

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO. E055 OF 2024

**D. CHANDULAL K. VORA &
COMPANY LIMITED.....PLAINTIFF/RESPONDENT**

-VERSUS-

M'ORIENTAL BANK LTD.....1ST DEFENDANT/APPLICANT

PETER N. GICHUKI T/A SPOTLIGHT

INTERCEPTS.....2ND DEFENDANT

RULING

1. The 1st defendant, which is the applicant in the application before court, sought to exercise its statutory power of sale and, among other things, dispose of the plaintiff's properties known as Land Reference No. Mombasa/Block XIX/281 and Mombasa/Block XXIII/190 Flat No. 4A. To forestall the applicant's action, the plaintiff/respondent commenced the instant suit against the applicant and simultaneously moved this Honourable Court for, *inter alia*, an interlocutory injunction against the 1st applicant to restrain it from exercising its statutory power of sale.
2. By a ruling delivered on 20 February 2025, this Honourable Court (Ng'arng'ar, J.) allowed the application. In particular, the court ordered as follows:

“(a) Pending the hearing and determination of the suit, this court grants an order of temporary injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns or any other person acting for them from auctioning,

selling, disposing of or in any other manner interfering with the ownership of any and/or all of the properties known as Land Reference Numbers MOMBASA/BLOCK XIX/281 and MOMBASA/BLOCK XXIII/190 Flat No.”

3. The court ordered that costs of the application would be in the cause. In coming to this decision, the court held, *inter alia*:

“18. I have considered the Notice of Motion application dated 16th August 2024, the 1st Defendant’s Replying Affidavit and submissions by the parties. The issues for determination are: -

(a) Whether the 1st Defendant’s Replying Affidavit is fatally defective for failing to indicate the date when it was sworn

(b) Whether the application for temporary injunction is merited”

4. On the first issue identified for determination, the court ruled that:

“22. The omission by the Defendants/Respondents to date the Replying Affidavit renders it defective and the same should therefore be struck out.”

And in considering the 2nd issue, the court held as follows:

“23. On the second issue, the Defendants/Respondents’ Replying Affidavit having been struck out renders the Plaintiff/Applicant’s application unopposed. This court will however consider whether

the Plaintiff/Applicant has satisfied the principles for grant of temporary injunction.

24. The court in Giella v Cassman Brown (1973) EA 358 set out conditions for grant of temporary injunction as follows:”

5. The court set out the conditions for grant of an injunction in the cited case and ultimately concluded as follows:

“29. Pursuant to the above, I am satisfied that the Applicant has established a prima facie case with a probability of success.

30. On whether the Plaintiff/Applicant may suffer irreparable injury which would not adequately be compensated by an award of damages, the Plaintiff/Applicant stated that Land Reference Number Mombasa/Block XXIII/190 Flat No. 4A is owned by Praksha Kumar Rajesh Vora who is a very old lady and who uses the said property as her only home which if it is sold she will be rendered homeless. I find that the Plaintiff/Applicant has established irreparable harm which cannot adequately be compensated by an award of damages.

31. On whose favour the balance of convenience tilts, the Plaintiff/Applicant submitted that the intended sale is illegal, unprocedural and in breach of the Plaintiff’s rights which should

not be the permitted to continue. I find that the balance of convenience tilts in favour of the Plaintiff/Applicant.

32. In the upshot, the Notice of Motion application dated 16th August 2024 is merited and allowed...”

6. In the wake of this decision, the 1st applicant/defendant has, by an application dated 6 March 2025, moved this Honourable Court for orders that:

“a) The Honourable Court be pleased to set aside, vary and/or discharge the Injunction Order issued on 20th February 2025.

b) In the alternative the Plaintiff, be ordered to deposit the sum of Kshs. 165,250,566.06 in a joint account of the parties Advocates as a condition for the grant of the Injunction Order.”

The applicant has also sought for an order on costs of the application.

7. The application is expressed to be filed under Section 1A, 1B and Section 3 of the Civil Procedure Act, cap. 21 and Order 40 Rule 7 of the Civil Procedure Rules.

8. It is supported by the affidavit sworn by Arif Gulamhussein who has introduced himself in the affidavit as the “*branch manager of M’Oriental Bank Limited, Mombasa Branch.*”

9. In summary, Gulamhussein has chronicled the history of the plaintiff's relationship with the 1st defendant which, basically, is a customer and banker relationship dating back to 2014.
10. It is in the course of that relationship that the 1st defendant advanced the plaintiff a loan on terms specified in the letter of offer and also contained in the charge instruments registered against assets or properties which the plaintiff offered as security for the loan. Gulhamhussein has deposed on the details of the loan including the terms upon which it was granted and exhibited to his affidavit copies of such documents as the letter of offer and the charge instruments. He has also given what is claimed to be the details of the plaintiff's failure to meet the terms of repayment of the loan and, in particular, the extent to which the plaintiff has defaulted in repayment of the loan.
11. It is as a result of the default that the defendant moved to exercise its statutory power of sale. According to the 1st defendant, the court failed to consider these facts in granting the injunction. To this end, it is pleaded in the grounds upon which the application is based that:

“7. Had the Honourable Court considered the 1st Defendant's Replying Affidavit, it would have been satisfied that all the requisite steps necessary for the exercise of its statutory power of sale had been complied with.”

12. The plaintiff opposed the application and, in this respect, filed a replying affidavit sworn by Darshan Dipak Vora. Vora has described himself as “*a director of the plaintiff*”.
13. According to the plaintiff, the 1st defendant’s application is an attempt to re-introduce evidence to oppose the Plaintiff’s application for injunction which application has been heard and determined. The crux of the 1st defendant’s case, it is urged, is to re-open for hearing of an application that has since been disposed of.
14. As far as the prayer that the Plaintiff be ordered to deposit Kshs. **165,250,566.06**, is concerned, Vora has been advised by his learned counsel that this court does not have jurisdiction to reopen an order which has already been granted and subject the same to fresh conditions which were not imposed at the time the order was made. In any event, the amount owed to the 1st defendant is in dispute and, before the dispute has been resolved, it would be premature at this stage of the proceedings to order the plaintiff to deposit the amount in court.
15. Again, the amount which the 1st defendant seeks to be deposited in court is already secured by assets or properties against which charges have been registered in favour of the 1st defendant.
16. Order 40 rule 7 of the Civil Procedure Rules which provides discharge, variation or setting aside of orders reads as follows:

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

17. The injunction to which reference has been made in the above rule would include an injunction made *ex parte* under Order 40 rule 4 and may be discharged, varied or set aside besides its limited lifespan prescribed in order 40 rule 4(2). The injunction subject to discharge, variation or setting aside also includes that which has been granted upon disposal of a substantive application for such an order which again, under order 40 rule 4(6), has a lifespan of one-year subject, of course, to such lease of life that the court may mete out.

18. Turning back to the applicant's application, it is apparent from Order 40 rule 7 that the variation or setting aside or discharge of an order for injunction is discretionary, and; therefore, it behoves an applicant who seeks the discretion to be exercised in his favour, to demonstrate to the satisfaction of the court that there is a sufficient reason or material, or both, to vary, set aside or discharge the order for injunction.

19. No doubt, the circumstances under which such a variation, setting aside or discharge of an order for injunction may be deemed necessary will vary from one case to another and, for this reason, I am not disposed to spell out any exhaustive list of circumstances when the court may

exercise its discretion in favour of an applicant. If I was to take that course, I would, at the very least, inhibit the exercise of discretion which, by its very nature, is designed to leave the court with such a wide latitude as to make a decision that is meet and just in the circumstances of any particular case.

20. That notwithstanding, I would suppose the conduct of any particular applicant or intervening circumstances subsequent to the grant of the injunction which the court could not foresee at the time the order for injunction was made, would be consequential in the exercise of the court's discretion, one way or the other.

21. If there is a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of an applicant at the time the injunction was granted, the proper application to be made would be an application for review under order 45 of the Civil Procedure Rules. By itself, such a discovery of a new and important matter would not be basis for an application under order 40 rule 7 of the Civil Procedure Rules.

22. A critical look at the affidavit sworn in support of the applicant's application coupled with the submissions filed in support of the position which the applicant has adopted shows that the 1st defendant's quest for the variation, discharge or setting aside of the order for injunction is largely informed by the depositions made in the affidavit sworn in

response to the plaintiff's application for injunction but which, for reasons given in the learned judge's ruling of 20 February 2025, was struck out.

23. As matter of fact, the applicant has gone further to question the court's ruling as a decision that granted the plaintiff "an open-ended injunction" without considering the 1st defendant's evidence. The submissions filed on behalf of the 1st defendant leave no doubt that this is the course that the applicant has adopted. At paragraph 15 of these submissions, the learned counsel for the applicant has submitted as follows:

"15. My Lord in so arriving at the determination to injunct the 1st Defendant, the Court therefore did not consider the loan agreement entered into between the parties; the instruments of charge executed over the suit properties to secure the advances made to the Plaintiff by the 1st Defendant; the statement of account evidencing the advance of the loan to the Plaintiff by the 1st Defendant and the default in repayment of the same; the Court did not take into account that at the time of the making of its decision there was due and owing a sum of Kshs. 165,250,566.06 from the Plaintiff to the 1st Defendant; the Court did not consider that the Plaintiff indeed acknowledged being indebted to the 1st defendant and had on various occasions through

correspondence made proposals to repay the loan amount but had nevertheless never honoured any of its promises; the Court did not consider that the 1st Defendant had bent over backwards to indulge and accommodate the Plaintiff by making several requests for payment of the loan amount and graciously giving to the Plaintiff more time to honour its commitments to no avail; the Court did not consider that the 1st Defendant indeed served all the requisite statutory notices and that its power to exercise its statutory power of sale had legally accrued. In short the Court did not consider the 1st Defendants case because it expunged the same and proceeded to determine the application as unopposed and granted an open ended Injunction restraining the 1st Defendant from exercising its statutory power of sale until the suit herein is heard and determined.”

24.Of course, the court noted what would have been the 1st defendant’s evidence in its decision. My reading of the learned judge’s ruling is that, the learned judge reproduced much of that evidence but he could not consider it in his decision because, in his opinion, the affidavit offended section 5 of the Oaths and Statutory Declaration Act, cap. cap. 15.

25.To insist that this Honourable Court ought to have considered evidence which the court expressly rejected is tantamount to questioning the

court's decision and, in particular, its apprehension of the law and direction on facts. In other words, the decision has been challenged on both factual and legal grounds under the guise of an application to vary, set aside or discharge the injunction order under order 40 rule 7 of the Civil procedure Rules.

26. I must not be mistaken to be saying that a litigant dissatisfied with any order or judgment of this Honourable Court cannot question it. Of course, he can, but the proper course would be for the aggrieved party to file an appeal against the impugned decision or, subject to conditions upon which a review application may be made, to file an application for review under order 45 of the Civil Procedure Rules. A misdirection on the facts and misapprehension of the law cannot be a basis for seeking to vary, set aside or discharge an injunction under order 40 rule 7 of the Civil Procedure Rules.

27. This particular rule is not a window to regurgitate an application that has otherwise been disposed of merely because the party aggrieved by the injunction order somehow insists that the evidence rejected by the court must be considered. Neither can an application filed under this rule assume the status of an appeal nor an application for review.

28. For these reasons, I hold that the 1st defendant's application is an abuse of the process of the court and I do not find any merit in it. It is hereby dismissed. Costs will abide the outcome of the suit. Orders accordingly.

Signed, dated and delivered on 24 October 2025

Ngaah Jairus

JUDGE