



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Muli v Kenya Commercial Bank Kenya Limited & another (Civil Case E016 of 2021) [2025] KEHC 10511 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E016 OF 2021
RC RUTTO, J
JULY 17, 2025**

BETWEEN

REUBEN MUSYOKI MULI PLAINTIFF

AND

KENYA COMMERCIAL BANK KENYA LIMITED 1ST DEFENDANT

NYALUOYO AUCTIONEERS 2ND DEFENDANT

RULING

1. Before this court for determination is a Notice of Motion Application filed under Certificate of Urgency dated 28th July 2021. The Applicant seeks the following orders: -
 - a. Spent
 - b. Spent
 - c. That an order of temporary injunction be issued restraining the Defendants/Respondents whether by themselves, their agents, their servants or persons claiming through them howsoever from advertising for sale, selling by public auction or public treaty or otherwise howsoever, disposing of, alienating, transferring, interfering or by any other means whatsoever from dealing adversely with the Plaintiffs/Applicants parcel of Land known by Title No. Machakos Municipality Block II/728 until hearing and final determination of the suit.
 - d. That an order do issue directing the 1st Defendant/Respondent to prepare and or render to the Plaintiff/Applicant and the court a true, proper, full and accurate statement of accounts of all the financial dealings conducted in the 1st Plaintiff's loan account from 10th February 2014 to date and/or an order for proper accounts to be taken.
 - e. That the costs of this application be provided for.



2. The grounds on the face of the application are that the Applicant obtained a financial facility of Kshs.43,672,366.38 from the 1st Defendant/Respondent, secured by his property known as Title No. Machakos Municipality Block II/728. The Applicant avers that he was servicing the loan when, on 14th August 2015, he was shot by thugs along the Nairobi–Mombasa Road, sustained serious injuries, and remained hospitalized for several months. As a result, he was unable to attend work or continue servicing the loan. He asserts that he had taken out an insurance policy with UAP Life Insurance Company Limited to cover such eventualities specifically, cases involving total permanent disability which policy stipulated that, in such circumstances, the insurer would settle the entire loan amount.
3. However, the insurer only paid Kshs.13,290,124.63, prompting the Applicant to institute legal proceedings against the insurer in Nairobi HCCC No. 339 of 2016, contesting the partial payment. The suit was determined in favour of the insurer, but the Applicant has since lodged an appeal.
4. The Applicant further contends that he has not received any statutory notices as required under Sections 90 and 96(2) of the Land Act, 2012. He states that the only notice he received was a 45day redemption notice sent by registered post. He therefore maintains that the 1st Defendant's exercise of its statutory power of sale is unlawful. He refers to sale advertisements published by the 2nd Defendant in the Daily Nation of 12th July 2021 and the Standard newspaper of 19th July 2021, demanding Kshs.63,059,976.02/= as at 20th May 2021. He contrasts this with the outstanding loan balance reflected in the mortgage account statement dated 17th May 2021, which stood at Kshs.27,571,568.74/= . Additionally, the Applicant states that the Defendants/Respondents have not conducted a forced sale valuation of the suit property, and he is apprehensive that the property may be sold at a value below its current market worth.
5. In response, the 1st Respondent filed a Replying Affidavit sworn by Bertha Oduor, the Recovery Manager of the 1st Defendant. She deposes that the Plaintiff/Applicant applied for and was granted several loan facilities, namely: a charge of Kshs.13,000,000 dated 8th July 2009 and registered as encumbrance number 6; a further charge of Kshs.8,000,000 dated 17th November 2010, registered as encumbrance number 7; a second further charge of Kshs.7,000,000 dated 6th August 2012, registered as encumbrance number 8; and a third further charge of Kshs.13,000,000, registered as encumbrance number 9. She further deposes that the Applicant subsequently approached the 1st Respondent for a fourth additional financial facility of Kshs.5,000,000, for which the subject lease was used as collateral. Prior to the drawing and execution of the charge instrument, the Applicant received a Letter of Offer dated 15th September 2024, outlining the terms and conditions of the said facility, which the Applicant was required to comply with. She avers that the total amount secured under the charges created in favour of the 1st Respondent is Kshs. 46,000,000, and asserts that the Applicant failed to adhere to the agreed terms of repayment of the loan.
6. She further avers that the 1st Respondent, through the Mortgage Portfolio Manager, issued the Applicant with a letter dated 4th May 2015, informing him that his account was in arrears of Kshs.1,242,485.20/= as at 1st May 2015, and advising him to deposit sufficient funds to regularize the account within fourteen[14] days. She avers that the Applicant did not respond to the said letter. Subsequently, the 1st Respondent issued the Applicant with a three-month statutory notice dated 29th August 2019, pursuant to the provisions of Section 90(1),[2], and[3] of the Land Act, as well as Section 74(1) and[2] of the repealed Registered Land Act. The notice indicated that the Applicant was in arrears of Kshs.4,418,456.29/= as at 31st July 2018 and that the total outstanding debt stood at Kshs.48,468,590.92/=.



7. She deponed that after the lapse of the three-month period without rectification of the default, the 1st Respondent issued a forty-day statutory notice dated 7th July 2020, which informed the Applicant that, as at 1st July 2020, the loan arrears had increased to Kshs. 62,437,238.57/=. She states that all the statutory notices were served via the Applicant's registered postal address, and that the Applicant has not denied that the address to which the notices were sent belongs to him.
8. She further stated that the Bank engaged the services of the 2nd Respondent for purposes of recovering the outstanding arrears. Consequently, the 2nd Respondent issued a redemption notice dated 21st May 2021, informing the Applicant that he had forty-five[45] days from the date of the notice to repay the sum of Kshs.63,059,967.02/=:, failing which the property would be sold by way of public auction. She contends that the issuance of the 45day notice did not elicit any response from the Applicant, thereby necessitating the advertisement of the subject property for sale in the Daily Nation newspaper of 12th July 2021. She further averred that a valuation of the subject property was conducted, and a valuation report dated 12th June 2020 was prepared by Wamae Mureithi & Associates, which detailed the market value, forced sale value, insurance value, and mortgage value of the property. She states that the Applicant acknowledged his indebtedness at paragraph 10 of the grounds in support of the application, and avers that the Applicant's injuries do not absolve him of the responsibility to ensure the timely repayment of the loan.
9. The 2nd Defendant/Respondent did not file any response to the application, and the Applicant did not file a further affidavit. The present application was canvassed by way of written submissions. The Applicant's submissions are dated 12th June 2024, while the 1st Respondent's submissions are dated 27th April 2022.

Applicant's submissions

10. The Applicant began his submissions by stating the grounds of the application.
11. The Applicant, relying on Sections 90, 96, and 97(1) and[2] of the *Land Act*, submitted that all statutory notices were required to be personally served upon him, with an Affidavit of Service demonstrating how the 1st Defendant effected such service. He contends that no valuation was conducted by the 1st Defendant in 2021, and instead, the last known valuation was done in 2020. He further submits that the statutory notice dated 29th August 2018, which was intended to run for three months, was never received by him, and that the 1st Defendant failed to file an Affidavit of Service in that regard. Similarly, he asserts that the second statutory notice dated 7th July 2020 was also not received by him.
12. The Applicant also contends that the letter dated 21st May 2021, notifying him of the redemption period, was never served upon him and that the 1st Defendant has not demonstrated how it was sent. With respect to the notification of sale, the Applicant submits that the remarks allegedly made by the auctioneer in the letter dated 21st May 2021 are neither signed nor dated. He further states that it has not been shown that the redemption notice was served on 25th May 2021, yet the handwritten remarks suggest that service was effected on 26th May 2021 at 7:28 a.m. He highlights the inconsistency, noting that the Certificate of Service is dated 25th May 2021 and bears a postal address with the code 90100, which, according to him, does not match his original address.
13. The Applicant, in support of his case, relied on the decisions in *Moses Kibiego Yator v Eco Bank Kenya Limited* [2014] eKLR, *Henry Ndungu Kinuthia v KCB Bank Kenya Limited*, and *David Ngugi Ngaari v Kenya Commercial Bank Limited*, HCC No. 135 of 2013. He submitted that he has established a prima facie case with a probability of success and further demonstrated that if the



intended sale proceeds, he will suffer irreparable harm that cannot be adequately compensated by an award of damages before the suit is heard and determined.

14. In conclusion, the Applicant urged the Court to grant an order of injunction restraining the Defendants, their agents, or any other persons acting on their behalf from auctioning the suit property, pending the hearing and determination of the suit.

1st Respondent's submissions

15. The 1ST Respondent commenced its submissions by reiterating the facts set out in its Replying Affidavit. It further submitted that the suit in Nairobi HCC No. 339 of 2016 *Reuben Musoki Muli v KCB Bank and UAP Life Assurance Limited*, was determined, and the Court held that the Applicant was liable to settle the outstanding loan balances. The 1st Respondent urged the Court to take judicial notice of this determination in considering the present application.
16. On the question of whether the present application has merit, the 1st Respondent submitted that it is devoid of merit, as the Applicant has admitted being in default. It was the 1st Respondent's position that such default entitles a chargee to exercise its statutory power of sale. The 1st Respondent asserts that all requisite statutory notices were duly issued and that a valuation of the charged property was conducted, thereby satisfying the legal prerequisite for the realization of the security.
17. While relying on the case of *Mwangangi Mutula Mutua v Equity Bank Limited & 2 Others* [2019] eKLR, the 1st Respondent submitted that the Applicant has not satisfied the conditions for the grant of an interlocutory injunction. The 1st Respondent further argued that the amount claimed is not disputed, and that there is no other viable means of recovering the outstanding loan except through the sale of the property offered as security.
18. In conclusion, the Respondent urged the Court to dismiss the application with costs.

Analysis and Determination

19. Having considered the parties' averments and the submissions filed, I find that the sole issue for determination is whether the Plaintiff/Applicant has established a sufficient basis to warrant the grant of the injunctive relief sought.
20. This application was filed under a Certificate of Urgency, and pursuant to the Ruling delivered on 2nd December 2021, the court directed that the status quo be maintained. The issue now before the court is whether the Applicant has satisfied the requirements for the grant of the injunctive orders sought, as well as the question of costs. It is the Applicant's burden to demonstrate that it meets the legal threshold for the grant of an injunction. It is also important to note that the grant of an injunction is a discretionary remedy, exercised by the court based on the specific facts and circumstances of each case. The applicable law for the granting of injunctions is found under the provisions of Order 40 Rule 1[a] of the *Civil Procedure Rules* and the principles for grant of injunction are set out in the case of *Giella v Cassman Brown and Company Limited* [1973] E.A 385, at page 360 where the court held as follows: -

“The conditions for the 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, 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.”



21. In the case of *Mrao Limited v First American Bank of Kenya and 2 Others* [2003] KLR 125, the Court of Appeal in determining what amounts to a prima facie case stated as follows: -
- “ A prima facie case in a Civil Case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as 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.”
22. At this stage of trial, the Court is not expected to consider the merits of the case when determining whether or not a prima facie case has been established. This position was set out in *Nguruman Limited vs Jan Bonde Nielsen* CA No. 77 of 2020 where the Court of Appeal stated as follows: -
- “ We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right that has been or is threatened with a violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case.”
23. On the issue of whether the Applicant has established a prima facie case with a probability of success, the Applicant alleged that no statutory notices were issued to him in accordance with the provisions of Section 56(2) of the *Land Registration Act* and Sections 90(1), 90(3), and 96 of the *Land Act*. The Applicant further contended that the 2nd Respondent failed to serve him with the 45day statutory notice as required under Rule 15(d) of the *Auctioneers Rules*. In response, the 1st Respondent maintained that all requisite notices were duly issued to the Applicant.
24. It is not in dispute that the 1st Respondent registered a charge over the subject property, of which the Applicant is the registered proprietor. It is also uncontested that the loan advanced has not been fully repaid. The Applicant’s principal contention is that he did not receive the statutory notices, save for the 45day Redemption Notice, as he admitted at paragraph 8 of the affidavit in support of the application. He therefore argues that due to the 1st Respondent’s alleged failure to properly serve the notices, and the absence of a valuation conducted contemporaneously with the intended sale, he is entitled to the injunctive relief sought.
25. Upon perusal of the documents annexed to the affidavits filed by the parties, this Court notes that the 1st Respondent exhibited the following documents: the letter dated 4th May 2015, the 90day statutory notice dated 29th August 2018, the 40day statutory notice dated 7th July 2020, the 45day redemption notice dated 21st May 2021, an undated Notice of Sale, and a Certificate of Service. Additionally, the Court has observed that two Certificates of Postage were exhibited, both indicating that the sender was the 2nd Respondent. The applicant contends that the certificate of service bears a postal address with a code that does not match his address. In light of the foregoing, the question that arises is whether the requisite statutory notices, which were allegedly issued by the 1st Respondent, were indeed properly posted and served upon the Applicant as required by law.
26. The Respondent argues that, since the Applicant did not dispute the postal address used in the notices, the court should presume that the notices were duly posted and received. However, this court notes that the applicant challenged the postal code indicated therein. The court reiterates the legal principle that



the burden of proof lies with the party who alleges. It is therefore incumbent upon the 1st Respondent to demonstrate that service of the statutory notices was properly effected on the Applicant.

27. It is important to emphasize that the law requires all mandatory statutory notices to be duly served before any auctioneer's notice can be issued. For the court to be satisfied that such statutory notices were indeed served, there must be clear and credible evidence, such as valid Certificates of Postage, confirming that the notices were properly dispatched.
28. In this instance 1st Respondent only produced file copies of the Notices but failed to provide all the certificates of postage as evidence of proper service. The absence of these certificates of postage is a prima facie indication that the notices were not properly served upon the Applicant as required under the terms of the Charge Document. I am guided by the Court of Appeal's decision in the case of *Nyangilo Ochieng & Another v Kenya Commercial Bank* Civil Appeal No. 148 of 1995[1996] eKLR where the court stated that: -

“Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Miss Awino, for the second respondent, and Mr. Oraro, for the third respondent, have argued that the learned judge correctly found that statutory notices were received by the appellants at P.O. Box 120, SARE which is the last known postal address of the appellants. There is no doubt that address is the last known postal address if the appellants but it must be understood that in the face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting.

It would have been a very simple exercise for the bank to produce a slip or slips showing proof of posting of the registered letter or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya.

Mr. Charles Manono Magachi[DW3] who worked for the bank at the material time simply produced his file copies of the notices allegedly sent by M/s Hamilton, Harrison and Mathews, the bank's advocates. As pointed out earlier it was incumbent upon the bank to, at least, prove posting of the registered letter or letters containing the statutory notice or notices.”

29. From the foregoing, it is evident that the burden of proving service or postage of the statutory notices rests with the 1st Respondent. In the absence of such proof the court finds that a prima facie case has been established in favour of granting injunctive relief. Proceeding with the intended sale without proper service would expose the Applicant to the risk of irreparable loss
30. I must however note that the Applicant has admitted his indebtedness to the 1st Respondent attributing his inability to repay the loan to his injuries that he allegedly sustained. In the case of *Labelle International Limited and another versus Fidelity Commercial Bank & Another*, Civil Case No. 786 of 2002 the court established that “. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.” I am persuaded by the reasoning in the foregoing decision and were it not for the failure to show compliance with the statutory prerequisites for the exercise of the power of sale, I would not have granted an injunction against the 1st Respondent. However, due to the observed failure to comply with the mandatory requirements under the law prior



to the intended realization of the security, I find it just and equitable to restrain the 1st Respondent and its agents from proceeding with the sale of the charged property.

31. This court is also persuaded that from the material tendered the applicant has an arguable case as there are serious questions and doubts raised as to the calculation of the loan paid and the accuracy the outstanding loan balance. On the foregoing ground the applicant is found to have a good and arguable case and as stated earlier these are issues best left to be determined after hearing the parties during trial where both parties will have the opportunity to present their evidence.
32. In the present circumstances, the court exercises its discretion guided by the principle of the balance of convenience. Having weighed the potential prejudice to each party, the court is satisfied that the risk of injustice to the Applicant arising from the 1st Respondent's failure to provide sufficient proof of service of the requisite statutory notices outweighs any harm that may be suffered by the 1st Respondent if the sale is temporarily halted. Accordingly, the court finds that the balance of convenience tilts in favour of the Applicant, and the intended sale should not proceed at this stage.
33. Thus, this court makes the following orders; -
 - a. An injunction is issued restraining the Defendants/Respondents whether by themselves, their agents, their servants or persons claiming through them howsoever from advertising for sale, selling by public auction or public treaty or otherwise howsoever, disposing of, alienating, transferring, interfering or by any other means whatsoever from dealing adversely with the Plaintiffs/Applicants parcel of Land known by Title No. Machakos Municipality Block II/728 until hearing and final determination of the suit.
 - b. An order is issue directing the 1st Defendant/Respondent to take accounts and render to the Plaintiff/Applicant and the court a statement of accounts of the Plaintiff's loan account from 10th February 2014 within the next 45 days.
34. In the meantime, as a condition precedent to the issue of injunctive orders
 - a. the Applicant is directed to deposit with the 1st Respondent an amount of Kshs.1, 000, 000/= within 60 days of this Ruling and to continue making the monthly payments, the sums which shall be payable direct to the 1st Respondent during the pendency of the suit.
 - b. In default of any requisite instalment, the 1st Respondent and the 2nd Respondent be at liberty to proceed with the sale of the subject property as the injunctive orders herein shall automatically be discharged.
35. Each party to bear their own costs of the Application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF JULY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Plaintiff.

.....Defendant.

Selina Court Assistant.

