REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL AND TAX DIVISION

HCCOMM NO. E135 OF 2025

DEDAN KAMAU THANDE……1ST PLAINTIFF/APPLICANT

MARY WANGARI NJONDE……..2ND PLAINTIFF /APPLICANT

VERSUS

TRIPPLE N CAR CLINIC LIMITED……1ST DEFENDANT/ RESPONDENT

CREDIT BANK PLC……2ND DEFENDANT/RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 26th February 2025 brought under Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. The Applicants seek, *inter alia*, a temporary injunction restraining the 1st and 2nd Respondents from selling, entering, taking possession of, or otherwise interfering with ownership of Title Number Dagoretti/Kangemi/1058, pending the hearing and determination of this suit. They also seek an order for an independent valuation of the said property.

2. The application is supported by the affidavit of Dedan Kamau Thande, the 1st Plaintiff/Applicant, and is opposed through a Replying Affidavit sworn on 10th March 2025 by Wainaina Francis Ngaruiya, the Head of Legal Services of the 2nd Respondent Bank.

Applicants' Case

3. The Applicants contend that the 1st Applicant is the registered owner of the suit property, inherited from his late father, and that it constitutes matrimonial property jointly developed with the 2nd Applicant. They allege that the property was unlawfully charged to the 2nd Respondent as security for a loan facility advanced to the 1st Respondent in the sum of Kshs. 10,000,000/=, without their knowledge, authority or consent.
4. It is their case that the charge instrument dated 20th September 2019 was procured through fraud and forgery, and that the spousal consent attached thereto was also falsified. They aver that they neither appeared before the attesting advocate nor executed any loan-related documents. They maintain that the original title deed was at all material times held by Equity Bank Limited, and therefore the 2nd Respondent could not have lawfully registered the impugned charge.
5. The Applicants further assert that the 2nd Respondent disbursed the loan to the 1st Respondent despite irregularities in documentation, including the alleged opening of a bank account contemporaneously with

disbursement. They challenge the valuation relied upon by the Bank, asserting that the property is undervalued. Unless restrained, they argue, the Respondents' intended sale will render the suit nugatory and cause them irreparable loss.

Respondents' Case

6. The 2nd Respondent opposes the application on grounds that the same is *res judicata*, having been fully litigated and determined before the Environment and Land Court, where Hon. Justice Oguttu Mboya declined to issue an injunction over the same property.
7. It is further contended that the Applicants are directors and shareholders of the 1st Respondent, a family-owned entity, and that the 1st Applicant voluntarily charged his property to secure the company's loan. The Bank avers that all relevant documents, including the charge, deed of guarantee, and spousal consent, were duly executed and attested to in accordance with the Land Act, 2012 and Land Registration Act, 2012.
8. The Respondent maintains that all statutory notices were issued in compliance with Sections 90 and 96 of the Land Act, and that the Applicants' default in repayment has persisted despite restructuring of the loan. The Bank therefore asserts that it is lawfully entitled to exercise its statutory power of sale.
9. The application was canvassed by way of written submissions and counsels highlighted their respective

submissions which I have considered together with the authorities cited.

Analysis and determination

10. Upon consideration of the pleadings, affidavits and submissions, the issues that arise for determination are:

    i. *Whether this Court has jurisdiction in view of the plea of res judicata; and*

    ii. *Whether the Applicants have met the threshold for the grant of a temporary injunction.*

On the issue of jurisdiction and res judicata

11. The Respondent asserts that this matter is barred by Section 7 of the Civil Procedure Act, as the as the applicants filed a similar application in the ELC court which delivered a ruling dismissing the application on the injunctive reliefs.

12. The principles guiding res judicata are stipulated in **Section 7** of the **Civil Procedure Act** which provides that;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

13. In **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others [1996] eKLR,** the Court of Appeal underscored that *res judicata* applies only where the prior decision was made by a court seized with proper jurisdiction and after a full and final hearing. The Court stated that:

> ***"The doctrine of res judicata applies where the court is competent and has heard and determined the issues finally. A decision rendered without jurisdiction or in breach of the law cannot form the basis of a valid plea of res judicata."***

14. It is not disputed that the Applicants herein had previously filed Environment and Land Court Case No. 251 of 2024, in which the parties were identical to those before this Court. In the said matter, the Applicants similarly sought injunctive orders restraining the 1st and 2nd Respondents from selling, entering upon, taking possession of, or otherwise interfering with the ownership and quiet possession of Title Number Dagoretti/Kangemi/1058. The application in that case was dated 20th June 2024.

15. The record reveals that the Environment and Land Court, (per Hon. Justice Oguttu Mboya), delivered a ruling on 15th November 2024, wherein the learned Judge held that the Court was devoid and divested of the requisite jurisdiction to entertain and adjudicate upon the dispute, noting that the matter fell within the commercial jurisdiction

of the High Court. However, notwithstanding that finding, the learned Judge proceeded to consider the merits of the application and found that the Applicants had failed to establish a prima facie case within the meaning of the decision in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. Consequently, the Court declined to grant the injunctive relief sought, upheld the Preliminary Objection dated 3rd September 2024, and proceeded to strike out both the Notice of Motion and the suit in its entirety.

16. With due respect, this Court takes the view that once the learned Judge had made a categorical finding that the Court lacked jurisdiction, it was improper to proceed to determine the merits of the application. It is trite law that jurisdiction is everything, and without it, a court of law must immediately down its tools. This principle was authoritatively enunciated by the Court of Appeal in **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, where Nyarangi, JA stated:

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

17. The same principle was reaffirmed by the Supreme Court in **Samuel Kamau Macharia & Another v Kenya**

Commercial Bank Ltd & 2 Others [2012] eKLR, where the Court held that jurisdiction flows from either the Constitution, statute, or both, and a court cannot arrogate to itself jurisdiction that is not so conferred.

18. Accordingly, once the Environment and Land Court made a clear pronouncement that it was divested of jurisdiction, it became *functus officio* in respect of the matter and could not validly proceed to adjudicate the substantive issues before it. Any determination made thereafter, including findings on the merits of the application was made *per incuriam* and without legal foundation. The effect of such a determination, is that all orders emanating therefrom are nullity *ab initio*, for want of jurisdiction.

19. The Court of Appeal in **Phoenix of E.A. Assurance Co. Ltd v S.M. Thiga t/a Newspaper Service [2019] eKLR** emphasized this point when it held that where a court finds that it has no jurisdiction, any further proceedings or pronouncements on the merits are a nullity, since a court cannot purport to exercise powers that the law does not vest in it.

20. It therefore follows that the findings of the ELC on the merits of the injunction application cannot found a basis for a plea of *res judicata*, as the same were made without jurisdiction and thus incapable of conferring finality under Section 7 of the Civil Procedure Act. The test for *res judicata* requires that the former suit must have been heard and finally determined by a court of competent jurisdiction, as

was reaffirmed in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**. Where, as in the instant case, the previous court expressly disclaimed jurisdiction, its determination cannot operate to bar subsequent proceedings before a competent court.

21. Accordingly, this Court finds and holds that the plea of *res judicata* as raised by the 2nd Respondent is misconceived and unsustainable, since the earlier decision relied upon was made without jurisdiction and therefore, a nullity *ab initio*.

Threshold for grant of a temporary injunction

22. The principles governing the grant of temporary injunctions were laid down in the celebrated case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, where the Court held that an Applicant must establish:

> ***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience."***

23. The test for what constitutes a *prima facie case* was restated by the Court of Appeal in **Mrao Ltd v First**

American Bank of Kenya Ltd & 2 Others [2003] KLR 125, where Bosire JA observed:

> ***"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself would 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."***

24. The 1st Applicant contends that the suit property was initially charged to Equity Bank and that he neither consented to, nor participated in, the discharge of that charge. He avers that the subsequent charge and further charge in favour of the 2nd Respondent were unlawfully procured, contending that his signature was forged and that the transactions were tainted with fraud and illegality.

25. However, I note that despite the grave allegations of fraud, no report has been made to any investigative authority, nor has any forensic evidence of forgery or illegality been tendered before this Court. It is trite that allegations of fraud must not only be specifically pleaded but also strictly proved - the standard being higher than a mere balance of probabilities though not as high as beyond reasonable doubt. The Court of Appeal in **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR** emphasized that:

> ***"It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The standard of proof is beyond a mere balance of probabilities."***

26. The 1st Applicant has further asserted that he was never a director or shareholder of the 1st Respondent company and denies attending any meeting or executing any document in relation to the impugned transaction. If indeed he was not a director, one would have expected the Applicant to take remedial steps under the Companies Act by filing a complaint or rectification proceedings at the Companies Registry. No such evidence has been placed before this Court.

27. From the record, it is apparent that the company was incorporated by the Applicants who were directors, and the 2nd Respondent has demonstrated that they were at all material times actively engaged in the loan transaction. The circumstances point to this being a family business enterprise, in which the Applicants were duly involved and benefited from the facilities advanced.

28. It is further undisputed that the 1st Respondent obtained a loan facility which remains unpaid. The 2nd Respondent, being a chargee, has a statutory right of sale under Sections 90 and 96 of the Land Act, 2012, to realize its security upon default. The Court will only interfere with the exercise of such a right where clear evidence of fraud,

illegality, or procedural impropriety is demonstrated. In **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal reiterated that:

> ***"The three conditions for the grant of an interlocutory injunction are sequential and not conjunctive. Failure to prove a prima facie case automatically disposes of the application."***

29. On the second limb on *irreparable harm*, the Applicants contend that the sale of the suit property would cause them loss as the suit is matrimonial property. However, the property having been offered as security, it by that very fact became a commodity for sale. In **Andrew Muriuki Wanjohi v Equity Building Society & 2 Others [2006] eKLR**, the Court held:

> ***"Once property is offered as security, it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated by damages."***

30. Accordingly, I am of the view that any loss that may arise from the realization of the security can adequately be compensated in monetary terms should the Applicants ultimately succeed at trial.

31. On the balance of convenience, the Court notes the Applicants have been in default for several years and have enjoyed interim orders in previous proceedings restraining the chargee from exercising its statutory rights. Equity aids the vigilant and not the indolent. In the circumstances, the

balance tilts in favour of allowing the chargee to proceed with realization, subject to compliance with the statutory requirements under the Land Act.

32. For the avoidance of doubt, the Court must guard against issuing orders that would have the effect of indefinitely restraining a lender from exercising its lawful remedies under a valid charge. In **Joseph Okoth Waudi v National Bank of Kenya [2001] eKLR**, the Court of Appeal stated:

> ***"A court of law cannot restrain a mortgagee from exercising its power of sale merely because the amount is disputed. The mortgagor's remedy is to pay the amount due under protest."***

33. In view of the foregoing, I find that the Applicants have not established a *prima facie case* with a probability of success, nor demonstrated that they stand to suffer irreparable harm incapable of compensation by damages. The balance of convenience, in any event, favours the 2nd Respondent, who is lawfully exercising its statutory rights as chargee. The prayer for temporary injunction is therefore without merit.

34. The allegations of fraud have not been substantiated, no demonstrable infringement of any legal right has been shown, and the injury apprehended, if any, is compensable by damages. This Court must therefore refrain from issuing an equitable remedy in the absence of a clear and compelling justification.

35. Accordingly, I find and hold that the Applicants have not met the legal threshold for the grant of a temporary injunction. The Notice of Motion dated 26th February 2025 lacks merit and is hereby dismissed with costs.

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

This **16th** day of **October** 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Kamau for Plaintiffs/Applicants

Mr. Arunga h/b for Mr. Kimutai for 2nd Defendant

Court Assistant*: Carlos*