



REPUBLIC OF KENYA



KENYA LAW
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Asembo Soko Limited & 2 others v Ncba Bank Kenya Plc & another (Commercial Case E015 of 2025) [2025] KEHC 16710 (KLR) (18 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E015 OF 2025**

A MABEYA, J

NOVEMBER 18, 2025

BETWEEN

ASEMBO SOKO LIMITED 1ST PLAINTIFF

GEORGE OTIENO OTWAL 2ND PLAINTIFF

LILIAN ANYANGO OTIENO 3RD PLAINTIFF

AND

NCBA BANK KENYA PLC 1ST DEFENDANT

AUCTIONNERS 2ND DEFENDANT

RULING

1. The 3rd plaintiff is stated to be a wife of the 2nd plaintiff. The 1st plaintiff is a borrower from the 1st defendant in the sum of Kshs.72 million. For security of the said facility, the 2nd defendant offered several properties as security.
2. The properties offered as security were: -
 - i. LR No. South Gem/Ndori/1640.
 - ii. LR No. South Gem/Ndori/1710.
 - iii. LR No. West Asembo/Nyagoko/2153.
 - iv. LR No. West Asembo/Nyagoko/2154
 - v. LR No. Kisumu/Kogony/3471
 - vi. LR No. Kisumu/Kogony/3199
 - vii. LR No. Kisumu/Kogony/6827



viii. LR No. Kisumu/Kogony/6362

ix. LR No. Kisumu/Korando/3976
(hereinafter 'the suit properties').

3. The 1st defendant defaulted and fell into arrears. As a result, the 1st defendant issued the requisite notices with a view to exercise its statutory powers of sale under the security documents executed in respected thereof.
4. Faced with the threat of exercise of statutory power of sale, the plaintiffs lodged a Motion on Notice in this Court dated 28/10/2025 seeking to restrain the 1st defendant from exercising that right. That the defendants be restrained from interfering with the suit properties pending the hearing and determination of the suit.
5. The application was supported by the affidavits of Lilian Anyango Otieno and George Otieno Otwal both sworn on 28/10/2025, respectively. They contended that there was no spousal consent that was given to charge the suit properties which were matrimonial properties. That the 2nd defendant had introduced a 3rd party who was willing to take over 50% of 'the collateral' but the 1st defendant had failed to respond to the same.
6. The application was opposed by the defendants through the replying affidavit of Christine Wahome sworn on 12/11/2025. She deposed that default was not denied. That the application was abuse of process of Court as there were two previous suits that had not been disclosed, to wit, KSM ELC No. E066 of 2025 Asembo Soko Ltd & 2 Others vs NCBA Kenya Ltd & Another and Siaya HCOMM No. E001 of 2024 George Otieno Otwal & Another vs NCBA Kenya Ltd.
7. That spousal consent was obtained and the respective charges were produced. That there was no bad faith on the part of the 1st defendant to the exercise of its statutory power of sale.
8. The application was argued orally by Mr. Oregu, Learned Counsel for the plaintiff and Mr. Odiyo for the defendants. The Court has carefully considered the same.
9. This is an application for interlocutory injunction. The principles applicable are as set out in the *Giella vs Cassman Brown* (1973) EA. These are that an applicant must establish a prima facie case with a probability of success, that an injunction will not ordinarily be granted unless an applicant may otherwise suffer damage that cannot be compensated and that if the Court is in doubt, it will determine an application on a balance of convenience.
10. On a prima facie, the plaintiffs case was that there was no spousal consent and that the 1st defendant was acting in bad faith. That it had failed to respond to a proposal for a 3rd party to take over 50% for the collateral.
11. On spousal consent, the 3rd plaintiff alleged that she never gave her consent to the creation of the charges. That she was the wife of the 2nd plaintiff who had guaranteed the debt.
12. Firstly, there is no dispute that the debtor has defaulted on repayment of the loan. That it has been unable to service the subject facilities.
13. Secondly, in its replying affidavit, the 1st defendant denied the allegation that there was no spousal consent. It produced the subject charges which contained spousal consent which it contended were given by the spouse of the 2nd plaintiff. I was also submitted that there was no evidence that the 3rd plaintiff was a spouse to the 2nd plaintiff.



14. The general rule is that he who alleges must prove. The 3rd plaintiff alleged that she had not given any spousal consent. However, the 1st defendant contained this by producing the subject charges which contained spousal consents. The 3rd plaintiff did not deny that the consents given to the said charges were valid. She also did not swear a further affidavit to deny that the said consents were given by the spouse of the 2nd plaintiff. Having failed to do so, the evidentiary burden of proof lay with her to dispute the said consents which she failed.
15. On bad faith, the identity of the alleged 3rd party who was willing to 'buy the 50% collateral' was not disclosed. The amount he was willing to put in was not revealed. The Court does not think that the failure by the 1st defendant to reply to the letter written in respect thereof amounted to bad faith.
16. There was the issue of the two other suits. The ELC case at Kisumu was withdrawn and failure to disclose it therefore amounts to nothing. However, Siaya HCOM No. E001 of 2024 is pertinent. It is in respect of the same properties, same securities and same parties. In failing to disclose it, the plaintiffs were acting in bad faith and intended to steal a match against the defendants. This suit therefore runs foul of section 6 of the Civil Procedure Act.
17. Accordingly, in view of the foregoing, there is no prima facie case that has been established with any probability of success.
18. On damages, once a property is given as a security, it becomes a commodity for sale in exercise of the lenders statutory power of sale. The damages to be suffered in this Court's view is compensable by an award of damages.
19. As regards balance of convenience, this tilts in favour of the 1st defendant who should recoup its outlay. Any further delay may water down the securities thereby exposing the 1st defendant to untold expense and loss.
20. In the view of the foregoing, I find the Motion dated 28/10/2025 to be without merit and the same is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF NOVEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE

