



**Prime Bank Limited v DJ Lowe & Company Limited & another (Environment and Land Case 142 of 2018) [2025] KEELC 7222 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7222 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE 142 OF 2018  
YM ANGIMA, J  
OCTOBER 23, 2025**

**BETWEEN**

**PRIME BANK LIMITED ..... PLAINTIFF**

**AND**

**DJ LOWE & COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GUARDFORCE SECURITY (K) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. Plaintiff's claim**

1. By a plaint dated 14.06.2018 and filed on the same date, the plaintiff sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants seeking the following reliefs;
  - a. An order of mandatory injunction to compel the defendants jointly and severally by themselves, their workmen, servants and or agents or otherwise howsoever, to vacate and hand over vacant possession of the plaintiff's property known as sub-divisions No. 1280 Section I, Mainland North situated at Nyali in Mombasa.
  - b. A declaration that D. J. Lowe & Co. Ltd and Guardforce Security [K] Ltd [the defendants] continued occupation of the parcel of the land know as Sub Divisions No. 1280 Section I, Mainland North situated at Nyali in Mombasa is unlawful and that he same constituted illegal trespass.
  - c. An order that the defendants be evicted from the parcel of land known as sub division No. 1280 Section I, Mainland North situated along Links Road, Nyali within Mombasa County should they fail to vacate therefrom.



- d. An order that the defendants do pay mesne profits equivalent to the rent chargeable for the property from 03.03.2011 for the continued occupation of the property until the defendants vacate the suit property.
  - e. Costs of the suit.
  - f. Any other relief the court deems fit and just to grant.
2. The plaintiff pleaded that it was the registered proprietor of sub-division No. 1280 Section I/MN [the suit property] situated in Nyali Mombasa which it purchased at a public auction conducted on 03.03.2011 by a charge pursuant to its statutory power of sale. It pleaded that it was unable to take possession of the suit property because the 2<sup>nd</sup> defendant had refused to yield possession thereof at the instance of the 1<sup>st</sup> defendant who was the chargor prior to the auction. It was further pleaded that the 1<sup>st</sup> defendant had filed various civil suits in a bid to challenge the sale and stop the transfer of the suit property without success.

### **B. Defendants' response**

3. The 1<sup>st</sup> defendant filed a defence dated 09.05.2019 which was later amended on 19.10.2023 to include a counter-claim against the plaintiff and the Attorney General. By its amended defence the 1<sup>st</sup> defendant denied the plaintiff's claim in its entirety and put the plaintiff to strict proof thereof. The 1<sup>st</sup> defendant pleaded that it was the legitimate owner of the suit property.
4. The 1<sup>st</sup> defendant pleaded that at some point in the past it operated an overdraft facility with Bank Indosuez [later Credit Agricole] for which it charged the suit property to act as security. It was pleaded that when the said bank ceased operations in Kenya in 2004 its business and liabilities were not taken over by any other bank hence the suit property could not be sold by any purported chargee in 2011. It was thus the 1<sup>st</sup> defendant's case that there was no valid auction of the suit property hence the plaintiff could not obtain a good or valid title thereto.
5. In its counter-claim, the 1<sup>st</sup> defendant pleaded that the auction and transfer of the suit property to the plaintiff was done fraudulently on account of fraud perpetrated by the plaintiff and the registrar of titles. The 1<sup>st</sup> defendant listed several particulars of alleged fraud at paragraph 17 of the counter-claim. It was further pleaded that upon the plaintiff's improper acquisition of the property it forcibly evicted the 1<sup>st</sup> defendant from the suit property in October 2018.
6. The 1<sup>st</sup> defendant pleaded that as a result of the actions of the defendants to the counter-claim, it had suffered loss and damage for which they were responsible. Consequently, the 1<sup>st</sup> defendant sought the following reliefs in the counter-claim;
- a. The 1<sup>st</sup> defendant by counter-claim's suit be dismissed with costs to the plaintiff by counter-claim
  - b. A declaration that the plaintiff by counter-claim is the lawful and beneficial owner of all that property known as plot No. Sub-division No. 1280 Section 1 MN Mombasa [CR No.11898].
  - c. An order be made expunging the registration of the 1<sup>st</sup> defendant by counter-claim as the registered owner of sub-division No.1280 Section 1MN Mombasa [CR No. 11898].
  - d. In the alternative and without prejudice to prayer [b] the plaintiff by counterclaim be awarded compensation for the loss of the suit property in the sum of Kshs.100,000,000/= being the value of the property as at the time of the said unlawful alienation.



- e. General punitive and exemplary damages to be assessed by the court.
  - f. Interest on [c] and [d] as applicable, at court rates.
  - g. The costs of this suit and interest thereon at court rates.
7. There is, however, no indication of the 2<sup>nd</sup> defendant having filed any defence to the plaintiff's suit.

### **C. Plaintiff's response**

8. The record shows that the plaintiff filed a reply to defence and defence to counter-claim dated 06.03.2025. By its reply to defence the plaintiff denied all the adverse allegations made in the amended defence. The plaintiff denied any impropriety in the manner of its acquisition of the suit property. It pleaded that it was lawfully registered as owner of the suit property pursuant to a court order and that the 1<sup>st</sup> defendant had unsuccessfully challenged the auction in previous proceedings.
9. By its defence to counter-claim, the plaintiff denied the allegation of fraud and impropriety pleaded in the counter-claim. It denied all the alleged particulars of fraud and put the 1<sup>st</sup> defendant to strict proof thereof. It was further pleaded that the issue of the legality of the public auction was raised and determined in previous legal proceedings.
10. The plaintiff denied any impropriety in the 1<sup>st</sup> defendant's eviction and pleaded that the eviction was properly conducted by court bailiff's pursuant to a court order made on 23.07.2018. The plaintiff further denied that the 1<sup>st</sup> defendant had suffered any loss or damage for which it was liable. The plaintiff, therefore, contended that the 1<sup>st</sup> defendant was not entitled to the reliefs sought in the counter-claim or any one of them. As a result, the plaintiff sought dismissal of the defence and counter-claim and entry of judgment as sought in the plaint.
11. The material on record shows that the Attorney General did not file any defence to the counter-claim despite service. The record further shows that the AG's attempt to seek leave to file a defence out of time whilst the suit was pending judgment was disallowed by the court.
12. It is also pertinent to point out that the plaintiff's claim against the 1<sup>st</sup> defendant in the main suit was withdrawn on 10.03.2025 since the plaintiff was unable to trace it for service of court process.

### **D. Trial of the action**

13. At the trial thereof, the plaintiff called one witness, Hasu Silva, and closed its case. She informed the court that she was an Assistant General Manager of the plaintiff. She adopted the contents of her witness statement dated 14.06.2018 and further statement dated 05.03.2025 as her evidence in chief and produced the documents in the plaintiff's trial bundle as exhibits.
14. On its part, the 1<sup>st</sup> defendant called one witness, Ruksana Abdulkarim, in support of its defence and counter-claim. She introduced herself as a director of the 1<sup>st</sup> defendant and adopted the contents of her statement dated 01.03.2025 as her evidence in chief. She also produced the documents in the 1<sup>st</sup> defendant's trial bundle as exhibits.

### **E. Directions on submissions**

15. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their respective submissions. The record shows the plaintiff filed submissions dated 06.06.2025 whereas the 1<sup>st</sup> defendant's submissions were dated 08.07.2025. The AG filed submissions dated 22.07.2025 on behalf of the 2<sup>nd</sup> defendant by counter-claim.



## **F. Issues for determination**

16. It would appear from the material on record that the parties did not file an agreed statement of issues for determination. As such, the court shall frame the issues for determination as stipulated under Order 15 Rule 2 of the Civil Procedure Rules. Under the said rule, the court may frame issues from any of the following;
  - a. The allegations made in the pleadings or in answers to interrogatories.
  - b. The allegations made on oath by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
17. The court has considered the pleadings, the evidence and documents in this matter. The court is of the view that the following on the main issues for determination herein;
  - a. Whether the plaintiff has proved its claim against the defendants in the suit.
  - b. Whether the 1<sup>st</sup> defendant has proved its counter-claim against the defendants in the counter-claim.
  - c. Whether the plaintiff is entitled to the reliefs sought in the suit.
  - d. Whether the 1<sup>st</sup> defendant is entitled to the reliefs sought in the counter-claim.
  - e. Who shall bear costs of the suit and counter-claim.

## **G. Analysis and determination**

### **a. Whether the plaintiff has proved its claim against the defendants in the suit**

18. The court has considered the material and submissions on record on this issue. The plaintiff's case was that it was the duly registered owner of the suit property hence entitled to enjoy all the bundle of rights which come with such ownership. The plaintiff's evidence was that it obtained ownership through a public auction conducted pursuant to a chargee's power of sale. The material on record shows that when the registrar of titles hesitated to effect the transfer of the suit property the plaintiff obtained a court order compelling him to do the needful in Mombasa ELC JR No.29 of 2016.
19. The material on record shows that the 1<sup>st</sup> defendant made every effort to challenge the auction and transfer of the suit property to the plaintiff through various legal proceedings without success. One of the 1<sup>st</sup> defendant's suit was struck out by the High Court for being an abuse of the court process. There is no indication on record if the order by Hon. Justice M. K. Ibrahim dated 29.11.2011 to that effect was ever appealed and, if so, with what outcome.
20. The court is satisfied on the basis of the extract of title and certificate of search of the suit property that the plaintiff is the current registered owner thereof. There is no indication on record to show that the 1<sup>st</sup> defendant ever succeeded in impeaching the sale and transfer of the suit property to the plaintiff. All indications on record are to the contrary.
21. The court is thus satisfied that the plaintiff has proved its claim over the suit property subject to the court's findings on the 1<sup>st</sup> defendant's counter-claim alleging fraud in the sale and transfer thereof to the plaintiff.



**b. Whether the 1<sup>st</sup> defendant has proved its counter-claim against the defendants in the counter-claim**

22. The court has considered the material and submission on record on the issue. The 1<sup>st</sup> defendant pleaded that the sale and transfer of the suit property to the plaintiff was illegal and fraudulent hence null and void. It was contended that the auction was a nullity because the chargee had ceased operating in Kenya in 2014 and its banking business and liabilities were not taken over by any other bank.
23. The 1<sup>st</sup> defendant contended that it was never served with the requisite statutory notices prior to the purported sale and that the auction was never advertised and that the Auctioneers' Act and the Auctioneer Rules were never observed in the process. The 1<sup>st</sup> defendant thus wanted the entire transaction declared null and void.
24. It has been held that it is a serious matter for a party to allege fraud in civil proceedings. Such allegations must be properly particularized and strictly proved to a degree higher than a balance of probabilities but not as high as proof beyond reasonable doubt. The consequences of proven fraud can be quite grave hence all necessary parties ought to be joined to such proceedings.
25. The court is of the view that the validity or legality of the impugned auction cannot not be conclusively determined in the absence of the chargee who was the holder of the charge at the material time. The issue of whether or not the assets and liabilities of Credit Agricole were taken over by any other bank and other related issues cannot be effectively and completely resolved in the absence of Credit Agricole. The mere fact that the bank ceased its operations in Kenya cannot excuse the 1<sup>st</sup> defendant's failure to join it in the proceedings. If the impugned auction was flawed, then the chargee or last known chargee ought to be accorded a hearing on the issue.
26. The court is further of the opinion that there is another reason why the court ought not to adjudicate over the 1<sup>st</sup> defendant's counter-claim. The 1<sup>st</sup> defendant is essentially aggrieved by the exercise of a bank's statutory power of sale under a charge. The 1<sup>st</sup> defendant disputed that any statutory notices were issued prior to the sale. It also contended that the auction was not conducted in accordance with the provisions of the *Auctioneers Act* and the Auctioneers Rules. The court is of the opinion that the 1<sup>st</sup> defendant's grievances flow directly from the charge and further charge created pursuant to the overdraft facility provided by the chargee. The court is thus of the opinion that the right forum for the 1<sup>st</sup> defendant to ventilate its grievances would be the High Court as was held in the case of the Co-operative Bank of Kenya Ltd v Patrick Njuguna Kang'ethe & 5 Others [2017] eKLR.
27. In fact, the material on record shows that the 1<sup>st</sup> defendant challenged the impugned auction before the High Court at Mombasa vide Msa High Court Civil Suit No.235 of 2010 but was unsuccessful. The fact that the 1<sup>st</sup> defendant was unsuccessful before the High Court would not necessarily confer jurisdiction upon the ELC as the next stage of litigation over the same issues. The court is thus not satisfied that the 1<sup>st</sup> defendant has proved its counter-claim the defendants in the counter-claim.

**c. Whether the plaintiff is entitled to the reliefs sought in the suit**

28. The court has found and held that the plaintiff has proved its claim against the 1<sup>st</sup> defendant on a balance of probabilities. The plaintiff is thus entitled to appropriate remedies to vindicate its property rights. The plaintiff has, however, conceded in its written submissions that it obtained possession of the suit property on or about 24.10.2018 on the strength of an eviction order issued by the court. The plaintiff thus conceded that prayers [a] [b] and [c] of the plaint were spent.
29. The plaintiff submitted that it was entitled to the remainder of the prayers, that is, mesne profits and costs of the suit. The court is of the view, however, that plaintiff did not place sufficient material



on record on the basis of which mesne profits may be reasonably assessed. The plaintiff's plea to be awarded the equivalent of the rent the suit property may have fetched for the period the 1<sup>st</sup> defendant had refused to yield possession was not supported by credible evidence on the applicable rental income.

30. The court has perused what purports to be a valuation report dated 12.11.2018 drawn by Phina Valuers. The terms of reference simply state that the valuer was required to inspect the suit property and advise on its "current condition". There were no instructions to undertake an assessment or valuation of reasonable rental income which the property may fetch. It is noteworthy that in its written submissions the plaintiff did not even suggest how much the expected rental income would be and no figure was suggested for the mesne profits sought.
31. In the premises, the court is unable to award an arbitrary amount on account of mesne profits. It was the duty of the plaintiff to substantiate its claim for mesne profits and it failed in that duty. The court is thus of the opinion that the only remedy the plaintiff is entitled to may be costs.

**d. Whether the 1<sup>st</sup> defendant is entitled to the reliefs sought in the counter-claim**

32. The court has found and held that the 1<sup>st</sup> defendant has failed to prove its counter-claim to the required standard. It would, therefore, follow that the 1<sup>st</sup> defendant is not entitled to any of the reliefs sought in the counter-claim

**e. Who shall bear the costs of the suit and the counter-claim**

33. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* [Cap 21]. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs of the action. As a result, the plaintiff shall be awarded costs of both the suit and the counter-claim. However, the 2<sup>nd</sup> defendant by counter-claim shall not be awarded any costs since he did not file a defence or participate in the hearing.

**H. Conclusion and disposal orders**

34. The upshot of the foregoing is that the court finds and holds that the plaintiff has proved its claim against the 1<sup>st</sup> defendant on a balance of probabilities. However, the court finds that the 1<sup>st</sup> defendant has failed to prove its counter-claim. As a consequence, the court makes the following orders for disposal of both the suit and counter-claim;
  - a. Judgment be and is hereby entered for the plaintiff against the defendant for costs of the suit only since prayers [a], [b] and [c] of the plaint are spent and prayer [d] was not proved.
  - b. The 1<sup>st</sup> defendant's counter-claim is hereby dismissed in its entirety with costs to the plaintiff.
  - c. The 2<sup>nd</sup> defendant by counter-claim shall not be awarded costs since he did not file a defence to the action.

35. It is so decided.

**JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 23<sup>RD</sup> DAY OF OCTOBER , 2025.**

**Y. M. ANGIMA**



## **JUDGE**

In the presence of:

Gillian - Court assistant

Mrs. Eunice Kibe for the Plaintiff

Mr. Kinyanjui for the 1<sup>st</sup> defendant

Mr. Penda for the AG for the 2<sup>nd</sup> defendant by counter-claim

