



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kala t/a Moyale Raha Express v Premier Bank Ltd (Civil Case  
E004 of 2024) [2024] KEHC 7621 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7621 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE E004 OF 2024  
EM MURIITHI, J  
JUNE 20, 2024**

**BETWEEN**

**ABASS ADAN KALA T/A MOYALE RAHA EXPRESS ..... PLAINTIFF**

**AND**

**PREMIER BANK LTD ..... DEFENDANT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 6/3/2024, pursuant to Order 40 Rules 1, 2, 3 and 4, Order 51 of the Civil Procedure Rules, Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law, the Plaintiff seeks that:
  1. Spent
  2. Spent
  3. There be an urgent temporary injunction order restraining Defendant by itself, agents, servants, employees, proxies and/or any person claiming under them from selling, auction, alienating, transferring, trading and/or interfering in any manner with the plaintiff's Land Parcel No. LR Ruiru/Kiu Block 3/764 situated within Ruiru Subcounty Kiambu County pending the hearing and determination of the plaintiff's suit.
  4. The costs of this application be provided for.
  5. Such other and/or further orders be made as this Honorable Court may deem fit and just.
2. The application is based on grounds on the face of it and supported by an affidavit sworn by the Plaintiff Abass Adan Kala. His business trading as Moyale Raha Express secured various business loans with the Defendant with his residential home known as L.R No. Ruiru/Kiu Block/3/764, which he has been servicing as per the loan agreement until 2023 when the transport business fell after the Defendant took possession of his buses which are parked in a yard as they seek prospective buyers.



Without income from the transport business, his loan facility went into arrears and efforts to get buyers for the impounded buses have been largely frustrated by the Defendant's staff. On request and agreement with the Defendant, he conducted a valuation of the buses and agreed they were to sell them according to the valuation reports. The Defendant has now threatened to sell the suit property by auction even before they dispose of the buses and take accounts of what has been realized from the sale. The Defendant has instructed an auctioneer who has not served him with a proper legal notification for sale or a redemption notice, but he casually notified him by text message. His efforts to negotiate with the Defendant to wait until the buses are sold and see if they will fetch the entire amount demanded and also restructure the said loan for the balance are in vain hence the application and the suit. The Defendant has loaded the loan account with huge illegal and hidden penalties which have made the repayment of the loan difficult. He is informed by his counsel on record that the Defendant ought to dispose of what they have attached before commencing attachment and/or sale or redemption of the suit property. His ability to repay is not in question but the amount that is to be paid and how the Defendant came up with that amount. He is informed by his counsel that he has satisfied the threshold for injunctive relief, because if the property is sold, he will suffer irreparable loss of the house where his family lives.

3. The Defendant opposed the application vide a replying affidavit sworn by Amran Abdikadir, its advocate on 11/4/2024. He accuses the Plaintiff of coming to court with unclean hands as he defaulted on his facility repayment obligations. The Defendant issued and served the Plaintiff with a 90 day Statutory Notice dated 17/8/2023 under Section 56 (2) of the Land Registration Act as read with Sections 90 and 96 of the Land Act for the entire defaulted sum of Ksh. 33,328,451.99 exclusive of default damages, recovery fees and charges. The Statutory Notice contained the Chargee's intention to sell the charged property title No. Ruiru/Kiu Block 3/764. The Defendant thereafter issued a 40 day Statutory Notice dated 21/11/2023 for the defaulted sum of Ksh. 32, 895,711.9. The Plaintiff did not rectify the default which prompted the Defendant to instruct Regent Auctioneers vide a letter dated 22/1/2024 to sell the charged property by public auction to recover the outstanding sum of Ksh. 15,435,235.32. The Auctioneers issued and served the 45 days Redemption Notice dated 23/1/2024 to the Plaintiff. The Plaintiff's earlier attempts to sell the motor vehicles through private treaty also collapsed prompting the Defendant to repossess them on 8/9/2023. The Defendant conducted an auction but received no bid above the forced sale value because the vehicles were in a bad state at the time of repossession. Other buyers fronted by the Plaintiff failed to complete their transactions frustrating any sale by private treaty. Consequently, the Plaintiff stands in continual default to the Defendant for a cumulative sum of Ksh. 42,465,269.52, and the Defendant is therefore entitled to take possession and realize its security against the secured property on the basis of clause 8 of the signed letter of offer. The Defendant fully complied with the applicable law in realizing its security with respect to the charged property by issuing and serving the requisite statutory notices. It is trite law that parties are bound by their contract and it is not the province of the court to rewrite the contract. The Defendant's statutory power of sale has legally crystallized over the charged property, and the loan recovery procedures are lawful on all accounts. There is no risk of irreparable loss where the Plaintiff knowingly defaulted on his financing facility obligations, which default continues to date. The application is a mere ploy to subvert and defeat due performance of the Plaintiff's financing facility obligations which is meant to frustrate lawful recovery action for sums truly and justly owed to the Defendant, which ought to be dismissed with costs.

### Submissions

4. The Plaintiff urges that he has been honest from the onset when he borrowed the loan facility from the Defendant and has come to court with clean hands. He urges that the repossession of his motor vehicles was irregular as the Defendant had not earlier notified him of the same. He urges that he



and the Defendant have been negotiating terms on how the loan was to be restructured and how he would be issued with a moratorium as he reorganized his business, and the repossession came as a shock to him. He humbly requests the court to allow the application and consider referring the matter to arbitration. He relies on *Caliph Properties Limited v Barbel Sharma & Anor* (2015) eKLR, *Giella v Cassman Brown & Company Limited* (1973) E.A 385, *Mrao Limited v First American Bank of Kenya and 2 Others* (2003) KLR 125 and *Lice Awino Okello v Trust Bank Ltd & Anor* LLR No. 625 (CCK).

5. The Defendant urges that the application fails the legal threshold for grant of injunction as defined in *Giella v Cassman Brown & Co. Ltd* [1973] 1 EA 358. It urges that the Plaintiff expressly admits borrowing a loan facility from the Defendant and offering his property L.R No. Ruiru/Kiu Block/3/764 as security. It urges that the Plaintiff expressly admits breaching his obligations and default in repaying the facility. It urges that its statutory power of sale crystallized, and was exercised in compliance with section 56(2) of the *Land Registration Act* as read with sections 90 and 96 of the *Land Act*. It urges the court to find that no prima facie has been demonstrated, as the Plaintiff admitted default, breached the facility agreement, issued and served statutory notices, and cites *Stek Cosmetics Limited v Family Bank Limited & Another* (2020) eKLR, *Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited* (2019) eKLR and *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* (2001) eKLR. It urges that once the charged property was offered as security for the loan, it became a commodity for sale in the event the Plaintiff defaulted, and its right to exercise its statutory power of sale has accrued and crystallized in light of the Plaintiff's unremedied default and failure to pay the loan facility.

### **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 undisputed facts of this case are that the Plaintiff was advanced a facility of Ksh. 14,000,000 by the Defendant and duly executed a letter of offer on 12/7/2021. At paragraph 4 of the said letter of offer on security, it is provided as follows: "It is a term of this Facility that prior to drawdown, the Customer procures that the Bank receives the under-mentioned documents (hereinafter the 'Security Documents' and 'Security Document' shall be construed accordingly) as a continuing security for all moneys obligations and liabilities certain or contingent now or hereafter due, owing or incurred by the Customer to the Bank namely:
  - 4.1 First ranking legal of Kes. 12,600,000 over Property Title Number Ruiru/Kiu Block 3/764 to be stamped and registered in favour of the Bank;
  - 4.2 Deed of Assignment of Rental Income Property Title Number Ruiru/ Kiu Block 3/764 Upon Completion of Construction;
  - 4.3 Joint Registration of the Motor Vehicles Registration Number KCS 038K, KCR 880U and KCR 211V in the name of the customer and the Bank;
  - 4.4 Chattels Mortgage over the Motor Vehicle Registration Number KCS 038K, KCR 880U and KCR 211V."



8. The Plaintiff was advanced a further facility of Ksh. 20,000,000 by the Defendant and duly executed a letter of offer on 22/4/2022. At paragraph 4 of the said letter of offer on security, it is provided as follows: “It is a term of this Facility that prior to drawdown, the Customer procures that the Bank receives the under-mentioned documents (hereinafter the ‘Security Documents’ and ‘Security Document’ shall be construed accordingly) as a continuing security for all moneys obligations and liabilities certain or contingent now or hereafter due, owing or incurred by the Customer to the Bank namely:
  - 4.1 Joint registration of motor vehicle numbers KDH 128A and KDH 127A in the names of the customer and the Bank;
  - 4.2 First ranking legal of Kes. 12,600,000 over Property Title Number Ruiru/Kiu Block 3/764 in the name of Abass Adan Kala, stamped and registered in favour of the Bank (Held);
  - 4.3 Chattels mortgage over motor vehicle registration numbers KDH 128A and KDH 127A.”
9. The Plaintiff was advanced another facility of Ksh. 2,000,000 by the Defendant and duly executed a letter of offer on 7/6/2022. At paragraph 4 of the said letter of offer on security, it is provided as follows: “It is a term of this Facility that prior to drawdown the Customer procures that the Bank receives the under-mentioned documents (hereinafter the ‘Security Documents’ and ‘Security Document’ shall be construed accordingly) as a continuing security for all moneys obligations and liabilities certain or contingent now or hereafter due, owing or incurred by the Customer to the Bank namely:
  - 4.1 Joint registration of motor vehicle registration number KCF 653Z in the names of the customer and the Bank;
  - 4.2 Chattels mortgage over motor vehicle registration number KCF 653Z.”
10. It is provided in the letters of offer that, upon the occurrence of an event of default as outlined in Clause 8, “a) The Bank’s commitment to advance the Facility or part thereof shall cease and all Security Documents and any and all other securities held by the Bank in respect of the Facility shall become immediately enforceable. The customer hereby agrees that in case of such occurrences, the Bank shall take possession of the security mentioned above in Security Clause 4. b) The customer undertakes to purchase the total outstanding Musharaka Unit as at the default date.”
11. The Court notes the copy of Certificate of Lease for the LR. No. Ruiru/Kiu Block 3/764 wherein the charge to the Defendant for Ksh. 12,600,000 was duly entered in the land register on 25/8/2021.
12. The Plaintiff has admitted his indebtedness to the Defendant since May 2023.

### **Statutory Notices**

13. When the Plaintiff utterly refused to rectify the default, the Defendant sent to him a demand letter dated 22/5/2023 via his email address. That letter elicited the response dated 6/7/2023 where the Plaintiff sought indulgence from the Defendant. The Defendant then issued the 90 days Statutory Notice dated 17/8/2023 and the 40 days Statutory Notice dated 21/11/2023 and the Auctioneer’s 45 days Redemption Notice dated 23/1/2024 which were all served via registered post, email and Whatsapp.
14. The Plaintiff’s lament that he was not served with the proper legal notification for sale or a redemption notice is far from the truth.
15. This court finds that the Defendant duly issued the requisite statutory notices to the Plaintiff, and is justified in realizing the security.



16. Therefore, the court does not find merit in the Plaintiff's complaint of lack of service of the statutory notices herein.

### **Adequacy of damages**

17. The Plaintiff was advanced other facilities which were secured by motor vehicle registration Nos. KCS 038 K, KCR 880 U, KCR 211 V, KDH 127 A, KDH 128 A and KCF 653 Z. The Plaintiff was advanced Ksh. 14,000,000 by the Defendant which was secured by a charge over L.R No. Ruiru/Kiu Block 3/764. How can such a parcel of land deliberately offered to secure that facility 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 loan? 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.
18. As urged by the Defendant herein, once the charged property was offered as security for the loan, it became a commodity for sale in the event the Plaintiff defaulted, and its right to exercise its statutory power of sale has accrued and crystallized in light of the Plaintiff's unremedied default and failure to pay the loan facility.
19. The Plaintiff treated the parcel of land as a security for the loan that he obtained from the Defendant, and he must be taken to have contemplated its sale in the event of default.
20. 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.”
21. 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.”
22. However, in the circumstances where there is a prima facie case on the issue whether circumstances have arisen to support the exercise of a power of sale, a chargor must be protected from the loss of property subject of the charge. Indeed, inherent in the mortgage arrangement is the term that so long as the chargor continues to pay the amounts due under the mortgage or charge, the chargee cannot seek to sell the property to recover monies. This is the effect of the provisions of section 80 of the *Land Act* that charge of land is a security only and section 89 of the Act underpinning the equity of redemption. There must be a default, lawful demand and notice before the power to sell crystallizes.
23. In this context, this court finds that the sale of the suit property is a loss which is contemplated under the charges and consequently, an award of damages is adequate remedy.



## **Balance of convenience**

24. This court is respectfully guided by the holding of the Court of Appeal in Charter House Investments Ltd v Simon K. Sang and Others [2010] eKLR that:

“The superior court correctly applied the case of Giella vs Cassman Brown [1973] E. A. 358 when it declined to grant the injunction sought. Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

25. The court considers that a Chargee whose right has crystalized is entitled to seek to realise the security.

26. The court finds that the balance of convenience tilts towards the exercise of the power of sale to realise the security and allow the lender to recover its money rather than the escalation of the loan dues to a point that the Chargee is unable to recover its money by sale of the asset.

## **Orders**

27. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The Plaintiff's application for injunction herein dated 6/3/2024 is dismissed.
2. The Plaintiff will pay costs of the application to the Defendant.

Order accordingly.

**DATED AND DELIVERED ON THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Mariga for K. Njiiri for Plaintiff.

Mr. Evan Ochieng for Defendant.

