



**Executive Super Rides Limited & another v NCBA Bank of Kenya  
PLC; Regent Auctioneers (Interested Party) (Civil Suit E434 of 2024)  
[2024] KEHC 12490 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12490 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E434 OF 2024  
PM MULWA, J  
OCTOBER 17, 2024**

**BETWEEN**

**EXECUTIVE SUPER RIDES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ERICK KIMATHI KIRIMA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NCBA BANK OF KENYA PLC ..... DEFENDANT**

**AND**

**REGENT AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. Before the court is the application dated 9<sup>th</sup> August 2024 brought by the Plaintiffs under Order 41 Rule 1, Order 51 Rule 1 of the [Civil Procedure Rules](#), Rules 17 of the [Auctioneers Rules](#) and Sections 1A,1B, and 3A of the [Civil Procedure Act](#) and all other provisions of the law.
2. The application seeks the following orders:
  - i. Spent
  - ii. Spent
  - iii. That pending the hearing and determination of this application, a temporary injunction be issued restraining the Defendant and the Interested Party through themselves, their agents, servants, or any person acting on their instructions from initiating the process of transferring, selling, completing a sale, leasing, mortgaging, charging, alienating, taking



possession or otherwise dealing with the 1<sup>st</sup> Plaintiff's title number LR No 1/432/11 (Original No 1/432/11) pursuant to a purported auction held on 7<sup>th</sup> August, 2024.

- iv. That the Interested Party be compelled to produce the proceedings of the purported Auction conducted on 7<sup>th</sup> August, 2024.
  - v. That costs of the application be provided for.
3. The application is supported by the grounds on the face of it, the supporting affidavit sworn by Erick Kimathi Kirima and Peter Kamau Wang'ang'a on 9<sup>th</sup> August 2024, Further affidavit of Erick Kimathi sworn on 23<sup>rd</sup> August 2024, and the affidavit of Dennis Anyoka Moturi sworn on even date.
  4. The dispute before the court originates from a loan facility of Kshs 173,205,000/= that was extended to Executive Super Rides Limited by NCBA Bank of Kenya PLC. The 1<sup>st</sup> and 2<sup>nd</sup> applicants guaranteed the facility through a charge on the property 1/432/11 (Original No 1/432/11).
  5. The applicants dispute defaulting on the loan and allege they dutifully remitted the monthly instalment with interest but were surprised when the interested party was appointed to auction the property. That no bidding took place on 7 August 2024, and the purported auction is a scheme to forcefully take over the plaintiff's property. Any purported sale to a third party is illegal, unlawful, and irregular, and any disposal of the Plaintiff's property is fraudulent.
  6. Counsel submitted that the purported auction failed to adhere to the Auctioneer's Rules and Regulations. No notification of the sale was issued to the Plaintiffs.
  7. The Defendant opposed the application by the replying affidavit dated 15<sup>th</sup> August 2024 sworn by Christine Wahome its Senior Legal Counsel, and filed the grounds of opposition dated 14<sup>th</sup> August 2024.
  8. The Defendant aver that save for the allegation that the auction did not take place as planned no evidence has been adduced to support thereof. To prove the auction took place she adduced in evidence, a copy of the auction report dated 7<sup>th</sup> August 2024. She alleges the property was sold to the highest bidder at the price of Kshs 198,100,000.00 which amount exceeded the forced sale value. That the 1<sup>st</sup> Plaintiff's equity of redemption extinguished at the fall of the hammer.
  9. The Defendant and the Interested Party submitted that the Plaintiffs have not established a *prima facie* case with probability of success. Counsel argues that it is trite law that a valuation report be not more than twelve (12) months from the date of auction. She states the valuation report dated 22<sup>nd</sup> September 2023 was valid and remained valid until 21<sup>st</sup> September 2024.

### **Analysis**

10. I have carefully considered the pleadings and the rival submissions filed before the court in support of the parties' respective positions. The main issue for determination is whether the applicants have made a case for a grant of the injunctive orders sought.
11. To succeed in a claim for injunctive relief the applicant must satisfy the conditions set out in the *Giella v Cassman Brown & Co. Ltd* (1973) E. A. 385. Firstly, they must show a *prima facie* case with a probability of success. Secondly, they must establish that they will 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.



12. The applicant is required to establish a *prima facie* case. The Court of Appeal in [Mrao Ltd v First American Bank of Kenya Limited & 2 others](#) (2003) eKLR elaborates what constitutes a *prima facie* case as follows:
- “A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”
13. While adopting the same position the Court of Appeal in [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR added that:
- “The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”
14. One of the grounds relied on by the applicant in seeking injunction is the alleged illegal, unlawful and irregular auction held on 7<sup>th</sup> August 2024. The applicant submits there is no proof that money was paid to the Defendant at the fall of the hammer as the first instalment reflected in the 1<sup>st</sup> applicant’s account on 15<sup>th</sup> August 2024. According to the applicants, the holdover account was used to cover up the Respondents’ actions in disposing of the Plaintiff’s property.
15. Under Section 97 of the [Land Act](#), the bank as a chargee has a duty of care to the chargor to obtain the best price reasonable at the time of the sale. In the instant case, the bank in the exercise of its statutory power of sale sold the suit property through public auction on 7<sup>th</sup> August 2024 to the highest bidder. The record shows there were two bidders with the highest bidder at Kshs 198,100,000.00 while the second bid was at Kshs 198,000,000.00.
16. At the fall of the harmer the suit property passed to the purchaser at that instant, and at that point that the Plaintiff’s equity of redemption was extinguished. In [Kamulu Academy Limited & Anor v British American Insurance \(k\) Ltd & 2 Others](#) (2018) eKLR wherein the court held that:
- “The sale by public auction extinguishes equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not...”
17. In my view, the Plaintiff’s equity of redemption has been extinguished. In the event the Plaintiffs successfully prove any irregularities in the auction, they are in law entitled to damages against the auctioneer under Section 26 of the [Auctioneers Act](#) (see the Court of Appeal decision in [Jacob Ochieng’ Muganda v Housing Finance Company of Kenya Limited](#) [2002] eKLR).
18. From the record, the applicants applied for a loan facility, failed to meet their part of the bargain and defaulted in repayment of the loan facility. They have come to court with unclean hands against the equity maxim of ‘he who comes to equity must come with clean hands. The sale by public auction has already taken place and as I have stated hereinabove the applicant’s equity of redemption was extinguished at the fall of the hammer. Therefore, there is need to protect the innocent purchaser. I must point out that once a property is offered as security for a loan, it becomes a commodity for sale



and damages are enforceable. The court cannot be used as a vessel to stop the bank from exercising its statutory right of sale.

19. What the applicant is seeking is to stop the transfer of the property sold at the public auction to an innocent purchaser. In balancing the rights acquired by the purchaser and the rights of the Plaintiffs, the court cannot issue an injunction to stop the completion of the sale and transfer process. The applicant having defaulted in repayment of the loan, cannot seek a stay of the transfer of the suit property to the purchaser.
20. In Joyce Wairimu Karanja v James Mburu Ngure & 3 others (2018) eKLR the court held that:

“Both statutory and decisional law have clearly stated that the remedy for a mortgagee who has suffered damages as a result of improper auction, is not to reverse the auction against an innocent purchaser – but in damages.”
21. In the circumstances, it is my finding that the Plaintiffs have not established a *prima facie* case to persuade this Court to exercise its discretion to grant orders of injunction stopping the transfer of the suit property. I find no reason to consider the two other conditions for granting an injunction.
22. From the foregoing I find no merit in the Notice of Motion dated August 9, 2024. The same is dismissed with costs to the Defendant and the Interested Party.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Mr. Anyoka for plaintiff

Mr. Kongere for defendant

Court Assistant: Carlos

