



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Stanbic Bank Kenya Limited (Commercial Case
E010 of 2023) [2024] KEHC 1218 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E010 OF 2023
RE ABURILI, J
FEBRUARY 7, 2024**

BETWEEN

GEOFFREY AMOLO ONYANGO OTIENO PLAINTIFF

AND

STANBIC BANK KENYA LIMITED DEFENDANT

RULING

1. Vide a Notice of motion dated 2nd October, 2023, the plaintiff /applicant herein sought the following orders from this court against the defendant/ respondent:
 1. Spent
 2. That pending the hearing and determination of this Notice of Motion inter partes, the Defendant whether by itself, agents, officers, employees, servants, assigns or any person acting under its authority be and is hereby restrained from transferring the Plaintiff's property known as Title No. Kisumu Municipality Block 13/54 to the purchaser and/or a third party pursuant to sale by public auction on 8th September 2023.
 3. That in the alternative to prayer 2 above the Honourable Court be and is hereby pleased to issue an Order restrain any further dealing with the property known as Title No. Kisumu Municipality Block 13/54 by way of further sale, transfer, charging or in any other way that is inconsistent with the Plaintiff's proprietary right or at all.
 4. That pending the hearing and determination of the Suit the Defendant whether by itself, agents, officers, employees, servants, assigns or any person acting under its authority be and is hereby restrained from transferring the Plaintiff's property known as Title No. Kisumu Municipality Block 13/54 to the purchaser and/or a third party pursuant to sale by public auction on 8th September 2023.



5. That the cost of this application be awarded to the Plaintiff.
2. The 14 grounds upon which the application is predicated give the history of the matter from 2018 when the plaintiff/ applicant obtained a loan facility of Kshs 19, 670, 000/= from the Defendant Bank which was secured by way of registration of a charge over the suit property No. Kisumu Municipality Block 13/54 on terms that the said loan facility was to be repaid over a period of two hundred and forty (240) months or twenty years, at the rate of Kenya Shillings two hundred and forty thousand (Kshs.240,000.00) with the first repayment being due on or about 5th October 2018 until 30th September 2043.
3. The applicant averred in a narration that he continued servicing the loan under the various terms stated therein but that due to economic hardships occasioned by the Covid 19 pandemic, he ran into arrears in the servicing of the loan facility and that as at March 2023, he had accumulated the arrears to the tune of Kenya Shillings seven million six hundred thousand (Kshs.7,600,000.00) or thereabouts.
4. He further states that as a result of the aforesaid default, the parties entered into negotiations and reached an agreement to have a Loan Amendment and Pay Off Instructions in March 2023 and that the applicant honoured the terms of the Amendment by paying the stated arrears of Kshs.7,600,000.00 upon which the loan facility's account was regularized such that by 3rd March 2023, he was no longer in arrears.
5. The applicant laments that notwithstanding the terms of the Loan Amendment Agreement, the Defendant Bank without adherence to the procedures set out under the Land Act proceeded surreptitiously, illegally and irregularly to sell the Suit Property No. Kisumu Municipality Block 13/54 to a third party hence this suit and the application seeking injunctive orders barring the Defendant from proceeding to effect transfer of the suit property to the purported buyer.
6. The applicant claims that he was never issued with statutory notices as required under sections 90 and 91 of the land Act; that he was denied the equitable right of redemption and that the defendant's duty of care under sections 96(2) and 97 of the Land Act and Rule 15(d) of the Auctioneers Rules was not complied with.
7. Besides, the applicant averred that the suit property was illegally sold and that the sale value was far much below the forced value and in contravention of section 97(3) of the Land Act. Further, that section 89 of the Land Act and the plaintiff's proprietary rights under Article 40 (2) of the Constitution were violated.
8. It was averred that damages cannot adequately compensate the plaintiff; that the applicant had met conditions for grant of an injunction as set out in the *Giella v Cassman Brown* Case and that this court has jurisdiction to grant the orders sought.
9. The application was supported by the affidavit sworn by the plaintiff on 2nd October, 2023 annexing several documents in support of his case and application including statements of the loan account and the loan facility agreements, which basically reiterate in deposition, the above given narrative in the grounds.
10. Opposing the application, the defendant/respondent filed a replying affidavit sworn by Edna Omangi, the Respondent's Manager, Non-performing Loans on 1st November 2023 denying the averments made by the Plaintiff in the application. Further it was the Defendant's contention that due processes preceding the impugned auction was followed hence the sale of the suit property was above board and hence the sale conferred a valid title to the purchaser.



11. According to the defendant/ respondent, having adhered to the due processes and sold the suit property to a third party, then the instant application was spent and that the same ought to be dismissed with costs.
12. The defendant/ respondent annexed to the aforesaid sworn affidavit the following documents in support of its position that it followed all due process in the exercise of its statutory power of sale of the charged property and as per the loan facility agreement:
 1. letter dated 7/10/2021, a 90-day Demand Notice under section 9(1)(2) and (3) of the [Land Act](#) demanding for settlement of the arrears of Kshs 590, 369.25
 2. a 40-day statutory Notice dated 25th February, 2022
 3. a 45-day Notification of sale Notice dated 3/6/2022 pursuant to Rule 15(d) of the Auctioneers Rules, 1997
 4. Notice of Advertisement for sale of property in the Daily Nation of 15/8/2022 upon which the applicant approached the defendant and promised to settle the outstanding loan only for him to renege hence the renewed advertisement of 6/2/2023
 5. Another advertisement for sale dated 21/8/2023 after the plaintiff failed to repay the loan
 6. Valuation report dated 10/8/2023 by Hallmark Valuers Co. Ltd under Rule 11 (b) (x) of the Auctioneers Rules, 1997 before advertising for sale on 21/8/2023 and finally selling the property at a public auction on 8/9/2023 to the highest bidder Mr. Geoffrey Ajiki, of the three bidders at Kshs 16,000,000.
13. The respondent therefore contended that the application by the plaintiff did not meet the threshold for an injunction to issue and that even the suit is an academic exercise because the applicant had not demonstrated that:- he has a prima facie case with probability of success, that damages are not adequate remedy and that therefore the balance of convenience tilts in favour of the injunctive orders sought not being granted at all in the applicant's favour.
14. According to the respondent, the sale as concluded is protected under section 99 of the [Land Act](#), 2012.
15. The applicant filed a further affidavit wherein it was deposed inter alia, that albeit the sale had been conducted, but that it had not been concluded as no transfer of the property was effected in favour of the purchaser hence an injunction could still issue to halt that transfer. It was also deposed that the defendant/respondent herein ought to have restarted the process of realizing the security afresh since there had been negotiations on the settlement of the arrears, which arrears had been settled.

The plaintiff/Applicant's Submissions

16. The parties' counsel filed written submissions to canvass the application. The plaintiff/ applicant framed the following issues for determination by the Court:
 - a. Whether the Plaintiff has met the threshold to be granted the injunctive orders sought?
 - b. Who bears the costs of the application?
17. On the first issue of whether the Plaintiff had met the threshold to be granted the injunctive orders sought, it was submitted on behalf of the applicant that the substratum of the application is premised under Order 40 of the Civil Procedure Rules under which this court can grant injunctive orders pending the hearing and determination of the suit; and that the applicant had demonstrated the



existence of imminent risk that may befall it should the court fail to issue such order orders as espoused under Order 40 Rule 1 of the Civil Procedure Rules, 2010.

18. Reliance was placed on the celebrated case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 at pg 360, where the court set out three conditions that must be met in order for the court to grant an injunction namely:- that he has a prima facie case with the probability of success; that the applicant will suffer irreparable damage which cannot be compensated in damages unless the injunction is granted and finally, that the balance of convenience tilts in favour of the applicant being granted the injunctive orders sought.
19. It was submitted, analyzing if the three (3) elements espoused in the above cited authority have been met by the Plaintiff in order to warrant the court to exercise its discretion in his favour in the instant application. Under the first principle, the applicant cited the case of *Mrao Limited v First American Bank of Kenya Ltd and others* [2003] eKLR where the Court of Appeal explained what a prima facie case was all about.
20. It was submitted that in this case, the Defendant breached the Loan Amendment and Pay Off Instructions Agreement entered into between the Plaintiff and the Defendant in March 2023 by proceeding with the auction despite there being no outstanding arrears.
21. The applicant admitted in his submissions that indeed, he fell into arrears in the months preceding the aforementioned agreement but that subsequent thereof, he duly paid Kshs. 7, 600, 000 as a result of which he regularized his accounts and was no longer in arrears.
22. That therefore there being no balance at all, the Defendant proceeded to instruct the auctioneers to sell by public auction the suit property, contrary to section 96 of the *Land Act* that requires the chargor to be in debt and fail to regularize the accounts notwithstanding the notices issued to it prior to the chargee exercising its statutory right to sell the charged property.
23. The said section provides that:

“Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.”
24. It was submitted by the applicant/ plaintiff’s counsel that the exercise of statutory power of sale by the Defendant had not crystalized since there was no outstanding arrears and that therefore the subsequent actions by the Defendant were illegal null and void.
25. Further submissions were that the defendant having agreed with the Plaintiff on a settlement term in respect of the credit facility subject of this suit, the Defendant illegally and flagrantly breached the terms of the said agreement by auctioning the suit property, which actions, according to the applicant, amounted to a breach of the agreement between the parties herein and amounts to breach of contractual obligations by the Defendant.
26. The plaintiff/ applicant relied on the case of *Cubic Business Solutions v Spectre International Limited* [2021] eKLR where the court stated in part that:

“..... parties must be held to the strict terms of their contracts, and that courts should be slow to re-write the terms of contracts unless a vitiating factor is proven.”



27. Further reliance was placed on the case of Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebraihim Pothiwalla vs Kidogo Basi Housing Cooperative Society Limited and 31 Others Civil Appeal No. 330 of 2003, where it was held that:
- “A court of law cannot re-write a contract between the parties. ... it is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”
28. The plaintiff’s counsel submitted that the blatant breach of the agreement between the parties herein by proceeding to instruct auctioneers to sell the suit property despite the settlement of account by the Plaintiff amounts to the infringement of a contractual right of the Plaintiff and the right to own property under Article 40 of *the Constitution* which ought to be sanctioned by this Court.
29. Further, that should there have been a default after the regularization of the account then the Plaintiff was obligated by law to re-issue the notices afresh thereby failing to comply with sections 96, 97 and 98 of the *Land Act* as a result of which it clogged the Plaintiff’s right to redeem the property.
30. It was further submitted that the Defendant failed to abide by the various procedures set out in the *Land Act* by failing to render accounts and details of the proceeds of the sale of the suit property by way of public auction, to the plaintiff/applicant herein as required under the *Land Act* to date.
31. Accordingly, it was submitted that in view of the above alleged breaches by the defendant the Plaintiff has a prima facie case with high chances of success and is deserving of injunctive orders sought.
32. On the second limb of the formula laid down in *Giella vs Cassman Brown* (supra) that 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. Counsel submitted that the above position was restated in the case of *Suleiman -vs- Amboseli Resort Limited* [2004] eKLR.
33. It was submitted that the suit property subject of this suit is a prime property within Kisumu and that the Plaintiff has faithfully abided by the various terms of the credit facility from the time of the issuance of the loan facility and has paid a whopping Kshs. 16, 206, 209 as against the sum of Kshs. 19, 670, 000/= issued to it but that the defendant has nevertheless proceeded to illegally auction the suit property. This, it was submitted, would cause the plaintiff irreparable harm which cannot be compensated by way of damages.
34. It was further submitted that in the absence of the orders of this court, the Defendant is likely to unprocedurally transfer the said property to a third party and have all the sums paid in servicing the loan lost without a possibility of any future compensation at all. Reliance was placed on the case of *Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others* [2008] eKLR where it was held, inter alia, that damages cannot be a substitute for loss occasioned by a clear breach of the law.
35. Further, the Plaintiff’s counsel submitted that in the event that the orders sought are not granted, the Plaintiff is unlikely to secure a similar property. Conversely, that the Defendant is unlikely to suffer any loss that cannot be compensated by way of damages. He relied on the holding in the case of *Kwanza Estates Limited v Dubai Bank Kenya Limited* (2013) eKLR that a party deprived of his property through an illegal process would suffer irreparable loss and or damage.
36. Thirdly, it was submitted that the Plaintiff has used the suit property as a source of his income having rented out the same to a tenant with a monthly rent of over Kshs. 140, 000/= part of which the Plaintiff has used to service the loan and meet his family needs. That in the absence of the orders sought, the



Plaintiff will be left without any other source of income to sustain his family and undertake other duties which in effect will cause irreparable harm to the Plaintiff and his family.

37. It was therefore submitted that in totality, under the second limb, in the event that the orders sought are not granted, there is a real likelihood that the Defendant will proceed to transfer the suit property to a third party and cause irreparable harm to the Plaintiff.
38. On the final limb of the elements which in essence requires the court to balance the probabilities should the court be in doubt as to whether an applicant is deserving of the orders of injunctions, it was submitted that the courts have held that should an applicant prove the first two limbs stated above, the court need not belabour on whether the balance tilts in favour of the applicant as was restated in the case of *Mawa Family Limited v Amica Savings & Credit Co-op Society & Another* [2022] eKLR where the court held that:

“Granted those circumstances, I am persuaded that the Plaintiff has established a prima facie case for grant of interlocutory injunction. Having reached that conclusion, I do not need to weigh the balance of convenience.”

39. Responding to the defendant/ respondent’s depositions and documents, it was submitted on behalf of the plaintiff/ applicant that the alleged transfer of ownership is yet to be actualized as it falls short of compliance with the provisions of 98(3) of the *Land Act* which provides that:

‘ A transfer of the charged land by a chargee in exercise of the power of sale shall be made in the prescribed form and the Registrar shall accept it as sufficient evidence that the power has been duly exercised.’

40. For the foregoing reasons, it was submitted that the interim orders sought have not been spent as no proof of transfer of the suit property to the alleged third party, one Geoffrey Ajiki had been demonstrated by the Defendant and that therefore, this court can still intervene and bar any subsequent illegal transfer by the Defendant as per prayer 2 of the application pending the disposal of the application and the suit.
41. On who bears the costs of the application, it was submitted that costs follow event and therefore the Plaintiff prayed that this court do award him the costs of the application.

The Defendant’s /Respondent’s Submissions

42. The Respondent adopted in entirety the facts as set out in the Replying Affidavit of Edna Omangi sworn on 1st November 2023 that set out the factual background of the relationship between the plaintiff and the defendant through a loan facility which was admittedly defaulted and the process that the defendant followed until the sale of the aforesaid property on 8/9/2023 at a public auction while maintaining that the sale was legal as it followed the established legal processes. Counsel for the defendant reiterated the depositions in the said affidavit and framed the following main issues for determination:
1. Whether the Applicant has met the threshold for grant of injunctive orders; and
 2. Whether the Respondent duly invoked its statutory power of sale.
43. On Whether the Applicant has met the threshold for grant of injunctive orders, the defendant submitted relying on the case of *Giella v Cassman Brown & Company Limited* (supra) which set out the three elements that must be satisfied by an applicant seeking an injunction as have been reiterated in



numerous decisions from Kenyan courts and more particularly, the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 [2014] eKLR where the Court of Appeal held that:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.”

44. Based on the above authority, the defendant’s counsel submitted at length reiterating the factual depositions that the plaintiff having defaulted on his obligations under the loan facility agreement and that having so admitted to such default; and that the defendant having followed all the legal procedures in the sale of the charged property, then the plaintiff had not established a prima facie case with a probability of success to warrant grant of injunction sought. On what a prima facie case is, reliance was placed on the case of Mrao Ltd Versus First American Bank of Kenya Ltd (supra)
45. Referring to paragraph 8 of the applicant’s further Affidavit sworn on 20th November 2023, where the Applicant deposed that there was no proof of transfer of the suit property to the alleged third party, one Geoffrey Ajiki; and that thus the court can still intervene, it was submitted that the Applicant’s assertion is founded on a misapprehension regarding the chargor’s right to exercise his equity of redemption, which right is only available to the chargor prior to the fall of the auctioneer’s hammer; and that the property passes to the purchaser even though certain formalities, including a formal transfer, may still be pending. Reliance was placed on the case of David Limo Bundotich v Housing Finance Company of Kenya Limited [2022] eKLR where it was held that:
- “The Equity of Redemption comes to an end when a valid contract of sale is executed or at the fall of the auctioneer’s hammer. The property passes to the purchaser even though some other conveyancing formalities are yet to be completed.”
46. Further reliance was placed on the case of Simon Njoroge Mburu vs Consolidated Bank of Kenya Ltd [2014] eKLR where the court considered the effect of fall of the hammer in an auction as follows:
- “What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished.”
47. It was therefore submitted that the extinguishment of the equity of redemption by the fall of the hammer effectively safeguards the purchaser of the property in accordance with section 99 of the [Land Act](#), regardless of whether or not other conveyancing formalities have been completed. Consequently, that if this Court were to grant the orders sought, it would be impossible to enforce them since the legal right to the suit property now resides with a third party, Geoffrey Ajiki.
48. The Respondent’s counsel therefore submitted that based on the material presented before this court, the Applicant has not demonstrated a prima facie case with a high chance of success and that therefore the Application fails on this ground.
49. On whether the Applicant has established the second element and demonstrated irreparable injury that cannot be compensated by an award of damages, it was submitted that the Applicant has not demonstrated that if the orders he seeks are not granted, he would be prejudiced in a manner not compensable by an award of damages. Further, that if the Applicant has suffered any loss for unlawful sale of the suit property, the loss is quantifiable and the Respondent would be in a position to make good any order for damages as may be directed by this Court. Reliance was placed on the case of Marple



Brooks Projects Company Limited & another v I & M Bank Limited [2019] eKLR where the Court held as follows about irreparable damage:

“The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages.

The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage.”

50. It was therefore submitted that the Applicant will not suffer irreparable harm which cannot be compensated by damages.
51. On the question of, in whose favour the balance of convenience will tilt, it was submitted that the balance of convenience tilts in favour of not granting an injunction because the suit property has already been sold and that if the court was to issue the said injunctive order, it would have to interfere with the contract of sale already entered into by the Respondent with a third party (Mr. Ajiki) without the purchaser’s participation in these proceedings.
52. It was submitted that an order for interim injunction at this stage is not available and that granting it would be an academic exercise as the order would be unenforceable.
53. Additionally, it was submitted that the Applicant having admitted to breaching the terms of its loan facility with the Respondent after which he came before this court seeking an injunction based on his own default, is a classic case of approaching this Court with unclean hands.
54. In light of the foregoing arguments, it was submitted that granting the injunction sought would cause far greater inconvenience to the Respondent than any inconvenience suffered by the Applicant, if any. For example, that how would the Court or the Respondent halt a sale that has already taken place? Further, that all indications point against granting the aforementioned injunction. The case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] e KLR was cited where the court held as follows with regard to the concept of balance of convenience:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants.”

55. It was therefore submitted that unlike the Respondent who has demonstrated that the balance of convenience tilts against not granting the interim orders, the Applicant has not demonstrated that the inconvenience caused to him if the injunction is not granted will outweigh that which may be caused to the Respondent. The defendant prayed that the court finds in favour of the Respondent.
56. On whether the Respondent duly invoked its statutory power of sale, it was submitted that, contrary to the assertion that the payment regularized the loan account, a breach of the facility’s terms and conditions renders the entire facility, including the principal sum, costs, and interest, immediately due and payable to the financier, irrespective of the original repayment period. Therefore, that the payment of a sum of Kshs. 7,600,000.00 did not regularize the plaintiff/ applicant’s breach of the terms of the loan facility.



57. In relation to the allegation that the Respondent ought to have begun the process afresh, it was submitted that once the process had begun, there is no legal requirement that the same ought to begin afresh. In this regard, the case of *Joyce Wairimu Karanja v James Mburu Ngunjiri & 3 others* [2018] eKLR was cited where the court held that:

“In my view, there is little reason to belabor the point. Once a statutory power of sale is activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise of the statutory power of sale is immunized from suit under section 99 of the *Land Act*.

Thirdly, a mortgagor’s equity of redemption is extinguished upon the fall of the hammer in a public auction. Fourthly, there is no requirement in law or equity that a mortgagor re-issues the statutory notice if a planned auction is temporarily stopped by the Court and then permitted to proceed through the lifting of the temporary orders.” (Emphasis Ours)

58. It was submitted further that this Court recognizes that once a borrower breaches the terms of a loan facility and the lender initiates the exercise of its statutory power of sale, subsequent efforts to regularize the loan account do not preclude the lender from resuming its right to exercise a statutory sale from the point where it was temporarily halted. That if this were not the case, banks would be discouraged from allowing defaulters to regularize their accounts after falling into breach, as not only would there be a potential for unrecovered losses, but also banks would also incur additional costs in engaging advocates, auctioneers and valuers in connection with the requirement to exercise the right to exercise the statutory power of sale afresh.

Determination

59. I have considered the application for injunction as presented by the plaintiff/applicant, the response thereto and the issues framed as argued in the written submissions filed by the respective parties’ Counsel supported by cited cases. In my view, the issue for determination is whether the applicant herein has met the conditions for grant of the injunctions sought. In this main issue lies elements as discussed by both parties’ Counsel in their submissions as captured above.

60. Injunctions are governed by Order 40 Rule 1 of the Civil Procedure Rules, 2010 which provides that:

“40(1) Where in any suit it is proved by affidavit or otherwise-

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree; or
- b.
- c. the court may by order grant a temporary injunction to restrain such act, or make such order for the purpose of staying and preventing the wasting, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

61. In *Giella vs Cassman Brown & Co Ltd* (supra) it was stated that the applicant must meet the following three conditions to warrant grant of an injunction:

“First, 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.

62. As to what a prima facie case is, in *Mrao Limited v First American Bank of Kenya Ltd and others* (supra), the Court of Appeal stated as follows:

“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.

But as I earlier endeavored to show, and I cite ample authority for it, a prima- facie is more than an arguable case. It is not sufficient to raise issues. 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.”

63. On whether the applicant has demonstrated that he has a prima facie case with the probability of success, this Court observes that the plaintiff readily admits that he defaulted in the loan repayment upon which an arrangement was reached for him to pay Kshs 7,600,000 and that upon his payment of the said money which then made him be up to date with the loan repayment, the defendant put in motion the process of selling the property in issue.

64. However, the email communication between the plaintiff and the defendant as annexed to the plaintiff’s own affidavit are clear that even after he had paid arrears, he went into default and he was given notice to make up the payments or the property be sold.

65. In addition, although the plaintiff tersely claims that no statutory notices were issued and that therefore the sale was illegal, it is clear from the annexed notices by the defendant, which notices have not been contested, that the defendant complied with all the legal procedures in exercising its statutory right and statutory power of sale. All the Notices as required under the cited *Land Act* and the Auctioneers Rules were issued and the land was valued within twelve months of the sale.

66. It is also not in dispute that the property in issue was sold prior to the suit herein being filed. From the annexures filed by the applicant himself, although the applicant claims that notice of sale was not issued to him, he annexed a letter by Garam Investments Auctioneers dated 15/8/2023 giving him 14 days to settle the outstanding loan as the auctioneers had instructions to sell the property on 8/9/2023. The applicant has not disputed that notice and he watched as the auctioneers proceeded to sell the said property before he filed this suit and the application seeking to stop any transfer of the sold property.

67. As correctly submitted by the defendant’s counsel, the chargor’s right to exercise his equity of redemption is only available to the chargor prior to the fall of the auctioneer’s hammer. Further, it is trite law that the property passes to the purchaser even though certain formalities, including a formal transfer, may still be pending. This is what the court stated in a *David Limo Bundotich v Housing Finance Company of Kenya Limited* [2022] eKLR and I concur that:

“The Equity of Redemption comes to an end when a valid contract of sale is executed or at the fall of the auctioneer’s hammer. The property passes to the purchaser even though some other conveyancing formalities are yet to be completed.”



68. And in *Simon Njoroge Mburu vs Consolidated Bank of Kenya Ltd* [2014] eKLR, the court considered the effect of fall of the hammer in an auction and stated inter alia that:
- “What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished.”
69. Thus, the equity of redemption is extinguished by the fall of the hammer and this action effectively safeguards the purchaser of the property in accordance with section 99 of the [Land Act](#), regardless of whether or not other conveyancing formalities have been completed.
70. It therefore follows that if this Court were to grant the orders sought, it would be impossible to enforce them since the legal right to the suit property now resides with a third party, Geoffrey Ajiki, who was not even joined to this suit as a party. Neither was the auctioneer who allegedly sold the property contrary to the law and especially in compliance with the 1997 Auctioneers Rules.
71. Further, the statements of the loan account annexed to the affidavit sworn by the plaintiff/applicant show that the 7.6 million paid by the applicant in March 2023 was the last amount that he paid to cover some arrears of the outstanding loan. Thereafter, he never paid any money to the bank and despite him engaging the bank in various email correspondences, the bank declined his proposals while asking him to clear the outstanding loan which amount outstanding was not in dispute.
72. In addition, in the applicant’s own email correspondences with the bank in July 2023, he acknowledged that he had defaulted and was in arrears and was asking for six weeks to pay off which request the bank declined. Emails of 6/7/2023 and 27/7/2023 are clear on this aspect.
73. Based on the above situation, I find that the plaintiff came to court too late in the day after the sale of the security and therefore his remedy would lie in him asking for accounts and claiming for damages for what he believes was an illegal sale and accounts to be rendered by the Bank from the proceeds of sale, and not in restraining the bank from transferring the sold property to the third party who is not a party to this suit.
74. This is so because once a sale is conducted at a public auction and at the fall of the hammer, this court cannot restrain the defendant herein from transferring the sold property to the successful buyer.
75. Furthermore, the applicant did not enjoin the buyer to these proceedings and therefore this court cannot nullify or stay transfer of the sold property without according the buyer the opportunity to be heard. The auctioneer who acted on instructions of the Bank would also have to be enjoined to be heard on the allegations that he conducted an illegal sale of the property in issue.
76. For the above reasons, I am not persuaded that the applicant has a prima facie case with a probability of success.
77. Secondly, and as stated above, I am not satisfied that the plaintiff has demonstrated that he shall suffer irreparable loss which cannot be compensated by an award of damages. I find that the damage if any, can adequately be compensated by an award of quantifiable damages should it be proved that the sale was irregular and in breach of the stipulated legal procedures set out under the [Land Act](#) and the Auctioneers Rules, 1997.
78. Finally, I find that the plaintiff has not demonstrated that the balance of convenience tilts in his favour for the injunction sought to be granted, the property having been sold to a successful highest bidder prior to this suit being instituted.



79. For the above reasons, I find this application dated 2nd October, 2023 not merited. It is hereby dismissed.

80. Costs shall be in the main suit.

THE RULING WAS DELIVERED ON 1/2/2024 IN THE PRESENCE OF BOTH PARTIES' COUNSEL. HOWEVER, THE DETAILED REASONS WERE NOT PROVIDED FOR THE REASONS CONTAINED IN THE PROCEEDINGS OF 1/2/2024.

THIS DETAILED RULING IS DATED AND SIGNED WITH FULL REASONS AT KISUMU THIS 7TH DAY OF FEBRUARY, 2024

R.E. ABURILI

JUDGE

