



**Ali & another v Standard Chatered Bank Kenya Limited (Commercial Case E037 of 2024)  
[2025] KEHC 12959 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12959 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E037 OF 2024  
MN MWANGI, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**ALI MOHAMED ALI ..... 1<sup>ST</sup> PLAINTIFF**

**JAMILA IBRAHIM HABIB MAKII ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**STANDARD CHATERED BANK KENYA LIMITED ..... DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 30<sup>th</sup> January 2024 filed by the plaintiffs pursuant to the provisions of Sections 1A, 1B, 3A & 63(c) & (e) of the *Civil Procedure Act*, Order 40 Rules 2(1) & 4(1) and Order 20 Rule 1 of the Civil Procedure Rules, 2010. The plaintiffs pray for orders that pending the hearing and determination of this suit, an order for temporary injunction be granted restraining the defendant, its agents or anyone acting on its behalf from advertising, selling, auctioning, or in any way disposing of L.R. No. 330/1315 (Original No. 330/690), Nairobi and that the defendant be compelled to provide a full account of all monies paid by the plaintiffs and the interest charged on the loan account from the date of the loan facility.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Ali Mohamed Ali, the 1<sup>st</sup> plaintiff herein. Mr. Ali averred that he and the 2<sup>nd</sup> plaintiff are joint registered owners of all that parcel of land known as L.R No. 330/1315, Nairobi. That on 26<sup>th</sup> February 2014, he was advanced a USD 402,926.00 mortgage by the defendant at an agreed interest rate of 5.9% p.a., secured by a charge on the suit property. He contended that despite challenges like the Covid-19 Pandemic and currency fluctuations, he has consistently serviced the loan until the defendant unilaterally increased the interest rate to over 10.73% p.a., without notice. Mr. Ali maintained that they have substantially repaid the loan and they are willing to clear any lawful balance



under fair terms. He asserted that the defendant failed to render loan account statements, making it difficult for them to verify the claimed balance.

3. He stated that on 1<sup>st</sup> November 2023, the defendant issued a Notice of Sale, seeking to recover USD 302,779.61, despite the plaintiffs' objection and without conducting a valuation or complying with mandatory legal procedures under Sections 84, 90, 96, and 97 of the Land Act. He averred that the defendant has refused to convert the aforesaid mortgage to Kenya Shillings, and has failed to address the rising interest rates and/or respond to inquiries made by the plaintiffs' Counsel, thus necessitating this suit. Mr. Ali deposed that the intended sale of the suit property is unlawful, premature, and infringes on the plaintiffs' statutory right of redemption, warranting them to be granted the orders being sought herein.
4. In opposition to the application, the defendant filed Grounds of Opposition dated 4<sup>th</sup> March 2024 raising the following issues -
  - i. That the plaintiffs/applicants' application is frivolous, misconceived, bad in law and lacks merit;
  - ii. That the defendant has only issued the 90 days' Statutory Notice, which Notice dated 1<sup>st</sup> November 2023 has been duly acknowledged by the plaintiffs and indeed annexed as their annexure "AMA-3" to their supporting affidavit;
  - iii. That the defendant has not issued the 40 days' Notice to Sell under Section 96(2) of the Land Act and neither has it issued the 45 days' Notice to Redeem and Notification of Sale under the Auctioneers Act and Auctioneers Rules, as a consequence whereof the statutory power of sale is yet to crystallize;
  - iv. That in the circumstances, the plaintiffs' suit is premature and an abuse of this Honourable Court's process;
  - v. That be that as it may, the plaintiffs do not deny the debt neither the creation of a validly binding charge over the suit property, hence at the opportune time, after issuance and service of the subsequent notices, and their lapse thereof without remedial action by the plaintiffs, the defendant will be by law be entitled to sell the suit property;
  - vi. That as it stands now, the plaintiffs are at liberty to remedy the loan by payment of the outstanding arrears, which arrears have been duly communicated to them via the already issued and acknowledged 90 days' Statutory Notice and also via issuance of the statement of account in compliance with the orders of this Honourable Court;
  - vii. That the plaintiffs have raised issue with the interest rate being charged on the subject loan, which interest rate, and any variation thereof, is strictly provided under the Facility Letter (duly produced and annexed by the plaintiffs as their annexure "AMA-2") and it is trite law that this Honourable Court cannot re-write parties' contracts as has severally been stated in numerous case law;
  - viii. That the defendant was amenable to the plaintiffs' request to convert the subject loan from US Dollar to Kenya Shilling, subject to the conditions set out in the defendant's emails dated 14<sup>th</sup> July 2023 and 1<sup>st</sup> August 2023 (duly produced and annexed by the plaintiffs at pages 27 – 29 of their annexure "AMA-4"), which conditions have to date not been met by the plaintiffs;
  - ix. That in view of the matters set out hereinabove, the plaintiffs have failed to meet the mandatory requirements for the granting of an injunction, as set out in the *Giella vs Cassman Brown &*



Company Ltd and their application should forthwith be dismissed with costs to the defendant; and

- x. Such other or further grounds as may be adduced at the hearing of the plaintiffs' aforesaid application.
5. In a rejoinder, the plaintiffs filed a further affidavit sworn on 10<sup>th</sup> October 2024 by Mr. Ali Mohamed Ali, the 1<sup>st</sup> plaintiff herein. He averred that the plaintiffs currently reside in Canada and they have leased the suit property to a tenant under a Lease Agreement dated 13<sup>th</sup> October 2023, but the defendant failed to serve the Statutory Notice of Sale dated 1<sup>st</sup> November 2023 on the tenant, who was in occupation at the time, thus rendering the said Notice not only defective but also a nullity. They contended that it is highly unlikely that a proper valuation was conducted on the suit property. Mr. Ali asserted that the defendant's actions appear ill-motivated and unprocedural, and aimed at disposing of the property unfairly to the plaintiffs' detriment.
6. The application herein was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of K. Mwaura & Company Advocates on 4<sup>th</sup> November 2024. This Court notes that in as much as the plaintiffs' submissions were filed on 27<sup>th</sup> November 2024, directions had already been given on the same day prohibiting them from filing written submissions in respect to the present application. Notably, at the time those directions were given, the plaintiffs' Counsel was present, but the plaintiffs had not filed their written submissions. Consequently, this Court shall disregard the submissions filed by the plaintiffs without leave of the Court after the timelines given for doing so.
7. Ms Karanja, learned Counsel for the defendant cited the cases of *Giella v Cassman Brown & Company Ltd* [1973] EA 360 eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, and submitted that the plaintiffs have not made out a case for being granted the orders sought herein. She indicated that the plaintiffs admit that the suit property was charged to the defendant to secure a loan of USD 402,926.00, repayable in 210 monthly instalments of USD 3,082.00. That the loan carried a variable interest rate, starting at 5.9% p.a., with the defendant having the right to vary the rate at its discretion in line with applicable laws. She submitted that the plaintiffs were served with a 90-day Notice, confirming that the debt of USD 302,779.61 was due and owing from the plaintiffs to the defendant.
8. Counsel refuted the plaintiffs' claim that interest was varied without notice, citing Clause 5 of the facility letter, which permits the defendant to adjust rates based on market conditions and Central Bank rates. She referred to the case of *Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited* [2017] eKLR and asserted that disputes over loan amounts do not warrant the issuance of an injunction. Ms Karanja argued that the plaintiffs have not been barred from paying the undisputed amounts but have still failed to do so, thus demonstrating bad faith and breach of contract. She asserted that the plaintiffs' fear of an imminent sale is premature, as only the 90-days' Notice, had been issued, and that the 40-days' and 45-days' Notices required for auction had not yet been issued and/or served.
9. Ms Karanja contended that the plaintiffs had not established a prima facie case to warrant being granted the orders being sought. She relied on the case of *Milimani Motors (K) Ltd v Kenya Commercial Bank Ltd* [2014] eKLR and submitted that the plaintiffs would not suffer irreparable injury in the event that the instant application is not allowed as they can still redeem the suit property by settling outstanding arrears before the sale. She submitted that the defendant risks irreparable loss in the event that the orders being sought are granted due to the plaintiffs' ongoing default. Counsel asserted that the balance of convenience tilts in favour of the defendant as any further delays would only lead to increased interest and penalties, possibly exceeding the suit property's value.



## ANALYSIS AND DETERMINATION.

10. I have considered the instant application, the grounds on the face of the Motion and the affidavits filed in support thereof. I have also considered the Grounds of Opposition filed by the defendant and the written submissions by Counsel for the defendant. The issue that arises for determination is whether the plaintiffs have made out a case to warrant being granted an order for temporary injunction, considering that an order for the defendant to supply the plaintiffs with a statement of accounts was made on 31<sup>st</sup> January 2024.

11. The application herein is being sought under the provisions of Order 40 Rule 2(1) of the Civil Procedure Rules, 2010 which provides that -

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.

12. The conditions for consideration when dealing with an application for temporary injunction were laid down in the case of *Giella v Cassman Brown & Company Limited* (supra), where the Court held that -

Firstly, 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.

13. It is evident that the defendant advanced a mortgage facility to the plaintiff at an agreed interest rate of 5.9% p.a., secured by a charge over the suit property. It is not disputed that the said facility was to be repaid in 210 monthly instalments of USD 3,082.00. The plaintiffs stated that they were consistently making their monthly payments towards settling the debt, but they stopped when the defendant unilaterally increased the interest rate to over 10.73% p.a., without notice. The defendant on the other hand submitted that the mortgage facility in question carried a variable interest rate, starting at 5.9% p.a., with the defendant having the right to vary the rate at its discretion as per Clause 5 of the Facility letter.

14. Following the plaintiffs' failure to service the mortgage facility, the defendant issued them with a Statutory Notice pursuant to the provisions of Sections 90(1) & (2) of the *Land Act*, requiring the plaintiffs to rectify the default and pay the defendant the outstanding total arrears of USD 16,761.81 as at 31<sup>st</sup> October 2023. This Court notes that in as much as the plaintiffs admit to having received the said Notice, they challenge its validity on grounds that it was not served on their tenant who was leasing the suit property at the time of service of the aforesaid Notice.

15. It is apparent that the dispute between the parties herein is on the interest rates applied to the mortgage facility advanced to the plaintiffs by the defendant and on service of the 90 days' Statutory Notice. On the issue of the interest rates applicable to the mortgage facility in question, upon perusal of the facility letter dated 26<sup>th</sup> February 2014, this Court notes that Clause 5 provides that -

The borrower shall pay interest to the Bank at a variable rate of 5.9% per annum calculated on the basis of the daily loan balance. Interest is payable monthly in arrears. The bank



reserves the right to vary the applicable interest rates at its sole discretion in accordance with applicable laws and any such changes shall not prejudice in any way whatsoever the recovery by the bank of any interest subsequent to any such changes. (Emphasis added).

16. In view of the above Clause, I do not agree with the plaintiffs that the defendant unilaterally increased the interest rate to over 10.73% p.a., without notice, since the facility letter granted the defendant the discretion to vary the interest rate. Further, since the plaintiffs do not claim that there was any fraud, coercion and/or undue influence that made them execute the facility letter dated 26<sup>th</sup> February 2014, I am not persuaded that the plaintiffs had a right to stop servicing the mortgage facility advanced to them by the defendant.
17. On the issue of service of the Statutory Notice issued pursuant to the provisions of Sections 90(1) & (2) of the Land Act, for context, I shall reproduce the said provisions, which state as follows -
  1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
  2. The notice required by subsection (1) shall adequately inform the recipient of the following matters -
    - a. the nature and extent of the default by the chargor;
    - b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
    - c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
    - d. the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
    - e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies. (Emphasis added).
18. It is clear from the foregoing provisions that a Notice under Section 90 of the Land Act is to be served on the chargor only. The said provisions do not provide for service of the said Notice on any other person and/or party other than the chargor. In the premise, the plaintiffs' contention that the Statutory Notice dated 1<sup>st</sup> November 2023 is defective and/or a nullity for want of service on the plaintiffs' tenant does not apply as such an argument does not gel with the provisions of Sections 90(1) & (2) of the Land Act, under which the said Notice was issued.
19. The foregoing coupled with the fact that the plaintiffs do not deny being indebted to the defendant, leads this Court to make a finding that the plaintiffs have not established a prima facie case with a probability of success to warrant being granted the orders being sought herein.



20. The Court of Appeal in the case of Mrao Ltd v. First American Bank of Kenya Ltd & 2 others (supra) defined what constitutes a prima facie case as follows -

So what is a prima facie case" I would say that in civil cases it 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 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.

21. As to whether the plaintiffs stand to suffer irreparable damage that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed, I am not persuaded that this is the case. The plaintiffs do not dispute being indebted to the defendant and they have not successfully demonstrated that the defendant has breached their contract with them and/or that they are about to breach the said contract, to warrant being granted an order under Order 40 Rule 2(1) of the Civil Procedure Rules, 2010.
22. In addition, the defendant is a financial institution with the capability of compensating the plaintiffs in the event that the suit herein is determined in their favour.
23. That said, the issue of balance of convenience does not arise since I am not in doubt. Nevertheless, based on my analysis herebefore, the balance of convenience tilts in favour of the defendant.
24. The upshot is that the instant application is devoid of merits. It is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Kimani for the plaintiffs/applicants

Ms Karanja for the defendant/respondent

Ms B. Wokabi – Court Assistant,

