



Maingi & 2 others v First Community Bank Limited & 2 others (Commercial Case E429 of 2024) [2025] KEHC 10322 (KLR) (Commercial and Tax) (14 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E429 OF 2024**

PM MULWA, J

JULY 14, 2025

BETWEEN

SHEILA KINYA MAINGI 1ST PLAINTIFF

SIMON MUTHOMI M'TUAMWARI 2ND PLAINTIFF

NAOMI JILLO WAQO 3RD PLAINTIFF

AND

FIRST COMMUNITY BANK LIMITED 1ST DEFENDANT

PREMIER BANK LIMITED 2ND DEFENDANT

**EMPRO ELECTRICAL & MECHANICAL ENGINEERS LIMITED 3RD
DEFENDANT**

RULING

1. For determination is the Plaintiffs/Applicants' Notice of Motion dated 23rd June 2025 brought under Order 40 Rules 1 & 4(a), Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, and Articles 40 and 159 (2)(b) of *the Constitution*.
2. The Applicants seek the following reliefs:
 - i. Spent...
 - ii. That pending the hearing and determination of the application inter partes, the Court to issue a temporary injunction restraining the 1st Respondent by itself or its auctioneers, agents, employees, or persons acting on its behalf from selling by public auction on any day thereafter or otherwise alienating or interfering with the suit property herein being all that property



described as L.R NO. 14607 I.R 65316 Forest View Road Karen Plains Estate & L.R No. 209/9071/40 I.r 45637 Miller Estate Phase 1 Nairobi West Area (the suit properties).

- iii. That prayer 2 be granted pending the hearing and determination of the suit.
 - iv. That there be a declaration that the guarantor obligation under the loan contract has not matured without exhaustion of the borrowers' ability to remedy the loan default.
 - v. Costs of the application.
3. The application is premised on the grounds on the face of the record and supported by the affidavits sworn by the 1st Applicant Sheila Kinya Maingi on 23rd June 2025 and on 9th July 2025. She deposes that the 1st Respondent (now 2nd Respondent) granted the 3rd Respondent (also the borrower) a loan facility which was secured by, inter alia, a Charge for an amount of Kshs. 50 million registered over all the assets of the 2nd Respondent and a legal charge over the suit properties herein.
 4. According to the 1st Applicant, the borrower defaulted on its repayment obligations but had given repayment proposals and settlement. She faults the Bank for advertising to sale the suit properties without first exhausting recovery from the borrower. She further contends that there is non-compliance with Section 97(2) of the *Land Act*, that no forced sale valuation of the suit property was undertaken and no statutory notices were served as required by the law.
 5. The 1st and 2nd Respondents oppose the application through affidavits by Claris Ogombo, their Manager Legal Services, sworn on 4th July 2025 and 8th July 2025. It is contended that the 1st and 2nd Applicants and the borrower (3rd Respondent) jointly and severally covenanted with the Bank (1st and 2nd Respondents) to pay the principal monies and financial rates secured by the Charge. That the Applicants had full knowledge of the security and its legal implications. And further that the 1st and 2nd Applicants together with the 3rd Respondent had sufficient knowledge of the nature and extent of their default.
 6. According the Bank, there was default, necessitating the exercise of the statutory power of sale. It is further deposed that all along, the 1st and 2nd Applicants, together with the 3rd Respondent knew the total amount claimed and owed, and that valuation of the charged properties was done and was within the limits stipulated under section 97(3) of the *Land Act*. The Respondent avers that the allegation of undervaluation cannot form the basis for the grant of an injunction.
 7. It was the 1st and 2nd Respondents' contention the Applicants had failed to disclose that similar orders as in the instant suit were sought in Milimani HCCC No. 490 of 2016 where the same parties plus Kenya Pipeline Company were involved. In that case, on 29th September 2020 the Court ordered that they pay the Bank all outstanding sums.
 8. I have considered the application, the affidavits both in support of the application and in opposition thereto, and the oral arguments by learned counsel for parties. The key issue is whether the Applicants have met the legal threshold for the grant of a temporary injunction.
 9. The court's discretion to grant temporary injunction is provided for under Order 40 Rule (1) and (2) of the Civil Procedure Rules 2010 which provide as follows:
 1. 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.

- 2(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.
10. The principles guiding the grant of interlocutory injunction are now well settled. In *Nguruman Ltd v Jan Bonde Nielsen and 2 Others* [2014] e KLR the Court of Appeal restated the law as follows:
- “In an interlocutory injunction application, the Plaintiff has to satisfy the triple requirements to;
- a. establish his case only at a prima facie level,
 - b. demonstrate irreparable injury if a temporary injunction is not granted, and
 - c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.
11. In addition, the court stated that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially. That is to say, the Applicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no prima facie case is established, the court need not look into the question of irreparable loss or balance of convenience.
12. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal defined a prima facie case as one “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.”
13. The Applicants allege that the Bank ought to have exhausted the process of recovery with the borrower who they contend is capable of settling the loan. They also claim that the requisite notices were not served and that no valuation of the suit properties has been done. And further that they ought to have been advised on the outstanding amount before service with any statutory notices.



14. The 3rd Respondent did not oppose the application but reiterated that Clause 10 of the Charge was clear as to conditions of sale and consequences of default. It maintained that the burden of proof as to the issue of service of statutory notices in accordance with Section 90 of the *Land Act*, squarely lay with the Chargee. That the Bank had failed to avail evidence of service of notices to the borrower and the chargor.
15. Conversely, the 1st and 2nd Respondents contend that all the Applicants signed guarantees to the amount advanced to the borrower. That there is a Charge document binding all the parties who are before Court. And that the covenant to pay is both to the Chargor and the Applicants jointly. It is reiterated by the 1st and 2nd Respondents and the Applicants know the amount being claimed by the Bank, that the requisite statutory notices were served including the redemption notice and the notification to sale and a valuation was done on the security properties.
16. It is not disputed that the Applicants charged the suit properties to secure a loan advanced by the Bank to the 3rd Respondent. It is also not in dispute that the borrower defaulted in the repayment of the loan. Further, it is evident from the Charge Document that the covenant to pay is both to the Chargor and the Applicants jointly.
17. Contrary to averments by the Applicants, the 1st and 2nd Respondents exhibited the following documents, thus discharging their burden as to service upon the 1st and 2nd Applicants, together with the 3rd Respondent: Formal letter of demand, spousal consent, 40-days statutory notice, 45-days redemption notice, notification of sale and a valuation report.
18. The Applicants have not challenged the propriety or legality of those notices. The right of a chargee to exercise the statutory power of sale in the face of default is protected by statute and judicial precedent. In *Keziah Njambi Maingi t/a Arrivals Textile Shop v Barclays Bank of Kenya Ltd* [2016] eKLR, the Court of Appeal stated:

“A charge is not merely a contract of lending between a lender and a borrower. It is also governed by the elaborate statutory provisions in Part VII of the *Land Act* and Part V of the *Land Registration Act*. By Section 90 read with Section 96(1) of the *Land Act*, the chargee has power to exercise the power of sale of the charged land if, inter alia, the chargor defaults in payment of money due under a charge and all the requisite notices have been served.”
19. Evidently, the dispute over the same suit properties was also raised by the Applicants in a suit for injunction that was dismissed in HCCOMM 490 of 2016, after the Applicants failed to prosecute the same. That finding has not been set aside and remains binding until and unless reversed.
20. My finding is that, the Applicants have failed to demonstrate a prima facie case to warrant the grant of injunctive relief. Having so found, the court is not required to consider the other limbs of the Nguruman test (supra). Nevertheless, for completeness, I will address them briefly.
21. It is a settled principle that once property is offered as security, it becomes a commodity for sale in the event of default. And there is no commodity for sale whose loss cannot be compensated adequately in damages (See *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2001]).
22. The Applicants have not demonstrated that they stand to suffer any loss incapable of being compensated by damages. The Respondent Bank is reputable.
23. The balance of convenience also favours the 1st and 2nd Respondents, who seek to recover a legally enforceable loan debt through a process that is recognized in both statute and case law. To restrain the



exercise of that right without sufficient justification would unduly fetter the Respondent's commercial rights and undermine the security regime established under the *Land Act*.

24. Given the foregoing, I find that the Notice of Motion dated 23rd June 2025 is devoid of merit and the same is dismissed with costs to the 1st and 2nd Respondents.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI.

THIS 14TH DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Mungai Kivuti for Plaintiffs/Applicants

Mr. Clifford Odhiambo for 1st & 2nd Defendants/Respondents

Mr. Wambugu for 3rd Defendant/Respondent

Court Assistant: Carlos

