

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCOMM NO. E339 OF 2024

KENMOT SPARES LIMITED.....PLAINTIFF

-VERSUS-

ABSA BANK KENYA PLC.....DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion application dated 24th June 2024, pursuant to the provisions of Articles 154(2) & 165(3) of the Constitution of Kenya, 2010, Sections 1, 1A, 1B, 3A & 63 of the Civil Procedure Act, Order 40 Rules 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law. The plaintiff prays for an order of permanent injunction restraining the respondent and their agents from advertising, selling, transferring, or interfering in any way with the plaintiff's ownership of the property known as L.R. No. 209/136/182 (Kirinyaga Road), pending the hearing and determination of this suit.
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. Stanley Njenga Muigai, a Director of the plaintiff company. He averred that the plaintiff entered into a Loan Agreement with the defendant on 10th April 2016 for Kshs.160,000,000/=, secured by a charge over all that property known as L.R. No. 209/136/182 (Kirinyaga Road). He stated that the loan was repayable over a period of 120 months at an interest rate of 17% per annum. He deposed that the suit property was initially valued at Kshs.160,500,000/=, but was later revalued at Kshs.190,000,000/= in 2019. Mr. Muigai averred

that due to economic challenges including a government directive affecting imports and the COVID-19 Pandemic, the plaintiff faced repayment difficulties, and for that reason, the repayment terms were revised to Kshs.600,000/= monthly and later voluntarily increased to Kshs.800,000/=.

3. Mr. Muigai stated that in late 2023 and early 2024, the plaintiff intended to make a lump-sum payment of Kshs.20,000,000/= from the sale of another property, but the sale collapsed due to flooding. He further stated that despite continued monthly payments, the defendant vide a demand letter dated 13th February 2024 wrote to the plaintiff demanding immediate payment of Kshs.238,258,405.65 said to be the outstanding debt as at 29th February 2024 and later instructed Auctioneers to sell the charged property. Mr. Muigai contested the valuation of the suit property and averred that it is grossly undervalued compared to previous valuations and their own recent valuation of Ksh.206,800,000/=. He claimed that a forensic audit indicates a discrepancy of Kshs.37,183,078.50 in the loan balance in favour of the plaintiff. Mr. Muigai averred that the defendant failed to serve proper interest variation notices or provide loan documents when requested, which makes the plaintiff's suit one that has high chances of success.
4. In opposition to the application, the defendant filed a replying affidavit sworn on 2nd August 2024 by Mr. Boniface Muthinja, the defendant's Corporate Recoveries Manager. He averred that the loan advanced to the plaintiff was charged interest at the rate of 7.13% per annum plus the Kenya Bankers Reference Rate and a default rate of 24% per annum. He contended that although the plaintiff initially serviced the loan, it begun defaulting from June 2018, leading to accumulation of arrears. Mr. Muthinja further averred that although the loan was restructured to include a temporary reduction of monthly payments to Ksh.600,000/=:, the plaintiff failed to adhere to the

agreed conditions which included providing updates on a planned sale of land.

5. Mr. Muthinja asserted that statutory notices were served in 2020 and as at 29th January 2024, the plaintiff's loan was in arrears of Kshs.238,258,405.65, prompting the defendant to issue a redemption notice in May 2024. He denied allegations of undervaluation and contended that the most recent valuation reflects a depressed market. He challenged the credibility of the plaintiff's Valuation Report and the forensic audit by IRAC claiming that they are both flawed and self-serving. He averred that the plaintiff voluntarily used the suit property as collateral to secure a commercial loan and cannot now resist enforcement based on sentimental or business reasons. He further averred that a dispute over the loan amount does not justify injunctive relief, and in any event, the plaintiff has not only failed to disclose material facts but has also admitted to being in arrears.
6. In a rejoinder, the plaintiff filed a further affidavit sworn on 17th October 2024 by Mr. Stanley Njenga Muigai, a Director of the plaintiff company. He averred that pursuant to a Court Order issued in response to the instant application, the plaintiff deposited Kshs.5,000,000/= with the defendant on 5th August 2024. In addition, that in addition, the plaintiff made two payments of Ksh.820,000/= each on 9th and 11th October 2024 to cover loan instalments for the months of September and October. He claimed that the plaintiff intended to make a similar payment in the month of November 2024, demonstrating continued good faith in servicing the loan.
7. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed on 18th October 2024 by the law firm of Solomon Mugo & Company Advocates, whereas the defendant's

submissions were filed by the law firm of Waruhiu, K'owade & Ng'ang'a Advocates on 8th November 2024.

8. Mr. Mugo, learned Counsel for the plaintiff submitted that the exact loan amount owed to the defendant by the plaintiff is currently unascertained and the defendant has not contested the recalculations provided in the plaintiff's IRAC Report. Further, that there is a significant discrepancy between the defendant's and the plaintiff's valuations of the suit property. He referred to the case of **Santowels Limited v Stanbic Bank (K) Limited** [2022] KECA 545 (KLR), and contended that the defendant unilaterally varied the contractual interest rate without ministerial approval, contrary to legal requirements.
9. In addition, Mr. Mugo asserted that the plaintiff has since complied with the Court's condition for a temporary injunction by depositing Ksh.5,000,000/= with the defendant and has made additional payments. He relied on the case of **Giella v Cassman Brown** [1973] eKLR and argued that the plaintiff has demonstrated that it has a *prima facie* case against the defendant to warrant being granted the orders being sought herein. On the issue of irreparable harm, Mr. Mugo submitted that the suit property hosts the plaintiff's family business and commercial tenants, and auctioning the property would cause irreversible loss and disrupt livelihoods, thus causing the plaintiff to suffer harm that cannot be compensated by an award of damages.
10. Mr. Thiga, learned Counsel for the defendant relied on the case of **Mrao Limited v First American Bank of Kenya Ltd & others** [2003] KLR 125, and submitted that the defendant acted within its legal mandate under the Loan Agreement, which required the plaintiff to repay the loan advanced to it in 120 monthly instalments of Ksh.2,780,762.45 with interest at 7.13% plus

the Kenya Bankers Reference Rate. He argued that the defendant has demonstrated good faith by accepting reduced payments of Ksh.600,000/= per month as requested by the plaintiff in August 2020, but the plaintiff failed to meet even this reduced payment consistently, as for instance, the plaintiff only paid Ksh.406,750/= in September 2021 and Ksh.598,710/= in the months of June and November 2023, falling short of the agreed amounts.

11. Mr. Thiga contended that due to the aforesaid defaults, the contractual default interest rate of 24% per annum became applicable, increasing the loan balance. He asserted that the defendant has a lawful right to exercise its statutory power of sale over the suit property under Section 96(1) of the Land Act, 2012, as the plaintiff is in breach of the terms of the charge. Counsel also cited the case of **Santowels Limited v Stanbic Bank (K) Limited** (supra) and stated that the defendant has not violated the plaintiff's rights but it has merely exercised its contractual rights under the Loan Agreement. He submitted that the plaintiff had failed to establish a *prima facie* case with a probability of success and it does not merit the injunctive relief sought.
12. Counsel submitted that the plaintiff was aware from the outset that the suit property could be sold in the event of default. He relied on the case of **Maithya v Housing Finance co. of Kenya & Another** [2003] 1 EA 133 at 139, and contended that the loss of the charged property is compensable by damages, as its value is ascertainable. Additionally, that the defendant being a reputable financial institution is capable of paying any such damages if ordered. Mr. Thiga asserted that the plaintiff has not demonstrated irreparable harm. On the question of balance of convenience, he submitted that since the plaintiff is clearly in default, this principle also weighs in favour of the defendant.

ANALYSIS AND DETERMINATION.

13. 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 filed by the defendant and the written submissions by Counsel for the parties. The issue that arises for determination is whether the plaintiff has made out a case to warrant being granted an order of injunction.
14. Upon perusal of the instant application, it is apparent that the order being sought by the plaintiff is an order for a permanent injunction restraining the respondent from advertising, selling, transferring, or interfering in any way with the plaintiff's ownership of property known as L.R. No. 209/136/182 (Kirinyaga Road), pending the hearing and determination of this suit, as opposed to an order for a temporary interlocutory injunction. A permanent or what is commonly referred to as perpetual injunction is usually granted after the full hearing of a case on the merits, of a case and it conclusively determines the rights of the parties and it becomes a decree of the Court. In this case, the order being sought is meant to permanently restrain the defendant from certain actions so as to protect the plaintiff's rights.
15. 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.

16. In as much as the plaintiff herein seeks an order of permanent injunction in an interlocutory application, this Court will still go ahead and determine whether an order of interlocutory injunction should issue in the circumstances of this case.
17. An order for an interlocutory injunction is provisional, and it is meant to only last for a specified duration of time or until further orders of the Court. It is intended to preserve the subject matter of the suit pending its final determination. Interlocutory injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states that -

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.

18. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] eKLR, the Court in dealing with an application similar to the instant one, held as follows:-

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.*

19. The Court of Appeal in the case of **Mrao Ltd v. First American Bank of Kenya** (supra)[2003] eKLR, considered what constitutes a *prima case* stated thus-

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.

20. The plaintiff herein does not dispute being indebted to the defendant or that the latter issued it with all the requisite statutory notices prior to its attempt to exercise its statutory power of sale over the suit property. The plaintiff challenges the defendant's right to exercise its statutory power of sale over the suit property on grounds that the outstanding debt due to the defendant is

unascertained and the valuation of the suit property that the defendant intends to rely on while auctioning the suit property grossly undervalued the said property.

21. A charge however, cannot be restrained from exercising its statutory power of sale over a charged property on the ground that there is a dispute over the amount due. **The Halsbury's Laws of England Vol. 32** (4th Edition) paragraph 725 sets out the circumstances in which a mortgagee or chargee may be restrained from exercising his statutory power of sale in the following words-

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.

22. In the case of **Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited** [2019] eKLR, the Court while addressing the same issue held the following-

I wish set it clear that in accordance with the already existing jurisprudence, a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a chargee from exercising its statutory power of sale. In the case of Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R) (unreported), the court stated as follows: -

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury’s Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

23. In light of the decisions I have referred to and the applicable law, this Court finds that the plaintiff’s challenge over the amount due to the defendant as a result of the loan advanced to it and the plaintiff’s claim that the outstanding debt is unascertained, cannot be a reason for this Court to restrain the defendant from exercising its statutory power of sale over the suit property.
24. On the issue of valuation of the suit property, this Court is of the considered view that a challenge on the valuation carried out on the suit property by the defendant especially in instances where neither the debt nor the service of statutory notices is disputed is not enough reason to warrant this Court to grant the plaintiff an order of interlocutory injunction. This is because upon determination of this suit, if the Court finds that the suit property was sold at a value below its current market value, the plaintiffs can always be compensated by an award of damages
25. It is my finding that the plaintiff has not discharged its burden of demonstrating that it has a *prima facie* case with a probability of success.
26. As to whether the plaintiff will suffer irreparable harm, I am not persuaded that this is the case. This is especially so because if the plaintiff suffers any

damages as a result of the defendant's actions, it can be adequately compensated by an award of damages as provided for under Section 99(4) of the Land Act. Additionally, it is now well settled that a property offered as security becomes a commodity for sale in the event of default. See the case of **Shimmers Plaza Limited v National Bank of Kenya Limited** [2013] eKLR. Given the above, and considering the fact that the suit property can be readily determined 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.

27. The issue of balance of convenience does not arise since this Court is not in doubt. The above notwithstanding, in the circumstances of this case, the balance of convenience tilts in favour of disallowing the application herein.
28. The upshot is that the application herein is bereft of merits. It is hereby dismissed with costs to the defendant.

It is so ordered.

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

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Nduli for the plaintiff/applicant

Ms Muthama holding brief for Mr. Thiga for the defendant/respondent

Ms B. Wokabi - Court Assistant.