



Hillside School Utawala Limited v Consolidated Bank of Kenya Ltd (Commercial Case E511 of 2023) [2025] KEHC 13355 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E511 OF 2023
MN MWANGI, J
SEPTEMBER 18, 2025**

BETWEEN

HILLSIDE SCHOOL UTAWALA LIMITED APPLICANT

AND

CONSOLIDATED BANK OF KENYA LTD RESPONDENT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 10th November 2023 pursuant to the provisions of Orders 40 & 51 of the Civil Procedure Rules, 2010, and Sections 3 & 3A of the *Civil Procedure Act*. The plaintiff seeks an order for the immediate release of its school bus, registration number KCX 205Z, Isuzu Mini Bus.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Joseph Kabugi Karanja, a Director and shareholder of the plaintiff company. Mr. Karanja averred that despite an ongoing application scheduled for inter partes hearing on 6th December 2023, the defendant after being served, unlawfully instructed Regent Auctioneers to seize and schedule the sale of the plaintiff's school bus, Isuzu Mini Bus, Registration No. KCX 205Z on 21st November 2023.
3. He asserted that the said vehicle was jointly registered and used as security for a loan that has since been fully repaid. He contended that the defendant's actions include failure to issue proper notice, misapplication of repayments, and illegal attachment of property, in breach of the Agreement between the parties herein and various legal provisions, including the *Movable Property Security Rights Act* and the *Banking Act*. Mr. Karanja contended that the defendant's actions are fraudulent, prejudicial, and risk causing irreparable loss to the plaintiff unless the orders sought herein are granted.



4. In opposition to the application, the defendant filed a replying affidavit sworn on 14th December 2023 by Mr. Jackson Talibong, the defendant's Senior Legal Manager. Mr. Talibong contended that the plaintiff defaulted on the loan facility advanced to it, which was secured by among other assets, the motor vehicle registration No. KCX 205Z, but due to the plaintiff's default in its loan repayment obligations, the defendant lawfully instructed Regent Auctioneers to recover the outstanding amounts through auction. He averred that at the time of issuing the aforesaid instructions, no Court orders barring the sale had been issued.
5. Mr. Talibong acknowledged the Loan Agreements cited by the plaintiff, but asserted that the loan facility was jointly secured, thus allowing disposal of any listed security upon default, without a specific order. He denied the allegations of fraud, breach, or illegality levelled against defendant by the plaintiff and stated that the defendant acted within the law. He further stated that the plaintiff being in default of its loan repayment obligations, cannot seek protection from enforcement actions. Mr. Talibong urged this Court to dismiss the instant application with costs, as halting the auction would unjustly prejudice the defendant's right to recover the subject debt.
6. The application herein was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of Irungu Kang'ata & Company Advocates on 8th March 2024. This Court however notes that the written submissions filed on behalf of the plaintiff by the law firm of Kurauka & Company Advocates on 19th December 2024, are in respect to the Notice of Motion application dated 19th October 2023 which the Court already noted had been compromised by an agreement of the parties.
7. Mr. Omondi, learned Counsel for the defendant cited Clause 42 of the Legal Charge dated 22nd March 2019 and submitted that a formal discharge is only issued upon full settlement, and at the chargor's request, neither of which has occurred. He further submitted that in this case no discharge of charge has been issued because the full loan balance, interest, and related expenses remain unpaid. He contended that no evidence had been adduced in respect to a WhatsApp conversation referred to by the plaintiff allegedly confirming full repayment of the loan advanced to the plaintiff.
8. He asserted that the loan offer letter dated 22nd December 2022 explicitly listed the motor vehicles as continuing security, and if any partial discharge was intended based on repayment progress, it should have been stated in the contract. To buttress these submissions, Counsel relied on the case of Joel Phenehas Nyaga & Joseph Nyaga Nzau (Suing as the Chairperson and Treasurer of Kemagui Electrification Self Help Group) v Aloysius Nyaga Kanyua & Julia Gicuku Nyaga [2020] eKLR. Mr. Omondi contended that due to the plaintiff's default, the defendant was, and is still entitled to realize the listed securities under the Loan Agreement and has the discretion to do so in any order, without prioritizing one security over another.
9. Counsel submitted that the defendant issued the plaintiff with a Statutory Notice dated 4th October 2023 pursuant to the provisions of Sections 65 & 67 of the *Movable Property Security Rights Act*, notifying the plaintiff of the intended sale of the subject motor vehicles due to loan arrears. He argued that since the plaintiff does not deny being in arrears, the 14-day Notice period was reasonable and legally compliant, as the law does not prescribe a fixed duration. He submitted that the plaintiff's allegations regarding loan merging, non-compliance with the loan terms, and breaches of the *Banking Act* lack specificity and evidence. He asserted that a chargee cannot be restrained from exercising its statutory power of sale due to mere disputes over accounts or interest, and that the defendant's actions were justified.



Analysis and Determination.

10. Upon consideration of the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the defendant and the written submissions by Counsel for the defendant, the issue that arises for determination is whether the application herein is merited.
11. The plaintiff, through the instant application, seeks an order compelling the defendant to immediately release motor vehicle registration number KCX 205Z, an Isuzu Mini Bus. Due to the manner in which the relief sought has been framed, the prayer is for an interlocutory mandatory injunction.
12. It is now well settled that an order of an interlocutory mandatory injunction is given sparingly. This position was stated by the Court of Appeal in the oft cited case of Kenya Breweries Ltd & another v Washington O. Okeya [2002] eKLR, as hereunder -

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the Applicant. Moreover, before granting a mandatory interlocutory injunction, the Court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.

13. The Court of Appeal in the case of Nation Media Group Ltd & 2 others v John Harun Mwau [2014] eKLR, expressed itself as hereunder in respect to interlocutory mandatory injunctions -

It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated; as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.

14. Upon reviewing the pleadings filed herein, it is not in dispute that vide offer letters dated 20th November 2018 & 22nd December 2022, the defendant advanced various loan facilities to the plaintiff which were secured by inter alia, the plaintiff's parcel of land and motor vehicles registration numbers KCY 127D and KCX 205Z. The plaintiff stated that by a demand letter dated 4th October 2023, the defendant threatened to sell the aforementioned motor vehicles in an effort to recover outstanding loan arrears. The plaintiff asserted that the loan facility secured by these motor vehicles had been fully settled and stated that the said vehicles do not secure any other loan facility, hence they cannot be attached in respect of any other indebtedness.
15. A review of the offer letter dated 22nd December 2022 clearly reveals that the defendant advanced the plaintiff a sum of Kshs.20,000,000/=, secured by inter alia, motor vehicles registration numbers KCY 127D and KCX 205Z. This Court notes that even though the plaintiff claims that the loan facility secured by these vehicles has been fully repaid, no evidence has been adduced to support this assertion, contrary to the provisions of Sections 107, 108 & 109 of the *Evidence Act*, which provides that he who asserts must prove.
16. Prior to the filing of this suit and the application herein, the defendant had served the plaintiff with a Statutory Notice of default demanding payment of Kshs.4,924,406.67, failure to which the defendant would sell motor vehicles registration numbers KCY 127D and KCX 205Z, which had been offered



as security for a financial facility advanced to the plaintiff, in order to recover the outstanding sum of Kshs.36,302,809.87. Further, a review of the Court record reveals that Counsel for the plaintiff on several occasions acknowledged the plaintiff's indebtedness to the defendant. For instance, on 10th June 2024, he stated that part of the debt had been settled and requested for additional time to advise the plaintiff to settle the outstanding balance. In light of the foregoing, I am satisfied that the plaintiff was, and remains indebted to the defendant.

17. The defendant served the plaintiff with a Statutory Notice of default dated 4th October 2023 demanding for payment of Kshs.4,924,406.67, pursuant to the provisions of Sections 65 & 67 of the *Movable Property Security Rights Act*, 2016 which states that -

Section 65

65. Post-default rights

1. After the failure of the debtor to pay or otherwise perform a secured obligation, the grantor and the secured creditor may exercise any right –
 - a. under this Part;
 - b. provided in the security agreement; or
 - c. provided under any other written law.
2. The exercise of a post-default right with respect to the collateral does not prevent the exercise of a post-default right with respect to the secured obligation, and the exercise of a post-default right with respect to the secured obligation does not prevent the exercise of a post-default right with respect to the collateral.
3. The grantor and any other person that owes payment or other performance of the secured obligation may not waive unilaterally or vary by agreement any of its rights under this Part before default.
4. If the security right has been created under a hire-purchase agreement, the secured creditor may enforce its rights only in accordance with the Hire Purchase Act (Cap. 507).

Section 67 1.

If there is a default with respect to any obligation, the secured creditor shall serve on the grantor a notification, in writing or in other form agreed between the parties, to pay the money owing or perform and observe the agreement as the case may be.

2. The notification required under subsection (1) shall adequately inform the recipient of the following matters –
 - a. the nature and extent of default;
 - b. if the default consists of non-payment, the actual amount and the time by the end of which payment must be completed;
 - c. if the default consists of the failure to perform or observe any covenant, express or implied, in the agreement, the act the grantor must do or desist from doing so as to rectify the default and the time by the end of which the default must have been rectified;



- d. the consequence that if the default is not rectified within the time specified in the notification, the secured creditor will proceed to exercise any of the remedies referred to in section 65; and
 - e. the right of the grantor in respect of certain remedies to apply to the Court for relief against those remedies.
 3. If the grantor does not comply within the time period indicated in the notification after the date of service of the notification, the secured creditor may –
 - a. sue the grantor for any payment due and owing under the agreement;
 - b. appoint a receiver of the movable asset;
 - c. lease the movable asset;
 - d. take possession of the movable asset;
 - e. sell the movable asset; or
 - f. pursue any of the remedies under section 65.
 4. The Cabinet Secretary may prescribe the form and content of a notification to be served under this section.
18. Upon reading Clause 14(xiii) of the offer letter dated 22nd December 2022, I am satisfied that the defendant in issuing the demand letter dated 4th October 2023, acted in accordance with the provisions set out therein. Additionally, I am equally satisfied that the defendant complied with the requirements of Section 67(1) of the *Movable Property Security Rights Act*, 2016. Given the said circumstances and considering that the plaintiff has not shown compliance with the terms of the said demand letter, I am persuaded that the defendant was, and remains within its legal rights to enforce its remedies as provided for under Clause 14(xiii) of the offer letter dated 22nd December 2022 and Section 67(3)(e) of the *Movable Property Security Rights Act*, 2016, in relation to motor vehicle registration number KCX 205Z.
19. In light of the above, I am not persuaded that the plaintiff has demonstrated the existence of any exceptional and special circumstances, to warrant being granted an interlocutory mandatory injunction.
20. This Court finds that the plaintiff's application dated 10th November 2023 is unmeritorious. It is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kurauka for the plaintiff/applicant

Mr. Omondi for the defendant/respondent

Ms B. Wokabi – Court Assistant.

