

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E315 OF 2024**

AZHAR KAMAL CHAUDRY.....PLAINTIFF/APPLICANT

-VERSUS-

DEVELOPMENT BANK OF KENYA

LIMITED.....DEFENDANT/RESPONDENT

**RULING**

1. Before me is a Notice of Motion application dated 10<sup>th</sup> June 2024 filed by the plaintiff/applicant pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Article 40 of the Constitution, Sections 90(1), 90(2)(b), 90(3) & 96(2) of the Land Act, 2012, Order 40 Rule 1 & Order 50 Rule 1 of the Civil Procedure Rules, 2010. The plaintiff seeks an order of temporary injunction restraining the defendant and its affiliates from selling, transferring, disposing of, or interfering with the plaintiff's ownership, possession, or use of the property known as L.R. No. 1870/1/308 (I.R. 331738) in Nairobi, pending the hearing and determination of this suit. In the alternative, the plaintiff seeks an order of *status quo* to preserve the current state of affairs in respect to the suit property.
2. The application is anchored on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Azhar Kamal Chaudry, the plaintiff herein. He averred that vide an offer letter dated 18<sup>th</sup> April 2008, the respondent offered Commcarrier Satelite Services Limited a loan of Kshs.105,000,000/=, which was secured by a guarantee dated 29<sup>th</sup> May 2008

executed by him and legal charges over two of his properties namely L.R. No. 1870/1/308 (I.R. 31738) and L.R. No. 7785/219.

3. Mr. Chaudry averred that all that property known as L.R. No. 7785/219 was subsequently sold by mutual consent and the proceeds used to clear the loan. He asserted that the loan in question was fully repaid and even if it was not, his liability as guarantor ended when the defendant entered into new arrangements with the borrower without his knowledge. He contended that the defendant's fresh demands for repayment are illegal, unfounded, and based on defective statutory notices, and the fact that they refer to loans denominated in other currencies which he never guaranteed.
4. Mr. Chaudry averred that the defendant's statutory power of sale over the suit property is time-barred under limitation law as the right arose more than seven (7) years ago. He further averred that the defendant's actions in recovery of the loan are fraudulent, dishonest and amount to statutory breach as there was a failure to issue statutory notices under Sections 90(2)(a) & 96(2) of the Land Act, 2012. He deposed that the threatened sale of the suit property will cause him to suffer irreparable loss, thereby violating his constitutional rights to property and legitimate expectation, especially since the property has been his home for over 50 years and it is a matrimonial home.
5. In opposition to the application, the defendant filed a replying affidavit sworn on 9<sup>th</sup> September 2024 by Mr. Fredrick Kodada, the defendant's Credit Officer. He confirmed that Commcarrier Satellite Services Ltd was granted a loan facility of Kshs.105,000,000/=, consisting of a term loan of Kshs.90,000,000/=, and an overdraft of Kshs.15,000,000/=, secured through various guarantees, including a legal charge over the plaintiff's property L.R. No. 1870/1/308. He averred that the borrower defaulted in its loan repayment obligations leading to

a restructure in 2010, involving a new loan in USD, secured by the same charge and guarantees.

6. Mr. Kodada averred that the plaintiff actively engaged in settlement discussions between the years 2015 - 2017, proposing several repayment options including a final settlement offer of USD 1,250,000.00 and later Kshs.50,000,000/=, but failed to follow through. He contended that the loan in question remains unpaid and the plaintiff's annexed statement only relates to a current account, not the loan account. Further, that no payment receipts had been produced. He stated that the charged property was never discharged and the guarantee remains binding, and that the defendant's actions to realize the security are lawful and justified under the Indian Transfer of Property Act and the legal charge.
7. Mr. Kodada averred that in regard to limitation of time, the plaintiff only acknowledged the debt in June 2017 thus resetting the limitation period. He contended that the enforcement action is not time-barred. He asserted that the defendant had complied with all legal procedures including issuing statutory notices as acknowledged by the plaintiff, obtaining a property valuation and ensuring all contractual obligations were honoured. He deposed that the outstanding debt is Kshs.338,940,179.02, and halting enforcement may risk the defendant's financial viability.
8. In a rejoinder, the plaintiff filed a further affidavit sworn on 4<sup>th</sup> December 2024 by Mr. Azhar Kamal Chaudry, the plaintiff herein. He contended that references to the 2010 offer letter are misleading and outdated, as the facilities were later tacked and consolidated under a new offer letter dated 1<sup>st</sup> November 2012, which introduced unsecured USD-denominated loans. He averred that the new term loans were never secured as the defendant failed to vary existing securities, contrary to Paragraphs 11.2 & 12.1 of the new offer. He contended that there was no Memorandum executed under Section 84(2) of the Land Act

to vary the charge. In addition, that the Stamp Duty Act requirements for fresh advances were not complied with.

9. Mr. Chaudry stated that as is evident from the letter dated 30<sup>th</sup> November 2012, that the new loans were used to clear prior liabilities under the charge dated 11<sup>th</sup> July 2008, effectively discharging the borrower and extinguishing his obligation as a guarantor. He further stated that the defendant's statements of account confirm disbursement of the new loans in 2012, but are incomplete as despite requests for the same, full statements were not provided. He contended that past letters proposing settlement were written *without prejudice* during negotiations and the debts they referred to were unrelated to the original secured facility. Mr. Chaudry averred that he strongly disputed the debt and requested account reconciliation in letters which went unanswered.
10. He contended that the defendant issued statutory notices demanding payment in EUR and USD, despite him never guaranteeing loans in those currencies or authorizing variation of the charge. Further, that additional facilities were advanced as per a letter written in the year 2010 including third parties like Pegrume, which facilities were outside the scope of the original loan secured by the plaintiff's property. He averred that the defendant failed to produce receipts, but the clearing of prior accounts via new loans constituted evidence of payment. He maintained that the charge in question is unenforceable, as it was not varied as per legal requirements and lacked the plaintiff's consent or execution of a Memorandum. Mr. Chaudry further averred that the defendant's claim is time-barred under the 12-year statutory limitation and any acknowledgment of debt cannot revive an unlawful or discharged obligation.
11. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Rachier & Amollo LLP on

9<sup>th</sup> December 2024, while the defendant's submissions were filed on 9<sup>th</sup> December 2024 by the law firm of G. M. Gamma Advocates LLP.

12. Mr. Munyua, learned Counsel for the plaintiff relied on the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya & 2others** [2003] KLR 123, and submitted that the plaintiff has established a *prima facie* case with a probability of success. He argued that the defendant's claim is premised on a series of USD-denominated term loans advanced through an offer letter dated 1<sup>st</sup> November 2012. He stated that the new facilities were not secured by valid and enforceable instruments. Counsel referred to paragraphs 11.2 & 12.1 of the said offer letter and contended that they expressly required that the lender's securities to be varied, executed, stamped, and registered for the new facilities to be binding. He stated that since it is not disputed that the plaintiff did not execute any Memorandum of variation nor was such a Memorandum presented for registration, the securities in question were never validly extended to secure the new loans.
13. Counsel contended that pursuant to Sections 84(2) of the Land Act and Sections 9 & 70 of the Stamp Duty Act, any increase in a secured debt must be formalized through a stamped, executed, and registered Memorandum, but in this case, no such Memorandum exists. Counsel asserted that the new term loans are unlawful, unsecured and non-binding on both the borrower and the plaintiff as a guarantor. Mr. Munyua submitted that the defendant has also issued statutory notices seeking to recover debts denominated in foreign currencies which were not guaranteed by the plaintiff, thus the said notices are invalid, illegal, and incapable of grounding the statutory power of sale under Section 90 of the Land Act.
14. Mr. Munyua referred to the letter dated 30<sup>th</sup> November 2012 and contended that the defendant confirmed that the proceeds of the new loans had been disbursed

and applied to redeem previous facilities, and for that reason, the charge dated 11<sup>th</sup> July 2008 became spent and the plaintiff was discharged as a secondary obligor. He cited the provisions of Section 19(1) of the Limitation of Actions Act and submitted that since the original charge was executed on 11<sup>th</sup> July 2008 and no valid acknowledgment of debt was made thereafter, the defendant's claim is statute-barred. Counsel referred to the Court of Appeal case of **Nguruman Ltd v Jan Bonde Nielson & others** [2014] eKLR, and argued that in the event that the instant application is disallowed, the plaintiff stands to suffer irreparable loss since the injury that would result from the sale of the suit property cannot be compensated in damages. He asserted that the balance of convenience tilts in favour of the plaintiff.

15. Mr. Odiyo, learned Counsel for the defendant relied on the case of **Giella v Cassman Brown Co. Ltd** [1973] EA 358 and submitted that the plaintiff has not established a case to warrant being granted an order of temporary injunction. He referred to the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya & 2 others** (supra) and argued that the plaintiff claims that the defendant engaged in loan restructuring and other arrangements without his involvement but fails to provide any specific documentary evidence or to identify the alleged arrangements. He stated that in any event, the plaintiff's name and signature appear on the 2010 offer letter and he has not denied the signature, undermining his claim of non-involvement and suggesting he was aware of at least one loan restructure.
16. Mr. Odiyo contended that in as much as the plaintiff claims that the borrower repaid the loan in full, he has failed to state when this occurred. He stated that the defendant has adduced evidence showing the plaintiff engaging in efforts to resolve a loan default. He stated that the account statements showing a nil balance relied on by the plaintiff belong to a current account, not the loan

account. He further stated that a nil balance in the current account does not prove that the loan was repaid. He submitted that the defendant has produced actual loan account statements showing an outstanding balance. Mr. Odiyo further submitted that the plaintiff admits to receiving statutory notices but disputes their validity based on the alleged loan repayment, thus confirming that all the statutory notices were duly served.

17. Counsel cited the Court of Appeal case of **Mwambeja Ranching Company Limited & Project Advisory Services Limited v Kenya National Capital Corporation** [2019] KECA 436 (KLR) and argued that a legal charge constitutes continuing security, hence as long as the charge is in force and the debt is unpaid, the limitation period does not apply. He contended that the plaintiff has not established a *prima facie* case with a probability of success. He submitted that since the plaintiff has not demonstrated a *prima facie* case with a probability of success, this Court needs not consider the remaining conditions for granting injunctions, as they must be met sequentially. Mr. Odiyo asserted that the plaintiff has failed to meet any of the required legal thresholds for an injunction and urged this Court to dismiss the application herein in its entirety.

#### **ANALYSIS AND DETERMINATION.**

18. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit by the defendant and the written submissions by Counsel for the parties. The issues that arise for determination are –

- i) Whether the defendant's claim is statute barred; and**
- ii) Whether the application herein is merited.**

**Whether the defendant's claim is statute barred.**

19. Limitation of actions is provided for under Section 4 of the Limitation of Actions Act which provides that –

**1) *The following actions may not be brought after the end of six years from the date on which the cause of action accrued –***

***a) actions founded on contract;***

***b) actions to enforce a recognizance;***

***c) actions to enforce an award;***

***d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;***

***e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.***

**2) ...**

**3) *An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.***

**4) ...**

20. The plaintiff contended that the defendant's statutory power of sale over the suit property is barred by limitation, since the said right accrued upon execution of the original charge on 11<sup>th</sup> July 2008 and no valid acknowledgment of debt has been made since. He claimed that his property L.R. No. 7785/219, was sold by mutual agreement and the proceeds therein were used to settle the subject loan. He contended that the defendant subsequently entered into new arrangements with the borrower without his knowledge, effectively terminating his obligations as guarantor. On that basis, and given that the enforcement action was initiated more than seven (7) years after the right allegedly arose, the

plaintiff contended that the defendant's statutory power of sale is now time-barred.

21. In opposition to the application herein, the defendant averred that the borrower defaulted on its loan repayment obligations, prompting a restructuring in 2010 that involved a new USD-denominated loan secured by the same charge and guarantees. It further averred that the plaintiff actively participated in settlement negotiations between 2015 and 2017, during which time he proposed various repayment options, including offers of USD 1,250,000.00 and later Kshs.50,000,000/=, though none materialized. The defendant asserted that these engagements effectively reset the limitation period. The defendant contended that the subject loan remains outstanding, and that the charged property was never discharged, and the plaintiff's guarantee remains valid and enforceable. The defendant maintained that the attempt to realize the subject security is lawful and properly grounded under both the Indian Transfer of Property Act and the terms of the legal charge, thus it is not barred by limitation.
22. In the case cited by the defendant herein of **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation** (supra), the Court of Appeal addressed the issue of whether or not a security can be statute barred as hereunder-

*It is trite law that as long as a contract is tied to a legal charge there is a continuing security; until the debt is paid and until the security is discharged, none of the parties can claim a cause of action based on a charge to be time barred. A cause of action under a continuing security never dies or lapses. (See the case of Habib Bank A.G. Zurich (supra)).*

23. On the issue of whether the subject debt has been fully repaid, this Court notes that although the plaintiff alleges full repayment, no evidence has been presented to substantiate this claim, contrary to the provisions under Sections

107, 108 & 109 of the Evidence Act, which place the burden of proof on the party asserting a fact. Additionally, the plaintiff has not produced any documentation confirming the alleged sale of L.R. No. 7785/219, no communication from the borrower affirming repayment, nor any receipts evidencing payment to the defendant. Furthermore, while the plaintiff claims to have had no involvement in the loan restructures, a review of the offer letter for the restructuring of banking facilities dated 2<sup>nd</sup> December 2010 reveals that it was executed by the plaintiff. Notably, the plaintiff has neither denied nor challenged the authenticity of the signature appearing next to his name on the said offer letter.

24. In the letter dated 23<sup>rd</sup> November 2016, the plaintiff asserted that his guarantee backed by a legal charge over L.R. No. 1870/1/308, was specifically intended to cover a term loan of Kshs.90,000,000/= and an overdraft facility of Kshs.15,000,000/=. He however noted that following the sale of his property, the outstanding loan balance was significantly reduced from Kshs.105,000,000/= to Kshs.49,059,480.45. The plaintiff acknowledged that although the subject loan had been restructured several times to include a special projects' facility of Kshs.48,641,606.91, no supplemental debenture over the borrower's assets or further charge on his property was executed. On that basis, he urged the defendant to exclude the special projects' facility from the total amount demanded leaving the balance of just over Kshs.100,000,000/= as the only debt secured by the existing debenture and legal charge. The plaintiff also proposed an immediate payment of Kshs.15,000,000/= towards settlement of the outstanding debt. These assertions were reiterated in his subsequent letter dated 28<sup>th</sup> June 2017, indicating acknowledgment of the debt by the plaintiff.

25. In as much as the plaintiff asserts that the aforesaid letters were written on a *without prejudice* basis during settlement negotiations, the letters themselves do not bear the phrase "*without prejudice*" on their face.
26. As affirmed by the Court of Appeal in the case of **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation** (supra), a cause of action arising under a continuing security does not lapse. In light of the said fact, this Court finds that the debt owed to the defendant remains outstanding and the securities held by the defendant have not been discharged. The defendant's efforts to enforce the security, including the exercise of its statutory power of sale over the suit property, cannot be said to be statute barred.
27. In the end, this Court finds that the defendant's claim is not statute barred.

**If the instant application is merited.**

28. Interlocutory injunctions are provided for under Order 40 Rules 1(a) & (b) of the Civil Procedure Rules, 2010, which provides 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.*

29. The leading authority on matters interlocutory injunctions is the case of **Giella v Cassman Brown** (supra). In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] eKLR, the Court in dealing with an application for injunction held thus -

*In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

- a) establish his case only at a prima facie level,*
- b) demonstrate irreparable injury if a temporary injunction is not granted, and*
- c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.*

30. The Court of Appeal in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others** [2003] eKLR, considered what constitutes a *prima case* and held 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.*

31. This Court has already determined that through his letters dated 23<sup>rd</sup> November 2016 & 28<sup>th</sup> June 2017, the plaintiff acknowledged his indebtedness to the defendant in the sum of over Kshs.100,000,000/=, arising from the original loan facility extended to Commcarrier Satellite Services Limited pursuant to an offer letter dated 18<sup>th</sup> April 2008. The plaintiff further admitted that the said facility was secured by *inter alia*, a personal guarantee dated 29<sup>th</sup> May 2008 backed by a legal charge over his property known as L.R. No. 1870/1/308 (I.R. 31738). In this context, the plaintiff's contention that the charge was not varied in line with the terms of the restructured loan offers, and therefore the restructured loans were unsecured, does not justify the issuance of an order of injunction.
32. In light of the foregoing, and considering that the plaintiff has not disputed receipt of the requisite statutory notices served by the defendant, this Court finds that the plaintiff has failed to establish a *prima facie* case with a probability of success to justify restraining the defendant from exercising its statutory power of sale over the suit property.
33. A property offered as security becomes a commodity for sale in the event of default. This was the holding by the Court in the oft cited case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2013] KEHC 363 (KLR)** where it was held that –
- The judge below found that no prima facie case was established and secondly that damages could in fact be an adequate compensation as the appellant's guaranteed security had been converted into a commodity for sale upon the same being charged to the respondent.***
34. Considering the fact that the value of all that parcel of land known as L.R. No. 1870/1/308 (I.R. 31738) can be readily ascertained through valuation, the defendant being a financial institution would be capable of compensating the plaintiff if the suit is ultimately decided in the plaintiff's favour. In the

circumstances, I am persuaded that the plaintiff does not stand to suffer irreparable harm that cannot be adequately compensated by an award of damages in the event the instant application is disallowed.

35. The issue of balance of convenience does not arise since the Court is not in doubt. Nevertheless, based on the foregoing, the balance of convenience tilts in favour of the defendant.
36. The application herein is devoid of merits. It is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 3<sup>rd</sup> day of October 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Wakwaya for the plaintiff/applicant

Mr. Pravin Odiyo for the defendant/respondent

Ms B. Wokabi – Court Assistant.