



**Muthoni v Capital Sacco Limited; Viewline Auctioneers Limited (Interested Party)  
(Commercial Case E001 of 2024) [2024] KEHC 1062 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1062 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
COMMERCIAL CASE E001 OF 2024  
EM MURIITHI, J  
FEBRUARY 6, 2024**

**BETWEEN**

**MARY MUTHONI ..... PLAINTIFF**

**AND**

**CAPITAL SACCO LIMITED ..... DEFENDANT**

**AND**

**VIEWLINE AUCTIONEERS LIMITED ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 22/1/2024, pursuant to Order 40 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) and all other enabling provisions of the law, the Applicant seeks that:
  - a. Spent
  - b. This Honourable Court be pleased to grant an order of temporary injunction restraining the Defendant/Respondent, its agents, assigns, servants and any other persons howsoever under their instructions from selling or in any way interfering with the Plaintiff/Applicant quiet possession, use and development of land Parcel No. Nyaki/Kithoka/3392 pending the hearing and determination of this application.
  - c. This Honourable Court be pleased to grant an order of temporary injunction restraining the Defendant/Respondent, its agents, assigns, servants and any other persons howsoever under their instructions from selling or in any way interfering with the Plaintiff/Applicant quiet possession, use and development of land Parcel No. Nyaki/Kithoka/3392 pending the hearing and determination of this suit.
  - d. Costs of this application be provided for.



2. The application is based on grounds on the face of it and supported by an affidavit sworn by the Applicant. She avers that she is the wife to Alex Mukira M'Buri (now deceased), who was the registered owner of land parcel No. NYaki/Kithoka 3392 (henceforth called the suit property). The suit property was registered as a matrimonial home and the registration was done on 9/11/2012 while their marriage was in subsistence and they built their house, a four-storey residential rental building and established a dairy farm. During the lifetime of the deceased upto 12/9/2017, he was the director of the Respondent. Although her husband was advanced a loan of Ksh. 15,000,000/= by the Respondent, the sum now being demanded is Kshs.45,000,000/=, and there is no explanation why the sum has tripled. She has been issued with a 45 days redemption notice and a notice for sale by the Interested Party. The Respondent has not explained whether the loan was secured or not and unless the illegal actions of the Respondent are curtailed by issuance of the orders sought, the Applicant stands to suffer irreparable harm.
3. The Respondent opposed the application vide a replying affidavit sworn by Nathaniel Kithinji Ikiugu, its debt recovery manager on 29/1/2024. He avers that one Alex Mukira M'Buri approached the Respondent with a view of charging the suit property, which charge was duly executed and registered. The Applicant availed a copy of her Identity Card, executed the charge document and signed a spousal consent. The Applicant acknowledged having read and understood the contents of the charge as well as the remedies of a chargee under section 90 of the *Land Act*. Pursuant to clause 10.5 of the charge, which allowed for tacking and consolidation, Alex Mukira approached the Respondent for further credit on his behalf and that of Chema Mugima Co. Ltd, jointly owned by him and the Applicant, and he was advanced further sums of Kshs. 15,000,000/= and Kshs.5,000,000/= which were subsequently consolidated to sum up to Ksh. 35,000,000. Prior to being advanced the said monies, Alex Mukira and the Applicant executed three applications for further credit as attested by the exhibited application forms. On the same breadth, Alex Mukira acknowledged that the money advanced to him aided in the construction of the suit property generating a monthly income of Ksh. 300,000 and requested that all the four loans that he had obtained from the Respondent be consolidated to one loan, which request the Respondent fulfilled. He notes that loan No. L116848 amounting to Kshs. 6,000,000/= was paid in full. Despite persistent notices from the Respondent, Alex Mukira constantly defaulted on servicing of the loan necessitating the Respondent to issue a statutory demand notice under section 90 of the *Land Act*. As veritably acknowledged by the Applicant, a redemption notice was thereafter issued followed by a notification for sale. As is required by law, they conducted a valuation of the charged property and obtained a land control board consent. It is quite unfortunate that the Applicant and her husband took money from the Respondent and put up commercial rental units which they continue to rake income from to the tune of Kshs.300,000/= but they do not want to repay the loan. As at the time the notification of sale was issued, the outstanding loan balance stood at Ksh.45,185,132.77 and the same continues to accrue interest and other charges. From the cumulative documents annexed herein, the chargor is both a borrower and a guarantor, and the issuance of an injunction will lead to the sky rocketing of the decretal sum owing to astronomical figures taking into account that the amount secured was colossal. He accuses the Applicant of waiting till the eleventh hour to approach the court despite being served with all the requisite notices under the law. He further accuses the Applicant of defiantly and obstinately refusing to defray the loan balance by advancing spurious reasons. He avers that the Applicant has not established a prima facie case with any glimmer of success and urges the court to dismiss the application with costs.
4. The Respondent relied on *Ronald Ratemo Moturi & Another v Credit Bank Limited & Another* (2021) eKLR, *Equip Agencies Limited v I & M Bank Limited* (2016) eKLR, *Andrew Muriuki Wanjohi v Equity Building Society Limited & 2 Others* (2006) eKLR, *Cieni Plains Company Limited & 2 Others v Eco Bank Kenya Limited* (2018) eKLR, *Abdikadir Arab Mohamud & Another v Tax*



Community Bank Limited (2020) eKLR and John Karanja Kihagi & Another v Jamii Bora Bank & 2 Others (2020) eKLR listed in its list of authorities dated 31/1/2024.

5. The Applicant swore a further supporting affidavit on 1/2/2024 refuting the averments in the Respondent's replying affidavit as follows, "3. I reiterate that LR No. Nyaki/Kithoka/3392 is a matrimonial home although we have built a rental stores building. Annexed and marked MM1 are copies of photographs showing my house and the storey rental units. 4. From the onset I wish to state that I had seen the spousal consent and the accompanying affidavit and I agree that my signature is appended therein but I did not read the content of the charge and the affidavit. 5. My husband just hurriedly brought me documents to sign and did not give me chance to read the same and have just read it courtesy of the Defendants replying affidavit. 6. From an overall read of the replying affidavit I understand and there is no unpaid loan advanced to my late husband that is pending. 7. A look at annexure NKI 6 it shows that the loan under his personal names was consolidated with the unsecured loans of Chema Mugima Company Limited all under the account of Chema Mugima Company Limited and this was done with the approval of the board on 14<sup>th</sup> November 2018. 8. I state the loans of Chema Mugima Company Limited are unsecured and annexures 5 a, b & d do not show the kind of security that was pledged by the Applicant apart from guarantee by way of shares. 9. If we were to buy the argument of the Defendant that the loan was secured then there ought to have been a further charge but this was not done and it is clear that Alex Mukira M'buri and Chema Mugima Company Limited are 2 different legal persons. 10. From the document filed by the Defendant my consent was limited Kshs 15,000,000/= and nothing more and from a look of annexure NKI4 the loan was insured as Kshs 75,000/= was deducted to pay for the insurance to cover the loan. 11. I am surprised why the Defendant has not followed up for the payment of the loan by the insurance after the death of my husband. 12. By the documents filed by the Defendant it is clear that my husband was servicing his loan properly before his demise. 14. There is no forty (40) days' notice as provide for under section 96 (1) of the Land Act. 15. Annexure NK 1 a and b is a purported notice under section 90 (1) of the Land Act and was not sent to me, the postage receipt does not show the postal address of the addressee. 16. In fact, I am advised by my advocates on record which advise I verily believe to be true that, annexure NKI 8 it is a demand letter which has no place in law under the land laws and it was in fact addressed to Chema Mugima Company Limited and not to my husband. 17. Further to the above this letter dated 5<sup>th</sup> September 2021 and this was the first time the bank ever demanded any amount from the alleged loans, showing that the loans were being properly served until the demise of my husband on 12<sup>th</sup> January 2021. Annexed and marked MM 2 a is a copy of his death certificate. 18. Now I aver that my land parcel Nyaki/Kithoka/3392 has not secured any loan amount and ought to be discharged."

### **Determination**

6. An application for interlocutory injunction is governed by the principles of interlocutory injunction set out in *Giella v Cassman Brown* (1973) EA 358, and the question before the court is whether a prima facie case has been established; whether damages are adequate compensation in the circumstances of this case, and where, in case of doubt, the balance of convenience lies on the issue of grant of temporary prohibitive injunction.

### **Prima facie Case**

7. The Applicant's husband (now deceased) was advanced an initial sum of Kshs.15,000,000/= (LN00009070) by the Respondent. The said sum was secured by the suit property vide a charge dated 6/9/2017. That loan was credited into the Chargor's account on 8/1/2018. The Applicant's husband (now deceased) was advanced a further sum of Kshs. 15,000,000/= and Kshs. 5,000,000/= which were equally secured by the same title. The Applicant now contends that she signed the spousal consent



hurriedly without reading and that the further sums of Kshs. 15,000,000/= and Kshs.5,000,000/= were unsecured, because there was no further charge to that effect. Pursuant to the execution and the subsequent registration of the charge, the rights and obligations created therein became enforceable.

8. Clause 10.2 of the Charge provides that, “It is hereby acknowledged and agreed by the Chargor that there shall be no restriction on the right of the Chargee of consolidating mortgage or charge securities and the Chargee hereby reserves the right to consolidate all mortgages and charges which the Chargee may from time to time hold from the Chargor on any account whatsoever and it is hereby declared that neither the Charged Property nor any other property of the Chargor which at any time during the continuance of this security is subject to a mortgage or a charge in favour of or vested in the Chargee shall be redeemed except on payment not only of the monies hereby or thereby secured but also of all monies secured by every such mortgage or charge (including this Charge).”

9. Clause 10.3 of the Charge provides –

“ 10.

3. That the Chargee shall be at liberty without thereby affecting its right hereunder at any time:-

10.

3.

1. to combine, consolidate, split, determine or vary any credit to or accounts of the Chargor and the mode of repayment thereof.

10.

3.

4. at any time and without notice to the Chargor combine or consolidate all or any part of the Chargor’s accounts with the Chargee and set off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of the Chargor’s liabilities be present, future, actual or contingent, primary, collateral, joint or several and whether such accounts and liabilities be current deposit, loan or of any other nature whatsoever whether subject to notice or not, whether in Kenya Shillings or in any other currency or in one or more branches of the Bank in Kenya.”

10. Clause 10.4 of the Charge provides that, “The Chargee is hereby irrevocably authorized by the Chargor in the Chargor’s name and at the Chargor’s expense to perform such acts and sign such documents as may be required to give effect to any consolidation, set-off or transfer pursuant to the foregoing sub-clause of this clause 10.”

11. The Applicant signed a spousal consent on 6/9/2017 consenting to, “unconditionally and irrevocably grant authority for the Bank’s rights under sections 82 and 83 of the L.A and the restrictions under



section 87 of the LA be noted against the above-mentioned title. I have read and had explained to me the above sections and confirm that I understand the same.”

12. The Defendant/respondent relied on the doctrine of tacking in the law of mortgages, which he submitted was the right of the borrower and could only be done at his request, which he submitted was not the case here. The Land Act, No. 6 of 2012 provided for tacking under section 82 (1) as follows:

“ 82. Tacking

- (1) Subject to the provisions of this Act, a chargor may make provision in the charge instrument to give further advances or credit to the chargor on a current or continuing account.
- (2) A further advance referred to in subsection (1) shall not rank in priority to any subsequent charge unless—
  - (a) the provision for further advances is noted in the register in which the charge is registered; or
  - (b) the subsequent chargor has consented in writing to the priority of the further advance.
- (3) Except as provided for in this section there is no right to tack.
- (4) Where a charge provides for the payment for a principal sum by way of instalments, the payment of those instalments shall not be taken to be a further advance.

13. It appears clear to this court that the use of the transitive verbs make and give in subsection (1) can only mean that the right to tack belongs to the Chargee who “may make provision in the charge instrument to give further advances or credit to the chargor”.

14. The matter was clarified by the Amendment through The Land Laws (Amendment) Act, no. 28 of 2016 s. 63, which provided as follows:

63. Section 82 of the Land Act is amended- (a) in subsection ( 1) by deleting the words a “chargor” appearing immediately after the word “Act” and substituting therefor the word “chargee”; (b) in subsection (2) by deleting the word “chargor” appearing in paragraph (b) and substituting therefor the word “chargee”.

15. The right to tack is clearly one for the chargee, the lender and not the chargor (borrower) whose further advances may be tacked in the same current account or continuing account. This is consistent with the Meaning of Tacking as given in Black’s Law Dictionary (2014) as “the joining of a junior lien with the first lien in order to acquire priority over an intermediate lien”, and the explanation in the commentary cited therein as follows:

“It is the established doctrine in the English law, that if there be mortgages in succession, and all duly registered, or a mortgage, and tack it to his mortgage, and by that contrivance ‘squeeze out’ the middle mortgage and gain preference over it. The same rule would apply if the first as well as the second encumbrance was a judgment; but the encumbrancer who tacks must always be a mortgagee, for he stands in the light of a bona fide purchaser, parting with his money upon the security of the mortgage.” 4 James Kent, Commentaries on American Law \*176 (George Comstock ed., 11<sup>th</sup> ed. 1866).”



16. The draftsman of the *Land Act* 2012 obviously made an error which was corrected by the amendment in section 63 of the 2016 Act.
17. The correct position as regards the principle of tacking under sections 82 is set out in the edition of the *Land Act*, 2016 as follows:

“ 82. Tacking

1. Subject to the provisions of this Act, chargee may make provision in the charge instrument to give further advances or credit to the chargor on a current or continuing account.
2. A further advance referred to in subsection (1) shall not rank in priority to any subsequent charge unless—
  - a. the provision for further advances is noted in the register in which the charge is registered; or
  - b. the subsequent chargee has consented in writing to the priority of the further advance.
3. Except as provided for in this section there is no right to tack.
4. Where a charge provides for the payment for a principal sum by way of installments, the payment of those installments shall not be taken to be a further advance.

[Act No. 28 of 2016, s. 63.]

18. Counsel for the Plaintiff obviously relied on the pre-2016 version of the *Land Act* in making his submission that:

“The defendant argues that under section 82 of the *land Act*, they applied the principle of tacking.

Tacking under section 82 of the *Land Act* is only available to the Chargor to be advanced further monies using the security he has charged with the Bank.”

19. The correct position is now as clarified by the Amendment of 2016. It is the defendant lender bank that had power to tack which it exercised, and consequently the plaintiff's objection thereon is rejected as mistaken.
20. As regards consolidation of mortgages, the law is set out in section 83 of the *Land Act* as follows:

“ 83. Consolidation

1. Unless there is an express provision to the contrary clearly set out in the charge instrument, a chargor who has more than one charge with a single chargee on several securities may discharge any of the charges without having to redeem all charges.
2. A chargee who has made provision in accordance with subsection (1) for the consolidation of charges shall record that right in the register or registers against all the charges so consolidated that are registered.



3. Upon commencement of this Act, the rules of equity applicable to consolidation shall not apply to charges.”
21. As only one security is involved on this matter, the right to consolidation, although reserved by the Chargee, the defendant lender herein, and purportedly sought by the plaintiff’s deceased husband, does not arise and noting turns on it.
22. In addition, by signing the spousal consent, the Applicant granted the chargee irrevocable authority to tack and consolidate the loan accounts, and the court cannot be asked to rewrite the contract of the parties.
23. The court notes the letter dated 9/11/2018, exhibit “NKI 6”, by the deceased requesting the Respondent to consolidate his 3 loan accounts as follows: “2. L00009070 Shs.15,000,000 3. LN00001433 Kshs. 15,000,000 4. LN00001783 Kshs. 5,000,000. I kindly request you to consolidate loan Nos. 2, 3 & 4 to one institutional loan of “Chema Mugima Co.”
24. The Applicant’s allegation that the subsequent loans of Ksh. 15,000,000 and Ksh.5,000,000 advanced to the deceased were unsecured is not well founded because the chargee reserved the right to tack the loans under the suit property and the deceased had unequivocally requested for all his loan accounts to be consolidated. Moreover, the advancement was requested by the chargor and the defendant acted on it by virtue of the doctrine of tacking set out in section 82 of the *Land Act*, which is expressly reserved by the lender chargee and accepted by both the deceased borrower and his spouse, the Plaintiff herein.
25. The Court considers that the issue separate legal entity of the company and the deceased chargor does not arise as the advances are shown to have been made at the request of the chargor not the company, and therefore, there are no different charges. Only one charge securing advancement of monies at the request of the chargor as expressly contemplated in the charge and permitted by the doctrine of tacking.
26. The Applicant at paragraph 10 of her further supporting affidavit, admits the initial debt of Kshs. 15,000,000/=, which still remains unpaid. This court in *Sarovima Sevens Stars Resort Lodge Ltd v Yetu Sacco Limited & Viewline Auctioneers Civil Suit No. E008/2023 004/2024* made the following observation:
- “28. Moreover, it is accepted that a mere dispute on accounts cannot found a case for halting the exercise of the chargee’s power of sale where the debt and default is admitted. There is no dispute that an amount of Kshs.40,800,000/= was advanced to the Plaintiff and there was default in payment. See Halsbury’s Laws of England Vol. 32 4<sup>th</sup> Edition that:
- “The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun 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 in Court, that is, the amount the mortgagee claims to be due him, unless, on the terms of the mortgage, the claim is excessive.”
27. The Applicant has not established a dispute as to being served with the statutory notices as required by sections 90 and 96 of the *Land Act* to be served on the chargor (and under the latter also on a spouse of the chargor who had given the consent). Further, this court notes the statutory demand notice dated



16/2/2023 NKI 9a; the 45 days redemption notice NKI 10 and the notification of sale all sent to the Applicant as exhibited by the respective certificates of postage.

28. On a balance of probabilities, with the evidence of certificates of postage attached and the Applicant acknowledging that she was indeed served with some requisite statutory notice, the court finds it more likely than not that the statutory notices were, and there is no reason for contrary conclusion, sent to the addresses shown on the notice. The Court was not properly served with an argument on the effect of insurance over the loan amount to the exercise of the statutory power of sale, suffice it to state that a mere precautionary measure taken by a defendant bank cannot found a claim for injunction to stop it from exercising its statutory power.
29. The Plaintiff agrees that she signed a spousal consent to charge the suit property, the spousal consent acknowledges the rights exercised by the lender, and the consent was signed before an advocate who indicates that the spouse appeared before him and she freely and voluntarily executed the instrument and understood its contents, which included the effects of sections 82 and 83 of the *Land Act*. The Applicant's argument that she signed the spousal consent without reading is therefore rejected.
30. In all the circumstances of this case, this court finds that the Applicant has not established a prima facie case with a probability of success within the test for the grant of interlocutory injunction in *Giella case* and elaborated in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Ors. supra*.

### **Irreparable Loss**

31. The suit property was charged by the deceased to secure multiple loans of an aggregated sum of Kshs. 35,000,000/= . With the admitted debt of Kshs.15,000,000/= and the acknowledged default, this court must find that the chargee's statutory power to sell has crystallized. The Applicant was given 45 days notice to redeem the property, which she did not. The Applicant was fully conscious that the failure to service the loan advanced to her and her deceased husband, the suit property, which they had voluntarily offered as security thereof would certainly be sold. The Applicant has not demonstrated any seriousness in settling the admitted debt.
32. In addressing the chargee's statutory power of sale, this court in *Sarovima Sevens Stars Resort Lodge Ltd v Yetu Sacco Limited & Viewline Auctioneers (supra)* had this to say: "How can such a parcel of land deliberately offered to secure these multiple loans be, in the minds of the borrower and the lender, anything other than an item for sale in the event of default of repayment of the loans? If there be any losses arising from the sale of the parcel of land offered as such security, say in sale at an under value or in the computation of monies due under the loan account, the same must be deemed to be remediable by an award of damages. As urged by the 1<sup>st</sup> Defendant herein, the suit land is, as a charged property, a commodity for sale. The borrower treated the parcel of land as a security for the various loans that it obtained from the 1<sup>st</sup> Defendant, as an equivalent to the monies advanced as loan thereon on four occasions, and it must be taken to have contemplated its sale in the event of default."
33. In *Kihara v Barclays Bank (K) Ltd (2001) 2 EA 420*, the Court rendered thus:-"The mere fact that a borrower has a claim in damages against a lender which is equal to or in excess of the debt due does not at law entitle it to resist the lender's attempt to exercise its statutory power of sale when this has properly arisen...As the Plaintiff had put up the property as security for the loan with full knowledge that should he default it would be sold, he had converted it into a commodity for sale and there was no commodity for sale the loss of which could not be adequately compensated in damages."
34. This court in *Stephen Michuki Kiunga v National Bank of Kenya Ltd [2018] eKLR* observed thus:-"Suffice it to state the his having offered the suit property as a security for the loans, the applicant must be deemed, as in *Isaac O. Litali v. Ambrose W. Shubai & 2 Ors*, to have been ready for the eventuality



that befalls it upon default of loan repayments and the Bank is entitled to realize its security in those circumstances, to give effect to certainty of commercial lending transactions.”

35. It was expressly provided under Clauses 7.1 and 7.2 that in the event of default on the repayment of the loan amounts, “The Secured Obligations shall immediately become due and payable and it is further agreed and declared that the Chargor shall provide cash cover on demand for all contingent liabilities of the Chargor to the Chargee and for all notes or bill accepted, endorsed or discounted and all bonds, guarantees indemnities, documentary or other credits or any instrument whosoever from time to time entered into by the Chargee for or with the agreement of or at the request of the Chargor.”
36. Whereas the Applicant contends that she will suffer irreparable loss if the suit property, which is her matrimonial home, is sold, the Respondent contends that the Applicant’s matrimonial home is situated on a distinct parcel of land. The Applicant’s claim that the suit property is matrimonial property has not been substantiated. Mere statement in the spousal consent that “the charged property forms part of the matrimonial property” does not make unassailable by the power of sale. Indeed, it is not the matrimonial home and it is its status as matrimonial property that makes the spousal consent necessary. But it is an item for sale in exercise of statutory of sale once the spouses agree to charge it to secure a loan. Needless to state, the Applicant, having charged the suit property, converted it to a commercial commodity, and it has not been shown that the Respondent will not be in a position to compensate the Applicant in in the event of any loss.
37. This court finds that the Applicant has not demonstrated that she will suffer irreparable loss which cannot adequately be compensated by an award of damages.

### **Balance of Convenience**

38. The court must not lose sight of the fact that the Defendant/Respondent is a money lending institution, whose ability to so trade and remain in business must be safeguarded by ensuring that the facilities advanced by it to its customers are repaid in full when and if they fall due. The Court accepts that protracted delay in the sale of the charged property may make it illusory the recovery of the loan amount by the lender if the value of the loan amount together with interest exceeds the value of the property thereby not only occasioning the defendant lender a loss on its investment but also affecting public confidence in bank loan and mortgages business. The court respectfully accepts the observation of the Court (Ochieng J. as he then was) in *Andrew Muriuki Wanjohi v. Equity Building Society Ltd & 2 others* (2006) eKLR that

“In my considered view if the 1<sup>st</sup> and 2<sup>nd</sup> defendants were restrained from selling off the suit property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property were sold, the plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1<sup>st</sup> and 2<sup>nd</sup> defendants would be able to compensate the plaintiff. In contrast, the stoppage of the intended sale by the chargor would result in the continued growth of debt, thus exposing them to potentially substantial irrecoverable losses. I therefore find that provided the chargee complies with all other legal requirements, he should be permitted to realise the security.”

39. The contention of the Plaintiff that the building subject of the suit is a matrimonial home of the Plaintiff is rejected. From photographic evidence and valuation report adduced by the parties, it is clear that the suit property herein is a business premises which, consequently, attracts only the commercial



considerations of certainty of business dealings, ability to recover loan amounts advance to chargors by realization of the security and resultant the growth of the economy by guaranteeing the effectiveness of the money lending industry.

40. This court finds that the balance of convenience tilts in favour of the Defendant/Respondent.

### **Orders**

41. Accordingly, for the reasons set out above, the Court finds that the application for interlocutory injunction herein dated 22/1/2024 has no merit, and it is dismissed.

42. The Applicant shall pay costs of this application to the Respondent and the Interested Party.

43. In the interest of justice bearing in mind that the plaintiff was not the principal operator of the mortgage account subject of this suit, and the latter - the plaintiff's spouse - being deceased, this court will afford an opportunity for the plaintiff/applicant to regularize the loan accounts by negotiating any agreement or accommodation with the defendant lender, or the sale by private treaty of the suit property and payment of the loan, or any re-financing as she may be advised by her legal advisor.

44. The Court, therefore, suspends the sale for a period of thirty (30) days from the date hereof. In the event of default, the Defendant/Respondent shall be at liberty to proceed with the scheduled auction.

45. For avoidance of doubt, it shall not be necessary to reissue any statutory notices before sale of the property, which is now only postponed to permit the Plaintiff's regularization of the loan accounts, or further agreement with the defendant.

Order accordingly.

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

### **APPEARANCES:**

Mr. Mutegi Mugambi for the Plaintiff/Applicant.

Mr. Ken Muriuki for the Defendant/Respondent.

