



Maloba v Standard Chartered Bank Limited & another (Civil Suit E006 of 2024) [2024] KEHC 13983 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT E006 OF 2024
RE ABURILI, J
NOVEMBER 4, 2024**

BETWEEN

ALFRED JUMA MALOBA PLAINTIFF

AND

STANDARD CHARTERED BANK LIMITED DEFENDANT

AND

PHILLIPS INTERNATIONAL AUCTIONEERS RESPONDENT

RULING

1. By a Notice of motion dated 18th April, 2024, the plaintiff/applicant herein Alfred Juma Maloba sought from this Court a temporary injunction restraining the defendants, their agents, servants and or assigns from selling by public auction or in any way dealing in the property known as Kisumu Municipality Block/15, Makasembo Road, Kisumu Town, Kisumu City County. The plaintiff also sought for costs of the application.
2. The application was predicated on seventeen grounds on the face of the notice of motion as replicated in the affidavit in support sworn by the applicant on 18th April, 2024.
3. In the grounds and supporting affidavit, the applicant deposed that he was advanced a loan by the 1st defendant in the sum of Kshs 14,000,000 in 2013 secured by a mortgage facility on land parcel No. Kisumu Municipality/ Block 6/15 situated along Makasembo Raod in Kisumu City County.
4. That due to hard economic situation, his business was not doing well, exacerbated by the Covid 19 pandemic thereby leading to part default in the repayment of the loan facility. However, that he managed to pick up the pieces and in January 2024, he completed payment of the balance being Kshs 4, 467, 464.26 as the last instalment.



5. That upon completion of the repayment, he sought to discharge his property but to his shock, he was informed that he still had arrears in terms of accumulated penalties allegedly arising out of the times that he was defaulting. He deposes that no specific amount comprising the outstanding arrears was ever communicated to him and that nothing in writing was communicated to him despite his inquiries concerning the actual outstanding balance if any. That he was only told verbally that he would be appraised of the exact balance that he owed the 1st respondent Bank.
6. According to the applicant, even before the 1st defendant responded to those inquiries made by the applicant, on the actual outstanding balance, the 1st defendant instructed the 2nd defendant auctioneer to sell by public auction the property subject of this suit as described hereinabove via public auction as was advertised in the Daily Nation Newspaper of 2nd April, 2024.
7. That upon coming across the said newspaper advertisement, the applicant instructed his counsel to write to the 1st defendant seeking for information as to the reason for the sale despite having cleared the payment but that no response was received hence this application. The application was filed 3 days to the scheduled sale with the applicant lamenting that unless restrained, the defendants were out to dispose of his property yet he was not indebted to the 1st defendant. That he had sentimental attachment to the property hence he would suffer irreparably unless the interim injunction sought was granted to preserve the subject matter.
8. He deposed that no prejudice would be occasioned to the defendants if the injunction sought was granted since the defendants would still recover from him if it turned out to be that he was indebted to them yet he would have lost his property if the court finds that he was in no way indebted to the defendants.
9. He relied on the documents filed accompanying the plaint which included, the newspaper advertisement, letter from his counsel to the 1st defendant dated 11th April 2024, the witness statement, list of witnesses and list of documents omitting the loan application letter.
10. After the Court considered the application ex parte in the first instance on 22nd April 2024, it directed the applicant to serve the respondents with the motion and it also granted the applicant an interim relief to stop the scheduled sale of the property in issue.
11. The court then gave inter partes directions in the subsequent proceedings and both parties complied with the directions of the court with the respondents filing a replying affidavit and both parties filing written submissions to canvass the application subject of this ruling.
12. However, the delay in determining the application was occasioned by the time taken to comply and the court proceeded on leave in July 2024.
13. Opposing the application for interlocutory injunction, the defendants filed a replying affidavit sworn by Bonface Machuki the Legal Services manager for the 1st defendant Bank. According to Mr. Machuki in his depositions, annexing several documents to establish the alleged indebtedness, that on or about July 2013 the Plaintiff approached the 1st Defendant for a term loan to finance the purchase of a commercial property and on by a letter dated 30th July 2013 (“the Facility Letter”), the 1st defendant offered to finance the purchase of the said property for the Plaintiff at a term loan of Kshs. 14,700,000 as shown by the annexed facility letter of offer which gave the terms of the facility as a) Interest rate of 21% per annum (variable) with the 1st Defendant’s right to review the same – clauses 3 and 5 of Facility Letter; b) The loan would be repaid by 180 equal monthly instalments of Kshs 269,100.00/- inclusive of interest – clause 3 of Facility Letter; c) Security for the loan would be a Charge created by



the Plaintiff in favour of the 1st Defendant over Title Number Kisumu Municipality/Block 6/15 for the sum of Kshs. 14,700,000/- clause 8 of the Facility Letter.

14. That in line with the agreement contained in the Facility Letter, the Plaintiff duly created the Charge dated 4th November 2013 over the Suit Property in favour of the 1st Defendant, which Charge was duly executed by the Plaintiff, his spouse who gave her consent to the same and which Charge was duly registered at the Kisumu District Land Registry on 5th November 2013.
15. That by virtue of clauses 26 and 30 of the said Charge, the security created therein constituted a 'Continuing Security' for all liabilities of the Plaintiff, hence the same is binding until all the amounts are paid in full to the satisfaction of the 1st Defendant.
16. Further deposition was that the Plaintiff bound himself to service the loan as per the terms of the agreement between the parties but in total disregard and in outright breach of what he had bound himself to do, the Plaintiff stopped meeting his end of the bargain and defaulted and to date continues to default, to the detriment of the 1st Defendant who at all material times had reasonable expectations of the loan being repaid per the agreement between the parties.
17. Further, the respondent deposed that the Charge is duly acknowledged by the Plaintiff in paragraph 19 of his Supporting Affidavit, which Charge clearly sets out the 1st Defendant's right of sale should the Plaintiff default in his commitment of repaying the loan.
18. That contrary to the Plaintiff's allegations that he has been dutifully and faithfully repaying the loan, and made a payment of Kshs.4,467,464.26, he has instead been in default of repayment of the loan for a long time by not ensuring that the loan account was sufficiently funded and/or he made payments that were grossly contrary/below the monthly instalments of Kshs 269,000 agreed upon between the parties, resulting in the accumulation of interest and penalties as reserved under the agreements between the parties. That as back as May 2015, the Plaintiff stopped making the agreed instalment amounts and worse still is that the Plaintiff at times made zero deposits, which trend continued for several months while at other times he deposited irregular amounts far below the required instalment amount.
19. It was therefore contended that it is untrue that the Plaintiff's default was occasioned by Covid19 Pandemic which commenced in Kenya in 2020, as his default started 5 years before.
20. On the allegation that the plaintiff/ applicant was never notified of any default, it was deposed that at all material times, the Plaintiff was and has continued to be notified of his indebtedness and the Statements on the loan balance are well within his knowledge as is evident by the various correspondence exchanged between him and the 1st Defendant, as referenced in paragraph 11 of the replying affidavit, contrary to the Plaintiff's unsubstantiated allegations that he has received no communication on the loan, nor been issued with Statements of Account.
21. That following the default, the plaintiff acknowledged his indebtedness by engaging with the 1st defendant in various correspondences as annexed, making several payment proposals to the 1st Defendant, including several indications from him that he will sell the Suit Property so as to redeem the loan, which he however has never followed through despite the 1st Defendant consenting to the proposed sales.
22. It was further deposed that as a result of the Plaintiff's default, the 1st Defendant instructed its Advocates on record to commence the foreclosure process in respect of the Suit Property by issuance of the legally required statutory notices, which said statutory notices were duly issued by the said Advocates and the 2nd Defendant as follows: -



- (a) Initial Demand Letter was issued on 27.05.2020 and duly sent via registered post to the Plaintiff's postal address and email address as annexed to the replying affidavit –at pages 74 - 75 of the Defendants' Annexures.
23. It was deposed that albeit there was no legal requirement for issuance of this initial demand notice, the 1st respondent did out of courtesy to afford the Plaintiff time an opportunity to rectify his default, makes it a practice to issue it.
- (b) 90 Days Notice to Rectify Default/Statutory Notice was issued on 13.08.2020 and duly sent via registered post to the Plaintiff and his spouse's postal address and to the Plaintiff's email address as per the Statutory Notice annexed, together with the registered post receipt at pages 47 – 49 of the Defendants' Annexures and the email to the Plaintiff on 13.08.2020 as per the email annexed at pages 73 - 74 of the Defendants' Annexures.
- (c) 40 Days Notice to Sell was issued on 9.12.2020 and duly sent via registered post to the Plaintiff and his spouse's postal address and to the Plaintiff's email address – as per the Notice to Sell annexed together with the registered post receipt at pages 50 - 52 of the Defendants' Annexures and the email to the Plaintiff on 09.12.2020 as per the email annexed at page 71 - 72 of the Defendants' Annexures.
- That the notice in c above was physically served at the Suit Property per the Affidavit of Service annexed at pages 53 – 56 of the Defendants' Annexures.
24. It was further deposed that around the same time, the Plaintiff wrote the letters dated 02.12.2020, 08.12.2020 and 05.03.2021 annexed at pages 57 - 59 of the Defendants' Annexures which clearly demonstrates that he duly received the above issued Notices, and was aware of and acknowledged his indebtedness to the 1st Defendant as he intended to sell the Suit Property and have the sale proceeds paid to the 1st Defendant by the purchaser, so as settle the outstanding loan.
- (d) Auctioneers 45 Days Notice to Redeem and Notification of Sale were issued by the 2nd Defendant on 12.05.2021 and personally served at the Suit Property on the said date, in addition to being posted via registered post – Please see annexed at pages 60 – 66 of the Defendants' Annexures, the Auctioneer's Certificate of Service and the said 45 Days Notice and Notification of Sale as well as the registered post receipt.
- (e) On 30.11.2021 the 1st Defendant's Advocates on record sent a Notice of Intention to Proceed with Foreclosure to the Plaintiff through his email address as per the said Notice annexed hereto at page 67 of the Defendants' Annexures and the email annexed at page 71 of the Defendants' Annexures.
- (f) Additionally, that the 2nd Defendant served upon the Plaintiff the Courtesy Notices 03.02.2022, 23.09.2022, 07.02.2023 and 15.06.2023 as a matter of courtesy to notify the Plaintiff that the Suit Property would be re-advertised for sale, hence affording him several chances to redeem the Suit Property by rectifying the arrears on the loan prior to the said advertisement – as per the the said Courtesy Notices annexed at pages 68 - 70 of the Defendants' Annexures and the Courtesy Notice dated 07.02.2023 which the Plaintiff has annexed as Annexure "AMJ 1" to his Supporting Affidavit dated 13th February 2023, hence confirming receipt of the same.
25. It was deposed that the aforesaid notices by the 1st Defendant's Advocates and the 2nd Defendant clearly demonstrate that the Plaintiff was served in accordance with the Law contrary to his misleading claims that this was never done. The emails trail at pages 71 – 75 of the Defendants' Annexures through



which the Plaintiff communicated to the 1st Defendant and its Advocates and the registered post receipts following each notice are sufficient proof of service on both the Plaintiff and his spouse who was equally served as indicated by the registered postage receipts accompanying the said respective Notices.

26. The 1st defendant further deposed that over and above the emails sent to the Plaintiff's email address, confirmed to have been received per the emails from him to the 1st Defendant, the postal address used for service of all the aforesaid is the same address provided by the Plaintiff in his pleadings before this Honourable Court and also provided by him and his spouse in the Charge where they both appended their signatures.
27. That despite receipt of all the above duly issued Notices, the grace period and several reminders and communications both on phone and email by the 1st Defendant and its Advocates, as evidenced in the annexed trail of emails at pages 71 - 75 of the Annexures, the Plaintiff did not rectify the default, necessitating the 1st Defendant to move to the next stage in the foreclosure process.
28. That as a result of the said continued default, in compliance with the Law, and prior to the intended public auction on 23.04.2024, the 1st Defendant relied on a current Valuation Report i.e. not older than 12 months, of the Suit Property as evidenced by the Valuation Report dated 25.04.2023 by Proland Realtors Ltd. annexed at pages 76 – 93 of the Defendants' Annexures.
29. The 1st defendant further deposed that in further compliance with the Law, prior to the intended public auction on 23.4.2024, the 2nd Defendant ensured that the Suit Property was duly advertised for sale via public auction in the Standard Newspaper of 02.04.2024 as confirmed by the Plaintiff in paragraph 25 (sic) and annexed as annexure 2 of his Supporting Affidavit and a copy of which is annexed at page 94 of the Defendants' Annexures. However, that the said auction was enjoined by this Court.
30. Further, that the Suit Property has previously come up for auction on previous dates as follows:-
 - (a) Auction on 21.07.2021 which was at the Plaintiff's request called off by the 1st Defendant to allow the Plaintiff more time to rectify default, which he unfortunately did not do;
 - (b) Auction on 02.11.2022 wherein the Suit Property was not sold as the highest bid did not meet the reserve price;
 - (c) Auction on 07.07.2023 which was enjoined by the Court vide Kisumu MCCC E171/2023 in which matter the plaintiff obtained ex-parte interim injunctions, which were however subsequently dismissed on the Defendants' application, hence his filing this fresh suit is a clear demonstration that the Plaintiff is 'forum shopping' by jumping from one Court to another with the sole aim of procuring injunctive orders.

suit details of which are set out in paragraph 18 hereinbelow.

That the plaintiff also filed previously filed Milimani HCCOMM E429/2022 which was later dismissed. (Interim orders obtained annexed)
31. That despite having notice of the impending auction on 23.04.2024 through the Courtesy Notice and newspaper advert, the Plaintiff waited until the last minute to apply to this Honourable Court on 19.04.2024 to enjoin the impending auction which demonstrates that the Plaintiff was indolent and is not entitled to an equitable relief.
32. That the intended auction sale of the Suit Property is procedural and in total compliance with the Law, and no iota of fraud has been pleaded, let alone proven against the said auction, nor against



the Defendants that would entitle this Court to grant the Plaintiff the orders sought in his subject application.

33. In view of the above, it was deposed in contention that the contents of Plaintiff's Supporting Affidavit are untrue and are all disproved by the facts I have demonstrated and proven hereinabove confirming that all due process under the subject Charge and under the Law has been adhered to by the 1st Defendant in exercising its statutory power of sale over the Suit Property.
34. That the plaintiff has not come to court with clean hands and that his application is marred with lies and concealment and as a consequence whereof he does not deserve the mercy of this Court.
35. That the Plaintiff is indebted and continues to be indebted to the 1st Defendant as claimed by the latter in its various Notices duly served on the Plaintiff, and the 1st Defendant properly seeks to exercise its statutorily given power of sale over the Suit Property.
36. It was therefore deposed that in the circumstances, the Suit Property is properly, rightfully and legally entitled to be sold by the 1st Defendant in exercise of its statutory power of sale and the Plaintiff has not proved either of his Applications and that on the contrary, the balance of convenience tilts heavily in favour of the Defendants and that the contents of the Plaintiff's Application and the Plaintiff's Supporting Affidavit are therefore misleading and an attempt by the Plaintiff to evade justice by wrongfully negating the 1st Defendant's legal right to sell the Suit Property.
37. That the Plaintiff's applications are both therefore frivolous and unmeritorious and ought to be dismissed by this court with costs to the Defendants.

SUBMISSIONS

38. Parties' counsel filed written submission to canvass the application for injunction. The plaintiff's counsel in his submissions dated 5th July 2024 framed one issue of whether the application satisfies the requirements for a temporary injunction. Counsel submitted that there was no evidence of indebtedness by his client to the 1st defendant hence there was no justification for the planned sale of the property subject of this suit. That no statutory notices were served upon his client as mandated under sections 90 and 96 of the *Land Act* and that the application meets the threshold in the *Giella v Cassman Brown* [1973] E.A 358 case. He relied on the case of *Dac Aviation (EA) Limited V KCB Bank Kenya Limited & Another (Commercial Case E778 Of 2021)* [2023] KEHC [3129] (KLR) (Commercial & Tax) (6 April 2023) (Ruling) where Majanja J allowed an application for an injunction to allow the defendant Bank to comply with the requirement for issuance of statutory notices under sections 90 and 96 of the *Land Act*.
39. Counsel also submitted that there had been no response to the application by the defendants herein hence the court should grant the orders sought by the plaintiff.
40. On behalf of the defendants, it was submitted as follows: On the allegations that the plaintiff did not receive the defendants' response to the Application, it was submitted that the Defendants duly responded by filing their Replying Affidavit on the e-filing platform, which was duly confirmed by Honourable Glorinah Nasimiyu Barasah (S.R.M.) when the matter came up before her on 8th July 2024 in the presence of Ms. Wanyaga holding brief for Mr. Okanda for the Plaintiff. That the said filed Replying Affidavit has been and remains on record as verified by the e-filing platform. That as of that day, Ms. Wanyaga appearing for the Plaintiff also confirmed that they had been duly served with the Defendants' Replying Affidavit and would serve their Written Submissions on the Defendants' Counsel. Counsel therefore submitted that the Plaintiff's allegations in their Submissions that the



Defendants have not filed & served their response are an attempt to steal a match on the Defendants, which he urged this Court to reject.

41. It was also submitted that the Rules of Natural Justice and Article 50 (1) dictate that no party should be condemned unheard, which would cause grievous injustice to the Defendants more so in view of the sturdy and weighty defense they have placed before this Court in response to the Plaintiff's misplaced application.
42. It was submitted that this being an injunction application, the Courts have innumerable times rightfully held that they are guided by the well-established, well-known and settled principles for determining such application, as set out in the Giella Vs. Cassman Brown Case [1973] EA 360 eKLR which are: -
 - (a) that the applicant must establish a prima facie case with a probability of success;
 - (b) that an injunction would ordinarily not be granted unless the applicant will otherwise suffer loss that cannot be compensated by an award of damages; and
 - (c) that if the court is in doubt, it will determine the matter on a balance of convenience.
43. Reliance was placed on the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR (decision 1 in the attached Case Digest) where the learned appellate judges stated that:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”
44. On whether the afore-mentioned 3 pre-requisite principles had been met by the plaintiff to warrant grant of an interlocutory injunction restraining the defendants from disposing of the suit property as advertised, counsel for the defendants reiterated the replying affidavit sworn on behalf of the defendants and submitted that none of the principles had been established to warrant a grant of a temporary injunction. He relied on several decisions and urged this court to dismiss the application with costs.

Analysis and Determination

45. I have carefully considered the applicant's Notice of motion, grounds, supporting affidavit and submissions. I have also considered the detailed opposing affidavit and submissions by the respondents and the statutory and case law relied on by both parties in their respective submissions.
46. The issue for determination is whether the plaintiff is deserving of the interlocutory injunction sought.



47. The law on granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 as follows:

“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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- (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.”

48. The power exercised by the courts in an application seeking interlocutory injunctive orders is discretionary. The discretion is guided by the principles established in the locus classicus case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the Court set out the principles that an applicant must satisfy for the court to grant an interlocutory 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.”

49. In the instant case, I have perused the pleadings filed by both parties. On the first limb on whether the applicant has shown a prima facie case with a probability of success, I note that the applicant bases his claim on this limb on the fact that the respondent did not comply with the statutory provisions of sections 90 and 96 of the *Land Act* regarding service of the Statutory Notices on him. This allegation is vehemently denied by the 1st defendant who, though a sworn affidavit which was never controverted, produced copies of all demands, statutory notices, evidence of service of those demands and statutory notices and acknowledgment by the plaintiff of the said Notices including acknowledgment of indebtedness to the 1st defendant and the plaintiff asking for indulgence to settle the outstanding loan. The plaintiff's own letters to the 1st defendant as annexed show that he even sought permission from the 1st defendant to allow him sell the suit property and repay the outstanding loan. Furthermore, the default was in 2015 well before the covid19 pandemic.

50. All the demand letters and statutory notices were sent to the plaintiff by the 1st and 2nd defendant by registered post and evidence of postage annexed. The plaintiff also acknowledged receipt of those letters and statutory notices. The 1st defendant also sent the notices by email and it is not denied that the email used was the plaintiff's nor that the postal address used was not his.

51. The initial demand letter notifying the plaintiff of his default was posted by registered mail vide letter dated 27/5/2020 and on email on 29/5/2020. The 90 days statutory notice to rectify the default was sent on 13/8/2020 by registered post while the 40 days notice to sell the property was sent on 9/12/2020.



52. The plaintiff wrote the following letters acknowledging default 2/12/2020 8/12/2020 and 5/3/2021. In the latter letter, the plaintiff while acknowledging his default, asked the 1st defendant to allow him to sell the property in issue.
53. The auctioneer, second respondent herein also served the 45 days' notice and all that evidence is on record, not controverted at all. There are also courtesy notices dated 3/2/2022, 23/9/2022, 7/2/2023 and 15/6/2023.
54. In *Mc Tough & another v National Bank of Kenya Limited & another (Civil Application E095 of 2023)* [2023] KECA 1265 (KLR) (25 October 2023) (Ruling) the Court of Appeal at Kisumu, less than a month ago had this to say in an application for stay of the High Court ruling declining an application for injunction to restrain sale of charged property:
- “The bottom-line is that what the applicants seek to injunctively interfere with is the 1st respondent’s exercise of its statutory power of sale in a situation where the loans advanced and the default are incontestable. As between a chargee and a chargor, this Court is very slow to restrain the former. Indeed, our jurisprudence is that even an allegation of fraud (of the kind made here) on the part of the chargee is usually insufficient to provoke a restraint without requiring the chargor to pay into court the disputed amounts (see *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR). There are, of course, exceptions to this general rule– for example where there are issues germane to the validity of the instrument creating the charge or when the integrity of the charge instrument is impugned.
33. In the instant case, there is not even a whisper that these exceptions apply. The applicants have not otherwise demonstrated to us why we should carve a special exception in their case. The general legal logic – borne of Law and Economics sensibility – is that when a chargor accepts to charge their property as security for a loan, they are, definitionally, agreeing that the charged property is a fungible commodity. Doing so means that such a chargor-applicant accepts that damages are an adequate remedy should a dispute or default arise and the chargee opts to exercise its statutory power of sale. Our jurisprudence has, consequently, consistently taken the position that charging a property commoditizes it: to offer a property as security for a loan is to convert it into a commodity for sale in the land market in the event of a default. See, for example, *Paul Muhoro Kihara vs Barclays Bank (K) Ltd, Milimani HCCC No.33 of 2002 (2001) 2EA 420* and *John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd* [2006] eKLR.
34. The upshot is that, in the circumstances of this case, the applicants are simply unable to demonstrate, in the face of the valid charge instrument and incontestable evidence that the debt is still owing, that their appeal will be rendered nugatory because, definitionally, there are adequate monetary reliefs for their alleged cause of action. This is one of those cases where, adopting the words of Lord Hoffman in *National Commercial Bank of Jamaica v Olint Corp. Limited* [2009] 1 WLR 1405, the applicants should be “left to their remedy in damages” in the event they eventually succeed.”
55. In this case, from the defendant’s annexures which were never contested unlike the plaintiff who decided to annex no document to establish a prima facie case and instead stated that he relied on some



- documents filed with the plaint, which documents have no material to support his application, there is uncontroverted evidence that the plaintiff defaulted to repay the loan and that he still owes the defendant monies.
56. Additionally, there is uncontroverted evidence that there are previous attempted auctions of the suit property and in the one of 21/7/2021, the plaintiff attended while in the second one of 2/11/2022, the highest bidder did not meet the required conditions of sale. In the advertised sale of 7/7/2023, the plaintiff sought and obtained an injunction to stop the sell. Further, the plaintiff filed two previous suits stopping the sale as advertised but those suits were dismissed as shown by the copies of interim orders of injunction in Milimani HCC E429 of 2022 and Kisumu CMCC E171 of 2023.
57. From the material placed on record by the defendants, which material was not controverted, I have no doubt in my mind that the plaintiff is a liar. He elide to this court that he had repaid the entire loan advanced without annexing even a single document of repayment. He also lied that he had not received any statutory notices and he further withheld very material evidence before the court so as to obtain an interim order of injunction. He is also guilty of inordinate delay and from the evidence that he filed two other suits and even participated in the earlier scheduled sales of the suit property, it is clear that the plaintiff is forum shopping and abusing court process. He must be stopped at all costs.
58. It follows that I need not delve deep into the principles for grant of interlocutory injunctions. I am satisfied on the material placed before this court that the plaintiff has not established a prima facie case with the probability of success, he has not demonstrated that he will suffer irreparable loss if the injunction sought is not granted in his favor and neither has he shown that the balance of convenience tilts in his favour. I have equally not been shown any good reason for grant of the orders sought.
59. In other words, the plaintiff has not satisfied any of those principles as set out in his own submissions and therefore he does not deserve any discretion of this court. He played dishonesty of the highest order, failed to disclose material particulars and lied to this court on oath that he had cleared the entire loan owed to the 1st defendant or that no statutory notices had been served upon him prior to the advertised sale of the suit property, which has turned out not to be the case.
60. On the plaintiff's assertion that the defendants had not filed any responses to the application or the submissions, the e-portal clearly shows that the defendants filed their response and submissions to canvass the interlocutory application herein. The plaintiff's counsel holding brief also confirmed that they had been served. The allegation is therefore not supported.
61. I find the application dated 18th April, 2024 to be devoid of any merit. It is hereby dismissed and the interim injunction granted is hereby discharged.
62. The defendants shall have the costs of this application as dismissed.
63. Pre trial directions shall be on 18/12/2024 unless the suit is withdrawn.
64. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2024.

R.E. ABURILI
JUDGE

