

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E548 OF 2024**

**THE EMPIRE REALTORS**  
**LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**NCBA BANK KENYA PLC.....1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**

**ELIZABETH W. MUIGAI T/A INTEGRA**  
**AUCTIONEERING (K) COMPANY..2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**

**RULING**

1. The Applicant has moved this Court by way of a Notice of Motion dated 12<sup>th</sup> September 2024 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The Applicant seeks, inter alia, injunctive orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with the intended auction of four parcels of land known as RUIRU EAST/JUJA EAST BLOCK 2/344 and 345, situated in Muhakaini Area, Mastore Location, Juja Sub-County, Kiambu County, and LR Nos. KAJIADO/KAPUTEI NORTH/101173 and 101174, located in Konza Area, Kajiado County.

2. The specific reliefs sought have been set out in the application, including interim and permanent injunctions, an order for joint valuation of the charged properties, rendition of accounts, and costs. The application is supported by the affidavit of Amos Kamau Kamenji, a director of the Applicant company, sworn on even date.

### **The Applicant's Case**

3. The Applicant avers that sometime in November 2016, it obtained a loan facility from the 1<sup>st</sup> Respondent for the purchase of property and for business expansion. It is the Applicant's contention that the said facility was fully repaid by September 2020, as confirmed by a bank statement issued by the 1<sup>st</sup> Respondent showing a zero-loan balance.
3. Despite full repayment, the Applicant alleges that the 1<sup>st</sup> Respondent unlawfully and without justification continued to levy interest, penalties, and other charges on the account, thereby creating an artificial debt. The Applicant asserts that these actions are fraudulent, oppressive, and intended to unlawfully deprive it of its property.
4. The Applicant further avers that the 1<sup>st</sup> Respondent, acting in concert with the 2<sup>nd</sup> Respondent, has advertised the charged properties for sale by public auction, as evidenced by the advertisement published in The Standard Newspaper on 2<sup>nd</sup> September 2024, scheduling the auction for 19<sup>th</sup> September 2024.

5. The Applicant maintains that the intended auction is illegal and unjustified, arguing that the 1<sup>st</sup> Respondent has no lawful basis to exercise its statutory power of sale since the alleged loan has been fully settled. It is further contended that the inclusion of the Kajiado properties, being LR Nos. KAJIADO/KAPUTEI NORTH/101173 and 101174, in the intended sale is particularly irregular, since an addendum executed on 30<sup>th</sup> November 2016 substituted those parcels with LR No. KAJIADO/KAPUTEI NORTH/30212 as the valid security for the loan.
6. The Applicant decries that the Respondents' actions are disproportionate and inequitable, as they seek to sell land worth approximately Kshs. 60,000,000/= to recover a disputed sum of Kshs. 9,484,835/=, an amount it denies owing. The Applicant contends that such conduct is actuated by malice and bad faith, and prays that in the alternative, the 1st Respondent be allowed to retain only one title deed as security pending the determination of the main suit.
7. The Applicant asserts that the conditions for grant of interlocutory injunctions as laid down in **Giella v Cassman Brown & Co. Ltd [1973] EA 358** have been met. It maintains that a prima facie case has been established, that irreparable harm would result if the auction proceeds, and that the balance of convenience tilts in its favour. The Applicant urges the Court to preserve the suit properties to prevent what it describes as "an unlawful deprivation of property."

## **The Respondents' Case**

8. The application is opposed through a replying affidavit sworn on 1<sup>st</sup> October, 2024 by Christine Wahome, the 1<sup>st</sup> Respondent's Recoveries Manager. She confirms that the Applicant was advanced a loan facility by a Letter of Offer dated 27<sup>th</sup> October 2016 amounting to Kshs. 14,904,384/=, intended partly for the purchase of LR No. KAJIADO/KAPUTEI NORTH/52475 and partly to take over a loan of Kshs. 3,904,384/= from Letshego Kenya Limited.
9. It is deposed that the said facility was secured by legal charges registered over LR Nos. RUIRU EAST/JUJA EAST BLOCK 2/344 and 345, and KAJIADO/KAPUTEI NORTH/30112, and that the 1<sup>st</sup> Respondent did not hold LR No. KAJIADO/KAPUTEI NORTH/52475 as part of the securities.
10. Ms. Wahome further deposes that by a Letter of Offer dated 17<sup>th</sup> August 2017, the Applicant was granted an additional facility of Kshs. 22,602,910/=, comprising a balance of Kshs. 12,602,910/= and an additional Kshs. 10,000,000/= for the purchase of LR Nos. KAJIADO/KAPUTEI NORTH/101173 and 101174. These were similarly secured by charges over the same Ruiru parcels and the Kajiado properties, including LR No. KAJIADO/KAPUTEI NORTH/30112, 101173, and 101174.
11. The 1<sup>st</sup> Respondent avers that the said securities were consolidated into a single facility, and the Applicant executed the requisite instruments confirming the consolidation. Consequently, the 1<sup>st</sup> Respondent contends

that it is lawfully entitled to exercise its statutory power of sale over any or all of the charged properties to recover the outstanding debt.

12. The 1<sup>st</sup> Respondent denies the Applicant's claim that the facilities were fully repaid, asserting instead that as at 18<sup>th</sup> September 2024, the Applicant was in arrears amounting to Kshs. 9,926,178.49. It maintains that all statutory notices under the Land Act, 2012 were duly issued and served upon the Applicant, and that Acumen Valuers Limited conducted a professional valuation on 23<sup>rd</sup> July 2024, prior to instructing the 2<sup>nd</sup> Respondent to advertise the sale.
13. The Respondent argues that the intended auction is lawful, regular, and procedurally compliant, and that the Applicant is seeking to use the Court to delay recovery of an undisputed debt. It is further contended that the Applicant has not demonstrated any prima facie case or irreparable loss, as any prejudice suffered can be adequately compensated in damages.
14. The 1<sup>st</sup> Respondent therefore urges the Court to find that the application is frivolous, vexatious, and devoid of merit, and to dismiss it with costs.

### **Analysis and determination**

15. I have carefully considered the application, the supporting affidavit, the replying affidavit, and the rival written submissions by learned counsel for the parties. The main issue for determination is whether the Applicant has

satisfied the principles governing the grant of a temporary injunction.

16. The guiding principles for the grant of interlocutory injunctions are well settled in the locus classicus case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, which established that:

***“an applicant must show a prima facie case with a probability of success, the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages, and if the Court is in doubt, it will decide the application on a balance of convenience.”***

17. These principles were reiterated in the court of appeal case in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, where the court reiterated the three limbs are distinct and sequential, and that the burden lies on the applicant to establish all of them.

18. On the first issue of a prima facie case, in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal defined a prima facie case as *“a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party.”*

19. The Applicant’s main contention is that the loan advanced in November 2016 was fully repaid by September

2020, and that the 1<sup>st</sup> Respondent has, despite such repayment, continued to levy unlawful interests and penalties, thereby creating an artificial debt. The 1<sup>st</sup> Respondent insists that the Applicant's loan facilities were consolidated and remain in arrears of Kshs. 9,926,178.49 as at 18<sup>th</sup> September 2024, and that all requisite statutory notices under the Land Act, 2012 have been duly served.

20. The dispute therefore turns on whether the facilities were fully paid, or validly consolidated into a continuing facility and which parcels of land lawfully stand as securities are substantive issues requiring interrogation of bank statements, facility letters, and charge instruments that can be conclusively determined at trial and not the interlocutory stage. Nonetheless, the allegation of an unlawful debt supported by a bank statement showing a zero balance raises a bona fide dispute touching on the 1<sup>st</sup> Respondent's statutory right of sale.

21. As observed by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, *"the first test is not about establishing success but only that the right claimed exists and has been infringed."* I am persuaded that the Applicant has met this first limb.

22. On the issue of irreparable harm, the Applicant submits that the suit properties comprise of the parcels of land situated in Ruiru and Kajiado, collectively valued at approximately Kshs. 60 million. It is the Applicant's case that these properties constitute its principal assets and that their

sale would not only deprive it of its proprietary interest but also occasion irreversible loss of business, goodwill, and economic stability. The Applicant further underscores that the amount claimed by the 1<sup>st</sup> Respondent, being Kshs. 9,926,178.49, is grossly disproportionate to the total value of the charged properties.

23. The 1<sup>st</sup> Respondent, on its part, contends that any loss the Applicant may suffer in the event of a wrongful sale would be quantifiable and compensable in damages, should the Applicant ultimately succeed at trial. While that submission carries legal weight, the Court is also guided by the well-established principle that land is unique and irreplaceable, particularly where it serves as the foundation of an applicant's livelihood or business.

24. Once property is sold in exercise of a chargee's statutory power of sale, the equity of redemption is extinguished and cannot thereafter be revived, even if the sale is subsequently found to have been irregular - see **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] 1 EA 86**.

25. Guided by this reasoning, I am persuaded that allowing the auction to proceed before the core dispute is adjudicated would expose the Applicant to irreparable harm that cannot be adequately remedied by an award of damages. The preservation of the suit properties is therefore necessary to

safeguard the substratum of the suit pending determination of the main claim.

26. Where the Court is in doubt, the balance of convenience must be considered. In the present case, the Applicant has expressed willingness to have one of the titles retained by the 1<sup>st</sup> Respondent as security, pending the determination of the suit. This, in my view, demonstrates bona fides and a willingness to secure the Respondent's interests while preserving the status quo.
27. On the other hand, the Respondent's interest is purely pecuniary, and its rights as chargee are protected under the Land Act. Thus, preserving the status quo would not prejudice the Respondent, since it can still realize its security should the Applicant's claim fail.
28. Consequently, the balance of convenience tilts in favour of preserving the suit properties to avoid rendering the suit nugatory.
29. Having considered all the circumstances of this case, the Court is persuaded that the Applicant has satisfied the threshold for the grant of interlocutory injunctive relief.

### **Statement of Accounts and disclosure**

30. The Applicant also prays for an order compelling the 1<sup>st</sup> Respondent to render a full and proper statement of account in respect of the loan facilities in question. It was the Applicant's submission that despite repeated requests, the 1<sup>st</sup> Respondent has failed to provide a clear reconciliation of

the sums allegedly owed, thereby casting doubt on the existence of any outstanding indebtedness.

31. In response, the 1<sup>st</sup> Respondent, through the affidavit of Christine Wahome sworn on 1<sup>st</sup> October 2024, averred that the loan account statements and the outstanding balance have been duly provided, showing that as at 18<sup>th</sup> September 2024, the Applicant was in arrears to the tune of Kshs. 9,926,178.49. The 1<sup>st</sup> Respondent maintains that the said statements were shared with the Applicant and annexed to the replying affidavit, thereby satisfying its duty of disclosure.
32. The Court notes that the Applicant has not disputed receipt of those statements, but rather challenges their accuracy. Such issues of reconciliation and computation of interest are matters best determined at the full hearing upon production of detailed evidence and cross-examination of witnesses.
33. At the interlocutory stage, the Court is not required to make definitive findings on the correctness of the accounts. It suffices that the 1<sup>st</sup> Respondent has demonstrated, through its affidavit evidence, that statements of account have been availed, and that the existence or quantum of any outstanding balance remains a contested issue to be resolved at trial.
34. Accordingly, the Court makes the following orders:

- i. A temporary injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their agents or servants, from selling, disposing of, or in any way dealing with the properties known as RUIRU EAST/JUJA EAST BLOCK 2/344 and 345, and KAJIADO/KAPUTEI NORTH/101173 and 101174, pending the hearing and determination of the main suit.***
- ii. The parties shall within thirty (30) days undertake a joint valuation of all the charged properties through valuers mutually agreed upon, and file the valuation reports with the Court.***
- iii. The Applicant shall continue to preserve the suit properties and shall not alienate, lease, or charge the same without leave of the Court.***
- iv. The costs of this application shall abide the outcome of the main suit***

**RULING** delivered virtually, dated and signed at **NAIROBI**

This **16<sup>th</sup>** day of **October** 2025.

**P.M. MULWA**

**JUDGE**

**In the presence of:**

*No appearance for all parties*

Court Assistant: *Carlos*

