



Kabaru & another v Standard Chartered Bank Limited & 2 others (Civil Appeal E044 of 2024) [2025] KEHC 11029 (KLR) (Commercial and Tax) (25 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E044 OF 2024
FG MUGAMBI, J
JULY 25, 2025**

BETWEEN

DUNCAN JOSEPHAT MURUGA KABARU 1ST APPELLANT

PERPETUA WACHEKE MUTURI 2ND APPELLANT

AND

STANDARD CHARTERED BANK LIMITED 1ST RESPONDENT

**JOSEPH M GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS 2ND
RESPONDENT**

OCTAVIA KADENYEKA CHANZU 3RD RESPONDENT

*(Appeal from a Ruling dated 16th February, 2024 in Milimani
CMCC No. E176 of 2022 delivered by Hon. R.L. Musienga (PM))*

JUDGMENT

Background and Introduction

1. By an amended plaint dated 2nd February 2023, the plaintiffs (who are the appellants before this Court), aver that they are the joint registered owners of Title Number Nairobi/Block 76/139 Buruburu Phase 111 (the suit property). It is their case that they purchased the suit property on or about 3rd July 2018 for a consideration of Kshs. 10,500,000/=, partly financed through a loan facility of Kshs. 8,100,000/= advanced by the 1st defendant (the Bank).
2. The appellants' grievance at the lower court arises from an auction and subsequent sale of the suit property by the 1st respondent Bank through its agents, the 2nd respondent, to the 3rd respondent as being legally untenable. Following the auction, the 3rd respondent filed an application dated 21st



February 2023 seeking to have the appellants surrender the suit property or in the alternative, for break in orders to the property.

3. The trial court allowed the application through a ruling delivered on 16th February 2024, stating in part as follows:

“I am satisfied that the 3rd Defendant has established a prima case with the probability of success against the Plaintiffs. I am persuaded that the 3rd Defendant stands to suffer irreparable injury unless the orders sought are granted. I wish to say that even if I were to consider the balance of convenience, the same would tilt in favour of allowing the application. The 3rd Defendant is the registered owner of the suit property having purchased the same through public auction. There is no justification for the Plaintiff’s continued occupation and interference with the property. In conclusion, I find merit in the Notice of Motion application dated 21st February 2023.”

4. The appellants were aggrieved by the Ruling and consequently lodged the present appeal by way of a Memorandum of Appeal dated 20th February 2024. They challenge the decision on several grounds, principally that the learned magistrate erred in law and in fact by making definitive findings, particularly on the appellants’ alleged lack of notice and the regularity of the auction, without the benefit of a full hearing on the merits.
5. They contend that the trial court improperly granted interim reliefs, including what effectively amounted to a mandatory injunction, despite such orders not having been specifically pleaded or supported by the 3rd respondent’s application. Counsel for the appellants further faults the court for issuing what were, in substance, final orders, such as the surrender of possession, at an interlocutory stage, thereby breaching the appellants’ right to be heard and violating the rules of natural justice.
6. Additionally, the appellants take issue with the trial court’s affirmation of the sale and its recognition of the 3rd respondent’s legal interest in the suit property at an interlocutory stage, arguing that such determinations were premature and unsupported by the evidence on record. They maintain that the trial court effectively determined key contested issues without the benefit of a full hearing, thereby prejudicing their case.
7. The appellants further contend that the balance of convenience did not favour the grant of interlocutory relief in favour of the 3rd respondent, particularly in view of the serious procedural irregularities they had raised concerning the auction process.
8. Moreover, the appellants submit that the 3rd respondent’s application dated 21st February 2023 improperly sought substantive relief in the nature of eviction, despite there being no such prayer in the main suit or any counterclaim. They argue that the court’s grant of such far-reaching orders at the interlocutory stage was contrary to established legal principles governing the scope and limits of interim relief.
9. The respondents oppose the appeal and submit that the appellants’ claim, that the trial court failed to consider their allegations of irregularities in the public auction, is wholly unsubstantiated. They contend that the trial court expressly addressed these allegations and found no evidence of any impropriety in the conduct of the sale. On the contrary, the court affirmed that the 3rd respondent lawfully acquired the suit property through a public auction and was therefore protected under Section 99 of the *Land Act*. That provision shields bona fide purchasers from challenges arising out of procedural defects in the exercise of the chargee’s statutory power of sale.



10. It is further submitted that the trial court correctly found that the appellants had not demonstrated any notice or proof of the alleged irregularities. As such, the 3rd respondent stood as a bona fide purchaser for value without notice, whose title could not be impeached. The respondents reiterate that, in accordance with settled legal principles, once a public auction is concluded and the property is transferred, the chargor's equity of redemption is extinguished, and any residual challenge to the sale becomes untenable.
11. In response to the appellants' contention that the 3rd respondent's application for vacant possession was not supported by the pleadings, the respondents argue that this position is both factually and legally flawed. They assert that the 3rd respondent had, in her defence and counterclaim, explicitly pleaded ownership of the suit property, sought a declaratory order to that effect, demanded vacant possession, and claimed mesne profits. The application dated 21st February 2023 was therefore a logical and legitimate extension of the existing pleadings and did not violate Order 2 Rule 6 of the [*Civil Procedure Rules*](#).
12. Counsel for the respondents further refutes the appellants' assertion that the trial court granted a mandatory injunction at an interlocutory stage. It is contended that no injunctive orders were sought by the 3rd respondent. Rather, the application for vacant possession arose as a procedural consequence of the court's recognition of her legal interest in the property, following the dismissal of the appellants' own application for injunctive relief. It would, the respondents argue, be inequitable to permit the appellants to continue occupying the premises without any lawful entitlement and without offering restitution whether by refunding the purchase price or compensating the 3rd respondent for loss of rental income.
13. Finally, the respondents submit that the appeal is frivolous, brought in bad faith and amounts to an abuse of the court process. They argue that the appellants have neither challenged the auction through repayment nor made any attempt to refund the purchase price. Instead, they continue to occupy the property in defiance of court orders and without paying rent.
14. The respondents invoke the doctrine of res judicata under Section 7 of the [*Civil Procedure Act*](#), asserting that the issues raised in this appeal have previously been heard and determined by courts of competent jurisdiction, including the Court of Appeal, and cannot be re-litigated under the guise of a fresh appeal.

Analysis and Determination

15. I have considered the record and supplementary records of appeal as well as the submissions and the authorities relied on by the parties. In my view, the central issue for determination is whether the appellants have established sufficient grounds to warrant the setting aside of the orders made by the trial court on 16th February 2024.
16. I am mindful that the role of this Court on a first appeal is to re-evaluate all the evidence presented before the trial court and arrive at its own independent conclusion. This position was reaffirmed in [*Oluoch Eric Gogo v Universal Corporation Limited*](#), [2015] eKLR, where the Court held as follows:

“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. ... From the above decisions which echo section 78 of the [*Civil Procedure Act*](#), it is clear that this court



is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”

17. The appellants have argued that the orders granted by the trial court, particularly the order for vacant possession, had the effect of prematurely determining the suit at an interlocutory stage, before a full hearing on the merits, especially with respect to the 3rd respondent's ownership of the property and the propriety of the auction process.
18. With respect, I find that this argument is not tenable for several reasons. First, the record reflects, and the appellants have not disputed, that they had previously filed an application seeking injunctive relief to restrain the intended public auction. That application was dismissed by the trial court on the express finding that the appellants had not established a prima facie case to warrant the grant of an injunction.
19. It is important to underscore that a finding on prima facie grounds is not equivalent to a final determination of the parties' rights; it merely reflects a provisional assessment based on the material then available. The dismissal did not resolve the substantive issues in the suit but nonetheless cleared the way for the auction to proceed. Following the auction and the subsequent transfer of title, the 3rd respondent filed the application for vacant possession. That application was not brought prematurely or in the abstract, but as a natural legal consequence of the court's earlier dismissal of the injunction and the completion of the sale.
20. Secondly, the trial court's order for vacant possession flowed directly from its finding that the 3rd respondent had, at the very least on a prima facie basis, demonstrated a credible claim to ownership of the suit property. The court was satisfied that the 3rd respondent had acquired good title pursuant to a public auction and was therefore entitled to exercise the attendant rights of ownership, including possession. Section 99 of the *Land Act* protects such a purchaser who had no notice of any irregularity in the sale.
21. The appellants did not demonstrate to the satisfaction of the trial court that the 3rd respondent acted in bad faith or was complicit in any impropriety. In the absence of any evidence displacing the status of the 3rd respondent as a bona fide purchaser, I am inclined to accept that the appellants had no continuing legal basis to remain in possession of the suit premises.
22. In the circumstances, and having also reviewed the evidence on record, the trial court was well within its discretion to grant vacant possession in order to vindicate the purchaser's proprietary rights.
23. It must be emphasized that the dismissal of the injunctive application and the grant of the orders for vacant possession do not, in themselves, preclude the appellants from pursuing their substantive claims in the main suit. Should the court ultimately find that the appellants have a valid claim against any or all of the respondents, an award of damages remains an available remedy. The loss of the property does not extinguish the appellants' right to redress, if liability is established.
24. As to whether the order for possession constituted a mandatory injunction as alleged by the appellants, I have reviewed the application which is the subject of this appeal. The 3rd respondent did not seek any injunctive relief. Her application was for vacant possession of property which she had already acquired lawfully through a concluded auction. The appellants' objection in this regard is therefore without merit.
25. The appellants' argument that the reliefs granted by the trial court were not anchored in the main suit or counterclaim is also unpersuasive. A perusal of the defence and counterclaim filed by the 3rd respondent reveals that she explicitly pleaded ownership of the suit property and sought declaratory



reliefs, vacant possession, and mesne profits. The orders made by the trial court were wholly consistent with these reliefs. There was no departure from the pleadings that could therefore be said to have occasioned prejudice to the appellants.

Disposition

26. In light of the foregoing, I find that the appellants have failed to establish any valid grounds to warrant interference with the judgment and orders of the trial court. The trial court properly evaluated the evidence, applied the correct legal standards, and reached a conclusion that was both factually and legally sound.

Final Orders

27. The appeal therefore lacks merit and is accordingly dismissed with costs to the 3rd respondent. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2025.

F. MUGAMBI

JUDGE

