Number CR 53742 LR No. Group V/1029 and Grant Number CR 53847 LR No. Group V/1240 until the hearing and determination of the suit. The applicant further seeks for a reasonable time of 24 months days to redeem the suit properties.

2. In opposition to the application, the 1st respondent filed a Replying Affidavit dated 11th December 2023.

The Applicant's Case.

3. The applicant avers that it took a loan facility from the 1st respondent of Kenya Shillings One Hundred and One Million, Five Hundred and Ninety Seven Thousand, Eight Hundred and Forty Four and Twenty Two Cents (Kshs. 101,597,844.22/-) securing the facility with the parcels of land listed herein. The applicant states that it has been servicing the loan and has remained with an outstanding debt of Kshs. 80,676,979.33/- as agreed upon by the parties until the year 2020 when covid 19 pandemic hit Kenya's economy and disrupted the loan repayments making it unable to repay the loan thereby forcing it to sell some of its properties to furnish the loan.

4. The applicant states that it has paid Kshs. 20 million and has only defaulted in repayment of the facility for 32 days due to economic hardship. Further, the applicant states that it has shown goodwill in repaying the loan by searching for purchasers to buy some of its land and has received two offers, the first offer is from one Daniel Kazungu Makupe who has offered to purchase 2.7 acres at Kshs. 750million and Exusus Investment Limited of Malindi which has offered to purchase 172.75 acres of land belonging to Kilifi Plains where it owns 30 acres.

5. The applicant states that the 2nd respondent proceeded to rely on a valuation report done more than a year ago and which does not reflect the current market price of the parcels of land.

The 1st Respondent's Case.

6. The 1st respondent states that the applicant has admitted to its default and thereby crystallizing its right to pursue a statutory power of sale. The 1st respondent states that it advanced two credit facilities to the applicant on 9th October 2019 for a sum of Kshs. 120 million and 3rd March 2021 for a sum of Kshs. 36 million which the applicant secured by the listed suit properties.

7. To facilitate ease of payment on the applicant's repayment obligations, the 1st respondent entered into a loan restructure with the applicant on 1st July 2021 consolidating the loan to a restructure facility of Kshs. 101,000,932/- to be repaid in a maximum period of 60 months with a 6 month moratorium period for servicing interest only and thereafter 54 equal monthly instalments of approximately Kshs. 2,480,346/-. Further, the applicable interest to be charged on the facility was 13% per annum on a reducing balance with the bank reserving the right to vary interest upon notice.

8. The 1st respondent states that the applicant fell into a habit of consistent default leading to accrued arrears on the loan account. As at 11th December 2023, the applicant's indebtness stood at Kshs. 92,619,936.84/-. Despite affording the applicant time to regularize the arrears on the loan account, the applicant failed to take heed necessitating the bank to exercise its contractual and legal remedies under the charges.

9. The 1st respondent states that on 14th June 2022, it served the applicant with a three months statutory notice to settle all pending arrears accrued on the loan facility. The applicant failed to secure its equity of redemption prompting the bank in conformity with Section 96 of the *Land Act* 2012 to serve it with a further forty days notice of its intention to sell the charged suit property. Upon failure by the applicant to comply with the said notices, the 1st respondent procured the services of the 2nd respondent to serve the applicant with a redemption notice and notification of sale dated 26th May 2023 and 14th June 2023 respectively. Further, the 1st respondent instructed the 3rd respondent to value the charged suit properties on 2nd June 2023 in anticipation of its sale. The 1st respondent argues that the 2rd respondent's valuations are less than a year old.

10. Once the market and forced values were ascertained, the 1st respondent proceeded to advertise the charged suit properties on the national dailies for sale on 31st October 2023.

11. The 1st respondent states that the applicant approached it with the view of reducing its indebtness with a sale agreement between Patrick Njoroge Wachira, a director of the applicant and David Kiguongo Kanja, a 3rd party for the purchase of LR Nos. 5025/305 CR 47049; 5025/307 CR 46457 and 5025/308 CR 47051 for a sum of Kshs. 8,100,000/-. In accepting the said proposal, a deposit of Kshs. 2,100,000/- was made on 10th July 2023 and the balance of Kshs. 6 million was deposited on diverse dates with the final amount being deposited on 26th September 2023. The 1st respondent states that the said funds were applied to the overdraft facility. Pursuant to that, the 1st respondent issued the legal representative of the 3rd party's purchaser with an undertaking dated 10th July 2023 in which it undertook to release the original titles and other relevant documents upon receipt of Kshs. 8,100,000/-. Once the 1st respondent was in receipt of the entire funds, it wrote to the 3rd party purchaser requesting for the draft discharge of charge to facilitate the discharge and transfer of the referenced properties.

12. The 1st respondent states that the proposed sale of the said three properties did not redeem the entire loan amount which currently stands at Kshs. 92,619,936.35/-and it was only towards resolving the overdraft facility and not the term loan facility.

13. The 1st respondent argues that the applicant has not placed any evidence to substantiate that the bank has neither relied on valuation reports done more than a year ago or that it has undervalued the charged suit properties in breach of Section 97 of the *Land Act*. In any event, the valuation of a property is not an irreparable loss as the same can be compensated by way of damages. Further, the 1st respondent states that the applicant has not produced affidavit evidence to regularize his defaulted loan obligations through the purported sale offer from one Daniel Kazungu Makupe and thus the loan still stands at Kshs. 92,619,936.35/-.

14. Directions were issued that parties put in written submissions and the record shows that the 1st respondent complied by filing submissions on 16th May 2025. The submissions by the applicant could not open in the CTS system and they did not produce a hard copy of the same by the time of writing this ruling.

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

15. The 1st respondent relies on the case of *Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others* [2006] eKLR and submits that the applicant has no recourse over the charged suit properties as it admitted default and voluntarily offered the charged suit properties as a commercial commodity for sale upon default.

16. Relying on the cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358; *Margaret Njoki Migwi v Barclays Bank of Kenya Ltd* [2016] eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the 1st respondent submits 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 does not dispute its indebtness to the bank.

17. The 1st respondent relies on the case of *Root Capital Incorporated v Tekangu Farmers Co-operative Society Ltd & Another* [2016] eKLR and submits that in the absence of a final payment to regularize the default, it has a contractual right under the charges and a legal right to dispose of the charged suit properties. Further, the 1st respondent refers to the case of *Mbuthia Macharia v Annah Mutua &*

Another [2017] eKLR and submits that it served the applicant with the requisite statutory notices in exercise of its lawful statutory power of sale.

18. The 1st respondent submits that the scheduled public auction sale of the charged suit properties was slated for 31st October 2023 while the valuation reports that determined the forced sale value of the properties were dated 2nd June 2024. Further, although the applicant alleged that the properties were below the purported market value, the applicant has failed to support its allegations through credible evidence to allow the court to arrive at a similar conclusion.

19. The 1st respondent further relies on the cases of Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR and Zum Investment Limited v Habib Bank Limited [2014] eKLR and submits that alleged gross undervaluation, it is incumbent for the court to recognize that the production of a counter valuation report containing different values does not entitle the court to presume that the charged suit properties were sold at an under value. Furthermore, without credible evidence and justification as to why the 1st respondent's valuation is irregular, the applicant's claim of undervaluation is only but a red herring.

20. Relying on the cases of *American Cyanamid v Ethicon Limited* 1975 1ALL ER 504 and *Andrew Muriuki Wanjohi v Equity Building Society Ltd* [2006] eKLR, the 1st respondent argues that in offering the charged suit properties as security, the applicant always contemplated that in the event of default, their property would be a commercial commodity for sale. The 1st respondent further relies on the case of *Maithya v Housing Finance of Kenya (K) Limited* [2003] EA 133 and submits that it shall suffer grave prejudice and loss if the orders sought are granted as the facility shall continue accruing default charges which the applicant has demonstrated cannot in turn compensate the bank.

21. The 1st respondent refers to the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR and submits that the balance of convenience tilts in its favour as it acted within its contractual mandate by disbursing the loan facility. The 1sr respondent further argues that it shall suffer the greater harm if injunctive relief is granted as it shall be burdened by a non performing facility whose value is likely to outstrip the value of security.

Issue for determination

22. 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.

23. The principles of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972]EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973]EA 358. Restating the said principles, Ringera J, (as he then was) in *Airland Tours & Travel Limited v 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.

24. Similarly, in *Dr. Simon Waiharo Chege v 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

25. What then constitutes a prima facie case? In the case of *Mrao Ltd v 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."

26. It is not disputed that applicant took two credit facilities with the 1st respondent on 9th October 2019 and 3rd March 2021. Further, the applicant does not dispute that it is in arrears of the said loan facilities. The applicant's bone of contention is that the valuation of the suit properties was carried out over one year from the scheduled date of sale of the suit properties and thus the suit properties have been grossly undervalued. Notably, the applicant does not dispute that it was served with the requisite statutory notices.

27. 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.

28. The importance of undertaking a forced valuation was explained in the case of *Koileken Ole Kipolonka Orumos v 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."

29. 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 as the valuation report is more than one year from the scheduled date of sale.

30. The principles that guide courts in determining whether or not to order an independent valuation have been discussed in the case of Zum Zum Investments Limited v 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.

31. Similarly in the case of Palmy Company Limited v 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.

32. Guided by the principles set out in the foregoing cases, it is my considered view that the applicant has not adduced evidence to show that the valuation done was a complete undervaluation of the suit property. The applicant has not demonstrated that the valuer Njihia Muoka Rashid Co. 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 on 2nd June 2023 for properties Mainland North/Section 1/2209 CR No. 25069, LR No. Kwale/Marenje/479, LR No. Kwale/Funzi Island/337, LR No. Kwale/Marenje/478, LR. No. Kwale/Marenje/74, LR Nos. 5025/305 CR No. 47049, LR No. 5025/307 CR No. 46457, LR No. 5025/308 CR. No. 47051, LR No. Group V/1024 CR No. 53737, LR No. Group V/1029 CR No. 53742, LR No. Group V/1030 CR No. 53708, LR No. Group V/1031 CR No. 53709, LR No. Group V/1041 CR No. 53633, LR No. Group V/1042 CR No. 53632, LR No. Group V/1043 CR No. 53631, LR No. Group V/1044 CR No. 53630, LR No. Group V/1045 CR No. 53629, LR No. Group V/1046 CR No. 53628, LR No. Group V/1240 CR No. 53847, LR No. 5025/611 CR No. 61761, LR No. 5025/612 CR No. 61755, LR No. 5025/613 CR No. 61756, LR No. 5025/614 CR No. 61762, LR No. 5025/615 CR No. 61763, LR No. 5025/616 CR No. 61764, LR No. 5025/768 CR No. 62031, LR No. 5025/769 CR No. 62032, LR No. 5025/722 CR No. 62035, LR No. 5025/773 CR No. 62036, LR No. 5025/774 CR No. 62037 and LR No. 5025/775 CR No. 62038. Thus the valuation was carried out 4 months before the date scheduled for public auction in line with Rule 11(b)(x) of the *Auctioneers Rules*. It is therefore, my considered view that the 1st respondent complied with Section 97(2) of the *Land Act*.

33. Accordingly it is my considered view that the applicant has not established a prima facie case.

Irreparable Injury

34. In *Paul Gitonga Wanjau v 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."

35. Similarly, in *Maithya v 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."

36. The issue herein is whether 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 argues that the suit properties are grossly undervalued and do not reflect the true market price. 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.

37. 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 to 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.

Balance of Convenience Test

38. In the case of *Pius Kipchirchir Kogo v 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 inunction will be greater than which is likely to arise from granting it.

39. In light of the above, it is my considered opinion that the balance of convenience tilts in favour of the 1st respondent because the inconvenience caused to it will be much greater than that caused to the applicant as the applicant has failed to show that the 1st respondent's statutory power of sale had not crystallized.

Conclusion

40. I thus opine that the applicant herein has not met the threshold as set out in the case of *Giella v Cassman Brown* and as such, an injunction cannot to issue in its favour. Consequently, the application dated 27th October 2023 lacks merit and is hereby dismissed with costs to the 1st Respondent.

41. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF JUNE 2025.

HON. F. MUCHEMI

JUDGE