



**Suraya Investments Limited & another v Diamond Trust Bank
Kenya Limited & another (Commercial Case E227 of 2024)
[2025] KEHC 12507 (KLR) (Commercial and Tax) (14 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E227 OF 2024
AB MWAMUYE, J
AUGUST 14, 2025**

BETWEEN

SURAYA INVESTMENTS LIMITED 1ST PLAINTIFF

THE LYNX AT WOODLEY LIMITED 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED 1ST DEFENDANT

STEPHE KARANJA KANG'ETHE T/A DALALI TRADERS

AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiffs/Applicants moved this Honourable Court vide Notice of Motion Applications. One is dated 16th December, 2024 brought under Article 40 and 159[2][d] of *the Constitution* of Kenya Sections 1A, 1B and 3A and 63 [c] of the *Civil Procedure Act* Cap 21, S. 96 [3] of the *Land Act*, and All other enabling provisions of Law. It seeks the following orders:
 - i. That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued prohibiting the Defendants, their employee, agents or persons acting on its behalf and or instruction, from disposing off the property known as Mandara Villa No6, and 12 Rosslyn Gardens Estates, erected on LR No 18113/117 Nyari and within Nairobi City County by way of public auction, private treaty, transferring, appointment of a receiver, leasing or in any other way whatsoever;
 - ii. That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued prohibiting the Defendants, their employee, agents or



persons acting on its behalf and or instruction, from disposing off the property known as LR NO 209/20673, Imara Daima within Nairobi City County by way of public auction, private / subleasing or in any other way whatsoever;

- iii. That pending the filing, hearing and determination of the intended Appeal, a temporary order of injunction be and is hereby issued prohibiting the Defendants, their employee, agents or persons acting on its behalf and or instruction, from disposing off the property known as Mandara Villa No6, and 12 Rosslyn Gardens Estates, erected on LR No 18113/117 Nyari and within Nairobi City County by way of public auction, private treaty, transferring, appointment of a receiver, leasing or in any other way whatsoever;
 - iv. That pending filing, hearing and determination of the intended Appeal, a temporary order of injunction be and is hereby issued prohibiting the Defendants, their employee, agents or persons acting on its behalf and or instruction, from disposing off the property known as LR NO 209/20673, Imara Daima within Nairobi City County by way of public auction, private treaty, transferring, appointment of a receiver, leasing/subleasing or in any other way whatsoever;
 - v. That costs of the application be provided;
 - vi. Any other order as the Honourable Court may deem fit.
2. The Application was supported by a Supporting Affidavit dated 16th December, 2024 sworn by Peter Kiarie Muraya a Director at the Plaintiff company.
 3. The second Application is the Notice of Motion dated 27th January, 2025 brought under Article 40 and 159[2][d] of *the Constitution* of Kenya Sections 1A, 1B and 3A and 63 [c] of the *Civil Procedure Act* Cap 21, Order 40 Rules 1 and 2 Civil Procedure Rule, 2010, S. 96 [3] of the *Land Act*, AND All other enabling provisions of Law. It seeks the following orders:
 1. Spent.
 2. That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued preventing the Defendants, their employee, agents or persons acting on their behalf and or instruction, from disposing off the properties namely; Mandara Villa Number M12, located at Rosslyn Heights Estate, erected on L.R. No. 18113/117, Redhill Road-Nyari, and Mandara Villa Number M6, located at Rosslyn Gardens Estate; erected on L.R. No. 28431, Redhill Road-Nyari, all Within Nairobi City County, L.R. No. 209/20673, Imara Daima, within Nairobi City County by way of public auction, private treaty, transferring, appointment of a receiver, leasing or in any other way dealing with the properties whatsoever
 3. That pending the hearing and determination of the suit, a temporary order of injunction be and is hereby issued preventing the Defendants, their employee, agents or persons acting on their behalf and or instruction, from disposing off the properties namely; L.R. No. 209/20673, Imara Daima, within Nairobi City County, Mandara Villa Numbers M12, located at Rosslyn Heights Estate, erected on L.R. No. 18113/117, Redhill Road-Nyari, and Mandara Villa Numbers M6, located at Rosslyn Gardens Estate, erected on L.R. No. 28431, Redhill Road-Nyari, all Within Nairobi City County, by way of public auction, private treaty, transferring, appointment of a receiver, leasing or in any other way dealing with the properties whatsoever.
 4. That costs of this application be provided for.
 5. Any other order as the Honourable court may deem fit.



4. The Application was supported by a Supporting Affidavit dated 27th January, 2025 sworn by Peter Kiarie Muraya a Director at the Plaintiff company.
5. The Plaintiffs/Applicants have moved this Honourable Court by way of an application seeking interim injunctive relief to restrain the 1st and 2nd Defendants from proceeding with the intended public auction of their respective properties that was scheduled for 28th January 2025.
6. It is averred that the Plaintiffs/Applicants filed an application dated 26th April, 2024, seeking injunctive reliefs against the Respondents in relation to Mandara Villa No6, and 12 Rosslyn Gardens Estates, erected on LR No 18113/117 Nyari and within Nairobi City County and LR No209/20673, Imara Daima within Nairobi City County. This Honourable Court, in a ruling delivered on 28th November, 2024, dismissed the application but acknowledged that the Plaintiff had established a prima facie case. The Court, however, declined to grant injunctive relief on the grounds that damages would suffice as compensation and that the balance of convenience lay with the Respondents. In support of its finding of a prima facie case, the Court observed that there existed triable issues including whether the Plaintiffs were indebted to the 1st Defendant, and whether the requisite statutory notices had been duly issued by the Defendants.
7. The Plaintiffs/Applicants contend that despite this finding, the Court proceeded to make a definitive conclusion on the issue of default, a position the Plaintiffs argue is internally inconsistent and premature. The Court further held that in the absence of irreparable harm, no injunction could issue. It is their position that it has an arguable appeal, which risks being rendered nugatory if the Court does not issue orders preserving the subject matter of the appeal. The Plaintiffs/Applicants further contend that, as guarantors to loan facilities extended to third parties who remain ongoing concerns and have not been pursued by the 1st Defendant no irreparable loss or prejudice would be suffered by the Respondents if injunctive orders were granted pending appeal. The Plaintiff notes that the application has been brought expeditiously upon receipt of the ruling on 16th December, 2024, and a Notice of Appeal has already been lodged. Despite this, the Defendants advertised the suit properties for sale by public auction on 18th December, 2024.
8. Additionally, the Plaintiffs/Applicants have moved this Honourable Court by way of the present applications seeking interim injunctive relief to restrain the 1st and 2nd Defendants from proceeding with a further intended public auction of the suit properties that was scheduled for 28th January, 2025. The 1st Plaintiff avers that it stands to imminently lose two residential properties, namely Mandara Villa Numbers M12 and M6, located respectively at Rosslyn Heights Estate and Rosslyn Gardens Estate in Nairobi City County, erected on L.R. No. 18113/117 and L.R. No. 28431. The 2nd Plaintiff similarly asserts that it faces the imminent loss of its property known as L.R. No. 209/20673, situated in Imara Daima, Nairobi.
9. The Plaintiffs contend that the intended sale is predicated upon an irregular and unlawful exercise of statutory power of sale by the 1st Defendant, a financial institution, which has instructed the 2nd Defendant, an auctioneer, to dispose of the subject properties. The Plaintiffs further aver that they are in the process of concluding viable financial and business arrangements aimed at settling the outstanding obligations. The 1st Plaintiff has entered into a conditional sale agreement for the two villas at a consideration of Kshs. 200,000,000/-, dependent upon the issuance of injunctive relief to enable completion of the transaction. In addition, the Plaintiffs have secured a joint venture agreement with ROK Properties Kenya for the development of the Imara Daima property, projected to generate proceeds of Kshs. 621,000,000/-. Collectively, the Plaintiffs expect to realise Kshs. 821,000,000/-, a figure that exceeds the Kshs. 400,000,000/- allegedly owed to the 1st Defendant.



10. It is further the Plaintiffs'/Applicants' case that the initial loan was advanced in Kenya Shillings to facilitate real estate development, on the understanding that purchasers of the developed units would remit payments directly to the 1st Defendant for purposes of offsetting the loan. To date, direct payments totaling Kshs. 449,369,306/- have been made to the 1st Defendant. However, the Plaintiffs allege that the 1st Defendant unilaterally converted the loan into a United States Dollar-denominated facility, thereby exposing them to prejudicial foreign exchange risks. The Plaintiffs also challenge the consolidation of various unrelated loan accounts into a purported Standby Letter of Credit [SBLC] facility in the sum of USD 37,000,000/-, equivalent to approximately Kshs. 5 billion, asserting that this amount is grossly inflated, lacks transparency, and remains unreconciled despite repeated requests. The 1st Defendant has allegedly declined to provide an account statement or reconciliation detailing how the claimed indebtedness accrued.
11. In the circumstances, the Plaintiffs argue that absent the injunctive relief sought, they are likely to suffer irreparable harm through the loss of valuable real property at an undervalue, and the derailment of legitimate business opportunities that would otherwise enable full settlement of the outstanding debt. The Plaintiffs maintain that they have established a prima facie case with a high probability of success, and urge the Court to preserve the status quo pending hearing and determination of the main suit. They further submit that no prejudice will be occasioned to the 1st Defendant if the auction is restrained, particularly in light of the substantial repayments already made, the securities in place, and the Defendants' failure to pursue the principal borrowers. The Plaintiffs contend that the actions of the Defendants are not only unlawful but also oppressive and constitute an abuse of the statutory power of sale.
12. The Plaintiffs canvassed their application by way of written submission dated 4th June, 2025.
13. The Plaintiffs rely on the well-established legal principles governing the grant of interlocutory injunctive relief as set out in the landmark case of *Giella v Cassman Brown* [1973] E.A. 358. The three guiding conditions for the grant of such relief are: first, the applicant must demonstrate a prima facie case with a probability of success; second, it must be shown that unless the injunction is granted, the applicant will suffer irreparable injury which cannot be adequately remedied by an award of damages; and third, where the court is in doubt, it should decide the matter on the balance of convenience.
14. In support of the first limb, the Plaintiffs further cite the decision in *Mrao Ltd v First American Bank of Kenya & 2 Others* [2003] KLR, as reaffirmed in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, which defines a prima facie case as one where the material presented discloses a right that appears to have been infringed, thus calling for an explanation or rebuttal. It is not necessary at the interlocutory stage to prove title; rather, the applicant must show the existence of a bona fide question regarding the asserted right, which merits protection against imminent and substantial harm.
15. Applying these principles to the present case, the Plaintiffs submit that they have met the threshold for injunctive relief. Through their Supporting Affidavit, they have demonstrated that they are at imminent risk of losing valuable properties namely L.R. No. 209/20673, Imara Daima [belonging to the 2nd Plaintiff] and Mandara Villas Numbers 6 and 12 on L.R. Nos. 28431 and 18113/117 respectively [belonging to the 1st Plaintiff].
16. The Plaintiffs submit that they are not the principal borrowers of the loan in question but merely guarantors for Westwood Villas Limited, the actual borrower, and that the loan has already been substantially repaid to the extent of Kshs. 449,369,306/-, thereby negating any contractual privity directly with the 1st Defendant. They contend that the 1st Defendant unlawfully converted the loan facility from Kenya Shillings to US Dollars, causing financial prejudice. Furthermore, the Plaintiffs



have demonstrated ongoing efforts to settle the outstanding sum, including the identification of a purchaser for Mandara Villas M6 and M12, expected to raise Kshs. 200,000,000/-, and a joint venture arrangement through Suraya Global LLC for the development of L.R. No. 209/20673, Imara Daima, projected to yield Kshs. 621,000,000/-. Collectively, these initiatives are expected to generate Kshs. 821,000,000/-, an amount well in excess of the Kshs. 400,000,000/- claimed by the 1st Defendant, thereby justifying the Plaintiffs' plea for injunctive relief.

17. The Plaintiffs further submit that they possess a recognized proprietary interest in the suit properties, which was well known to and acknowledged by the 1st Defendant. Accordingly, the 1st Defendant cannot lawfully exercise its statutory power of sale in disregard of the Plaintiffs' rights. They further argue that the 1st Defendant unlawfully sold the properties through a private treaty without first attempting a public auction, in contravention of established legal procedure. Citing the authority in *Rayat Trading Co. Limited v Bank of Baroda & Another* [2024] KEHC 1306, the Plaintiffs emphasize that a mortgagee may not resort to a private treaty unless a public auction has been attempted and failed due to the conduct of the borrower; otherwise, such a sale is void ab initio. In this case, since the 1st Defendant had advertised the properties for public auction but proceeded to sell them privately without adhering to the prescribed statutory process, the Plaintiffs contend that the resulting sale is null and void.
18. It is also their submission that they, alongside others, were bona fide purchasers of apartments within the suit property, thereby acquiring proprietary interests in both the general property and specific units. Any attempt to dispose of the properties without due process would arbitrarily deprive them of their constitutionally protected rights under Article 40 of *the Constitution*, and violate provisions of the *Land Act* and *Land Registration Act*. By virtue of their financial contributions toward the purchase of the units, the Plaintiffs assert that they hold a purchaser's lien an equitable interest recognized in law, as established in authorities such as *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd, George Eason & Another* [Liquidators of Alpha [Students] Nottingham Limited v. Anthony You-Wing Wong [2017] EWHC 209 [Ch] and *Lehmann v. BRM Enterprise Ltd* [1978] 99 DLR [3RD] 87. These cases affirm that a purchaser's lien is enforceable regardless of whether statutory formalities are completed, as it arises to prevent injustice and secure the purchaser's interest, including through the appointment of a receiver. The Plaintiffs argue that this lien constitutes a proprietary right which cannot be extinguished by monetary compensation, and is therefore not adequately addressed by damages alone. They further submit that the 1st Defendant's actions threaten their property rights and would result in irreparable harm, as they have no contractual relationship with the 1st Defendant and would be left without recourse. Consequently, the Plaintiffs contend that the balance of convenience favours the grant of injunctive relief to preserve their interests, and that they have met all the legal thresholds for such orders to issue.
19. It is contended that that the Defendants' assertion that this Honourable Court is functus officio is legally unfounded. While the Plaintiffs did file a Notice of Appeal dated 2nd December 2024 with the intention of challenging a previous ruling, they did not proceed to file a Memorandum of Appeal or Record of Appeal as required under Rule 84[1] of the Court of Appeal Rules, 2022, which mandates that an appeal be instituted within 60 days of filing the notice. Consequently, in accordance with Rule 85[1] of the same Rules, the failure to institute the appeal within the prescribed time renders the Notice of Appeal deemed withdrawn. Therefore, the mere filing of a notice, without more, does not divest this Court of jurisdiction, nor does it render the Court functus officio. As such, according to them, the Defendants' objection is without merit and should be disregarded.



20. Accordingly, and on the basis of the foregoing submissions and legal arguments, the Plaintiffs urge this Honourable Court to allow their Applications dated 16th December 2024 and 27th January 2025 in the terms prayed therein.

Respondents' Case:

21. The Application was opposed by a Replying Affidavit dated 10th February, 2025 and further Replying Affidavit dated 29th April, 2025 sworn by Faith Ndonga, the Legal Manager of the 1st Defendant, on behalf of both the 1st and 2nd Defendant.
22. The Defendants, in opposition to the Plaintiffs' applications dated 16th December 2024 and 27th January 2025, deny the contents of the Supporting Affidavit and submit that the issues raised therein are res judicata, having already been heard and determined by this Honourable Court in a previous application dated 26th April 2024. The said application sought similar injunctive reliefs against the exercise of the 1st Defendant's statutory power of sale over the same charged properties, and was dismissed via a ruling delivered on 28th November 2024. The Defendants contend that the Plaintiffs, being aggrieved by that ruling, filed a Notice of Appeal dated 2nd December 2024 and applied for proceedings, thereby escalating the matter to the Court of Appeal. As such, the Defendants argue that this Court is now functus officio and lacks jurisdiction to entertain the present applications, which they assert amount to a collateral attack on a decision already rendered.
23. The Defendants further argue that the Plaintiffs are not entitled to injunctive relief as they have not made any repayments since the suit was filed, and the outstanding loan arrears under the Amalgamated Term Loan facility currently stand at USD 36,999,900.01.
24. They contend that the borrower remains in persistent default, and that any further delay in the exercise of the statutory power of sale will prejudice the 1st Defendant, whose ability to recover the outstanding debt will be diminished due to depreciation of the security. The Defendants assert that the Plaintiffs' applications are mere delay tactics with no merit, and that the sale and joint venture agreements relied upon by the Plaintiffs were entered into without the Bank's prior written consent, in contravention of Section 88 of the *Land Act*, No. 6 of 2012, and are therefore illegal.
25. Moreover, the Defendants maintain that the Plaintiffs have failed to demonstrate the risk of irreparable harm, particularly because they are not going concerns and have no income to service the loans if the injunction is granted. They submit that, as a Tier 1 financial institution with significant assets and regional presence, the 1st Defendant is well capable of compensating the Plaintiffs should the Court eventually find in their favour. As such, they argue that any potential loss can be adequately remedied by damages, and the balance of convenience tilts against granting the injunctive relief sought.
26. The Defendants further contend that following the dismissal of the Plaintiffs' application for injunction dated 26th April 2024 and the consequent discharge of the interim orders previously in place, the 1st Defendant lawfully proceeded to undertake valuations of the charged properties. The valuations were conducted on 27th January 2025 by Messrs. Chrisco Real Estates, who established that both Rosslyn Gardens House No. M6 [on Title No. 28431, Nairobi] and Roselyn Heights House No. 12 [on Title No. 18113/117, Nairobi] had market values of Kshs. 67,000,000/- each, and forced sale values of Kshs. 51,000,000/- each.
27. Subsequently, and in accordance with Section 98[1][d] and [5] of the *Land Act* No. 6 of 2012, the 1st Defendant sold the two properties by way of private treaty on 28th March 2025 for Kshs. 70,000,000/- each..



28. The Defendants submit that, by virtue of these sales, the Plaintiffs' equitable right of redemption has been extinguished, and therefore, the current application for stay has been rendered moot and overtaken by events.
29. The Defendants filed written submissions dated 2nd June, 2025.
30. The Defendants submit that the Plaintiffs' application dated 27th January 2025 is barred by the doctrine of res judicata, the same having been conclusively determined by this Honourable Court through its ruling delivered on 28th November 2024 in respect of a previous application dated 24th April 2024. The orders sought in both applications are identical, thereby inviting the Court to sit on appeal over its own decision. In support of this position, reliance is placed on the authority of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others* [1966] eKLR where the Court emphasized that re-litigation of matters previously decided is prohibited under Section 7 of the [Civil Procedure Act](#).
31. Further reliance is placed on the decision in *Dr. Ali Wario v Dr. John Ngondou* [2011] eKLR, where Kasango J. held that a subsequent application raising similar issues to those already determined is res judicata. The Defendants submit that the Plaintiffs, in filing a second application seeking substantially the same reliefs, are engaging in forum shopping and abusing the court process. Consequently, the Defendants urge this Honourable Court to uphold the principles of finality in litigation and judicial economy by dismissing the present application with costs on the ground that it is res judicata.
32. The Defendants submit that the Plaintiffs' application dated 16th December 2024 is devoid of merit and has been overtaken by events. It is their contention that the injunctive reliefs sought restraining the Defendants from disposing of the charged properties are no longer tenable, as the said properties were validly sold by way of private treaty on 28th March 2025 pursuant to Section 98[1][d] and [5] of the [Land Act](#), following the lapse of interim orders and the dismissal of a prior injunction application on 28th November 2024.
33. The Defendants argue that upon execution of binding sale agreements, the Plaintiffs' equitable right of redemption was extinguished.
34. In support of this position, the Defendants rely on the Court of Appeal decision in *Harishchandra Bhovanbhai Jobanputra & Bhavna Harishchandra Jobanputra v Paramount Universal Bank Shree Krishna Hardware & Paints Limited, Suresh Ghedia & Rajesh Ghedia* [2019] KECA 582 where it was held that the chargor's equity of redemption is extinguished upon sale by auction or upon entering into a binding contract of sale. Similarly, reference is made to *Mbuthia v Jimba Credit Finance Corp and Another*[1986-1989] 1 EA 340 and *Savings and Loan Kenya Ltd v Mayfair Holdings Ltd* [2012] eKLR, in which courts affirmed that once a statutory power of sale is lawfully exercised, and a sale concluded, the chargor ceases to have any further claim of redemption.
35. The Defendants submitted that the Plaintiffs' application for injunctive relief is not tenable in law, as the Plaintiffs' equity of redemption has been extinguished following the sale of the charged properties through private treaty. In support of this position, the Defendants relied on a line of authorities affirming the legal effect of a valid sale by a chargee in exercise of its statutory power of sale.
36. Reliance was placed on the decision in *Captain Patrick Kanyagia & Another v Damaris Wangechi & 2 Others* [1995] eKLR, where the Court of Appeal held that the equity of redemption is extinguished upon the execution of a valid contract of sale. The court further affirmed that a purchaser at a properly advertised auction has no obligation to investigate the mortgagee's right to sell, and that registration of the title in the purchaser's name further confirms the extinguishment of the chargor's rights.



37. The Defendants also cited *Mbuthia v Jimba Credit Finance Corporation & Another*, where it was similarly held that a valid sale contract executed pursuant to the statutory power of sale terminates the chargor's equity of redemption, and the chargee becomes a trustee only for any surplus proceeds of the sale.
38. Further, the Defendants relied on the High Court's decision in *Bomet Beer Distributors Ltd & Another v Kenya Commercial Bank Ltd & 4 Others* [2005] eKLR, where Kimaru J held that once a sale has been conducted under a valid statutory power, the chargor's right of redemption is lost, and the appropriate remedy for any alleged irregularity lies in a claim for damages. The court held that injunctive relief cannot issue where the chargor cannot demonstrate a prima facie case, irreparable loss, or where damages would be an adequate remedy. The learned judge emphasized that the balance of convenience favours the purchaser who has acquired proprietary rights through the concluded sale.
39. Additionally, the Defendants cited *Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd* [2014] eKLR, where the court held that Section 99 of the *Land Act*, 2012 provides statutory protection to purchasers in such transactions, and that any remedy available to the chargor in cases of alleged impropriety is limited to damages. The court underscored that upon the fall of the hammer at auction, or conclusion of a binding sale agreement, the chargor's equity of redemption is extinguished by operation of law, and not subject to injunctive protection.
40. The Defendants therefore submitted that, in view of the concluded private treaty sales of the suit properties and the extinguishment of the Plaintiffs' equity of redemption, the present application for injunction has been overtaken by events and is legally untenable. The appropriate remedy, if any, lies in damages, and not in injunctive relief.
41. The Defendants submitted that the suit properties were sold on 28th March 2025 by private treaty to a bona fide purchaser, Mr. Iftekhar Hussein Hassanali Ahmed Yushuf, thereby extinguishing the Plaintiffs' equity of redemption. They argued that in light of the completed sale, the Plaintiffs can no longer seek injunctive relief to prevent the transfer of the properties, and any recourse lies solely in a claim for damages as provided under Section 99 of the *Land Act*, 2012.
42. The Defendants submitted that the Plaintiffs have failed to demonstrate that they will suffer substantial loss, which is a critical requirement for the grant of stay or injunctive relief pending appeal, as emphasized in *Mukuma v Abuoga* and subsequent jurisprudence Citing *Baiba Dhidha Mjidho V. Van Leer East Africa Ltd. [Greif [K] Ltd.] [A Business of Greif Bros Co-Op]* [2006] eKLR and *Shalimar Flowers Self Help Group v Kenya Commercial Bank Limited* [2016] eKLR.
43. On the contrary, the Defendants contend that they would suffer irreparable harm if stay is granted, given that the Plaintiffs' loan arrears amount to USD 36,999,900.01, a sum that continues to accrue interest and already exceeds the value of the charged properties. Relying on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Defendants emphasized that a mortgagor cannot be granted an injunction to restrain a mortgagee's statutory power of sale unless they deposit the entire amount claimed in court, which the Plaintiffs have not done. The Defendants further pointed to the *Arkay Industries v Diamond Trust Bank Kenya Limited & another* 2021 KEHC 5949 [KLR] decision, where the court declined to grant stay due to the applicant's failure to demonstrate substantial loss or offer security. In this case, the Plaintiffs have only offered a general undertaking as to damages, which is insufficient in law. As such, the Defendants pray that the application be dismissed for failure to prove substantial loss and failure to offer security. In the alternative, should the Court be inclined to grant a stay, the Defendants request that the Plaintiffs be ordered to deposit the full arrears amount of USD 36,999,900.01 in a joint interest-earning account within 30 days.



44. In view of the foregoing, the Defendants urge this Honourable Court to dismiss the Plaintiffs' applications with costs.

Analysis And Determination;

45. Upon reviewing the Parties filed and exchanged written submissions to buttress their respective positions, it emerges that the following are the issues for determination:
- i. Whether the Plaintiffs have established a prima facie case;
 - ii. Whether they have demonstrated irreparable harm not compensable by damages;
 - iii. Whether the balance of convenience favours the grant of injunctive relief;
 - iv. Whether the sale by the 1st Defendant was lawful;
 - v. Whether the Plaintiffs have offered adequate security for the orders sought;
 - vi. Who will bear costs.

Prima Facie Case;

46. A prima facie case is the first consideration for the grant injunctive relief. The test, established in that seminal case of *Giella v. Cassman Brown* [1973] EA 358, requires that the plaintiff/applicant must demonstrate that a legal right has potentially been infringed upon by the defendant/respondent's actions. This principle was further elaborated in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, where a prima facie case was defined as:

“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 as to call for an explanation or rebuttal from the latter”

47. In considering the prima facie case question at the interlocutory stage, this Court must be careful not to engage in a detailed consideration and analysis of the relative merits and demerits of each party's case. The Court need only identify if there is a legal right or rights that have been asserted and which are alleged to have been infringed by the opposing party or parties. Those issues must be of a nature that requires rebuttal rather than being ones that can be determined summarily at the interlocutory stage.
48. In the present case, it is clear that there are triable issues raised that must canvassed at a full hearing with respect to whether the Plaintiffs are indeed indebted or obligated to the 1st Defendant, whether the amounts in dispute are proper, whether there was compliance with the applicable statutory and regulatory requirements, among others. Thus it is the finding of this Court that a prima facie case has been established for the purposes of consideration of the grant of interlocutory conservatory orders.

Irreparable Harm;

49. Irreparable harm refers to injury that cannot be adequately remedied through monetary compensation. Courts have held that property offered as security becomes a commodity that can be sold to recover debt, as noted in *Andrew Muriuki Wanjohi v. Equity Building Society & Another* [2006] eKLR:

“Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, any loss occasioned can be compensated in damages.”



50. The Plaintiffs argue that the properties are family homes and long-term investments, and their loss cannot be adequately compensated by damages. They further claim to hold a purchaser's lien arising from financial contributions made towards the development of the units, which they argue is an equitable interest not extinguishable by money.
51. This Court does not agree. The properties were used as security for credit facilities and were independently valued. No unique or personal character has been demonstrated to elevate them beyond commercial interests. The assertion of a purchaser's lien is not supported by any sale agreements, formal assignments, or court orders recognizing their claims to specific units. Additionally, they admit to not having completed the transactions or sought protection through registration.
52. The 1st Defendant, a Tier 1 commercial bank with proven financial capacity, is capable of compensating the Plaintiffs should they succeed in their appeal. As reiterated in *Nguruman Ltd v Jan Bonde Nielsen* [2014] eKLR where loss is compensable by damages, injunctive relief is inappropriate. The Plaintiffs have failed to prove that damages would be inadequate.

Balance Of Convenience;

53. The balance of convenience does not favour the Plaintiffs. The loan in question which is not disputed has been in default, and the Plaintiffs have not made any payments since the filing of the suit. The outstanding arrears, as of 14th February 2024, stood at USD 36,999,900.01, a sum that continues to accrue interest.
54. The Plaintiffs' claim that they have identified a buyer and structured a joint venture does not negate the fact of persistent default nor does it amount to legal tender. No binding agreements demonstrating imminent inflow of funds have been availed. The 1st Defendant, whose business model depends on circulating borrowed funds, stands to suffer irreparable commercial harm if restrained further. As held in *Andrew Ouko v Kenya Commercial Bank Ltd*, the lender's ability to recover in the face of growing arrears outweighs speculative hardship by a borrower in default.

Security For Damages;

55. The Plaintiffs have not offered any tangible security. An undertaking as to damages, in circumstances where the loan arrears exceed USD 36 million, is inadequate. Citing *Mrao Ltd v First American Bank of Kenya Ltd* [2003] KLR 125, the Court affirms that injunctive relief restraining statutory sale requires that the outstanding amount be deposited in court. The Plaintiffs' refusal or inability to deposit any such amount undermines the equitable basis of their application.

Disposition;

56. The Court agrees with the Defendants that this application is an afterthought and an attempt to delay lawful recovery proceedings. The sale having already taken place, the right of redemption having lapsed, and the Plaintiffs having failed to establish the core elements required for interlocutory relief, the application must fail.
57. The Plaintiffs seek an injunction to stay the transfer and sale of the properties, claiming that they will suffer substantial loss if the injunction is not granted. However, the Defendants have convincingly demonstrated that the Plaintiffs' right of redemption was extinguished upon sale, and the purchaser is a bona fide party entitled to ownership under established legal principles and Section 99 of the [Land Act](#), 2012.



58. On the critical issue of substantial loss, the Plaintiffs have failed to establish that they will suffer irreparable harm that cannot be compensated by damages. The 1st Defendant, a well established financial institution with extensive assets and a broad regional presence, has shown the ability to compensate the Plaintiffs should their appeal succeed. This is in line with the court's findings in the cases of *Mukuma v Abuoga*, *Baiba Dhidha Mjidho*, and *Shalimar Flowers Self Help Group*, which emphasize that the risk of monetary loss alone does not suffice to justify an injunction or stay.
59. Granting the injunction would cause substantial prejudice to the Defendants, whose loan facility remains largely unpaid, with arrears exceeding USD 36,999,900.01. Allowing the stay would likely render the debt irrecoverable and frustrate the Defendants' lawful rights.
60. The Court finds that the Plaintiffs' current application raises issues that have already been substantively determined in prior proceedings, including the validity of the sale by private treaty and the 1st Defendant's exercise of its statutory power of sale. These issues were conclusively adjudicated, and no appeal or review has overturned those findings. Pursuant to Section 7 of the *Civil Procedure Act*, this application is barred by the doctrine of res judicata, which precludes re-litigation of matters directly and substantially in issue between the same parties, and which have already been heard and finally determined by a court of competent jurisdiction.

Costs;

61. On costs, the default position is that costs in an application should follow the event; meaning that the losing party in an application should bear the costs of the victor. That position is a default one, which an applicant must show should not apply to their application. In the present Application, the Applicants have not satisfactorily shown why costs should not be awarded against them and thus the Defendants shall have costs as against the Plaintiffs.
62. For the foregoing reasons, the Plaintiffs/Applicants Notice of Motion Applications dated 16/12/2024 and 27/01/2025 are found to be without merit and the same are dismissed with costs to the Defendants.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 14TH DAY OF AUGUST, 2025.

BAHATI MWAMUYE

JUDGE

In the presence of:

Counsel for the Plaintiffs - Ms. Kasyoka h/b Mr. Gachaga

Counsel for the 1st and 2nd Respondnet- Mr. Kisinga

Court Assistant – Miss Neema

