Mediheal Hospital & Fertility Centre Limited & another v Bank Of India (Kenya) & another (Civil Suit E026 of 2024) [2025] KEHC 15427 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15427 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E026 OF 2024

E OMINDE, J

OCTOBER 30, 2025

BETWEEN

MEDIHEAL HOSPITAL & FERTILITY CENTRE LIMITED .... 1ST APPLICANT

SWARUP RANJAN MISHRA .... 2ND APPLICANT

AND

BANK OF INDIA (KENYA) .... 1ST DEFENDANT

ESHIKONI AUCTIONEERS .... 2ND DEFENDANT

RULING

1. By way of Notice of Motion dated 20th October 2024, the applicants seek the following orders;
   1. Spent
   2. Spent
   3. That a permanent injunction do issue to restrain and prevent the defendants/ Respondents by themselves and/or their agents, servants, employees, assigns or otherwise howsoever from proceeding with the intended public auction scheduled for 4th November, 2024 and 5th November, 2024 over Eldoret / Municiplaity Block 8/744, 8/683, 13/151, L.R 7914/123 I.R 220731, chepterit/ k1pchamo block 2 (mogobichi)/ 96, pioneer ngeria block 1 eatec 10109,10110,10111, 10112, 10113, 10114, 10192, 10193, Irong Iten / 3829 or any other auction pending the hearing and determination of the main suit.
   4. That the costs be provided for.
2. The application is expressed to be brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules and Sections 1A, IB, 3A and 63(e) of the *Civil Procedure Act*. The application is premised on the

grounds on the face of it and the averments in the affidavit sworn by Maryline Chepkosgei Langat in support of the application.

3. In her affidavit, she deposed that the applicants acknowledge having taken a facility with the 1st defendant and have been servicing the same of late but due to the harsh business condition they delayed a bit in having the loan paid on time. That recently, one of their employees saw an advert in one of the dailies intimating that the respondent intends to sell the applicants properties vide public auction on 4th and 5th November 2024 despite the fact that no notices were issued prior to the advertisement. She deposed that the entire suit will be rendered nugatory if the orders sought are not granted.

4. She reiterated that no notice was ever issued to the applicant and further, that according to their account is not in default. That if it is, they call upon the respondent to bring forth statement of accounts which they have been constantly failing to provide despite their requests. She stated that unless the issues raised above are dealt with and the law followed, the applicants shall be rendered destitute by a process' par incuriam' the law.

5. She urged that the respondents will not suffer any prejudice if the orders sought are not granted and that the applicants shall suffer irreparable loss and damage if the orders sought are not granted.

1st Respondents' Replying Affidavit

6. The respondents filed a replying affidavit dated 30th October 2024, sworn by Ramarao Bongani, the Chief Manager at the Eldoret Branch of Bank of India. He deponed that the application is an abuse of this Honourable Court's process and the same should be dismissed with costs to the Respondent. He stated that the Application herein is res judicata as it is pending determination on the same terms in Eldoret HCCC NO. E016 OF 2024 and the entire suit should therefore be shuck out for duplicity.

7. He annexed and marked as RB1 a copy of the Applicants Notice of Motion Application dated 10th July 2024 alongside the Supporting Affidavit of Maryline Chepkosgei Lang'at sworn on 16th July 2024. That the Applicants/Plaintiffs are in a bid to engage the Defendants/ Respondents in unending litigation and waste both the Court's and Defendants time and resources by filing and Application on a matter that the Court had previously issued directions on in Eldoret HCCC NO. E016 OF 2024 and the matter is pending further directions on 25th November2024, annexing and marking as RB2 a copy of the Court Order issued on 15th October 2024.

8. He urged that the Applicants have, misrepresented and/or concealed material facts pertaining to this matter in a veiled attempt to mislead this Honourable Court. He provided a background and summary regarding the facts of the case as follows;

    a. Mediheal Hospital and Fertility Centre Limited is the Borrower in the instant transaction,

    b. The Bank of India, vide its Letters of Offer dated 11th May 2023, sanctioned and granted Banking Facilities to the Borrower. [Annexed hereto is and marked as RB 3 is a copy of the Offer letter dated 11th May 2023)

    c. The Banking facilities aggregating to the total sum of Kenya Shillings One Billion Seventy-Nine Million Seven Hundred and Eighty Thousand only (Kshs. 1,079,780,000.00) were secured inter alia by an array of charges, over the following properties Title No. 7. c. 1. Pioneer/Ngeria Block 1 (EATEC) 10109, 10110, 10111, 10112, 10113, 10114, 10192 and 10193 registered in the name of Swarup Ranjan Mishra; 7. c.2. Land Reference Numbers. 7914/123, 7914/124 & 7914/125 registered in the name of Mediheal Hospital and Fertility Centre Limited; 7. c.3.Kisii Municipality/Block 111/328 registered in the name of Mediheal Hospital and Fertility Centre

Limited; 7. c.4, lrong/lten/3829 registered in the name of Mediheal Hospital and Fertility Centre Limited; 7, c.5.Eldoret Municipality/Block 8/774 registered in the name of Mediheal Hospital and Fertility Centre Limited; 7. c.6.Eldoret Municipality/Block 8/883 registered in the name of Mediheal Hospital and Fertility Centre Limited; 7, c.7.Eldoret Municipality/ Block 13/151 registered in the name of Swarup Ranjan Mishra and Fallavi; and 7. c.8. Cheptiret/Kichamo Block 2 (Mogobich)/96 registered in the name of Swarup Ranjan Mishra and Fallavi.

d) The Borrower breached the terms of the facilities as granted by the Bank being in persistent default in repaying the mentioned facilities with the arrears as at 30th October 2024 being Kshs. 701,791,890.38. (Annexed hereto and marked ns RB 4(a-f) are copies of the Applicant's Bank account statement as of 30th October2024)

9. The deponent averred that despite several reminders by the Bank to the Borrower to make repayments and regularise their account, the Borrower continued to be in default and failed to pay the outstanding amount after they issued the Borrower with a thirty (30) day notice dated 24th August 2023 notifying the Borrower that its account had been classified as non-performing which notice was ignored. He annexed and marked as KB 5 the thirty (30) days' Notice. He stated that the borrower's persistent breach of the terms of the facilities as granted have compelled the Bank to institute and exercise the remedies available to it by law and as condensed in Sections 90 and 96 of the *Land Act*, No.6 of 2012 by issuance of the Statutory Demand Notice dated 21st March 2023 and Statutory Notice of Intention to Sell dated 27th July 2023. He annexed and marked as RB 6(a), 6(b) & 6(c) and RB 6(d), 6(e) & 6(f) the Statutory Demand Notice dated 21st March 2023 and Statutory Notice of Intention to Sell dated 27th July 2023. He urged that despite issuance of the two statutory notices, the Borrower failed to regularize the accounts with the Bank and the default of the aforementioned banking facilities continued and subsisted to the Bank's detriment.

10. The Bank engaged and instructed Eshikhoni Auctioneers, to proceed and advertise and sell the suit property through public auction. The Auctioneers issued forty-five (45) days redemption notices dated 4th March 2024 to the Borrower which were duly served on 5th March 2024. He annexed and marked as RB 7(a), RB 7(b) and RB 7(c) copies of the Letters of Instructions addressed to Eshikhoni Auctioneers dated 4th March 2024. By way of a letter dated 16th April 2024 addressed to the Bank of India, Swarup Ranjan Mishra as a director of the Borrower, acknowledged receipt of the redemption notices and their indebtedness to Bank of India and further requested an extension of time (6 weeks) to redeem the arrears with respect to the banking facilities granted. He annexed and marked as RB8 a copy of the Applicants' letter dated 16th April 2024.

11. The Bank of India acting in good faith, graciously accepted the Borrower's request by granting the Borrower an extension of time to redeem its arrears and instructed the Auctioneers to suspend the intended sale of the properties. Despite the extension of time granted to the Borrower and issuance of the redemption notices, they failed to regularize the accounts with the Bank and the default of the banking facilities continued and subsisted to the Bank's detriment. The Bank instructed the Auctioneers to proceed to issue the 15-day notifications of sale upon the Borrower and thereafter advertise and sell the suit properties through public auction. Eshikhoni Auctioneers issued the notifications of sale that were received by representatives of the Borrower on 2nd July 2024.

12. That the court in Eldoret HCCC E016 of 2024 vacated the Temporary Injunction staying the public auction of the properties as advertised in the Daily Newspaper on 4th July 2024 and the sale as was scheduled to take place on 22nd July 2024, 23rd July 2024 and 24th July 2024. It is on that note that the Respondent issued further instructions to Eshikhoni Auctioneers to proceed to advertise and sell

the suit properties through public auction. He annexed and marked as RB10 the letter of instructions addressed to Eshikhoni Auctioneers.

13. The deponent urged that the Bank's remedies now stand fully crystallized and the Borrower has no other remedy available to them outside regularizing his accounts with the Bank. That the Borrower has brought the instant application with a view to unjustifiably impede the Bank from exercising its remedies as rightfully accrued by law. He has not annexed records of any substantial payment of the banking facilities and therefore continues to be in arrears. He invited the court to as well examine the conduct of the Applicants who now seeks equitable relief while coming to this Honourable Court with unclean hands, stained with continued and persistent breach and default of express terms of financial facilities and obligations and a further concealment of material facts in its pleadings vis-a-vis the Respondents who have at all material times complied with legal obligations and established lawful procedure.

14. He deposed that the balance of convenience in the instant matter should shift to the Respondent. He urged the court to dismiss the application with costs.

2nd Respondent's' Replying Affidavit

15. Kennedy Shikuku, the 2nd Respondents Director filed a replying affidavit dated 16th July 2024 in response to the application. The affidavit is more or less a duplicate of the affidavit sworn by Ramarao Bongani, the 1st Respondents' Chief Manager.

16. He urged that the application is an abuse of this Honourable Court's process and the same should be dismissed with costs to the Respondent. Further, that the Applicants have, in their application, misrepresented and/or concealed material facts pertaining to this matter in a veiled attempt to mislead this Honourable Court. Further, that the Application herein is res judicata as it is pending determination on the same terms in Eldoret HCCC NO. E016 OF 2024 and the entire suit should be struck out for duplicity. He annexed and marked as KS1 a copy of the Applicants Notice of Motion Application dated July 2024.

17. He urged that the Court had previously issued directions on in Eldoret HCCC NO. E016 OF 2024 and the Bank of India (hereinafter "the Bank"), exercising their remedy as a chargee to the statutory power of sale, engaged and instructed ESH1KHONI AUCTIONEERS, through their appointed advocates, to issue the requisite 45-day redemption notices to Mediheal Hospital and Fertility Centre Limited as they are the Borrowers in the Instant transaction and were in breach of the terms of the banking facilities granted. He annexed and marked as KS3 (a), KS3 (b) and KS3(c) copies of Letters of instructions addressed to the 2nd Respondent. Contrary to paragraph 5 of the supporting affidavit, the Respondent issued the forty-five (45) day redemption notices all dated 4th March 2024 to Mediheal Hospital imploring them to redeem the arrears which then stood at Kshs. 703.302,431.63 which were duly served and received on 5th March 2024 over the following properties, title number(s),

    a) Pioneer/Ngeria Block 1 (EATEC) 10109, 10110, 10111. 10112. 10113, 10114, 10192 and 10193 registered in the name of Swarup Ranjan Mishra;

    b) Land Reference Numbers: 7914/123, 7914/124 & 7914/125 registered in the name of Mediheal Hospital and Fertility Centre Limited; •

    c) Kisii Municipality/Block III/328 registered in the name of Mediheal Hospital and Fertility Centre Limited;

    d) Irong/Iten/3829 registered in the name of Mediheal Hospital and Fertility Centre Limited;

e) Eldoret Municipality/Block 8/774 registered in the name of Mediheal Hospital and Fertility Centre Limited;

f) Eldoret Municipality/Block 8/863 registered in the name of Mediheal Hospital and Fertility Centre Limited;

g) Eldoret Municipality/Block 13/151 registered in the name of Swamp Ranjan Mishra and Pallavi; and

h) Cheptiret/Kichamo Block 2 (Mogobich)/96 registered in the name of Swamp Ranjan Mishra and Pallavi and stated that the public auction of the properties was scheduled for the 8th and 9th May 2024. He annexed and marked as KS4 (a-q) copies of the title documents for the properties and KS5 (r-u) copies of the redemption notices and corresponding payment receipts for postage. He stated that by way of a letter dated 16th April 2024, the 2nd applicant requested for an extension of time which was granted but despite the extension, they failed to regularize the accounts with the Bank.

18. The bank then instructed the Respondent to proceed to issue the 15-day notifications of sale upon the Mediheal Hospital and thereafter advertise and sell the suit properties through public auction. The Respondent issued the notifications of sale that were received by representatives of the Applicant on 2nd July 2024 and which stated that the advertisement for public auction of the properties would appear in the Daily Nation Newspaper on 4th July 2024. He annexed and marked as KS7 (a~e) copies of the notifications of sale). That the Court in Eldoret HCCC No. E016 of 2024 vacated the Temporary Injunction staying the sale by public auction of the Properties as advertised in the Daily Newspaper on 4th July 2024 and the sale as was scheduled to take place on 22nd July 2024, 23rd July 2024 and 24th July 2024. It is on that note the 1st Respondent issued further instructions to Eshikhoni Auctioneers to proceed to advertise and sell the suit properties through public auction which instructions we acted upon and advertised the suit properties in the Daily Nation Newspaper, on 19th October 2024.

19. He stated that the Applicants' allegation that the Respondent did not issue them with the redemption notices and notifications of sale is false, lacks foundation and does not warrant any consideration by this Honourable Court. He prayed the application be dismissed with costs.

Applicants' Further Affidavit

20. The applicants filed a further affidavit dated 29th November 2024 sworn by Maryline Chepkosgei Lang'at. In response to the Replying Affidavit. She stated that it is true that there was a suit earlier filed being Eldoret HCC NO. E016 OF 2024 however looking at the parties, the application and entire suit was against the 2nd defendant and not the 1st defendant. That the applicant should have filed a notice of preliminary objection which they have not. She urged that statutory power of sale is a process which has steps, which the Respondent failed to comply with as the steps should have started a fresh after interim orders in HCC NO 16 of 2024 were set aside.

21. She urged that 30 days after the orders were set aside, another advertisement was done and that necessitated the filing of this other suit as they could not file the application in HCC NO. 16 OF 2024 reason being the orders had already set aside and the respondents ought to have issued fresh notices. She denied receiving the letter dated 24th August, 2023 from Bank of India Eldoret Branch. Further, that despite there being clear clauses in the facility letter requiring the notices to be sent to the last applicant's registered address, the respondents elected to serve a former employee whose interest was adverse to that of the hospital at the time of service. They should have served the directors personally if

they did personal service and not a junior employee hence the service was improper. She urged that she believed the respondents knew that is the only way to obtain our stamp and validate an invalid process.

22. The deponent averred that Mr Bansal left the hospital in November, 2023 a month after the notices were given to him and he left under unclear/ non-cordial circumstances. Further, the documents were allegedly served upon a person called Fredrick Chakua who is a front office clerk. He urged that unless they could show that service was direct or on a director the same is null and void. She further stated that the respondents have been asking them to do a commitment which they drafted and asked them to put on their letterhead. Being that they are at their mercy they had to comply. She reiterated that the application dated 20th October 2024 should be allowed and the matter proceed to interparty hearing.

Applicant's Submissions

23. Learned counsel for the applicant submitted that the respondent filed their documents and among their contention was that the applicants had earlier filed a suit being Eldoret HCC NO. E 016 OF 2024 which is still active but whose interim orders had been vacated. On whether the suits are similar, the applicant urged that there were the following glaring differences between the suits;

    a. In Eldoret HCCC NO. E016 OF 2024 the plaintiffs are the same but there is only one defendant who is the 2nd defendant in Eldoret HCC NO. E026 OF 2024 since there is another party sued then the suit is a fresh one and not the same.

    b. In Eldoret HCC NO. E016 OF 2024 auction was scheduled on 23rd July, 2024 and in E026 OF 2024 auction was scheduled for 4th,5th and 6th November, 2024 hence the glaring difference.

    c. The properties scheduled for auction on both dates are similar however since the auctions were on different dates, it is our submission that the respondent ought to have started the process a fresh.

24. On whether the applicant has proved his case to warrant issuance of temporary injunction pending hearing and determination of the main suit, counsel urged that the guiding principle for grant of orders of temporary injunction are well settled in the case of Giella Versus Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No. 77 of 2012 (2014) eKLR. He additionally cited the case of Mrao Ltd Versus First American Bank of Kenya Ltd (2003) eKLR in this regard.

25. Counsel submitted that if the properties are sold vide public auction the applicant cannot get the properties back due to the innocent purchaser principle. That the applicant is an essential service provider involved in health services and any form of execution for alleged debt that has not been proved in court shall have devastating consequences in the first instance. He urged that for the reasons above, the applicant has proved his points and an injunction should be granted.

26. On Whether the respondent used the correct procedure in proclamation and attachment, counsel submitted that the relevant sections of the law is Section 90 of the *Land Act* laws of Kenya which gives the strict requirements that must be followed before realizing any statutory power of sale. Citing the case of Moses Kibiego Yator v Eco Bank Kenya Limited NKU E&L No. 426 of 2013 (2014) eKLR, counsel submitted that the act states that all the notices should be served. He stated that looking at all the documents presented by the chargee, there is no evidence that the notices were served upon the applicants hence the application ought to be allowed. Further, that the charge failed to provide a valuation report as required by law and therefore, the sale process was marred with irregularities from the beginning and should be stopped in the first instance.

27. Counsel urged that the suit is not sub judice for the following reasons;

  a. In both cases there were auctions scheduled for different dates even though the said auctions were for the same properties.

  b. Since realizing the statutory power of sale is procedural, the respondents ought to have commenced with issuance of the requisite notices and not.

28. Counsel cited the case of Republic vs Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya eKLR on the issue of sub judice and further, submitted that for Res Judicata to apply, the principles therein have to be met. He reiterated the earlier mentioned differences as to why the case is not res judicata and cited the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).

29. He submitted that in the earlier case, there is no order or judgment that is final, secondly the application was not heard on merit and the parties are not identical.

1st and 2nd Respondents' Submissions

30. Learned counsel for the respondents laid down the background of the case and submitted that the issue on whether the Respondent used the correct procedure in proclamation and attachment, he urged that by dint of the depositions in their Replying Affidavit, the court ought to find that the statutory demand notices annexed as RB6a-c were indeed regular and lawful and that the service of the notices dated 21st March 2023 was done by the 1st respondents advocate by hand delivery, which has been supported by a copy of the letter (annexed as "RB 6 a-c"). That it is clear that the statutory notice was issued in the manner set out in law and consequently every other notice issued thereafter, should be deemed as lawful including the Auctioneer's redemption notices and notifications of sale and corresponding payment receipts for postage annexed as KS4 r-u & KS6 a-e respectively in the 2nd Respondent's Replying Affidavit.

31. Due to persistent breach, they issued the Statutory Notices of Intention to sell upon the Applicants. In the same manner as the statutory demand notice and as indicated in the 1st Respondent's Replying Affidavit, the Statutory Notices of Intention to Sell (annexed as "RB 6 d-f") were served in the manner set out in law. The Service of the Notices dated 18th January 2024 was done by the 1st Respondent's Advocates via hand delivery and this has been supported by a copy of the letter (annexed as "RB 6 d-f') duly acknowledged by the Applicant by imposing the Applicant's stamp and a signature of one of the Applicant's representatives on the first page of the notice. Further, that the Applicant did actually respond to the Respondents' statutory notices via its letter (annexed as "RB 8" in the 1st Respondent's Replying Affidavit) to the 1st Respondent, of 16th April 2024. The said letter goes on to plead the Respondent for indulgence to allow the Applicant a period of six (6) weeks to clear the loan. Urging that the Applicants need not say more, counsel submitted that the Statutory Notice was issued and the same is regular, lawful and meets the requirement set out in law and hence it was procedural for the Respondent to issue the Notice of Intention to sell once the statutory notice lapsed and subsequently for the 2nd Respondent to issue redemption notices and notifications of sale once the Notice of Intention to sell lapsed.

32. On the issue of the failure to provide a valuation report, the Respondents submit that the claim that the alleged failure as a basis for injunction is misplaced because; 1) valuation of the properties was duly conducted which enabled the Respondents to indicate the market and sale value of the properties in the requisite notices and 2) even if the valuation of the property is yet to be undertaken, the law requires

valuation to be available at the time of sale and therefore, it is premature and speculative to state at this stage that valuation has not been done or will not be available. He cited Section 97 of the *Land Act* in this regard.

33. On whether the suit and application are sub judice, counsel submitted that it is sub-judice in view of the pendency of Eldoret HCCC No. E016 of 2024 which was previously filed by the Applicants and concerns the same facts and issues that are before this court in the present suit and application which has resulted in a duplicity of suits. That the sub-judice rule is described in Section 6 of the *Civil Procedure Act* which he reproduced. Counsel urged that the subject matter in both suits relate to the same properties as can be confirmed from the court records and same facilities granted to the Applicants by the 1st Respondent. The filing of these frivolous suits and applications by the Applicants is a veiled attempt to frustrate the 1st Respondent from exercising its remedies as a chargee under the statutory power of sale and bury the Respondents in unending litigation.

34. Counsel urged that the Applicants have not established a prima facie case with a probability of success or at all. The 1st Respondent is guided by the pronouncements of the Court of Appeal in Nairobi COACA No. 77 of 2012 - Nguruman Limited v Jan Bonde Nielsen and 2 Others 120141 eKLR while making reference to Mrao Ltd, v First America Bank of Kenya Ltd & Others [20031 KLR 125. He stated that the Applicants must go beyond merely having an arguable case, merely raising issues does not suffice. It is incumbent upon this Honourable Court to examine the material evidence presented before it and ask itself if it is possible to discern a right accruing to the Applicant and an imminent infringement. This is the bedrock of a prima facie case which must cumulatively point towards a probability of success for the Applicant's case upon trial.

35. Counsel submitted that there is no evidence on the record in the instant Application speaking to the alleged failure by the Respondents to conduct valuation of the suit properties or the alleged failure by the Respondents to issue notices contrary to prescribed law. Further, that the Applicant has not made any attempt to exercise its equity of redemption nor has it made any offer to repay the entire amount arising from the charge. The material placed before this Honourable court solely constitutes allegations. It does not disclose a right accruing to the Applicant which is under imminent threat of adverse action and as such does not meet the threshold of a prima facie case.

36. The Applicant appears to be inviting this Honourable Court to take cognizance of its ownership of the property offered as security for the facility extended by the 1st Respondent as a right worth protecting and the auctioneering process as imminent threat of infringement. However, in the context of securities and facilities, where breach has been alleged or established, the properties provided as securities must first be applied for the recovery of the default amount. It is not the 1st Respondent who interferes with that right of ownership, it is the law, in the form of remedies to the chargee which interferes with the charger's right of ownership. It is only redemption of the default or proof of payment that would again firmly bring the properties under the uninterrupted ownership of the mortgagor. This position was maintained by the Hon. Justice Reuben Nyakundi in Kajiado HCCC No. 13 of 2018 Empeut Resort Limited & another v Tourism Finance Corporation& another [20181 eKLR. Counsel urged that failure to at the very least produce evidence showing some effort to make substantial payment cripples the establishment of a prima facie case in the instant case and the Application, on this limb must fail.

37. Counsel referred to the decision of the Court of Appeal in Nairobi COACA No. 77 of 2012 Nguruman Limited v Jan Bonde Nielsen and 2 Others [2014] eKLR where the court stated that-

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

a. establish his case only at a prima facie levelb. demonstrate irreparable injury if a temporary injunction is not granted, andc. ally any doubts as to (b) by showing that the balance of convenience is in his favour

38. He stated that these are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. He urged that if the applicant fails to establish a prima facie case, the court must down its tools.

39. Counsel urged that the 1st Respondent presents that any injury, it at all, to be suffered by the Applicant is indeed accurately quantifiable and can be remedied by way of monetary damages. Additionally, that the 1st respondent is capable of compensating the Applicants for any injury or loss sustained by way of monetary damages. Counsel placed reliance on the decision of the Court of Appeal in Muga Developers Limited v Equity Bank of Kenya Ltd & 4 Others (Civil Application E082 of 2021)2022] KECA 453 (KLR).

40. Counsel invited the court to determine the envisaged damage that is reparable by way of damages and urged that the 1st Respondent is a banking institution in the commerce of taking deposits and issuance of banking facilities and various financial accommodation. That the 1st Respondent is not threatened with any winding down or insolvency proceedings and therefore stands in a position fit and capable of compensating the Applicant at the estimated value of the suit property should this or any other Court issue such order.

41. On a balance of convenience, counsel urged that the matter tilts in favour of the Respondents and that even on the third pillar, the Application fails. Further, that the third pillar should not even be considered and the court should dismiss the Application in its entirety. Further, that the award of costs is a discretionary power vested in a court of law which should be exercised judicially and not arbitrarily as was highlighted by the High Court of Kenya in Nyeri HCCC No. 17 of 2014 Cecilia Karuru Ngayu v Barclays Bank of Kenya & Credit Reference Bureau Africa limited [2016] eKLR. He urged the court to dismiss the application with costs.

Analysis & Determination

42. Upon considering the application and the attendant responsesas well as the submissions, it is my considered opinion that the following issues arise for determination;

    a. Whether the Applicants were served with the requisite statutory notices;

    b. Whether the application is Res Judcicata;

    c. Whether the bank ought to have issued notices afresh and

    d. Whether the Application meets the threshold for a grant of orders for a permanent injunction at the interlocutory stage

43. I will handle each of these issues one after another as here below.

Whether the Applicants were served with the requisite statutory notices

44. Before a Chargee can exercise its statutory power of sale, the law requires it to issue notices to the Chargor as follows:

    a. 90 days' statutory notice of default, pursuant to Section 90(1) and (2) of the *Land Act*, 2012.

    b. 40 days' notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012.

c. 45 days' redemption notice pursuant to Rule 15(d) of the Auctioneers' Rules, 1997.

d. 14 days' notification of sale, pursuant to Rule 25(e) of the Auctioneers' Rules, 1997.

45. The Applicants contend that they were not served with the statutory notices by the defendant bank. In this regard, paragraph 9 of the Further Affidavit, sworn by one Maryline Chepkosgei Chelagat, refers. The deponent averred that the requisite notices were served upon a former employee whose interests were adverse to those of the hospital at the time of service. The 1st Respondent on their part annexed a copy of the notice of default as issued under Section 90(1) of the *Land Act* which was marked as annexure RB5 to the replying affidavit. Appended to the said document is a signature indicating that it was received on 29th August 2023. On 17th October 2023, the 1st Respondent, through its advocates, issued a Notice to exercise its Statutory Power of Sale annexed as annexure RB6a). This bears the stamp of the 1st Applicant and the signature of one Ashok, indicating it was received on 17th October 2023.

46. On 18th January 2024, a series of Notices of Intention to Sell issued through counsel for the 1st Respondent, were served upon that Applicants and were received by Fredrick Chakua and stamped with the 1st applicants' stamp as received on 23rd January 2024. The same were annexed as annexures RB6(a)-(f). The 1st defendant also annexed copies of the Notice of Instruction for sale by way of public auction to the 2nd defendant dated 4th March 2024, as RB7a-c. I also note that the 2nd Defendant annexed Certificates of Postage as annexures KS4(r)-(u) as evidence that the applicant was served with the Redemption Notices and Notices of Sale.

47. By way of a letter dated 16th April 2024 addressed to the Bank of India, Swarup Ranjan Mishra in his capacity as a Director of the Borrower, acknowledged receipt of the Redemption Notices and their indebtedness to the Bank of India and further requested for an extension of time (6 weeks) to redeem the arrears with respect to the banking facilities granted. He annexed and marked as RB8 a copy of the Applicants' letter dated 16th April 2024. Despite the extension of time granted to the Borrower and issuance of the redemption notices, they failed to regularize the accounts with the Bank and the default of the banking facilities continued and subsisted to the Bank's detriment.

48. This action of the Director Swarup Mishra therefore begs the question as to how he sought this extension without having been served with any notices. Further, the 1st Applicant, in the Further Affidavit, urged that the service was on one Mr. Bansal who later left employment a month after the said service and additionally, that the clauses in the facility required that the notices be sent to the applicants' last registered address. It is trite law that he who alleges must prove. In this regard, the applicants were required to, but did not provide the facility letter with the clause as alleged, and specifically, the clauses with regards to service of notices.

49. Further the court notes that it is submitted that the said Mr. Bansal had left employment a month after the notices were served. It is nowhere indicated that at the time he was being served with the said notices, he did not have the capacity to receive them on behalf of the Applicant. These, coupled with the letter by the 2nd applicant seeking extension of the time to repay the loan, has persuaded the court that the applicants were indeed served with the requisite statutory notices as is required by law and that they did receive them. This was also evidenced by the signatures of their employees and the stamps of the office on the dates the notices were received. The court is therefore satisfied that service was properly effected.

Whether the Application is Res Judicata

50. The 2nd respondent contends that the application is res judicata as the applicants had sought the similar orders in Eldoret HCCC E016 of 2024 vide a Notice of Motion dated 16th July 2024.

51. The principles on res judicata are set out in Section 7 of the *Civil Procedure Act* as follows;

> " 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 can 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."

52. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

> ''Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.''

53. The principle was well explained in the case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) in which the Court of Appeal held that:

> " Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

54. The Applicants' position is that the application is not res judicata for reasons that the parties in HCCC No. E016 of 2024 were different to the parties in this Application, pointing out that the entire suit in HCCC No. E016 of 2024 was against the 2nd defendant and not the 2nd Respondent. I have considered these submissions and in light of the orders of the court issue on 28th November 2024 that the case as filed in HCCC No. E016 of 2024 be heard alongside this cause, for the sake of clarity, it is important to briefly explain how the issue of these two causes arose.

55. It should be noted that the HCCC No. E016 of 2024 was not at all heard at all on its merits. That suit was filed with an Application under Certificate of urgency dated 16th July 2024 seeking interim orders of injunction against the sale by way of auction of the same properties belonging to the Applicant that are now the subject matter of the instant Application. Interim interlocutory orders of injunction were issued in favour of the Applicants on 17th July 2024. On 15th October 2024, the said orders were vacated by this court for want of prosecution of the Application.

56. The Applicant then immediately moved the court by way of a Certificate of Urgency in this cause HCCC No. E026 of 2024 and obtained fresh orders of injunction against the sale by way of auction over the same properties before the Hon Justice Nyakundi on 23rd October 2024. It is in fact the Counsel for the Respondents who brought this fact to the attention of the court when the instant Application came for inter parties hearing and the court then directed that this being the case, in order to avoid a duplicity of cases by the same parties over the same subject matter in different courts of concurrent jurisdiction, HCCC No. E016 of 2024 be heard alongside this matter.

57. The above being the case, and for reasons that the HCCC No. E026 of 2024 was not heard and determined on its merits, the doctrine of res judicata is not applicable. Further in light of the directions given that the two causes be heard together for the as herein explained, it is my considered opinion that the issue of res judicata is moot.

Whether the Respondents should issue fresh notices in exercise of their statutory power of sale

58. On this issue, the court is guided by the decision of Court of Appeal in the case of Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others [2020] eKLR which answered this question as hereunder;

> " From the record it is clear that after receiving the notice giving (whether it was for the 14 days or 90 days), the advocates on record for the mortgagor engaged counsel for the Bank with proposals on how to liquidate the loan. They did not complain at all that the notice they had been given was invalid. They actually acted on it. Following the discussions, the auctioneers were advised to hold any advertisement for the sale of the suit property. That was in November 1998. The property was not re-advertised until April 2001. The question we should be asking, in our view is whether in these circumstances, it was necessary to reissue another statutory notice. The answer to this is in the negative as the default in payment had continued for more than 3 months following the notice in view of Section 69A (1) (a)."

59. Also relevant is the holding of Warsame, J (as he then was) in the case of Executive Curtains & Furnishings Ltd v Family Finance Building Society [2007] eKLR in which he had the following to say:

> " The plaintiff was given an opportunity to redeem the charge property through the statutory notice dated 24th February, 2006. I am not aware of any law requiring the defendant to repeat or reissue the statutory notice once it is issued and served upon the borrower. The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charged property is out of the hands of the borrower."

60. The applicants in the instant case contend that upon the setting aside of the interim injunction that was granted in Eldoret HCCC E016 of 2024, the Respondents were required to issue fresh notices in order to exercise their Statutory Power of Sale. In considering this issue, it is essential that the court considers the purpose of the process that is set out and which a chargee is obligated to follow if it wishes to exercise its Statutory Power of Sale. This process is meant to enable borrowers have sufficient time within which to redeem their charged properties because if a chargee fails to issue the requisite notices as per the law, the same would amount to a clog on a chargors equity of redemption.

61. With the court being satisfied as already herein expressed that the applicants have failed to sufficiently demonstrate that the issuance of the Statutory Notices was irregular, and/or that they were not all informed of their indebtedness to the chargee and that the said chargee had now set in motion the process of realizing the securities charged, and further that prima facie, it is it is apparent that there exists a debt that has not been settled, and further because the court has found that the cause in HCCC No. E016 of 2024 is directly related to this cause No. HCCCE026 of 2024 the court is satisfied that the Respondent was under no obligation to go through the process of issuing fresh notices for reasons that the Applicant had already been properly served with all the requisite notices. The only notice that was required to be issued by the 2nd defendant is the 14 days' Notification of ale, pursuant to Rule 25(e) of the Auctioneers' Rules, 1997.

Whether a Permanent injunction can issue at the interlocutory stage

62. With the above said on the merits of the Application, the court notes that even as in the submissions tendered, the applicants have submitted on the law governing the issuance of temporary injunctions, the applicants in their application seek for a permanent injunction pending the hearing and determination of the main suit. This being the case, the law is that firstly, submissions are not pleadings, and secondly, it is trite law that parties are bound by their pleadings. The court therefore cannot depart from a parties' pleadings but must reach its determination based on the same.

63. In this regard, the court is guided by the decision of the Court of Appeal in the case of Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR) where the court held;

> Parties were bound by their pleadings which in turn limited the issues upon which a trial court could pronounce. The judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before the Court. To that extent, the court committed a reversible error.

64. The above said, the issue of whether a permanent or mandatory injunction can be issued at the interlocutory stage has been discussed in various precedents over time. In Shepherd Homes Ltd v. Sandham [1971] 1 CH. 34, Megarry, J. stated:

> "It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."
>
> On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

65. Additionally, the Court of Appeal, in Shariff Abdi Hassan vs. Nadhif Jama Adan [2006] eKLR held that:

> " The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case."

66. Upon considering the pleadings, responses and the attendant submissions, it is my finding that the Applicants herein have not made out an unusually strong and clear case to warrant the issuance of a permanent injunction at this interlocutory stage. Further based on my conclusions on the all the issues raised for determination, I am of the further finding that the Applicant has not established a prima facie case with a high probability of success as envisaged in the case of Mrao Ltd Versus First American Bank of Kenya Ltd (2003) eKLR to warrant the grant of an order of a temporary injunction in their favour. This being the case the, by dint of the decision of the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen, the court need not consider the other two requirements that a party must demonstrate to wit irreparable loss and balance of convenience.

67. The upshot therefore is that I find that the application by the Applicant lacks merit and the same is hereby accordingly dismissed in its entirety with costs to the Respondent.

READ DATED AND SIGNED AT ELDORET ON 30TH OCTOBER 2025

E. OMINDE

JUDGE