Kipkoech v Fina Bank Ltd & 3 others (Civil Case 161 of 2011)
[2025] KEHC 10176 (KLR) (15 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10176 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 161 OF 2011

RN NYAKUNDI, J

JULY 15, 2025

BETWEEN

EMMY JEPKEMOI KIPKOECH ..... PLAINTIFF

AND

FINA BANK LTD ..... 1ST DEFENDANT

ROSE JEPCHIRCHIR BUNEI ..... 2ND DEFENDANT

GUARANTY TRUST BANK (K) LTD ..... 3RD DEFENDANT

PHILLIPS INTERNATIONAL AUCTIONEERS ..... 4TH DEFENDANT

RULING

1. By way of Notice of Motion dated 13th May 2025, the Applicant seeks the following orders;
    1. Spent.
    2. Spent.
    3. A temporary injunction restraining the Defendants/Respondents and/or its agents from trespassing on, selling, disposing, transferring or otherwise interfering in any way with the Plaintiff/Applicant's ownership, use, possession and occupation of all that parcel of land known as Uasin Gishu/ Kimumu/816 pending the hearing and determination of the main suit.
    4. That the orders herein be served upon the Ocs Eldoret Central Police Station for enforcement and or any other police station or police officer within the jurisdiction.
    5. Cost of this application be provided for.

2. The Application is expressed to be brought under Order 40 rule 1 and 2 of the Civil Procedure Rules 2010 and any other enabling provisions of the law. The Application is premised on the grounds on the face of it and the averments of the Applicant in her affidavit sworn in support of the Application.

3. In her affidavit, she deposed that she is the registered and absolute owner of land parcel No. Uasin Gishu/ Kimumu/816, a copy of which she annexed and marked as "EJK-1". Further, that the 4th Respondent issued her with a 45 days Redemption Notice which expired on or about the 28th April 2025 and have gone ahead to advertise her parcel of land with the intention of putting it on sale by way of Public Auction. She urged that her eviction will cause her to lose her home and source of livelihood. She stated that she stands to suffer irreparable loss and damage.

4. The Applicant urged that the 2nd Respondent fraudulently used her title deed to secure a loan from the 1st and 3rd Respondents and now wish to put on sale her parcel of land to realize the loan. She stated that she did not guarantee or authorize the 2nd Respondent to her title deed to secure any loan. Further, that she lost her title deed during the time she was admitted in Hospital and she reported the matter on 7th April, 2008 at the Eldoret Police Station and it was booked in the Occurrence Book as OB/NO 19 /07/04/2008. She annexed and marked a copy of the Police Abstract and OB/ NO. as "EJK-4".

5. She denied being asked to appear before the 1st and 3rd Respondents to execute any guarantee documents or consenting to the use of her title to guarantee a loan. Additionally, that she did not appear before Uasin Gishu Land Control Board to procure consent to charge her property to secure the said loan advanced to the 2nd Respondent because she was unwell and admitted to Hospital during that period. She annexed a copy of the letter from Aic Tenwek Mission Hospital as "EJK~5".

6. The Applicant stated that she filed this matter at the lower courts vide Eldoret Mcelc No. E161 OF 2024 but was told that there is a similar case pending at the High Court, annexing and marking a copy of the court order as "EJK-6". That the injunctive orders she secured were vacated on the grounds that there is a similar case pending in this court. She urged that it is in the interest of justice that the orders sought be granted.

7. In response to the application, the 3rd Defendant filed a Replying Affidavit sworn by one Kristie Mukobi, their Legal Officer. She urged that the 3rd Defendant is the successor in title to the 1st Defendant. She stated that her general response to the application is that it is incurably defective and an abuse of the court process and ought to be dismissed in the first instance. She stated that the Plaintiff has not shown any sufficient ground allowed under the law to warrant the grant of injunctive relief orders as prayed.

8. She laid down the history of litigation, specifically referring to the Application dated 26th October, 2011 by the Plaintiff, in which she sought temporary orders of injunction against the Defendant with regard to the suit property. She stated that the Honourable Justice Azangalala heard the said application ex parte and issued a temporary order of injunction over the suit property pending the hearing and determination of the application. She annexed and marked as KM-2 a copy of the Court's order. Further, that the Plaintiff, after obtaining the injunctive orders abandoned the suit and has not prosecuted the said suit. Additionally, that by dint of Order 17 Rule 2(5) of the Civil Procedure Rules the suit stood dismissed after 2 years.

9. The deponent stated that the doctrine of finality has already set in hence this court should not entertain any more applications on the part of the Plaintiff. Further, that the injunctive orders automatically lapsed by operation of law and as the Plaintiff was still in default the Bank therefore proceeded to exercise their statutory power of sale over the suit property by issuing the requisite statutory notices as

required under law. She urged that the Plaintiff has since the year 2011 been well aware of the suit but has taken no action on it and abandoned it.

10. The deponent stated that on 17th September, 2024, the Plaintiff decided to file a suit in the lower court MCELC No. El61 of 2024: Emmy Jepkemoi Kipkoech versus Fina Bank Limited and Rose Chepchirchir Bunei by way of a Plaint dated 17th September, 2024 seeking similar orders as those sought in the High Court suit and an application in which it seeks an injunctive order once again over the suit property Uasin Gishu/Kimumu/816. She annexed and marked as KM-3 copies of the Plaint and Application. She stated that this suit granted the Plaintiff injunctive orders on 11th October, 2024 stopping the auction scheduled for 14th October, 2024. Further, that on 6th March, 2025, the lower court discharged the interim orders after learning of the existence of this suit. The Plaintiff once again filed a third application before this court seeking the same interim orders to once again block the lawful sale of the Bank's security. She stated that it is clear that the Plaintiff is abusing the court process and has acted in bad faith in order to obtain fresh injunctive orders by filing this application after filing the application in the lower court failed to yield the results the Plaintiff wanted.

11. She stated that the Plaintiff s application has not met the threshold for the grant of injunctive relief orders for various reasons. She urged that vide a Letter of Offer dated 9th May, 2008, the 2nd Defendant obtained a loan facility for the sum of Kshs, 2,219,800 from the Defendant Bank to be secured by among others a Legal Charge over Uasin GishuIKimumuI816 registered in the name of the Plaintiff. In line with the Letter of offer, a charge dated 5th June, 2008 was executed by the Plaintiff and the 2nd Defendant and the 1st Defendant bank to secure the sum of Kshs. 2,300,000 and the same was registered over the property. The Plaintiff further guaranteed the entire loan amount by executing a Guarantee dated 22nd May, 2008 which she annexed and marked as KM- 6, a copy of the Guarantee dated 22nd May, 2008. It was the parties' agreement that in case of default, the charged property would be sold to clear or reduce the debt. The Bank had no other choice but to initiate realization of the security to safeguard its own interests. As a consequence of the default, several demands, requests and reminders were issued to the Plaintiff and 2nd Defendant including calling upon the said parties to regularize the 2nd Defendant's account and settle the then outstanding loan arrears but the Borrower and Chargor failed to rectify the default.

12. She stated that on 1st September, 2011, the Bank proceeded with issuing statutory notices to the Plaintiff resting with a 45-days' Redemption Notice and Notification of sale of immovable property both dated 1st September, 201I which notices were served upon the Plaintiff and the 2nd Defendant on the even date and which sale the Plaintiff challenged in High Court Eldoret High Court Case No. 161 OF 2011: Emmy Jepkemoi Kipkoech versus Fina Bank Limited and Rose Chepchirchir Bunei. The court granted the injunctive orders after which she never took any further action on the suit and therefore the orders lapsed. The account continued to be in arrears and accumulating interest and on or about 5th May, 2022 the Bank reinitiated the statutory demand process. She annexed and marked KM- 8 a copy of the demand letter issued to the Plaintiff. Upon failure to act on the said demand the Bank issued a 90 day Notice pursuant to section 90 of the *Land Act*, 2012 to the Plaintiff demanding rectification of the loan account. She annexed and marked as KM-9 a copy of the 90-day Notice and Certificate of postage. Upon the issuance of the said statutory notice the 2nd Defendant proceeded to approach the Bank, acknowledged the debt and proposed to sell the property by way of a private treaty in order to settle the outstanding balance. The Bank had no objection to the said sale but informed them of the conditions that had to be met prior to the sale by way of their letters dated 22nd and 26th June. 2022. She annexed and marked as KM- 10 a copy of the letters dated 22nd and 26th June, 2022.

13. She deponed that negotiations with the Plaintiff fell through and therefore the Bank proceeded with issuing the 40-day Notice under Section 96 (2) of the *Land Act* dated 1st November, 2022 on the Plaintiff. She annexed and marked as KM-11 a copy of the 40-day Notice and Certificate of postage. She further stated that the plaintiff still failed to rectify the default, and the Defendant Bank herein had no option but to proceed with exercising its statutory power of sale. Upon the 40-day Notice expiring, the Bank instructed Phillips International Auctioneers to prepare and serve a 45 days Redemption Notice and Notification of Sale upon the Plaintiff which was served by post on 6th August, 2024. She annexed and marked as KM-12 a copy of the Auctioneer's Notice and certificate of postage. Pursuant to Section 97 (2) of the *Land Act*, a valuation was done over the suit property on 6th August, 2024 by GIMCO Limited which valuation indicated that the Market Value of the property was Kshs. 6,500,000 whereas the Forced Sale Value was Kshs. 4,875,000. She annexed and Mark as KM-13 a copy of the Valuation report.

14. Pursuant to the Auctioneers' Rules, 1997, the auctioneers placed an advertisement on the sale by public auction over the charged property in the dailies and the public auction was scheduled for 14th October, 2024. The advertisement caused the Plaintiff to file the suit before the magistrate court and she obtained orders to stop the sale.

    She stated that it is clear that at all material times to this suit the Plaintiff was served with all necessary statutory notices as per the law in exercising its statutory power of sale. Further, that it is evident that the Plaintiff has always been fully aware about the charge and its import and consequences of default in the loan repayment. She denied the allegations of fraud and urged the court to dismiss the application.

15. The parties filed submissions on the application.

Applicants' Submissions

16. Counsel for the Applicant submitted that the guidelines to be used in determining whether a party deserves injunctive orders or not were set out in the celebrated case of Giella vs Cassman Brown & Co Ltd [1973] EA.

17. Counsel submitted that the Applicant has established a prima facie case with a probability of success against the defendants. The Applicant has annexed a copy of police abstract dated 7th April, 2008 where she had reported the loss of her title deed at the Eldoret Police Station and further, that she annexed a report showing that she was admitted in hospital by the time she was expected to attend land control land board to give her consent to charge her property. He submitted that the law of contract provides that fraud can be a ground for invalidating or rescinding a contract. Counsel posited that the Plaintiff is seeking interim orders so that she can prove at the hearing that her parcel of land was fraudulently used to secure the loan.

18. Counsel urged that before the main hearing of this matter, they will seek to enjoin the Branch Manager who illegally approved the loan to the 2nd Defendant because the evidence will show that he was an accessory to the fraudulent transaction.

19. Counsel submitted that the doctrine of privity of contract exempts the Applicant to being a party to the contract between the defendants. He cited the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR. He further stated that in the case of Noor Mohammed Jan Mohammed vs Kassam Ali Virji Madhani [1953] 20 LRK and EA Industries vs Trufoods [1972] EA 420 the court was clear that in order to justify granting of injunctive orders; one must demonstrate that his property is in imminent danger of sale or disposition. Additionally, it must be shown that the anticipated loss and injury is irreparable in that it will not be compensated by an award of damages.

20. Counsel urged that unless conservatory orders are issued, the Applicant's home will be sold by way of public auction and she will suffer substantial loss. She urged the court allow the application with costs.

Respondent's submissions

21. Counsel submitted that the application is incompetent and a complete abuse of the court process and reproduced the contents of the Replying Affidavit. He stated that the Application does not meet the threshold for the grant of a temporary injunction and cited the case of Giella v Cassman Brown & Company Limited [1973] E.A 358 which sets out the conditions for consideration in the granting of an interlocutory injunction. He additionally cited the case of Nguruman Ltd v Jan Bonde Nielsen & 2 Others, [2014] eKLR in this regard.

22. Counsel urged that the Applicant has failed to demonstrate that she has a prima facie case with a probability of success and cited the case of Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR where the court defined a prima facie case.

23. Counsel urged that the Plaintiff has alleged fraud on the part of the Bank which allegations are baseless and unsubstantiated and no evidence presented to prove this. Further, that the Plaintiff has made vague and very general allegations of fraud against it and that the said allegations are clearly a constructed story used by the Plaintiff whenever the Bank tries to exercise its statutory power of sale.

24. Counsel submitted that the Plaintiff has not provided any evidence to this Court that shows she stands to suffer irreparable harm and that she would not be adequately remedied by an award of damages. He cited the case of Nguruman Ltd v. Jon Bonde Nielsen & 2 Others, urging that the Applicant has failed to demonstrate irreparable harm.

25. It is the Respondents' case that as the Plaintiff has failed to meet the first two tests which must be surmounted sequentially as set out by the Court of Appeal in the Nguruman Ltd Case (supra) this court should not delve to consider the Plaintiffs application on a balance of convenience. Further, that even if this Court was to decide this application on a balance of convenience, the same would still tilt in favour of the 3rd Defendant as it has established that it has discharged its obligations as required by law. He urged the court to dismiss the application with costs.

Analysis & Determination

26. Upon considering the application, responses thereto and the submissions, the following issues arise for determination;

    Whether the orders for a temporary injunction should issue

    From the facts underlying the application, it is evident that the Applicant had initially filed a Chamber Summons Application dated 25th October 2011 seeking a temporary injunction in the same terms as the present application. Vide the order issued on 28th October 2011, Justice Azangalala issued the temporary injunction after which the Applicant did not prosecute the matter any further. The only deduction that can be made from the conduct of the Applicant is that the purpose of the application was to prevent the Respondents from exercising their statutory power of sale.

27. The Applicant then approached this court seeking the same orders and was granted an interim injunction pending the determination of the application. As the initial application was not conclusively determined, I shall proceed to make a final determination on the issue of injunctions so as to avoid another situation where an Applicant seeks another injunction.

28. Determination on whether to grant interim injunctions is governed by Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

> " Where in any suit it is proved by affidavit or otherwise —
>
> (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

29. The principles that guide a Court in dealing with applications for injunctions were well settled in the celebrated case of Giella –vs-Cassman Brown and Company Limited, Civil Appeal No. 51 of 1972 where it was held as follows:

i. The Applicant must establish a prima facie case with a probability of success.

ii. Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.

iii. Applicant has to demonstrate that balance of convenience tilts in its favour.

30. Further, in Nguruman Limited v Jane Bonde Nielsen and 2 Others, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

> " 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."

31. It is also settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact made on the basis of the conflicting Affidavit evidence. In connection

thereto, in Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1, the Court of Appeal guided as follows:

> "...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

Whether the Applicant has a prima facie case

32. What constitutes a "prima facie" case was discussed in the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, where the Court of Appeal held as follows:

> "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 sustainable 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 a 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 been 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."

33. In this case, I agree that before a Chargee can exercise its statutory power of sale, the law requires it to issue notices to the Chargor as follows:

    a. 90 days' statutory notice of default, pursuant to Section 90(1) and (2) of the *Land Act*, 2012.

    b. 40 days' notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012.

    c. 45 days' redemption notice pursuant to Rule 15(d) of the Auctioneers' Rules, 1997.

    d. 14 days' notification of sale, pursuant to Rule 25(e) of the Auctioneers' Rules, 1997.

34. In regard to (a) above, Section 90 aforesaid provides as follows:

    1. 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 default for one month, the chargee 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.

    2. .....

    3. If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may —

        (a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

35. Section 96(1) then provides that:

> " Where a chargor 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 chargor under section 90 (1), a Chargee may exercise the power to sell the Charged land."

36. In the present case, there was a letter of offer dated 9th May 2008 where the 2nd Defendant obtained a loan facility for Kshs. 2,219,8000/- which was to be secured by a charge on the suit parcel which had a title registered in the name of the Plaintiff who duly executed the letter of offer annexed and marked as annexure KM-4 to the Replying Affidavit to the application. A legal charge was then registered over the suit parcel where the plaintiff was listed as the chargor and the 2nd defendant as the borrower, duly executed on 5th June 2008. The Applicant, in disputing this, stated that she had reported her title deed missing on 7th April 2008 and further, that she was admitted in hospital on 20th May 2009, during the time the Land Control Board Consent was to be given.

37. It is clear that the 1st Respondent issued a 45 days statutory notice on 1st September 2011 and as aforementioned, the Applicant obtained a temporary injunction to stop the Respondent bank from exercising statutory power of sale. I note that the Applicant. The Applicant failed to prosecute the matter and the injunction lapsed pursuant to the provisions of Order 40 Rule 6 of the Civil Procedure Rules which provides as follows;

> Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

38. The 1st Respondent then issued the Applicant with a 90-day statutory notice dated 24th May 2022 pursuant to section 90 of the *Land Act* and a certificate of postage which were annexed and marked as KM9. The Respondent issued a 40-day Notice to Sell dated 6th November 2023 pursuant to sections 96(1) and (2) of the *Land Act* and upon failure by the Applicant to respond, it instructed the 4th Respondent to issue a 45 days' redemption which it did. Additionally, in compliance with section 97(2) of the act, the Applicants conducted a valuation of the property in 6th August 2024 before the property as placed on auction on 14th October 2024.

39. It is evident that there are sums owing to the defendant bank and further, that the Applicant guaranteed the loan to the 2nd defendant. Despite claiming that the title deed was fraudulently used to secure the charge, the Applicant, since 2008 or thereabout has not made any effort to prosecute the complaint on forgery, something which is improbable in my view.

40. When it comes to allegations of fraud, it has been severally stated that the same must be proved. In Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must,

of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts."

41. In R.G Patel v Lalji Makanji [1957] EA 314 the former Court of Appeal for East Africa stated as follows:

> " Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

42. For a party to abandon a report on fraud for 17 years could only mean one thing, and the allegations of fraud another thing all together. The premise of the Applicants' claim is that there was fraud in using her title to guarantee the loan. The pertinent question is essentially the subject matter of the suit is for recovery of land which the plaintiff claims was fraudulently transferred by the second respondent to the first Respondent bank to secure a loan for her benefit. This loan apparently remains unpaid for more than 17 years.

43. What the plaintiff/applicant has not demonstrated falls within the spectrum of inordinate delay in prosecuting the claim on fraud as between the second and the first Respondent Bank. This to me amounts to serious abuse of the court process. The court in Utalii Transport Company Limited & 3 Others vs. Nic Bank Limited & Another [2014] eKLR had this to say om this issue:

> " Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate the delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality"

44. The further test which the court should apply is the one enunciated in the case of Ivita v Kyumbu [1984] KLR 441, Chanson, J. (as he then was) and was adopted in the case of Communication Courier & Another V Telcom (K) LTD [1999] eKLR by Lesiit J that:

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

45. On applying the courts mind to the facts of this case one can ascertain that there has been inordinate delay on the part of the plaintiff/applicant to prosecute the so called fraudulent mortgagee and mortgagor agreement as between the second Respondent with the first Respondent Bank. The applicant to this application has made attempt to explain to the court the delay to prosecute the case has not been intentional or an abuse of the court process but due to serious health concerns beyond a control. From the perspective of compassion the plaintiff has offered a reasonable explanation of the delay though there is clear evidence of her advocates not providing the necessary legal counsel and re-presentation during the period under review. There are occasions when the advocates on record will move the court for an interlocutory relief of injunction under Order 40 Rule 1 & 2 of the Procedure Rules but end up abandoning the litigation landscape to the detriment and prejudice of the applicant.

> " Generally speaking it is the law in Kenya that whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due diligence, through evidence or correspondence of the follow up with the advocates or to pursue their rights. On the same breadth the mistakes or negligence of an advocate should not be unfairly visited upon their client. However, this principle is not absolute, and clients are expected to show some degree of diligence in following their cases. If a client demonstrates a lack of interest or effort in pursuing their case, despite being represented by counsel, a court may be less inclined to excuse errors made by the advocate. See Kariuki v Wangeci & 7 others (Civil Application E250 of 2023)

46. It is true to where the justice case mandate as per law established mistake of an advocate should not be visited on the clients or litigants.

47. The fundamental question at the tail end of this discussion is whether the plaintiff/applicant case raises serious question to be tried at the main suit. The applicable provisions of the law remain to be Order 40 of Rule 1 & 2 of the Civil Procedure Rule as construed with section 1(A), 1(B) & 3(A) of the *Civil Procedure Act*. The comparative jurisprudence shared with our common law heritage in the case of Eng Mee Yong & Others v Letuchasan, 1979 UKPC 13 (4th April 79) Lord Diplock stated that:

> " The guiding principle in granting an interlocutory injunction is the balance of convenience, there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability,' a 'prima facie case' or a 'strong prima facie case' that if the action goes to trial, he will succeed; but before any question of a balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous or vexatious; in other words that the evidence before the court discloses there is a serious question to be tried, American Cynamid v Ethicon Ltd (1975) AC396."

48. As reiterated in the American Cynamid case:

> " It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a

determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."

49. Closer home the court in Giella vs Cassman Brown [1973] E.A 358 said the principles of injunction when it held that:

> " The conditions for grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be 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. See Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR

50. The issue of mortgagor and mortgagee contract as between the plaintiff/applicant, and the second Respondent who charged her title with the first Respondent happens to be a contentious matter pursuant to the provisions of the *land Act* 2012. The plaintiff/applicant avers in her affidavit that she did not sign the instruments of transfer to create a charge as her security to the first Respondent to the loan agreement with the second Respondent. In fact, from the affidavits of the plaintiff/applicant and the second Respondent they have admitted to have committed a fraud and misrepresentation by altering a false document to the first Respondent Bank. The question therefore arises as to whether there is before this court or the evidence necessary to determine the issue of forgery in this matter. I am of the considered view at this stage to answer the question in the negative. My understanding of this application on assessment of replying affidavit by the first Respondent Bank weighing it with the rest of the affidavits by the plaintiff/applicant and the second Respondent there are however conflicts on the evidence alluded to by the parties pertaining to the issues before me. This court cannot settle the questions of law presented at this interlocutory stage based on the facts outlined in the affidavit evidence.

51. Before departing from this space, the background adverted to by the first Respondent Bank is contending that the plaintiff/applicant averments in her claim, form the basis of the previous decision by the various session judges on account of res judicata under section 7 of the *Civil Procedure Act*. The overriding objectives of this doctrine is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between parties.

52. From the analysis of replying affidavit of the First Respondent Bank together with annexures the following criterion has not been met to invoke the doctrine res judicata:

    a. That there has already been a judicial decision by a competent court or tribunal;

    b. That decision was of a final character;

    c. The decision relates to the same question as that sought to be put in issue by the plea in respect of which the estoppel is claimed; and

    d. The decision must have been between the same parties or their privies as the parties between whom the question is sought to be put in issue

53. In seeking to advance the first Respondents' Bank case I am of considered view that the character of the plaintiff/applicant case is not yet in the realm of re judicata. The decision in question relate to interim orders of injunction with no decision on the merits. Yes, I agree the parties and the subject

matter remain to be the same but yet to come across a decision on the merits in respect of the cause of action in this case docket.

54. Put altogether I am therefore satisfied that notwithstanding inordinate delay by the plaintiff/applicant to prosecute the substantive suit but kept on re-litigating by way of interlocutory applications, she has a very strong if not unanswerable case as against the Respondents against whom I grant the interim relief of injunction pending the hearing and determination of the suit. In addition to the above the following orders shall abide:

    a. That the plaintiff/applicant shall cause this long time pending suit be fixed for hearing within 14days from todays' date of the ruling

    b. That a final status pre-trial conference shall be held on 23rd July 2025 to set in motion the disposal of this case before the 5th August 2025.

    c. That in default by the plaintiff/applicant to comply with the above timelines on case management, the suit shall be dismissed with costs to the Respondents'.

    d. That the plaintiff/applicant to be accorded an opportunity to address the court and adduced evidence at the main trial must produce evidence of having settled the costs and auctioneers fees issued by this court follow an interim injunction against the scheduled public auction which was set to be held on 16th May 2025 at Eldoret City, outside the main post office starting at 11am

    e. The species of this case are not res judicata

    f. The costs of this application shall be equally be met by the plaintiff/applicant in favour of the Respondents'.

55. It is so ordered

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15TH DAY OF JULY 2025

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R. NYAKUNDI

JUDGE

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