



**Muhugu Limited v KCB Bank Kenya Limited; Devshibhai & Sons Limited (Interested Party) (Commercial Case E176 of 2024)
[2025] KEHC 10025 (KLR) (Commercial and Tax) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E176 OF 2024**

PM MULWA, J

JULY 10, 2025

BETWEEN

MUHUGU LIMITED APPLICANT

AND

KCB BANK KENYA LIMITED RESPONDENT

AND

DEVSHIBHAI & SONS LIMITED INTERESTED PARTY

RULING

1. Before the Court for determination is the Plaintiff's/Applicant's Notice of Motion dated 11th April 2024 brought under Sections 1A, 1B, 3A and 63(c) of the *Civil Procedure Act*, and Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010.
2. The Applicant seeks the following substantive reliefs:
 - i. An order of temporary injunction restraining the Defendant/Respondent, its servants, employees, agents or assigns from selling, transferring, disposing of, leasing or otherwise interfering with house units 2, 3, 6, 7, 13, 15 and 19 erected on Land Reference No. 5842/13 (Original No. 5842/2/12), situated in Kerarapon, Karen.
 - ii. An order restraining the Defendant/Respondent from evicting the Applicant's tenants or interfering with their peaceful occupation and enjoyment of house units 2, 6, 13, 15 and 19.
 - iii. Costs of the application.



3. The application is premised on the grounds of the face of the record and supported by the affidavits sworn by the Applicant's director Makenna Wambui Nyammo on 11th April 2024 and 30th August 2024. She depones that the Respondent granted her a loan facility of Kshs. 446,250,000.00 in 2013, and a further Kshs. 39,795,712.00 in 2015, for the completion of 20 villas on the suit property. The facility was secured by a charge over the property and a purported lien of Kshs. 50,000,000.00 in a fixed deposit account. She asserts that proceeds from the sale of 10 villas amount to Kshs. 500,000,000.00 were deposited in her account in 2022 before the Respondent issued statutory notices. Upon engagement of auditors, it is alleged that the Respondent overcharged Kshs. 60,298,312.00 in interest. The Applicant also states that HCCOMM E326 of 2023, involving a third party's interest in Units 3 and 7, remains unresolved, and that the intended sale would expose her to third-party claims and irreparable harm.
4. The Respondent opposes the application through affidavits by Amina Jillo, its Head of Legal - Litigation, sworn on 24th July 2024, and Kenneth Kiurah, sworn on 8th July 2024. It is contended that the Plaintiff defaulted on the loan, necessitating the exercise of the statutory power of sale. It is further deponed that the alleged lien was waived before disbursement and the claim of Kshs. 500 million repayment is disputed for lack of supporting evidence. The Respondent avers that the issue of ownership of Units 3 and 7 was determined in HCCOMM E326 of 2023, which found that the Plaintiff had sold the units without its consent in breach of the charge terms.
5. An affidavit in support of the application was also filed by the Interested Party's director, Devshi Pindoria on 16th August 2024, asserting a beneficial interest in Units 3 and 7 and accusing the Respondent of failing to address key issues on interest computation and account reconciliation.
6. The application was canvassed by way of written submissions.
7. I have considered the application, the affidavits both in support of the application and in opposition thereto, and the submissions. The key issue is whether the Applicant has met the legal threshold for the grant of a temporary injunction.
8. 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.
9. 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.
10. 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.

Whether a Prima facie case has been established

11. 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.
12. The Applicant alleges that the loan account was mismanaged through overcharging of Kshs. 60 million in interest and failure to recognize a lien of Kshs. 50 million in a fixed deposit account. It also claims that the sale proceeds of Kshs. 500 million from 10 units were remitted to her loan account, but the Respondent failed to consider the amount before issuing the statutory notices. These are, on their face, serious claims. However, the Applicant has not produced any documentary evidence to substantiate these assertions. No bank statements, audit reports, or confirmation letters have been annexed to demonstrate actual receipt of funds by the Respondent or the existence of a lien.
13. Conversely, the Respondent denies receiving any such sum and avers that the lien was waived prior to disbursement. This is a specific and material rebuttal. In the face of these denials, the burden shifted back to the Applicant to provide objective evidence, which it failed to do. the Respondent also argues that the repayment obligations were breached, and statutory notices were issued per Sections 90 and 96 of the *Land Act*, 2012. The Applicant does not dispute that she fell into default.
14. The undisputed facts are that the Plaintiff defaulted on the loan repayments. The statutory notices were issued under Sections 90 and 96 of the *Land Act*. The Applicant does not challenge 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.”

15. The dispute over Units 3 and 7, raised by the Applicant as a ground for injunction, was resolved in HCCOMM E326 of 2023, where the Court found that the units had been sold to a third party without the Respondent’s consent, in violation of the terms of the charge. That finding has not been set aside and remains binding until and unless reversed on appeal.

16. The Applicant also relies on an alleged breach of the in duplum rule to resist the sale. While the rule is firmly rooted in Section 44A of the *Banking Act*, the Applicant has not tendered an expert opinion or financial computation to show that the interest charged has indeed exceeded the principal owing. In any event, even where the amount due is disputed, the law is clear that this alone does not defeat the statutory power of sale. The Court of Appeal in *Joseph Okoth Waudi v National Bank of Kenya Ltd* [2006] eKLR held:

“A dispute as to the amount owing is not a ground for restraining a chargee from exercising its statutory power of sale.”

17. It is equally settled that courts ought not to rewrite contracts freely entered into by parties. This Court has no powers to vary the terms of the contract agreed between the parties herein as was held by the Court of Appeal in *Husamuddin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla v Kidodgo Basi Housing Corporative society Limited and 31 others Civil Appeal No. 330 of 2003* that:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

18. The court in exercise of its discretion, should not restrain a mortgagee from exercising its statutory power of sale because the amount due is in dispute. I am therefore of the considered view that the Applicant has failed to demonstrate a prima facie case to warrant the grant of injunctive relief. The core claims of overpayment and account mismanagement are unsupported by credible evidence, and the right of the Respondent to realize its security under statute has not been successfully challenged.

19. Having found that no prima facie case has been established, the court is not required to consider the other limbs of the Nguruman test (supra). Nevertheless, for completeness, I will address them briefly.

20. It is a settled principle that once property is offered as security, it becomes a commodity for sale in the event of default. Once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages (See *Elijah Kipng’eno Arap Bii vs Kenya Commercial Bank Limited* (2001)).



21. The Applicant has not demonstrated that she stands to suffer any loss incapable of being compensated by damages. The units are revenue-generating and capable of valuation.
22. The balance of convenience also favours the Respondent, who seeks to recover a legally enforceable 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*.
23. Given the foregoing, I find that the Notice of Motion dated 11th April 2024 is devoid of merit and the same is hereby dismissed with costs to the Respondent.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Kubai for Plaintiff/Applicant

Mr. Gitau for Defendant/Respondent

Ms. Kioko h/b for Ms. Okoth for Interested Party

Court Assistant: Carlos

