



**New Attitude Limited v Equity Bank Limited & another (Commercial Case E187 of 2023)  
[2024] KEHC 13194 (KLR) (Commercial and Tax) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E187 OF 2023  
MN MWANGI, J  
OCTOBER 14, 2024**

**BETWEEN**

**NEW ATTITUDE LIMITED ..... PLAINTIFF**

**AND**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PHILLIPS INTERNATIONAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff filed a Notice of Motion application dated 3<sup>rd</sup> May 2023 pursuant to the provisions of Sections 1A, 1B, 3A & 63(c) of the *Civil Procedure Act*, Order 40 of the Civil Procedure Rules, 2010, Sections 85 & 97 of the *Land Act*, 2012, Rule 11 of the Auctioneers Rules 1997, and all other enabling provisions of the law, seeking inter alia for an order of temporary injunction restraining the 1<sup>st</sup> & 2<sup>nd</sup> defendants from transferring, selling, or otherwise dealing with the property known as L.R. No. 209/7733 on Muchai Drive, Nairobi County, registered in the name of Lynx at Muchai Drive Ltd, and from interfering with any other assets, chargors, or guarantors related to the loan agreement dated 9<sup>th</sup> November 2016 and the letter of offer dated 24<sup>th</sup> August 2016, an order directing the 1<sup>st</sup> defendant to render a complete, true and accurate statement of accounts of the plaintiff's purported loan account showing the exact indebtedness of the plaintiff if any, to date, and an order under the doctrine of lis pendens and Section 106 of the *Land Registration Act*, prohibiting any further registration or changes in ownership, leasing, allotment, or any rights related to the property known as L.R. No. 209/7733 on Muchai Drive, Nairobi County, registered in the name of Lynx at Muchai Drive Ltd, with any Land Registries, Government Departments, and other registering authorities pending the determination of this suit.



2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Mr. Peter Kiarie Muraya, a Co-Director of the plaintiff company. He averred that the 1<sup>st</sup> defendant advanced a loan of Kshs.400,000,000/= under a loan agreement dated 9<sup>th</sup> November 2016 and a letter of offer dated 24<sup>th</sup> August 2016 to the plaintiff. That the said loan was secured by several instruments; a first legal charge over L.R. No. 209/7733 in Nairobi County for Kshs.260,000,000/=, a first legal charge over L.R. No. 28223/33/C1-C5 for Kshs.140,000,000/=, an All Asset Fixed and Floating Debenture by New Attitude Limited for Kshs.400,000,000/=, and an Inter-Company Corporate Guarantee by Suraya Property Group Limited for Kshs. 400,000,000/= . He deposed that the loan facility was further secured by personal guarantees from Mr. Peter Kiarie Muraya and Ms Joyce Sue Wacheke, as well as corporate guarantees from Lynx at Muchai Drive Ltd, Suraya Sales Ltd, and Muga Developers Ltd, all dated 9<sup>th</sup> November 2016, each for Kshs. 400,000,000/=.
3. Mr. Muraya claims that the plaintiff has fully repaid the loan and even overpaid by Kshs.253,533,555.60. Additionally, that the plaintiff sold part of its charged land, L.R. No. 28223/33/C1 & C2, for Kshs.277,000,000/=, with the understanding that the proceeds would be credited towards the loan as partial repayment, but the 1<sup>st</sup> defendant misapplied the proceeds from the sale of L.R. No. 28223/33/C2. He stated that out of a Kshs.18,000,000/= deposit, Kshs.2,760,000/= was paid as agency commission to an undisclosed party, and Kshs.15,240,000/= was transferred to Muga Developers Limited's loan account without the plaintiff's consent. He averred that Kshs.8,120,000/= was transferred from the plaintiff's current account to Kimani & Michuki Advocates on behalf of Muga Developers Limited, also without the plaintiff's consent. Mr. Muraya averred that the balance of Kshs.74,000,000/= was remitted to the plaintiff's account, but Kshs.66,665,000/= was then transferred to Muga Developers Limited's loan account without the plaintiff's consent.
4. Mr. Muraya contended that the 1<sup>st</sup> defendant fraudulently transferred Kshs.185,000,000/= from the sale of L.R. No. 28223/33/C1 to Muga Developers Limited's loan account on 4<sup>th</sup> May 2018, and as a result, the plaintiff's right of redemption was fettered. He averred that the 1<sup>st</sup> defendant issued the plaintiff with a statutory Notice of sale dated 30<sup>th</sup> May 2019 demanding immediate payment of Kshs.507,946,444.40 being the alleged outstanding amount as at 24<sup>th</sup> May 2019. In response, the plaintiff via a letter dated 30<sup>th</sup> July 2019 highlighted the aforesaid discrepancies to the 1<sup>st</sup> defendant and demanded that Kshs.277,000,000/= transferred to Muga Developers Limited's account be reversed and credited to the plaintiff's account in partial settlement of the loan facility. He further averred that despite sending multiple demand letters and holding meetings with the 1<sup>st</sup> defendant's CEO, the plaintiff received no response.
5. He stated that the plaintiff had initially agreed to sell the remaining parcels of land (L.R. Nos. 28223/33/C3, C4, & C5) for Kshs.484,000,000/= but it later discovered that the 1<sup>st</sup> defendant had already fraudulently sold the aforesaid land and credited only Kshs.448,240.00 to the plaintiff's account, leaving Kshs.35,760,000/= unaccounted for. Mr. Muraya asserted that the plaintiff noticed that on 27<sup>th</sup> December 2019, the 1<sup>st</sup> defendant debited Kshs.448,237,248/= from its account as a loan payment, however, a review of the loan statement showed that as at 10<sup>th</sup> May 2020, the plaintiff owed Kshs.124,789,765/= to the 1<sup>st</sup> defendant, but the 1<sup>st</sup> defendant did not account for the Kshs.277,000,000/= that the plaintiff claims should have been reversed and credited to its loan account.
6. Mr. Muraya averred that despite fully repaying its debt to the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant unlawfully advertised the sale of L.R. No. 209/7733 Muchai Drive, Nairobi County, in the Daily Nation of 17<sup>th</sup> April 2023, which sale by public auction was scheduled for 5<sup>th</sup> May 2023 to recover an alleged outstanding loan of Kshs.507,946,444.40. He argued that if the Court does not grant the



orders sought, the plaintiff will suffer immeasurable loss and face multiple lawsuits from purchasers of housing projects on the suit property.

7. In opposition to the instant application, the 1<sup>st</sup> defendant filed grounds of opposition dated 10<sup>th</sup> May 2023, raising the following grounds –
- i. The plaintiff is not entitled to any equitable remedies because the plaintiff has failed to disclose material facts. See *Uhuru Highway Development Limited v Central Bank of Kenya Nai 140 of 1995* (unreported). The plaintiff did not disclose that -
    - a. By a facility letter dated 19<sup>th</sup> February 2019 signed by Muga Developers Limited (Muga) and the plaintiff on one hand and the 1<sup>st</sup> defendant, it was agreed that the debts owed by Muga and the plaintiff to the 1<sup>st</sup> defendant would be consolidated;
    - b. Clause 1.2 of the facility letter dated 19<sup>th</sup> February 2019 states “Borrower” means each one of, and/or jointly, Muga Developers Limited and New Attitude Limited;
    - c. Clause 3.7 of the facility letter dated 19<sup>th</sup> February 2019 provided that the consolidated facility advanced to Muga and the plaintiff would be secured by inter alia the charge over L. R. No. 209/7733 (the Charged Property) created by Lynx at Muchai Drive Limited;
    - d. Muga Developers Limited has instituted High Court Commercial Case E082 of 2020 *Muga Developers Limited v Equity Bank Kenya Limited and 4 others* where the subject matter of the dispute is inter alia the outstanding amount owed by Muga and the plaintiff under the facility letter dated 19<sup>th</sup> February 2019. This matter is still pending before this court; and
    - e. The plaintiff made a complaint to the Central Bank of Kenya on 5<sup>th</sup> May 2021 raising the same complaints made in this suit. The plaintiff is pursuing remedies in separate fora on the same subject matter which is an abuse of process.
  - ii. The plaintiff is not the registered owner of the Charged Property. Lynx At Muchai Drive Limited which owns the Charged Property has not moved the Court to challenge the 1<sup>st</sup> defendant’s exercise of its power of sale. In the circumstances, the Court has no jurisdiction to issue an injunction under Order 40 Rule 1 of the Civil Procedure Rules, 2010 because the plaintiff has not demonstrated that the defendant has threatened or intends to remove or dispose of the plaintiff’s property;
  - iii. The plaintiff has not established a prima facie case with a probability of success as is required for the grant of an interlocutory injunction for the following reasons -
    - a. The plaintiff is indebted to the defendant and is in default. It is not disputed that Lynx at Muchai Drive offered the Charged Property to secure the plaintiff’s indebtedness. The 1<sup>st</sup> defendant should be allowed to realize its security in light of the plaintiff’s default; and
    - b. The 1<sup>st</sup> defendant issued the requisite statutory notices in respect of the Charged Property. These notices are not disputed by the plaintiff. The 1<sup>st</sup> defendant has complied with all the statutory requirements to exercise its power of sale by public auction. The allegations made by the plaintiffs are baseless and the 1<sup>st</sup> defendant should not be prevented from exercising its power of sale by public auction.



- iv. The plaintiff has not demonstrated the irreparable harm it will suffer that cannot be compensated by an award of damages. Once the Charged property was offered to the 1<sup>st</sup> defendant, it became a commodity for sale that could be sold to recover the facilities advanced to the plaintiff. Any loss that the plaintiff may suffer is calculable and can be compensated by damages;
  - v. The defendant is a stable bank and there is no suggestion that it will be unable to compensate the plaintiffs, if the plaintiffs are successful at the trial;
  - vi. The balance of convenience tilts in favour of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant is owed a substantial amount by the plaintiff, which sum continues to accrue interest. The longer the debt remains outstanding the harder it will be for the 1<sup>st</sup> defendant to recover the monies advanced to the plaintiff;
  - vii. The plaintiff has been indolent and is therefore undeserving of the equitable remedy of an interlocutory injunction. Despite being served with the notification of sale of the Charged Property on 21<sup>st</sup> February 2023, the plaintiffs waited until 3<sup>rd</sup> May 2023 to move the Court to stop the auction. This was a mere 2 days before the date of the auction; and
  - viii. There is no legal basis for the Court to apply the provisions of Section 52 of the now repealed Indian Transfer of Property Act (1959) to the present proceedings.
8. The 1<sup>st</sup> defendant also filed a replying affidavit sworn on 12<sup>th</sup> September 2023 by Mr. Kariuki King'ori, the 1<sup>st</sup> defendant's Legal Services Manager. He averred that the plaintiff is related to Muga Developers Limited, sharing similar Directors. He also averred that the 1<sup>st</sup> defendant had advanced various credit facilities to Muga Developers Limited starting from 18<sup>th</sup> February 2011 for the construction of the Fourways Junction Project on L.R. No. 28223/33, which was also charged to the 1<sup>st</sup> defendant, but disputes arose between Muga Developers Limited's Directors during the project's development, leading to a lawsuit (HCCOMM No. 352 of 2011) filed by Ms Nancy Wanja Gatabaki, one of the Directors. That Muga Developers Limited informed the 1<sup>st</sup> defendant on 3<sup>rd</sup> August 2015 about challenges among its Directors that were hindering the development of the Fourways Junction Project. He stated that in order to address the issue, Muga Developers Limited proposed transferring undeveloped portions of L.R. No.28223/33 to special purpose companies, including the plaintiff, owned by Suraya Property Group Limited, with the properties still charged to the 1<sup>st</sup> defendant.
  9. Mr. Kariuki deposed that the 1<sup>st</sup> defendant approved this reorganization on 1<sup>st</sup> December 2015, subject to charges being registered in its favour. That subsequently, through a facility letter dated 24<sup>th</sup> August 2016, the 1<sup>st</sup> defendant advanced Kshs.400,000,000/= to the plaintiff for purchasing sub-plot C from L.R. No. 28223/33, a property owned by Muga Developers Limited, and for paying off a Kshs.100,000,000/= loan from Transnational Bank. He stated that the parties then formalized these terms in a loan agreement dated 9<sup>th</sup> November 2016. Mr. Kariuki stated that following the said Agreement, a charge was registered by Lynx at Muchai Drive Limited on 17<sup>th</sup> November 2016 over L.R. No. 209/7733 in favour of the 1<sup>st</sup> defendant. He indicated that the facility letter and the Charge Agreement included provisions that the charged property would serve as continuing security for the payment of the plaintiff's debt to the 1<sup>st</sup> defendant. He added that the plaintiff then subdivided its sub-plot C and sold several sub-plots between 2017 and 2018 to reduce its debt but, despite the said sales, the plaintiff remained indebted to the 1<sup>st</sup> defendant.
  10. He stated that on 18<sup>th</sup> January 2019, the 1<sup>st</sup> defendant demanded repayment from the plaintiff under Section 90 of the Land Act, warning that failure to pay would result in the exercise of its statutory power



- of sale. In response, the plaintiff sought to consolidate its facilities with those of Muga Developers Limited, and to secure additional funds to complete the Fourways Junction Project. Mr. Kariuki deposed that in February 2019, the plaintiff and Muga Developers Limited agreed to restructure their debts, consolidating the amounts owed by both companies, and a facility letter dated 19<sup>th</sup> February 2019 formalized this agreement with the 1<sup>st</sup> defendant, making the plaintiff and Muga Developers co-borrowers. He averred that the consolidated debt totaled Kshs.1,884,204,365/=, with the plaintiff's outstanding debt at Kshs.507,944,023/= as at 20<sup>th</sup> February 2019. He stated that the consolidated debt was secured by a charge on Plot C from L.R. No. 28223/33 and the charged property, with Clause 3.2 of the facility letter granting the 1<sup>st</sup> defendant the right to consolidate security.
11. Mr. Kariuki contended that doing so did not violate the plaintiff's equity of redemption, as the plaintiff acknowledged owing Kshs.507,944,023/= in the facility letter dated 19<sup>th</sup> February 2019. He averred that the letter also allowed the 1<sup>st</sup> defendant to apply payments at its discretion to reduce both borrowers' debts, and although the facility under the Unconfirmed Standby Letter of Credit was not disbursed, the debt consolidation agreement remained valid. He averred that by May 2019, both the plaintiff and Muga Developers Limited had fallen into arrears. That on 9<sup>th</sup> May 2019, Muga Developers Limited proposed selling plots C3, C4, C5 & C6 to reduce the debt, but no sale price was agreed upon, so the 1<sup>st</sup> defendant sold the plots at the best market price. Mr. Kariuki stated that the 1<sup>st</sup> defendant issued Notices to the plaintiff and Lynx at Muchai Drive Limited under Sections 90 and 96 of the [Land Act](#), demanding payment of the outstanding loan amount, failure to which the charged property would be sold. He further stated that the plaintiff acknowledged owing Kshs.507,000,000/= and proposed selling L.R. No. 28223/33 sub-plots C3, C4 and C5 to settle the said debt.
  12. Mr. Kariuki stated that the said plots were sold in December 2019 for Kshs.448,240,000/=, which sum was applied towards the consolidated debt of the plaintiff and Muga Developers Limited. He denied any misappropriation of the sale proceeds, explaining that the Kshs.8.1 Million transferred to Kimani Michuki Advocates was for legal work, and the alleged transfers of Kshs.15,240,000 and Kshs.185,000,000 did not occur. Additionally, that Kshs.2,760,000/= was paid as an agency commission from the sale deposit of L.R. No. 28223/33. He averred that the 1<sup>st</sup> defendant attempted to sell the suit property through a public auction, but the sale was unsuccessful because the bids did not meet the reserve price. He contended that as a result, the plaintiff and Muga Developers Limited remain indebted to the 1<sup>st</sup> defendant, and as at 1<sup>st</sup> September 2023, the plaintiff's outstanding debt to the 1<sup>st</sup> defendant was Kshs.125,210,265.
  13. In a rejoinder, the plaintiff filed a supplementary affidavit sworn on 3<sup>rd</sup> July 2023 by Mr. Peter Kiarie Muraya, a Co-Director of the plaintiff company. He averred that no agreement was made to consolidate the loans owed by the plaintiff and Muga Developers Limited. He argued that the plaintiff is not barred from reporting the 1<sup>st</sup> defendant to its Regulator or seeking legal recourse in Court, particularly regarding the 1<sup>st</sup> defendant's plan to sell the suit property via public auction. He asserted that there is no reason to involve Lynx at Muchai Drive Limited in these proceedings, as it is not a party to the loan agreement, and the loan servicing was solely managed by the plaintiff. He denied that the plaintiff was a special purpose vehicle created from the reorganization of Muga Developers Limited or that the loans of the two entities were consolidated. He pointed out that the 1<sup>st</sup> defendant did not provide any evidence of a request for such consolidation by the plaintiff.
  14. Mr. Muraya asserted that the plaintiff had informed the 1<sup>st</sup> defendant through letters dated 30<sup>th</sup> July 2019, 15<sup>th</sup> October 2019, 25<sup>th</sup> October 2019, 14<sup>th</sup> November 2019 and 13<sup>th</sup> February 2020 that it had fully serviced the loan facility advanced to it. He clarified that the facility letter dated 19<sup>th</sup> February 2019 was not a loan facility but an Unconfirmed Standby Letter of Credit (SBLC), which was a five-



- month guarantee by the 1<sup>st</sup> defendant to Muga Developer Limited's contractor, Roko Construction (Kenya) Limited (Roko), ensuring that if Muga Developers Limited was unable to pay for construction works after completion, the 1<sup>st</sup> defendant would cover the payment and then seek reimbursement from Muga Developers Limited and the plaintiff. He emphasized that the SBLC was simply a guarantee and not a consolidation of the loan facilities of the plaintiff and Muga Developers Limited. He stated that Muga Developers Limited canceled the Standby Letter of Credit (SBLC) and its contract with Roko Construction (Kenya) Limited on 29<sup>th</sup> March 2019 due to Roko's failure to mobilize and commence the agreed construction works at the Fourways Junction Project.
15. He stated that cancellation letter highlighted that the SBLC was defective and fraught with challenges, thus it was not unconditionally accepted and as a result, the SBLC was considered canceled or automatically withdrawn under Clauses 6.1.5 and 18, releasing all parties from their obligations and rendering the contract void from the start. Mr. Muraya asserted that since Roko did not undertake any construction within the five-month period and the contract was canceled, the SBLC, whose sole purpose was to guarantee payment to Roko, had no further basis. He argued that the meetings and minutes mentioned in paragraphs 27, 28 and 29 of the 1<sup>st</sup> defendant's replying affidavit were related to the conditions of sanction under Clause 4 of the canceled SBLC, and since no funds were disbursed under the SBLC due to the breach of Clause 4, any actions taken or documents executed as a result thereof are void ab initio. He also pointed out inconsistencies in the 1<sup>st</sup> defendant's statements regarding the plaintiff's debt, since the statutory demand listed the debt as Kshs.507,946,662.25, while the 1<sup>st</sup> defendant's replying affidavit showed a debt of Kshs.125,210,265.00.
  16. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed on 5<sup>th</sup> July 2023 & 27<sup>th</sup> September 2023 by the law firm of Murgor & Murgor Advocates, while the 1<sup>st</sup> defendant's submissions were filed by the law firm of Hamilton, Harrison & Mathews Advocates on 27<sup>th</sup> September 2023.
  17. Mr. Otieno, learned Counsel for the plaintiff relied on the Court of Appeal case of Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR, and submitted that the plaintiff had not only fully repaid the Kshs.400,000,000/= loan advanced by the 1<sup>st</sup> defendant, but had also overpaid by Kshs.253,533,555.60. He cited the case of Marple Brooks Projects Company Limited & another v I & M Bank Limited [2019] eKLR, asserting that the plaintiff has established a prima facie case with a probability of success. He emphasized that the 1<sup>st</sup> defendant failed to produce the facility letter that allegedly consolidated the plaintiff's debt with that of Muga Developers Limited. He submitted that if an order of temporary injunction is not granted, the plaintiff will suffer irreparable harm, as its right to redeem the suit property will be lost, and it may face multiple lawsuits from Lynx at Muchai Drive Limited and its purchasers.
  18. He claimed that the balance of convenience favours the plaintiff. He cited the case of Erdmann Property Limited v Credit Bank Limited [2018] eKLR, and highlighted that in the dispute between the parties herein, the 1<sup>st</sup> defendant claims the plaintiff owes Kshs.507,946,444.40, while the plaintiff asserts that it has overpaid the loan by Kshs.253,533,555.60. For that reason, he stated that an order for the 1<sup>st</sup> defendant to provide a detailed accounts of the plaintiff's loan, showing its exact indebtedness to the 1<sup>st</sup> defendant if any, is necessary. Mr. Otieno cited the Court of Appeal case of Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR, and argued that due to the conflicting interests between the plaintiff and the 1<sup>st</sup> defendant regarding the suit property, it is in public interest and necessary for the effective administration of justice to issue an order under the doctrine of lis pendens, restraining the defendants from dealing with the suit property during the pendency of this case.



19. Counsel also referred to the case of *Wagichiengo v Gerald* [1988] eKLR, and asserted that the 1<sup>st</sup> defendant having admitted that the SBLC contract was withdrawn and/or cancelled, and on the other hand insist that the agreement to consolidate the facilities under the SBLC contract remains valid, amounts to approbation and reprobation. Additionally, he cited the decision in *Nairobi Hospice v Kenya Commercial Bank Limited & 2 others* [2019] eKLR, to emphasize that an SBLC is essentially a type of guarantee.
20. Mr. Ondieki, learned Counsel for the 1<sup>st</sup> defendant submitted that the plaintiff is not the legal or registered owner of the suit property, and cannot challenge the 1<sup>st</sup> defendant's right to exercise its statutory power of sale. He emphasized that since the plaintiff admits that it is not the registered owner, it has no locus standi to seek any of the orders requested in the application. He cited the cases of *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (supra) and *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] eKLR, to support his argument. He also stated that although the plaintiff and Muga Developers Limited borrowed separately, they agreed to consolidate their debts through the facility letter dated 19<sup>th</sup> February 2019, where the plaintiff acknowledged owing the 1<sup>st</sup> defendant Kshs.507,944,023.00. Counsel argued that the plaintiff has not fully settled the loan advanced by the 1<sup>st</sup> defendant and has not overpaid by Kshs.253,533,555.60 as claimed.
21. He maintained that although the conditions for disbursing the Standby Letter of Credit (SBLC) were not met, the agreement to consolidate the debts of the plaintiff and Muga Developers Limited remains valid. He pointed out that the plaintiff failed to provide evidence supporting the claim that Kshs.185,000,000/= was improperly applied to reduce Muga Developers Limited's debt instead of the plaintiff's. He contended that the loan account statement provided by the plaintiff does not specify what the funds were for, only mentioning that the payment was made by Suraya Sales Limited. Counsel further argued that Mr. Muraya, a Director of both the plaintiff and Muga Developers Limited, is attempting to benefit from his own misconduct by claiming that Muga Developers Limited had no authority to authorize the sale of sub-plots C, despite not being the registered proprietor.
22. Counsel for the 1<sup>st</sup> defendant asserted that the plaintiff and Muga Developers Limited had intertwined their financial and technical affairs, relying on each other for assistance. He submitted that the plaintiff has not established a prima facie case with a likelihood of success to justify the orders sought, as the consolidated debt remains outstanding, and the 1<sup>st</sup> defendant has the right to realize the securities provided by the plaintiff. Citing the case of *John King'ori Kioni v Sidian Bank & another* [2020] eKLR, Mr. Ondieki maintained that the suit property offered as security for the loan became a commodity that can be sold to recover the debt. He argued that the plaintiff will not suffer irreparable loss if the property is sold, as any loss can be compensated by damages under Section 99(4) of the *Land Act*, 2012, and that the balance of convenience tilts in favour of the 1<sup>st</sup> defendant.
23. He contended that the plaintiff has already produced the account statements it is seeking from the 1<sup>st</sup> defendant in its affidavit in support of the application herein and its second supplementary affidavit. He contended that no evidence has been tendered to warrant an order for the 1<sup>st</sup> defendant to produce account statements for Muga Developers Limited which the plaintiff claims is a separate company from it, with its own affairs. Further, that no evidence has been tendered to demonstrate and/or suggest that the accounts which the plaintiff has supplied and obtained from the 1<sup>st</sup> defendant are not complete, true and accurate. Mr. Ondieki relied on the case of *Comztek East Africa Limited v Jane Wanja Muriithi* [2012] eKLR, and stated that the prayer sought at prayers 4 (v-xv) amount to a fishing expedition as the plaintiff has not justified why and how the information requested is meant to aid its case.



### **Analysis and Determination.**

24. I have considered the instant application, the grounds on the face of the Motion and the affidavits filed in support thereof, the replying affidavit and grounds of opposition by the 1<sup>st</sup> defendant, together with the written submissions by Counsel for the parties. The issues that arise for determination are –
- i. Whether the plaintiff has made out a case to warrant being granted an order for temporary injunction;
  - ii. Whether the 1<sup>st</sup> defendant should be ordered to render a complete, true and accurate statement of accounts of the plaintiff's loan account and that of Muga Developers Limited; and
  - iii. Whether an order should issue under the doctrine of *lis pendens*.

### **Whether the plaintiff has made out a case to warrant being granted an order for temporary injunction.**

25. Interlocutory injunctions are provided for under Order 40 Rules (1)(a) and (b) of the Civil Procedure Rules, 2010 which states as hereunder -

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 wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,  
the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

26. The conditions to be considered when dealing with applications for temporary injunctions were laid down in the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358, where the Court held the following -

Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

27. The property in dispute in this suit is L.R. No. 209/7733 on Muchai Drive, Nairobi County, registered in the name of Lynx at Muchai Drive Ltd, which was charged to the 1<sup>st</sup> defendant to secure a loan of Kshs.400,000,000/= advanced to the plaintiff by the 1<sup>st</sup> defendant. It is well settled that before granting an order for temporary injunction, Courts have to ensure that the property in dispute in the suit is either in danger of being wasted, damaged or alienated by a party to the suit, or wrongfully sold in execution of a decree, or that the defendant threatens or intends to remove or dispose of the property.
28. It is not disputed that the 1<sup>st</sup> defendant advanced to the plaintiff a loan of Kshs.400,000,000/= secured by among others, the suit property. The plaintiff contends that it has since fully repaid its loan to the



1<sup>st</sup> defendant in excess of Kshs.253,533,555.60, which it now claims from the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant on the other hand asserts that the plaintiff is still indebted to it, and it has issued it with the requisite statutory notices but the plaintiff has still failed to comply by settling the outstanding debt that is still due and owing from the plaintiff to the 1<sup>st</sup> defendant, thus it has every right to exercise its statutory power of sale over the suit property.

29. The plaintiff herein is a related company to Muga Developers Limited, which also has financial facilities advanced to it by the 1<sup>st</sup> defendant, secured by a charge over all that parcel of land known as L.R. No. 28223/33 registered in favour of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant averred that it was undertaking a project to construct housing units on the said parcel of land referred to as the Fourways Junction Project. That some time in the year 2016 due to the infighting of Directors within Muga Developers Limited, it excised undeveloped portions of L.R. No. 28223/33 and sold them to the plaintiff to limit the risk posed to the Fourways Junction Project. The parcels of land that were purchased were subsequently transferred to the plaintiff and charged to the 1<sup>st</sup> defendant to secure the loan advanced to the plaintiff by the 1<sup>st</sup> defendant. The plaintiff does not dispute that it further subdivided the parcel of land purchased from Muga Developers Limited, and sold some of the plots between the years 2017 and 2018 in order for the proceeds of the sale to be applied towards reducing the plaintiff's indebtedness to the 1<sup>st</sup> defendant. The plaintiff however asserts that this was not done as the proceeds from the said sale were credited to Muga Developers Limited loan account.
30. The 1<sup>st</sup> defendant claims that as a result of the foregoing, the plaintiff's finances and those of Muga Developers Limited were intertwined. Consequently, vide a facility letter dated 19<sup>th</sup> February 2019, the plaintiff's debt to the 1<sup>st</sup> defendant and that of Muga Developers Limited were consolidated, thus any repayments made by either company were applied to reduce the indebtedness of both companies at the 1<sup>st</sup> defendant's discretion. In as much as the 1<sup>st</sup> defendant acknowledges the existence of the facility letter dated 19<sup>th</sup> February 2019, it denies that it consolidated its debt with that of Muga Developers Limited. Upon perusal of the said facility letter annexed to the 1<sup>st</sup> defendant's replying affidavit, I note that it provided for an Unconfirmed Standby Letter of Credit, for no more or no less than a five-month guarantee by the 1<sup>st</sup> defendant to Muga's contractor, Roko Construction (Kenya) Limited, that upon completion of the agreed unfinished housing units within five months, and in the event that Muga Developers Limited was unable to pay it for the construction works, the 1<sup>st</sup> defendant as a guarantor would pay Roko for the construction works and claim the same from Muga Developers Limited and the plaintiff herein.
31. This Court in its ruling delivered on 15<sup>th</sup> May 2024 in determining whether or not the plaintiff's debt and that of Muga Developers Limited were consolidated as a result of the facility letter dated 19<sup>th</sup> February 2019 held the following -

The plaintiff submitted that by letters dated 29<sup>th</sup> March 2019, Muga Developers Ltd cancelled the SBLC together with the contract to Roko Construction (Kenya) Limited for failure to mobilize and undertake the construction works at Fourways Junction project as agreed. Further, by a letter dated 9<sup>th</sup> May 2019, Muga Development Limited informed the 1<sup>st</sup> defendant that they had held preliminary instructions (sic) with Roko Construction (Kenya) Limited and could not proceed with the SBLC as offered.

On perusal of the letter dated 29<sup>th</sup> March 2019 addressed to the 1<sup>st</sup> defendant by Muga Developers Ltd, I note that the said company communicated to the 1<sup>st</sup> defendant of its intention to cancel the Unconfirmed Standby Letter of Credit. Further, the 1<sup>st</sup> defendant



in its draft statement of defence and its replying affidavit sworn on 12<sup>th</sup> September 2023 confirms that no disbursements were made under the SBLC.

On perusal of Clause 18 of the facility letter dated 19<sup>th</sup> February 2019, I find that it states –

The offer hereby made is open for acceptance within thirty (30) days from the date of this letter and if not accepted unconditionally within that period, it will be deemed to be withdrawn from the date of expiry thereof. Notwithstanding, the Facility is available for drawdown for a period of one hundred and eighty (180) days from the date of the said acceptance at the offer failing which the Facility shall be deemed to have been withdrawn.”

In view of the above provisions, the fact that the 1<sup>st</sup> defendant confirms that no disbursements under the said letter were made, together with the letter dated 29<sup>th</sup> March 2019 addressed to the 1<sup>st</sup> defendant by Muga Developers Ltd, my considered view is that the facility letter dated 19<sup>th</sup> February 2019 was withdrawn and/or cancelled, therefore the terms therein were not applicable and/or binding to either the plaintiff, Muga Development Limited or the 1<sup>st</sup> defendant herein. Further, the 1<sup>st</sup> defendant has not demonstrated by providing any agreement between the said parties other than the facility letter dated 19<sup>th</sup> February 2019, which also does not provide for consolidation of the plaintiff's and Muga Development Limited pre-existing debts.

32. In view of the above finding made in the earlier ruling, this Court still holds that the plaintiff's and Muga Developers Limited's debts were not consolidated by the facility letter dated 19<sup>th</sup> February 2019 which was in any event withdrawn and/or cancelled. In the premise, it is my finding that the 1<sup>st</sup> defendant had no discretion and/or power to apply funds from the plaintiff's accounts and/or proceeds from the sale of the plaintiff's parcels of land towards offsetting Muga Developers Limited's debt to the 1<sup>st</sup> defendant.
33. The 1<sup>st</sup> defendant in its replying affidavit has readily admitted to having sold the plaintiff's parcels of land even while acting on instructions from Muga Developers Limited without the plaintiff's knowledge and/or consent. Further, upon perusal of the plaintiff's Statements of Account annexed to its affidavit in support of the instant application, it is evident that on 13<sup>th</sup> June 2017, the 1<sup>st</sup> defendant debited the plaintiff's account with Kshs.8,120,000/= and credited the said funds to the account of Kimani & Michuki Advocates, which transaction the plaintiff asserts was done without its consent. It is also evident that on 4<sup>th</sup> August, 2017, the plaintiff's account was credited with Kshs.74,000,000/=, out of which Kshs.66,665,000/= was transferred to the account of Muga Developers Limited, which transfer again the plaintiff claims was done without its consent. From the said account statement, it is impossible to tell how much was credited to the plaintiff's account, from the sale of plots C1 & C2, but it is clear that Kshs.448,240,000/= was credited to the plaintiff's account on 28<sup>th</sup> December 2019, on account of the sale of plots C3, C4 & C5. Thereafter, Kshs. 448,237,248.00 was transferred to account No. 0180569756175, in the form of loan account payments. The plaintiff once again contended that the said transfer was done without its consent.
34. Annexed to the plaintiff's second supplementary affidavit is an Account Statement for Muga Developers Limited which shows that on 4<sup>th</sup> May 2018, Kshs.185,000,000/= was credited into its account, on account of Suraya Sales Limited–Phase Two, which sum was later debited for loan account payment for Acc. No. 0180569967993. What is evident from the foregoing is that there is a lot of co-mingling and movement of funds between the plaintiff and Muga Developers Limited, which the plaintiff asserts was done without its consent. It cannot therefore be said with certainty whether or not



the plaintiff is still indebted to the 1<sup>st</sup> defendant to justify the 1<sup>st</sup> defendant's exercise of its statutory power of sale over the suit property.

35. In as much as the 1<sup>st</sup> defendant avers that the plaintiff has no right to challenge the sale of the suit property since it is not the registered proprietor of the land, it is not disputed that the 1<sup>st</sup> defendant's attempt to sell the suit property is based on the ground that the plaintiff failed to settle its outstanding debt with the 1<sup>st</sup> defendant. Further, the said debt was secured by a charger over the suit property, thus the 1<sup>st</sup> defendant after serving the plaintiff and the chargor with all the requisite Notices opted to exercise its statutory power of sale over the suit property. In the premise, I am persuaded that the plaintiff is within its right in filing this suit as it disputes its indebtedness to the 1<sup>st</sup> defendant. Consequently, this Court has to determine whether the 1<sup>st</sup> defendant's exercise of its statutory power of sale had accrued at the time the 1<sup>st</sup> defendant advertised the suit property for sale by public auction.
36. The Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* (supra), defined what constitutes a prima facie case as follows-
- “So what is a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”
37. Bearing in mind the above definition, coupled with the fact that the 1<sup>st</sup> defendant herein acknowledged having sold land belonging to the plaintiff without the plaintiff's consent and applied the proceeds of the said sale towards offsetting Muga Developers Limited's loan, I am persuaded that the plaintiff has demonstrated that it has a prima facie case with a probability of success.
38. On the issue of the damages being an adequate remedy for the plaintiff in the event the instant application is not allowed, I am bound by the Court of Appeal's holding in the case of *Muiruri v Bank of Baroda (Kenya) Ltd* [2000] KLR 183, cited by the Court in the case of *Peter Kimani Nene v Kenya Commercial Bank Limited* [2016] eKLR where it held:-
- ...disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.
39. The sale of a person's property amounts to infringing of the person's right to own property as enshrined under Article 40 of *the Constitution* of Kenya, 2010, in instances where an applicant has established a prima facie case with a probability of success such as is the case herein. It has to be proved through evidence that the sale was justified and that the proceeds were properly applied by the 1<sup>st</sup> defendant, as required. In the circumstances, I am satisfied that the plaintiff has demonstrated that in the event the order sought herein is not granted, it will suffer damages that cannot be adequately compensated by an award of damages.
40. Based on the analysis made, the balance of convenience tilts in favour of the plaintiff.



**Whether the 1<sup>st</sup> defendant should be ordered to render a complete, true and accurate statement of accounts of the plaintiff's loan account and that of Muga Developers Limited.**

41. Having found that there is a lot of co-mingling of the plaintiff's funds with those of Muga Developers Limited and with the plaintiff having demonstrated that there was movement of funds from its account to Muga Developers Limited's loan account, and with the 1<sup>st</sup> defendant having admitted to selling the plaintiff's parcels of land without the plaintiff's consent and thereafter applying the proceeds of the sale towards offsetting Muga Developers Limited's indebtedness to the 1<sup>st</sup> defendant, I agree with the plaintiff that it is in the interest of justice for the 1<sup>st</sup> defendant to render a complete, true and accurate statement of accounts of the plaintiff's loan account to show the plaintiff's indebtedness to the 1<sup>st</sup> defendant if any.
42. I however agree with Counsel for the 1<sup>st</sup> defendant that Muga Developers Limited is a different and separate legal entity from the plaintiff herein, and it is not a party to this suit. I therefore see no reason for compelling the 1<sup>st</sup> defendant to render a complete, true and accurate statement of its accounts in this suit. If at all proceeds from the sale of the plaintiff's parcels of land were credited to its loan account, and/or funds were transferred from the plaintiff's accounts to its accounts, that can be demonstrated via production of the plaintiff's accounts, and agreements and proof of payment of the sale of the plaintiff's parcels of land. The accounts will establish how the proceeds of sale were applied.

**Whether an order should issue under the doctrine of lis pendens.**

43. The Court of Appeal in the case of Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR, addressed the doctrine of lis pendens as follows –

Black's Law Dictionary 9<sup>th</sup> edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows -

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of Mawji vs US International University & another [1976] KLR 185, Madan, J.A. stated thus:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from



giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case at page it was observed inter alia that:-

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

44. From the foregoing excerpts the doctrine of lis pendens can be understood as a legal principle that prevents the transfer or sale of property involved in a civil suit to third parties during the pendency of the suit. Its purpose is to preserve the disputed property until the Court resolves the rights of the parties involved. This Court has already held that there is need to preserve the suit property herein pending the hearing and determination of this suit, to give room for determination of whether the plaintiff is indebted to the 1<sup>st</sup> defendant, and whether the 1<sup>st</sup> defendant’s exercise its of statutory power of sale over the suit property had accrued at the time of sale.
45. In the premise, I am persuaded that the doctrine of lis pendens is applicable in this suit.
46. The upshot is that this Court finds that the instant application is merited, to the extent expressly specified in this ruling. The application is hereby allowed as prayed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF OCTOBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Otieno for the plaintiff/applicant

Mr. Ruto h/b for Mr. Kiragu Kimani(SC) for the 1<sup>st</sup> defendant/respondent

Ms B. Wokabi – Court Assistant.

