Omingo v Rafiki Microfinance Bank Limited & another (Civil Case E006 of 2025) [2025] KEHC 9551 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9551 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL CASE E006 OF 2025

CW MEOLI, J

JULY 3, 2025

BETWEEN

JUSTINE SURE OMINGO ..... PLAINTIFF

AND

RAFIKI MICROFINANCE BANK LIMITED ..... 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. By the motion dated 13.02.2025, the Plaintiff herein, Justine Sure Omingo (hereafter the Applicant) seeks a temporary injunction to restrain the Defendants Rafiki Microfinance Bank Limited and Garam Investments Auctioneers (hereafter the 1st and 2nd Respondents, respectively/ the Respondents), their employees, agents, servants or any other person acting on their behalf from disposing of, or otherwise howsoever completing by conveyance or transfer the purported sale by public auction or taking possession, leasing, letting, charging of or otherwise howsoever interfering with the Applicant's title to all that parcel of land known as NGONG/NGONG/20268 (hereafter the suit property), pending the hearing and determination of this suit. The motion invokes Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA) and Orders 40 and 51 of the Civil Procedure Rules.

2. In support of the motion, the Applicant swore an affidavit of even date, therein asserting to be the registered proprietor of the suit property, and chargor in the third-party legal charge dated 20.07.2020 and a further charge dated 7.03.2022, both registered in the favour of the 1st Respondent, the borrower being Right Stones Enterprises which defaulted in repayment of the loan. Leading to the issuance of notices issued in exercise of the statutory power of sale by the 1st Respondent and valuation returning a market value of Kes. 16,000,000/- and forced sale value of Kes. 12,000,000/- prior to the advertisement and sale of the suit property by public auction by the 2nd Respondent at Kes. 12,100,000/-. He deposed that there was a significant difference between the said values and those contained in the valuation

conducted prior to the charge, placing the market value of the suit property at Kes. 36,000,000/- and the forced sale value at Kes. 27,000,000/- vide a valuation report dated 28.6.2020.

3. Further he deposed that the suit property was sold on 7.12.2024 at a public auction, which the deponent asserts was characterized by material irregularities and fraud and was therefore unlawful and unprocedural as particularized in paragraph *10*(a – e). Thus, unless the orders sought were granted the suit property, would have been sold below the market value, causing him irreparable harm, damage and financial loss. And hence his interests would only be protected through an order staying the transfer of the suit property. Finally, the deponent states that no prejudice will be occasioned to the Respondents as they would have an opportunity to re-advertise the property for resale.

4. The 1st Respondent opposed the motion through a replying affidavit dated 12.03.2024 sworn by John Langat, described as an assistant manager, debt recovery with the 1st Respondent. Asserting that indeed a valuation conducted by qualified valuers placed the market value of the property to be Kes. 16,000,000/- and the forced sale value at Kes. 12,000,000/-, the deponent stated that the Applicant did not challenge this valuation prior to the auction taking place; that the suit property was sold at a public auction on 17.12.2024 to one Sidney Oganga Onserio, the highest bidder who also complied with the condition requiring the immediate payment of the 10% deposit and the balance of the purchase price in 90 days. The deponent disputed allegations that the sale was illegal and fraudulent pointing out that no evidence has been produced to this effect.

5. Defending the procedure followed in the auction, the deponent stated that the suit property was sold at Kes. 12,100,000/- which was above the forced sale value and asserted that the 1st Respondent was not obligated to sell the property at the market value. He denied any breach of duty of care owed to the Applicant by the 1st Respondent and stated that the chargee's legal obligation was to ensure that the property was not sold below the reserve price. Reiterating that the suit property had already been sold, the deponent asserted that the Applicant will not thereby suffer irreparable loss that cannot be adequately compensated by damages, if the property is transferred to the highest bidder. Finally stating that Right Stone Enterprises owed the 1st Respondent an outstanding current debt of Kes. 27,224,049/- on account number 0011490000018 and a further sum of Kes. 2,260,151/- on account number 001103000050; and that the 1st Respondent as a financial business will be greatly prejudiced if the orders sought are granted, and therefore urging that the motion be dismissed.

6. The motion was canvassed by way of written submissions. Through his submissions dated 8.4.2025, the Applicant recited the conditions for grant of injunction as stipulated in the case of Giella v Cassman Brown 1973)EA 358, namely, the demonstration by an applicant of a prima facie case, the likelihood of irreparable damage to be occasioned if the orders sought are not granted and, and that the balance of convenience tilts in favour of granting the prayers sought.

7. Citing the definition of a prima facie case in Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] eKLR, counsel for the Applicant reiterated the assertion that the suit property was grossly undervalued; that in 2020, prior to the registration of the material charges, the property was valued at Kes. 36,000,000/-, but subsequently assigned a forced sale value of Kes. 16,000,000/-. The case of Levi House Construction and Engineering Ltd v ABC Bank Limited & another [2021] eKLR was cited to the effect that the value of land always appreciates.

8. Counsel reiterated the contents of the supporting affidavit at paragraph *10* to the effect that the public auction attended by 4 persons of whom 3 were officials at the 1st Respondent bank and the highest bidder was irregular, fraudulent and unlawful; a matter not disputed by the 1st Defendant. Moreover, citing Section 112 of the *Evidence Act*, asserted that the 1st Respondent had not tendered evidence that the 10% deposit of Kes. 1,000,000/- (sic) was paid. Counsel here citing the cases of Kimotho –

v- KCB (2003) 1 EA 108 and Makambi (Suing as Legal Representative of the Estate of Albert Otoro Nyakegita – Deceased) v Ombati [2024] KEHC 1169 (KLR) as authority for the proposition that in such circumstances, the court is entitled to make an adverse inference against the 1st Respondent.

9. On the question of irreparable damage, counsel relied on the observation by the Court of Appeal decision in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, that "(A) an injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy." And reiterating that if the orders sought are declined, the undervalued property risks being sold at a price lower than the market value.

10. In conclusion, counsel relied on the case of Peter Kimani Nene (supra) where the Court cited with approval the case of Alice Awino Okello v Trust Bank Ltd and another LLR No.625 (CCK) to contend that the balance of convenience is in favour of the Applicant, as the sale of private property being tantamount to deprivation of the right to property under Article 40 of *the Constitution*, should not be allowed to proceed in doubtful circumstances. Hence contending that the balance of convenience tilts in favour of the Applicant, who stands the risk of being rendered homeless.

11. The Respondents' submissions dated 29.04.2025 commenced with a reference to Order 40 Rule 1(a) and (b) of the Civil Procedure Rules (CPR) providing for the grant of injunctions and the applicable principles as settled in Giella v Cassman Brown [supra]. On the question whether the Applicant had established a prima facie case, they relied on the Mrao Case [supra], and answered in the negative, pointing out that allegations of undervaluation of the property do not stand, as the valuation was conducted duly qualified professional valuers who spelt out the rationale behind the valuation figures arrived at. And specifically noting a downturn in the property market explained that potential buyers were likely to assign minimal value to the semi-permanent and temporary structures present on the property. On this issue relying the case of Zum Zum Investments Limited v Habib Bank Limited [2014] eKLR where the court spelt out the duty of an applicant alleging undervaluation of his property to demonstrate, for instance, that the Respondent's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors, inter alia.

12. Further counsel for the Respondents pointed out that the Applicant did not object to the valuation report up until the auction had been conducted. And citing the case of Cedarwood Hotel & Resorts Investment Company v Kenya Commercial Bank Limited and Another [2022] KEHC 15000 (KLR), where despite the facts comparing well to the current case, the suit and application were filed before the auction took place, the court reiterated the holding in Palmy Company Ltd v Consolidated Bank of Kenya Ltd that the onus of establishing via cogent evidence on prima facie basis, that the applicant's right has been infringed by the respondent through violation of Section 97(1) of the *Land Act*, and resultant undervaluation lies on such applicant. The Respondents asserted that they complied with the provisions of Section 97(2) of the *Land Act*.

13. In closing, the Respondents relied on the definition of irreparable loss in the case of Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR. And contended that the suit property became a commodity for sale upon being charged as security for the loan facility. And besides, any damage the Applicant might suffer can be adequately compensated through damages. Further, asserting that the Applicant having failed to establish a prima facie case and likely irreparable damage, the balance of convenience tilts against granting of the interlocutory injunction.

Analysis and Determination

14. The court has considered the rival affidavit material and submissions of the parties in respect of the motion. The questions to be answered are whether the Applicant established a prima facie case with a probability of success; that unless an interlocutory injunction is issued, he will suffer irreparable injury, which would not adequately be compensated by an award of damages. In case of doubt on the latter, where does the balance of convenience lie? Order 40 Rule 1 of the Civil Procedure Rules provides for temporary injunctions in the following terms: -

> " 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
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> (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,
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> 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".

15. The now settled principles governing the grant of interlocutory injunctions were spelt out in Giella v Cassman Brown & Co. Limited [1973] EA 358 were reiterated in Nguruman Limited (supra). The latter decision is particularly illuminating. The Court described the role of the court in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The Court further observing that:

> " ...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:
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> In an interlocutory injunction application, the Appellants has to satisfy the triple requirements to:
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> a) establish his case only at a prima facie level
>
> b) demonstrate irreparable injury if a temporary injunction is not granted.
>
> c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."

16. The Court explained that the three (3) conditions above apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. Such that, it was not enough for the applicant to establish a prima facie case, they must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the Court will consider the balance of convenience. Conversely, where no prima facie case is established, the court need not consider irreparable injury or the balance of convenience. The Court of Appeal emphasized that the standard of proof is to prima facie standard.

17. As to what constitutes a "prima facie case" the Court of Appeal expressed itself as follows: -

> " Recently, this court in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
>
> "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 appellant's case upon trial. That is clearly a standard, which is higher than an arguable case.

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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 which has been or is threatened with 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. The Appellants need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant's case is more likely than not to ultimately succeed."(emphasis added).

18. The basic facts in this matter are not disputed. The Applicant, the proprietor of the suit property, was the charger/ guarantor in the third-party legal charge dated 20.07.2020 and further charge dated 7.03.2022 both registered in the favour of the 1st Respondent, for facilities advanced to Right Stones Enterprises which subsequently defaulted in repayment of the loan. The 1st Respondent having issued the requisite notices proceeded to instruct Kenstate Valuers to conduct a valuation of the charged property, which was eventually sold by public auction on 7.12.2024 at a price of Kes. 12,100,000/. It would appear that despite the sale, the outstanding debt was not fully settled and as of the time of the hearing the debt owed amounted to about Kes. 30,000,000/-.

19. The chief complaint by the Applicant, as I understand it is pegged on the duty of care imposed on charges by Section 97 of the *Land Act*, and relates to the values contained in the valuation report obtained prior to the sale; he asserts that the market value of the charged property at the time of the charge was about Kes. 36,000,000/-, whereas the valuation (market value) at the time of public auction was a mere Kes. 16,000,000/-. Further, that the public auction was marred by fraud and irregularities. Thus, the Applicant asserts that the 1st Respondent violated the duty of care imposed by Section 97(1) of the *Land Act*, and thereby infringed upon his right to property.

20. Section 97 of the *Land Act* Provides inter alia that: ''

> (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection

(1); and (b)the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

(4.) ....."

21. In observance of the duty to obtain the best price reasonably obtainable at the time of sale, the Respondent bank is dutybound under Section 97(2) of the *Land Act* to ensure that a forced sale valuation was undertaken by a professional valuer prior to sale. The differences in value in this case between 2020 and 2024, without more, cannot be prima facie evidence of breach of the Bank's duty of care. The Applicant was obligated to establish, prima facie, that the Bank has failed to discharge its duty of care under Section 97(1) of the *Land Act*, by demonstrating that the impugned forced sale valuation prior to sale represents a gross under valuation of the charged property.

22. In this instance, the Applicant asserts that the property was grossly undervalued at the time of sale and compares the valuation in June 2020 to the valuation at the time of auction in December 2024. From the material before the court, the difference relates to the market value of Kes. 36m and forced sale value of Kes. 27m in 2020 versus the market value of Kes 16m and forced sale value of Kes. 12m in May 2024. The Applicant did not apparently undertake any valuation in 2024 as no counter-valuation report was tendered in an attempt to prove the alleged gross undervaluation.

23. On their part, the Respondents have highlighted factors cited in the valuation report by Kenstate Valuers dated 24th May 2024 affecting the saleability of the suit property, including a slump in the property market and negligible value attachable to the semi-permanent and temporary structures on the Applicant's property. The onus was on the Applicant to tender his own expert valuation report to counter these matters and ultimate values in the report by Kenstate Valuers. He did not. His further complaint regarding the sale at the forced sale value rather than the market value does not accord with the provisions of Section 97 of the *Land Act*, which envisages that the chargee ought to obtain a forced sale value of the property prior to the sale of charged property. It is therefore doubtful that the Respondents were under any duty or obligation to sell the suit property at the market value.

24. In Zum Zum Investment Ltd v Habib Bank Limited [2014] e KLR where the Applicant had proffered a counter-valuation report against the lender's report Kasango J (as she then was) observed that:

> " It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on (in auctioning the charged property) does not give the best price obtainable at the material time ... The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out

in consideration of irrelevant factors or that the valuation was done before the time of the intended sale."

25. As for complaints touching on fraud and irregularity in the conduct of the public auction as asserted at para 10 (a) and (b) of the Applicant's affidavit, the 1st Respondent has by the replying affidavit (paras 10-12) disputed these. Explaining that the highest bidder first paid the eligibility to bid deposit of Kes. 1m and upon being declared the highest bidder topped up the balance to make up the 10% deposit of the purchase price of Kes. 1.2 m. In that regard, the memorandum of sale (annexure JL3) contains an acknowledgement of receipt of the 10% deposit.

26. The Applicant's own deposition appears to confirm that a cheque in respect of the eligibility deposit had been made out prior to the auction, and tends to support the depositions at paras 10-12 in the replying affidavit. No prima facie demonstration of the alleged fraud or irregularity has been shown, and as observed earlier, the mere difference in the valuations in respect of the property does not suffice in the circumstances of the case.

27. In civil cases, a higher degree of proof is required where fraud is alleged by a party, due to its quasi-criminal in nature. See Koinange & 13 Others v Koinange [1986] KLR 23 and Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, the latter where the court observed as follows:

> " When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof.....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 balance of probabilities is required".

28. This means that even at interlocutory stage, a party who alleges fraud bears a higher onus to demonstrate the same. The Applicant herein has not discharged that onus, and hence, nothing turns on his allegations of fraud against the Respondents.

29. As observed by the Court of Appeal in the case of Nguruman Limited (supra):

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

30. In Orion East Africa Ltd v Eco Bank Kenya Ltd and Another [2015] eKLR the Court of Appeal set out the circumstances in which a mortgage may be restrained from exercising its statutory power of sale. The court stated:

> " The circumstances in which a mortgage may be retrained from exercising its statutory power of sale are set out in Halsbury's Laws of England, volume 32 (4th Edition) paragraph 725 as follows:
>
> "725. When mortgage may be restrained from exercising statutory power of power of sale.
>
> The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which

the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

31. Consequently, the Court of Appeal upheld the decision of the trial judge that a prima facie case had not been established despite the disputed value of the mortgaged asset, and the Court further upheld the direction made at trial that notwithstanding, the mortgagee re-issue a statutory notice and re-value the suit properties to determine the forced sale value before exercising its statutory power of sale. In this case, the Applicant has come to court after the public auction of the suit property, seeking to stop the perfection of the sale through transfer to the purchaser. In the result, the court finds that the Applicant has failed to surmount the first hurdle of demonstrating a prima facie case

32. Further, and without going into any details, it is also apparent from the Applicant's own material that any damage that may be suffered by him can be quantified and compensated by way of damages. Besides, once a property is given out as a security for a loan, it becomes a commodity for sale in the event of default and, no party can be heard to claim that its loss cannot be compensated through damages. Here, it appears that the debt owed to the 1st Respondent may well have outstripped the value of the suit property and if the court were to interfere with the completion of the sale of the auctioned property in these circumstances, it would work prejudice against the chargee. In the circumstances, the court finds no merit in the motion dated 13.02.2025, which is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 3RD DAY OF JULY 2025.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Moige holding brief for Mr. Omari

For the Respondents: No appearance

C/A: Lepatei