Ogola t/a Diri Enterprises v Kenya Commercial Bank Limited (Civil Case E013 of 2023) [2025] KEHC 15036 (KLR) (24 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15036 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL CASE E013 OF 2023

A MABEYA, J

OCTOBER 24, 2025

BETWEEN

AUGUSTINE OGOLA T/A DIRI ENTERPRISES ..... PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED ..... DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's application dated 16.12.2024. The same was brought under sections 1A, 1B, 3A, of the *Civil Procedure Act*, Section 97 of the *Land Act*, Order 8 rule 5 of the Civil Procedure Rules & Rules 11 (1)(b) (vi) (vii) and (x) of the Auctioneers Rules.

2. The plaintiff sought to restrain the respondents from selling by public auction or private treaty his property known as Kisumu Municipality/ Block 8/103 ('the suit property'). He also sought that a fresh valuation be undertaken on the suit property.

3. The application was based on the grounds set out on the face of the Motion as well as the supporting affidavit of Augustine Ogolla sworn on 16/12/2024. He contended that he used the suit property as collateral to secure a loan facility from the defendant in the sum of Kshs. 102,509,873/-. He acknowledged that the facility had gone into arrears and the defendant was in the process of exercising its statutory power of sale.

4. That the defendant intended to sell the suit property at a value not commensurable with the current market value contrary to the provisions of section 97 (2) of the *Land Act* as the defendant had not undertaken any valuation on the suit property.

5. The defendant opposed the application vide its Replying Affidavit sworn on the 4/3/2025 by one Francis Ocharo, its Credit Administration Manager. He stated that the application was frivolous, misconceived and an abuse of court process as it intends to delay the defendant from exercising its statutory power of sale over the suit property.

6. That the applicant's basis of seeking temporary injunction expressed to be that he has discovered that the defendant intends to sell the suit property at a price not commensurate with the market value is speculative as it is not based on any evidence presented before this Court. That it had undertaken and obtained the most recent valuation of the suit property on the 6/8/2024 that led to the intended sale of 18/12/2024.

7. The application was disposed off by way of written submissions. The applicant submitted that he is likely to be prejudiced if the defendant is allowed to sell the suit property at a lower value than the current market value as they will come back to him for the balance of the loan an issue that can be cured by the appointment of a joint valuer to revalue the suit property.

8. That a joint valuation should be undertaken to prevent the defendant from selling the suit property at a price below its market value. That this proves his prima facie case to warrant the grant of a temporary injunction. That the intended sale has no legal import and is therefore null and void.

9. On its part, the defendant submitted that the instant application was premature and speculative and ought to be dismissed as the applicant had not proved a prima facie breach of duty imposed upon the defendant to warrant grant of a temporary injunction.

10. That the applicant can be adequately compensated in the unlikely event that he suffers loss as the defendant is a stable financial institution with sufficient capacity to compensate him. That the applicant seeks an equitable remedy whereas he comes to Court with unclean hands as he is in default of payment of the loan owed to the defendant.

11. I have considered the application, the responses filed thereto and the submissions by Learned Counsel. The first issue for determination is whether the application is res judicata.

12. The principles for grant of temporary injunctions were settled in the case of Giella –versus- Cassman Brown and Company Limited (1973) E.A 385. These are that first; an applicant must show a prima facie case with a probability of success. Secondly, that 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. And thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

13. A prima facie case was defined in Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125, to be a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case

14. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal held: -

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion ... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

15. In the present case, the applicant based his application for temporary injunction on the alleged fact that the defendant intended to sell the suit property at a value not commensurate with its market value and thus the court ought to order a joint valuation.

16. The applicant averred that he undertook a valuation on the suit property and established its current market value which is not that indicated by the defendant. However, the said valuation was produced before Court and as such, the Court was left to speculate on the same. That being the case, the applicant's averments remain unproven.

17. It is not disputed that the applicant is in arrears of the loan he obtained from the defendant. The defendant is in the process of exercising its statutory power of sale to recoup its outlay. It is trite that parties are bound by their contracts. It is not part of the Court's business to interfere. The Court will only interfere where one party is in breach of the terms of the contract.

18. The applicant having willingly obtained a loan from the defendant. He offered the suit property as security therefor. He had a duty to settle the same and in breach, the defendant has the right to exercise its statutory power of sale as agreed under the contract.

19. Consequently, the applicant has failed to prove a prima facie case in his favour.

20. On the second ground of irreparable harm, in Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR, the Court considered the Halsbury's laws of England on what irreparable loss is and stated that: -

> " First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."

21. The applicant needed to demonstrate that he was likely to suffer harm that cannot be compensated on monetary sums. In Nguruman Limited V. Jan Bonde Nielsen & 2 others [2014] eKLR, it was stated as follows on irreparable injury or damage: -

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

22. In this case, the defendant is a stable financial institution with sufficient capacity to compensate the applicant in the event that he suffers loss. Consequently, the balance of convenience tilts in favour of allowing the defendant to recoup its outlay before the debt outstrips the security.

23. Accordingly, I find the application dated 16/12/2024 to be without merit and dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2025.

A. MABEYA, FCI Arb

JUDGE