

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E348 OF 2024**

**ROSEMELE ANYANGO MUTOKA .....PLAINTIFF/APPLICANT**

**VERSUS**

**EQUITY BANK KENYA LIMITED....1<sup>ST</sup> DEFENDANT**

**/RESPONDENT**

**TEMBO TAMU LIMITED.....2<sup>ND</sup>**

**DEFENDANT/RESPONDENT**

**DANSTONE ODHIAMBO OKWANY..3<sup>RD</sup>**

**DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant filed a Notice of Motion dated 28<sup>th</sup> June 2024 brought under Article 40 of the Constitution of Kenya, and Sections 1A, 1B, and 3A of the Civil Procedure Act, seeking an order of injunction to restrain the 1<sup>st</sup> Respondent, its agents or servants from advertising for sale, selling, foreclosing, or in any way interfering with the ownership and possession of the property known as Nairobi/Block 171/148 (hereinafter “the suit property”), pending the hearing and determination of the suit.
  
2. The application is supported by the affidavit of Rosemele Anyango Mutoka, who avers that she is the registered proprietor of the suit property. She denies ever charging the same to the 1<sup>st</sup> Respondent as security for any loan or acting as

guarantor for the 2<sup>nd</sup> Respondent. She further contends that she never executed any letter of offer or authorized anyone to do so on her behalf. It is her case that the title deed has been in the custody of the 3<sup>rd</sup> Respondent since 2018 following the demise of her husband and son. She asserts that she only became aware of the alleged charge upon receiving a redemption notice and notification of sale dated 17<sup>th</sup> May 2024 demanding a sum of Kshs. 377,667,727.26.

3. She further avers that any charge or security instrument purportedly created over the suit property was done fraudulently and without her knowledge or consent, in conspiracy between the Respondents. She contends she is not a director nor a shareholder of the 2<sup>nd</sup> Respondent and thus not privy to the activities, she never participated and was not aware of the purported board meetings held on 18<sup>th</sup> November 2020 leading to the resolution by the 2<sup>nd</sup> Respondent. She contends that she did not issue any power of attorney to Patricia Lelei Jeptoo Advocates to enter into transactions and sign documents pertaining to the suit property. Her signature is not on the offer letter dated 3<sup>rd</sup> July 2020. She avers she has never appeared before James Kituku Advocates to execute a personal guarantee and indemnity dated 25<sup>th</sup> March 2021 and maintains that her signature is a forgery and attaches the forensic document examination report dated 2<sup>nd</sup> September 2024.

4. The 1<sup>st</sup> Respondent opposed the application through a replying affidavit sworn on 30<sup>th</sup> July 2024 by Kariuki King'ori, its Legal Manager. He depones that the 2<sup>nd</sup> Respondent was a customer of the bank who was advanced various loan facilities amounting to Kshs. 135 million, 65 million and 90 million pursuant to letters of offer dated 3<sup>rd</sup> July 2020 and 19<sup>th</sup> October 2020. That the Applicant, who is a sister to the 3<sup>rd</sup> Respondent, executed a personal guarantee and indemnity dated 25<sup>th</sup> March 2021 and deposited her title to the suit property as security. The 2<sup>nd</sup> Respondent defaulted in repayment, prompting the bank to issue statutory notices under the Land Act, 2012 and to initiate the process of realizing the security.
5. The 1<sup>st</sup> Respondent contends that all requisite notices were duly served through the postal address provided in the loan documentation and that valuation of the property was conducted by Dominion Valuers Limited prior to the proposed sale. It asserts that the Applicant is not candid with the court, having willingly executed the charge instruments and guarantee.
6. Parties filed written submissions. The Applicant's submissions are dated 21<sup>st</sup> March 2025 while the 1<sup>st</sup> Respondent filed submissions dated 24<sup>th</sup> March 2025.

### **Analysis and determination**

7. Having considered the pleadings, affidavits, and submissions of counsel, the issue for determination is whether the Applicant has established a case to warrant the grant of a temporary injunction.

8. The law governing the grant of interlocutory injunctions is well settled. In **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, the Court set out the guiding principles, namely that:
- i. The Applicant must establish a prima facie case with a probability of success;*
  - ii. The Applicant must demonstrate that the applicant stands to suffer irreparable injury which cannot be adequately compensated by damages; and*
  - iii. If the court is in doubt, it will decide the application on a balance of convenience.*
9. These principles were reaffirmed by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, where it was held that the three conditions are sequential, and that the applicant must first establish a prima facie case before the court can consider the other two limbs.
10. **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, defines a *prima facie* case as one:
- “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 so as to call for an explanation or rebuttal from the latter.”*
11. In the present case, the Applicant contends that she is the registered proprietor of the suit property Nairobi/Block 171/148 and that she never charged the property to the 1<sup>st</sup> Respondent or guaranteed the 2<sup>nd</sup> Respondent’s loan facilities. She asserts

that her title was fraudulently used as security through forged documents and that her signature was falsified in the alleged personal guarantee and indemnity dated 25<sup>th</sup> March 2021. The forensic report annexed to her supporting affidavit purports to confirm the forgery and it indicates that her signature was not procured in most of the documents.

12. On the other hand, the 1<sup>st</sup> Respondent insists that the Applicant willingly guaranteed the loan facilities and executed the necessary documents in the presence of an advocate. It further avers that all statutory notices under Sections 90 and 96 of the Land Act, 2012 were duly issued prior to the intended sale.
13. The core dispute before this Court, therefore, revolves around whether the Applicant indeed executed the charge documents and guarantee, or whether they were forged and fraudulently procured. That question goes to the root of ownership rights and the validity of the securities sought to be enforced by the 1<sup>st</sup> Respondent.
14. Article 40 of the Constitution of Kenya, 2010 guarantees every person the right to acquire and own property of any description and in any part of Kenya, and further protects against arbitrary deprivation of property. The Applicant has demonstrated to the court that her title or its use as collateral was tainted by fraud or forgery, her constitutional right to property has thus been implicated.
15. A prima facie case is established where the material before the court discloses an apparent infringement of a right

calling for rebuttal by the opposite party. Allegations of fraud are serious and must be specifically pleaded and proved to a standard higher than on a balance of probabilities, though not as high as beyond reasonable doubt - See **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**.

16. The Applicant has presented a forensic document examiner's report suggesting that her signatures on the guarantee and other security documents were forged. Without delving into the merits of that evidence at this interlocutory stage, this Court is satisfied that the claim raises serious triable issues warranting investigation at the full hearing.
17. In **Joseph Siro Mosioma v Housing Finance Co. of Kenya Ltd & 3 Others [2008] eKLR**, the Court held that once an applicant shows that the intended sale is founded on a contested or potentially illegal charge, the court ought to intervene to preserve the property until the dispute is determined. Where the validity of the charge is in issue, it would be unjust to allow the chargee to proceed with sale before the question is settled.
18. I therefore find that the Applicant has established a prima facie case with a probability of success.
19. On the issue of irreparable injury, the Applicant has demonstrated, on a prima facie basis, that her signatures were forged in the creation of the impugned charge instrument. If this allegation is ultimately proven at trial, it would mean that the charge was void *ab initio* and incapable of conferring any power of sale upon the 1<sup>st</sup> Respondent. In the circumstances,

allowing the bank to proceed with the intended sale would amount to sanctioning an illegality and would gravely prejudice the Applicant's proprietary rights protected under Article 40 of the Constitution of Kenya.

20. The courts have consistently held that where the authenticity of a charge or the validity of a security instrument is in question, the subject property should be preserved pending determination of the dispute. In **John Gakuo v Equity Bank (Kenya) Limited [2024] KEHC 276 (KLR)**, the Court emphasized that once an Applicant establishes that her title may have been unlawfully encumbered, any threatened sale constitutes an irreparable injury since the deprivation of land especially one alleged to have been charged fraudulently cannot be adequately compensated by damages.
21. In the present case, therefore, I am of the view that permitting the 1<sup>st</sup> Respondent to proceed with the auction or realization of the suit property, in the face of uncontroverted allegations of forgery, would not only defeat the purpose of the pending proceedings but also occasion irreparable harm that no monetary compensation could redress. The Applicant stands to lose her proprietary rights in the suit property.
22. Having found that the Applicant has established a prima facie case and demonstrated the likelihood of suffering irreparable harm, the Court must now consider where the balance of convenience lies. In this case, the balance of convenience tilts heavily in favour of preserving the *status quo*. The Applicant asserts proprietary ownership of the suit

property and denies ever executing the impugned charge, while the 1<sup>st</sup> Respondent relies on documents whose authenticity is seriously contested. If the property were to be sold before the determination of this suit, and it later emerges that the documents were indeed forged, the Applicant would have suffered a permanent deprivation of property in violation of her constitutional rights. Conversely, if the injunction is granted and the 1<sup>st</sup> Respondent eventually succeeds, it would still have recourse through recovery proceedings against the principal debtor.

23. In light of the foregoing analysis, the Court is persuaded that the Applicant has met the threshold for the grant of a temporary injunction. Accordingly, the Notice of Motion dated 28<sup>th</sup> June 2024 is hereby found to be meritorious and is allowed as follows:

- i. A temporary injunction is hereby issued restraining the 1<sup>st</sup> Respondent, its agents, servants, or auctioneers from advertising for sale, selling, transferring, alienating, or otherwise interfering with the Applicant's ownership and possession of the property known as Nairobi/Block 171/148, pending the hearing and determination of this suit.***
- ii. For the avoidance of doubt, the order herein shall not preclude the 1<sup>st</sup> Respondent from pursuing its remedies against the principal borrower through lawful means, provided such remedies do not involve the sale or transfer of the suit property.***

***iii. The costs of the application shall be in the cause.***

**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:**

*Ms. Nekoye h/b for Mr. Simiyu* for Plaintiff/Applicant

*Ms. Mbaji* for 1<sup>st</sup> Defendant/Respondent

Court Assistant: *Carlos*