



Wangui & another v NCBA Bank Kenya PLC & another; Mutiga (Sued as the Legal Representative of the Late Mwenda Patrick Mutiga t/a Mapema Enterprises) (Interested Party) (Civil Suit E189 of 2024) [2025] KEHC 15393 (KLR) (Commercial and Tax) (30 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E189 OF 2024**

PM MULWA, J

OCTOBER 30, 2025

BETWEEN

MOSES MUIRURI WANGUI 1ST APPLICANT

FIDELIS WANGUI WAMBUGU 2ND APPLICANT

AND

NCBA BANK KENYA PLC 1ST RESPONDENT

PETER M. GACHIE T/A REGENT AUCTIONEERS LTD 2ND RESPONDENT

AND

CAROLINE MUTIGA (SUED AS THE LEGAL REPRESENTATIVE OF THE LATE MWENDA PATRICK MUTIGA T/A MAPEMA ENTERPRISES) INTERESTED PARTY

RULING

1. Before this Court for determination is the Notice of Motion dated 16th April 2024, brought by the Applicants seeking injunctive and ancillary reliefs against the Respondents. The Application is expressed to be brought under the provisions of Sections 1A, 3, 3A & 63(e) of the *Civil Procedure Act*, Order 40 Rules 1 and 2, and 4, Order 51 of the Civil Procedure Rules, Sections 96(2) and 97 of the *Land Act* 2012 and Article 40 of *the Constitution* of Kenya.
2. The Applicants seek, inter alia, the following substantive orders
 - i. An order of injunction restraining the Respondents, their agents or assigns, from advertising for sale, disposing of, alienating, transferring, leasing, or in any way interfering with the



ownership or title to L.R. No. Mavoko Town Block 3/18478, situated in the Joska Area, Mavoko Municipality, Machakos County, (hereinafter the suit property).

- ii. An order directing the 1st Respondent to render and deliver to the Applicants a true and accurate statement of account in respect of all current and loan accounts held by the late Mwenda Patrick Mutoga with the said Respondent.

Brief background.

3. The material facts, as set out in the supporting affidavit sworn by Moses Muiruri Wangui, are that the late Patrick Mwenda Mutoga (deceased) obtained a loan facility in January 2015 from the 1st Respondent, secured by a legal charge over the suit property. The 1st Applicant acted as the chargor while the 2nd Applicant acted as guarantor to the facility. The borrower passed away on 8th June 2020.
4. In March 2024, the Applicants discovered a public notice advertising the charged property for sale by public auction. They allege that the said advertisement was made without compliance with the statutory notices and valuation procedures mandated by Sections 96 and 97 of the *Land Act*, 2012, and that the property is grossly undervalued. They contend that they had offered to settle the arrears through an instalment proposal dated 3rd November 2023, and that they had notified the insurer that loan cover would be used to offset the arrears. They assert that the sale would occasion irreparable loss as the suit property constitutes their matrimonial home, where they and their school-going children reside.
5. In opposition, the 1st Respondent filed a replying affidavit sworn by Christine Wahome on 30th September 2024. It is the 1st Respondent's position that all statutory procedures were complied with. It avers that the borrower defaulted, prompting issuance of a 90-day statutory demand notice, followed by a 45-day notice of intention to sell, and subsequent advertisement in the Daily Nation of 18th March 2024. A forced sale valuation was allegedly conducted on 9th February 2024. The Respondent further avers that the Applicants' proposals were duly considered and that the bank accepted a sum of Kshs. 3,500,000/= as full and final settlement of the arrears, but that the balance of the loan remains unpaid.
6. The parties thereafter filed written submissions. The 1st Respondent's submissions are dated 25th February 2025, the 2nd Respondents are dated 30th January 2025, while the Applicants' submissions were filed on 10th February 2025.

Analysis and determination

7. I have carefully considered the pleadings, affidavits, annexures, and rival submissions. The issue for determination is whether the Applicants have met the threshold for the grant of an interlocutory injunction.
8. The guiding principles are well settled in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, as restated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, namely:
 - i. Whether the applicant has established a prima facie case with a probability of success;
 - ii. Whether the applicant stands to suffer irreparable injury which cannot be adequately compensated by an award of damages; and
 - iii. If in doubt, the Court will determine the matter on a balance of convenience.



9. A prima facie case, as defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, is one that discloses an apparent right infringed or threatened by the opposite party, warranting judicial intervention.
10. On the first limb of whether a prima facie case has been established, the Applicants' main contention is that the Respondents failed to comply with the procedural safeguards under Sections 96(2) and 97 of the *Land Act*, 2012, which require proper service of statutory notices and a current valuation before sale. They claim that they were never served with any notice and that the property has been undervalued.
11. The 1st Respondent, on its part, has exhibited copies of a 90-day statutory demand notice dated 22nd March 2019, a 40-day notice to sell dated 4th July 2019, and a notification of sale issued to the Applicants' postal address, P.O. Box 10538-00200, Nairobi by registered mail.
12. The Applicants have not tendered evidence to show that the address used was incorrect, nor have they filed an affidavit denying receipt. In terms of Section 96(2) of the *Land Act* and Section 3(5) of the *Interpretation and General Provisions Act*, service by registered post to the last known address constitutes valid service. On the material before the Court, I find that the Respondent substantially complied with the statutory requirements.
13. Regarding the alleged undervaluation, Section 97(2) of the *Land Act* imposes a statutory duty on the chargee to obtain the best price reasonably obtainable at the time of sale. The purpose of this provision, as underscored in *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR, is to protect the chargor's equity of redemption. However, the duty is discharged by commissioning a current valuation by a duly qualified valuer. In the present case, the 1st Respondent has produced a valuation report dated 9th February 2024, setting out both the market and forced sale values. The Applicants, however, have not made a counter-valuation. Bare allegations of undervaluation, without supporting expert evidence, are insufficient to demonstrate a breach of the chargee's statutory duty.
14. As regards the failure to provide statements of account, the Respondent has annexed a loan statement and correspondence evidencing acknowledgement of debt. Once a default is established, a chargor cannot restrain a chargee from exercising its statutory power of sale merely on the ground of a dispute as to the exact amount owing. (see *Joseph Okoth Waudi v National Bank of Kenya Ltd* [2006] eKLR).
15. In the circumstances, I am satisfied that the Applicants have not demonstrated non-disclosure or misrepresentation on the part of the Respondent, and consequently, they have failed to establish a prima facie case with a probability of success.
16. On the second limb, the Applicants claim they will suffer irreparable loss because the charged property is their matrimonial home. While this Court appreciates that a home has sentimental value, the law is settled that once property is offered as security for a loan, it becomes a commodity for sale upon default. In *Andrew Muriuki Wanjohi v Equity Building Society & Another* [2006] eKLR, the Court held that sentimental attachment cannot override contractual obligations voluntarily undertaken.
17. On the balance of convenience, the Respondent is a financial institution holding a valid and subsisting charge over the property. The Applicants have admitted default and have not tendered evidence of full settlement or demonstrated a concrete repayment plan supported by proof of capacity to redeem. In such circumstances, the balance of convenience tilts in favour of allowing the chargee to exercise its statutory power of sale, subject only to compliance with the law.



18. In sum, I find that the Applicants have failed to establish a prima facie case with a probability of success, or that they stand to suffer irreparable harm incapable of compensation by damages. The Court is therefore not persuaded to issue the injunctive relief sought.
19. Accordingly, the Notice of Motion dated 16th April 2024 lacks merit and is hereby dismissed with costs to the 1st Respondent.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF OCTOBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Gichana h/b for Ms. Wachira for Plaintiffs/Applicants

Mr. Nyabega h/b for Mr. Ochieng for 1st Defendant/Respondent

Court Assistant: Carlos

