

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E443 OF 2024

STEPHEN NJIHIA MBUGUA.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA DEVELOPMENT

CORPORATION.....1ST DEFENDANT/RESPONDENT

STARTRUCK AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

FEAST FOODS PROCESSORS LTD.....3RD DEFENDANT/RESPONDENT

FUNGUO INVESTMENT LTD.....4TH DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 6th August 2024 filed by the plaintiff/applicant under the provisions of Articles 22 & 23 of the Constitution of Kenya 2010, Order 40 Rules 1, 2 & 3 and Order 50 Rules 1 & 4 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 34 & 63(e) of the Civil Procedure Act and all enabling provisions of the law. The plaintiff prays for an order of temporary injunction restraining the 1st & 2nd defendants from selling, alienating, disposing of, or interfering with possession of property L.R. No. 10901/214 Kahawa Sukari, registered in the name of the plaintiff, pending the determination of this suit.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Stephen Njihia Mbugua, the plaintiff herein. Mr. Mbugua averred that the Government's Big Four Agenda in 2013 emphasized agro-manufacturing, prompting the incorporation of the 3rd defendant in 2014 as his family business. That

subsequently, the 3rd defendant acquired land and a factory in Kwale to set up a juice-processing plant. He stated that feasibility studies and NEMA approvals were obtained, but the 3rd defendant still required funding. For that reason, he approached the 1st defendant for a loan of Kshs.200,000,000/=, but during negotiations the 1st defendant insisted on the 3rd defendant bringing in the 4th defendant as a partner for capital injection, despite the fact that the 3rd defendant's original promoters had initially engaged Fullscope Services Ltd who were experts in distribution, with vast knowledge in the manufacture and sale of juices, dairy and other beverages in the East African region.

3. Mr. Mbugua contended that unbeknown to them, senior officials of the 1st defendant had undisclosed shareholding interests in the 4th defendant, which created a conflict of interest. He averred that consequently, the 3rd defendant's original promoters were put under pressure so as to change the business model from ready-to-drink juices to puree, and to unfair loan terms which included the 4th defendant's provision of Kshs.62,500,000/= working capital and for it to take a 51% controlling stake in the 3rd defendant. He averred that eventually, the 1st defendant issued the 3rd defendant with a letter of offer dated 4th July 2017 for a loan facility of Kshs.276,000,000/=, secured by charges over L.R No. Kwale/Galu Kinondo/886 on which the factory is built, and on the plaintiff's parcel of land known as L.R. No. 10901/214 Kahawa Sukari, a fixed and floating debenture over the 3rd defendant's assets, and personal guarantees of the 3rd defendant's original promoters.
4. Mr. Mbugua stated that the aforesaid restructuring was formalized vide a Loan Agreement dated 20th March 2018 and a Cooperation Agreement dated 11th June 2018, which effectively stripped the 3rd defendant's original promoters of control of the 3rd defendant. He asserted that in an unfortunate turn of events,

the 4th defendant mismanaged the 3rd defendant, failed to inject its equity, implemented poor policies, and caused the company to collapse without repaying the loan, but despite this, the 1st defendant issued him with a notice of intention of sale dated 24th January 2023 over his property L.R. No. 10901/214 Kahawa Sukari, irrespective of the fact that there were other securities. Mr. Mbugua averred that the 1st defendant undervalued the said property at Kshs.295,000,000/= in collusion with the 2nd defendant. He deposed that he engaged Lloyd Masika Limited & Pinnacle Valuers Limited who valued the property at Kshs.320,000,000/= and Kshs.340,000,000/=, respectively. He asserted that a redemption notice was wrongly issued to the 3rd defendant vide a letter dated 21st June 2024 and the property was advertised for auction on 21st August 2024.

5. In opposition to the application, the 1st defendant filed a replying affidavit sworn on 19th November 2024 by Ms Dorothy Asiema, a Senior Portfolio Management Officer at the 1st defendant company. She averred that in 2017, the 3rd defendant was advanced a Kshs.276,700,000/= loan by the 1st defendant vide a letter of offer dated 4th July 2017 and a Loan Agreement dated 20th March 2017. She stated that the said loan was secured by legal charges over L.R. No. Kwale/Galu Kinondo/886 and L.R. 10901/214 Kahawa Sukari, a floating debenture over the 3rd defendant's assets and Directors' personal guarantees. She further stated that the plaintiff personally signed the loan and charge documents in the presence of Advocates and acknowledged having understood the consequences of default.
6. Ms Asiema stated that the 3rd defendant only made partial repayments totaling Kshs.14,466,403.30 through inconsistent instalments. She further stated that the last significant payment made by the 3rd defendant was Kshs.5,376,403.30 in

August 2024 following a Court Order, before which only Kshs.500,000/= had been paid on 29th August 2022. She stated that as at 6th August 2024, the 3rd defendant's loan balance stood at Kshs.466,567,47.00 with arrears of Kshs.402,595,301.78, and as at 31st October 2024, the debt had grown to Kshs.485,056,351.79 with arrears of Kshs.418,860,259.31. Ms Asiema maintained that the 1st defendant issued all the requisite statutory notices in exercising its statutory power of sale and conducted proper valuations before advertising the suit properties for auction.

7. Ms Asiema accused the plaintiff of failing to disclose that the 3rd defendant, where he is a Director, had already filed another suit being **HCCOMM No. E438 of 2024** and obtained injunctive reliefs. She asserted that the plaintiff attempted to mislead the Court by claiming mismanagement of the 3rd defendant by the 1st defendant, whereas the management of the 3rd defendant was his responsibility as a Director. She maintained that the plaintiff's claim of undervaluation of the suit property cannot be sustained since the variance between his valuation and that of the 1st defendant is only 13% which meets the threshold of Section 97(3) of the Land Act. The above notwithstanding, she asserted that any alleged undervaluation or irregularities can be compensated by damages under Section 99(4) of the Land Act.
8. The 3rd & 4th defendants also filed a replying affidavit in opposition to the instant application sworn on 4th September 2024 by Mr. Mwangi Wamae, a Director of the 4th defendant company, which is a shareholder in the 3rd defendant company. He averred that the plaintiff's claims of unfair prejudice, fraud, conflict of interest, insider trading and unjust enrichment are false, unsupported, and malicious. He stated that as per the term sheet, the 4th defendant was to acquire 51% shares in the 3rd defendant with the plaintiff

retaining 49%, but the plaintiff still holds the majority shares in the 3rd defendant company and has failed to cede the shareholding to the 4th defendant as seen by the 3rd defendant's current CR-12.

9. Mr. Wamae averred that the plaintiff continues to be a majority shareholder and Director of the 3rd defendant, actively participating in its management and decision-making. He stated that the 3rd defendant's Board structure is equal since both the plaintiff and the 4th defendant have 2 seats each so no party has unilateral control. He asserted that the plaintiff voluntarily charged his property to the 1st defendant and executed the 2018 Loan Agreement, thus he cannot now claim coercion, fraud, or unfair terms. He averred that loan proceeds were paid directly to suppliers not to the 3rd defendant, hence allegations of mismanagement are baseless. He stated that business setbacks brought about by *inter alia*, the COVID-19 Pandemic, drought and equipment delays explain the 3rd defendant's struggles not mismanagement.
10. Mr. Wamae maintained that the 4th defendant has been working to protect the 3rd defendant by *inter alia*, filing **HCCOMM No. E438 of 2024** alongside the 3rd defendant to preserve its assets from auction. Furthermore, that business proposals and restructuring attempts prove good faith by the 3rd & 4th defendants. He contended that contrary to the plaintiff's allegations, both the plaintiff's property and that of the 3rd defendant are equally exposed to auction. He urged the Court to dismiss the claims of unfair prejudice and fraud with costs, as they are baseless and prejudicial to the 3rd & 4th defendants.
11. In a rejoinder, the plaintiff filed a supplementary affidavit sworn on 5th December 2024 by Mr. Stephen Njihia Mbugua, the plaintiff herein. He denied the defendants' claim of non-disclosure of **HCCOMM No. E438 of 2024** and stated that he was unaware of the case filed by the 3rd defendant, which was

done without his knowledge or authority. He averred that he does not need the 3rd defendant's authority to protect his own land. Mr. Mbugua asserted that the statutory notices issued by the 1st defendant are defective since he was not served with the 45 days notification of sale dated 21st June 2024 that was served on the 3rd defendant. He contended that contrary to the defendants assertions, the suit property was undervalued by the 1st & 2nd defendants by 35%, thus the 1st & 2nd defendants valuation is illegal.

12. Mr. Mbugua stated that the 1st defendant controlled the loan account and disbursed funds directly to suppliers, so mismanagement cannot be blamed on him. He contended that Courts can intervene where terms are harsh, oppressive, or unconscionable. He denied having refused to cede shares and indicated that it was the 3rd defendant's Company Secretary who was appointed by the 4th defendant who failed to register changes. He stated that in practice, the 4th defendant has controlled the Board and decisions of the 3rd defendant under the influence of the 1st defendant. He asserted that his position as a chargor is similar to that of a guarantor, thus priority of recovery should be from the borrower's property not his.
13. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed on 6th December 2024 by the law firm of Prof. Tom Ojienda & Associates, and the 1st defendant's submissions were filed by the law firm of Rachier & Amollo LLP on 20th December 2024. The 3rd & 4th defendants' submissions were filed by the law firm of Abdullahi Gitari & Odhiambo Advocates LLP on 20th January 2025.
14. Mr. Makokha, learned Counsel for the plaintiff submitted that the 3rd defendant had no authority to file a case on the plaintiff's behalf over land that personally belongs to him. He stated that the plaintiff did not need the 3rd defendant's

authority to defend his own property under Article 22(1) of the Constitution. He argued that the plaintiff did not disclose **HCCOMM No. E438 of 2024** because he was unaware of it, thus the 1st defendant's claim that the plaintiff is undeserving of equitable relief for material non-disclosure is baseless.

15. In urging the Court to grant the orders being sought herein, Counsel relied on the case of **Giella v Cassman Brown & Co. Ltd** [1973] EA 358. He also relied on the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] KECA 175 (KLR), and submitted that the plaintiff has established a *prima facie* case against the defendants to warrant being granted of the orders being sought herein. He cited the Court of Appeal case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited** [2017] KECA 152 (KLR), and argued that the Loan and Cooperation Agreements entered into by the parties herein were oppressive, unjust, and unconscionable, and urged this Court to intervene. Counsel further submitted that the 1st defendant's intended auction of his property is unlawful due to procedural flaws including failure to issue the mandatory 45-day notice to the plaintiff, lack of proper accounts of arrears, reliance on an undated and invalid Valuation Report and gross undervaluation of the property by 35%.
16. Mr. Makokha submitted that the loan advanced to the 3rd defendant by the 1st defendant can be recovered from the 3rd defendant's assets, but despite the 3rd defendant's growth in assets and profitability, the 1st defendant is targeting the plaintiff's property instead of the 3rd defendant's. Counsel attributed the said action to a conflict of interest, since the 1st defendant through the 4th defendant has stakes in the 3rd defendant and seeks to protect those assets while sacrificing the plaintiff's property. Counsel referred to the case of **Geepak Limited & 2 others v Housing Finance Company Limited** (Civil Suit E140 of 2023)

[2023] KEHC 22040 (KLR), and reiterated that the 1st defendant can recover the loan from the 3rd defendant's charged assets, but instead it seeks to sell the plaintiff's property to cover losses caused by the 1st & 4th defendants' mismanagement of the loan proceeds, thereby protecting their own stake in the 3rd defendant. He argued that the foregoing would cause the plaintiff irreparable harm that cannot be compensated by damages. Mr. Makokha asserted that the balance of convenience tilts in favour of the plaintiff.

17. Mr. Wakwaya, learned Counsel for the 1st defendant cited *inter alia*, the case of **Samson Aliton Okello v Barclays Bank of Kenya Limited** [2009] KEHC 4022 (KLR), and submitted that the plaintiff having approached the Court with lies and material non-disclosure, is undeserving of an equitable relief such as an injunction. He relied on the Court of Appeal case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited** [2017] KECA 98 (KLR), and submitted that once a statutory power of sale has crystallized, it cannot be endlessly litigated by guarantors or principals. He argued that since the 1st defendant's statutory power of sale is already being challenged by the 3rd defendant in **HCCOMM No. E438 of 2024**, it is improper for both the 3rd defendant and the plaintiff to contest it in separate suits.
18. Mr. Wakwaya cited the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] KECA 606 (KLR) and submitted that the plaintiff has not established a *prima facie* case, and that since both the plaintiff and the 3rd defendant admit to the loan default, the 1st defendant is entitled to exercise its statutory power of sale over the suit properties. He relied on the case of **Milimani Motors (K) Ltd v Kenya Commercial Bank Ltd** [2014] KEHC 5963 (KLR), and maintained that all statutory notices were duly issued and

served on both the plaintiff and the 3rd defendant, and that the plaintiff even sought a loan restructuring in response, thereby proving awareness.

19. In submitting that where a lender holds multiple securities such as is the case herein, it has the discretion unless restricted by law, to choose which security to realize first, thus the 1st defendant cannot be faulted for seeking to sell the plaintiff's property before other securities, Counsel referred to the case of **Prime Bank Limited v Jessa & 3 others** [2024] KEHC 13414 (KLR).
20. Mr. Wakwaya contended that Courts have held that under Section 97 of the Land Act, a mere allegation of undervaluation is insufficient to show breach of duty by a chargee. He referred to the case of **Desnol Investments Limited v Family Bank Limited** [2021] KEHC 3819 (KLR), and asserted that a chargor must provide cogent evidence proving the bank's valuation was defective, not just a counter-valuation. He argued that the plaintiff has not proved any breach of statutory duty, particularly on undervaluation, since no evidence shows a variance of above 25% as required under Section 97 of the Land Act. Counsel contended that the plaintiff had failed to establish a *prima facie* case to warrant being granted the orders being sought herein.
21. Mr. Wakwaya relied on the case of **Blay Energy Limited & another v Barclays Bank of Kenya Limited & another** (Civil Suit E418 of 2023) [2024] KEHC 4187 (KLR), and submitted that the plaintiff cannot claim irreparable harm, since damages would be adequate if any loss occurred, given that property offered as security is a commodity for sale upon default. He asserted that the balance of convenience tilts towards dismissing the application herein.
22. Ms Mukobi, learned Counsel for the 3rd & 4th defendants relied on the case of **Kibugi Farmers Co-op Society v Philip Mungai t/a Mungai Electrical**

Ventures [2018] KEHC 1253 (KLR), and submitted that the Loan Agreement dated 20th March 2018 between the plaintiff and the 1st defendant is a valid and binding contract, as it was in writing and duly signed by the borrower in compliance with the provisions of Section 3(1) of the Contract Act. She argued that the plaintiff's claims of coercion, fraud, or undue influence are unsubstantiated, as no evidence has been provided. Counsel contended that the Loan Agreement in question was freely and voluntarily executed, making it binding upon the parties thereto. Ms Mukobi asserted that the 3rd & 4th defendants support the issuance of the injunctive reliefs being sought herein, but distance themselves from the plaintiff's grounds for seeking it. She argued that contracts must be honored, and turning to Court while misrepresenting facts amounts to an abuse of process.

ANALYSIS AND DETERMINATION.

23. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavits by the 1st, 3rd & 4th defendants, and the written submissions by Counsel for the parties. The issue that arises for determination is whether an order of interlocutory injunction against the defendants should issue.
24. The instant application seeks an order of temporary injunction against the 1st & 2nd defendants in respect to the property known as L.R. No. 10901/214 Kahawa Sukari. Interlocutory injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010, which states that –

Where in any suit it is proved by affidavit or otherwise-

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

25. The conditions that a Court must consider when determining an application for a temporary injunction are well established. The Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** (supra) in dealing with a similar application held as follows -

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

a) establish his case only at a prima facie level,

b) demonstrate irreparable injury if a temporary injunction is not granted, and

c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

26. A *prima facie* case was defined by the Court of Appeal in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others** (supra) as follows-

So what is a prima facie case? I would say that in civil cases it is a case in 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. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

27. The plaintiff's case is that the 1st defendant forced inclusion of the 4th defendant as the 3rd defendant's partner, yet its officials secretly held interests in the 4th defendant. He also claimed that the 1st defendant imposed oppressive loan terms on the 3rd defendant which eventually led to him being stripped of the control of the 3rd defendant. From the CR-12 of the 3rd defendant, I however note that the plaintiff is still the majority shareholder, although the plaintiff asserts that that is the position on paper, but in practice he does not have actual control of the 3rd defendant. The 3rd & 4th defendants contended that the 3rd defendant's Board structure is equal, since both the plaintiff and the 4th defendant have 2 seats each so no party has unilateral control.
28. The plaintiff on the other hand claimed that the Board of the 3rd defendant constitutes five members, two from the original promoters, two from the 4th defendant and one from the 1st defendant who is also the biggest shareholder in the 4th defendant. In an effort to demonstrate the elements of fraud, conflict of interest and undue influence, the plaintiff averred that the 1st defendant concealed the fact that it is a shareholder in the 4th defendant before the 4th defendant acquired controlling shares in the 3rd defendant company. From the

pleadings filed, it is noteworthy that the 1st defendant has neither denied nor responded to the said allegation.

29. The 1st defendant's involvement in the 4th defendant, which holds a controlling stake in the 3rd defendant company, presents a troubling scenario as it raises doubts about the 1st defendant's motives in exercising its statutory power of sale over the suit property. To this end, it my considered view that whether the 1st defendant is a shareholder of the 4th defendant, whether the 1st & 4th defendants jointly control and manage the 3rd defendant and whether such control gives rise to fraudulent dealings, are matters that can only be conclusively resolved at the full hearing of this suit after the parties herein have tendered evidence on oath.
30. This Court is also persuaded that the plaintiff's allegations relating to fraud and conflict of interest, some of which remain uncontroverted by the defendants raise serious questions of unconscionability, undue influence, and conflict of interest, warranting preservation of the suit property pending the full determination of the case.
31. Additionally, the plaintiff contends that the statutory notices allegedly issued by the defendant are defective on the ground that he was not served with a 45-days' notice of intention to sell. This Court however notes that the law does not provide for a 45-days' notice of intention to sell, but a 40-days' notice and a 45-days' redemption notice. The above notwithstanding, the 1st defendant maintains that it duly served the plaintiff and the 3rd defendant with all the requisite statutory notices, hence the orders being sought herein ought not to be granted.
32. On examination of the annexures attached to the 1st defendant's replying affidavit, it is evident that a 40-days' notice of intention to sell addressed to the

plaintiff in respect of the suit property, was indeed prepared. On the face of the notice, it is clear that it indicates that it was to be served by registered post to the plaintiff. The 1st defendant has however not provided proof of actual service of the said notice. There is also no evidence of service of a 45-days' redemption notice as provided for under Rule 15(d) of the Auctioneers Rules, 1997. I am therefore not satisfied that the plaintiff was duly served with the statutory 40-day notice of intention to sell as required under Section 96(2) of the Land Act.

33. The question of whether or not the 1st & 2nd defendants carried out a proper valuation of the suit property prior to exercising the statutory power of sale is not decisive in determining an application for an injunction. This is because Section 99(4) of the Land Act stipulates that any person aggrieved by an unauthorized, improper, or irregular exercise of the power of sale has recourse in damages against the party exercising that power.
34. I am of the finding that the allegation that the plaintiff is guilty of material non-disclosure for failing to disclose about the existence of **HCCOMM No. E438 of 2024** filed by the 3rd defendant against the 1st defendant is a factual issue that ought to be determined at the hearing of the main suit. This is because the plaintiff asserts that although he is a Director of the 3rd defendant, he was unaware of the said proceedings.
35. In view of the foregoing, I am persuaded that the plaintiff has established a *prima facie* case with a probability of success to warrant being granted an order of temporary injunction against the defendant.
36. As to whether the plaintiff is likely to suffer irreparable harm that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed, this Court finds that having established a *prima facie*

case with a likelihood of success, the sale of the suit property would introduce an uncertainty and risk infringing on the plaintiff's constitutional right to property under Article 40 of the Constitution of Kenya. To this end, I am bound by the Court of Appeal's holding in the case of **Muiruri v Bank of Baroda (Kenya) LTD** [2000] K.L.R 183 cited by the Court in the case of **Peter Kimani Nene v Kenya Commercial Bank Limited** [2016] KEELC 99 (KLR), where it held:-

...disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss

37. I am cognizant of the fact that Courts are reminded to consider the fact that the sale of a person's property amounts to infringing on the person's right to own property as enshrined under Article 40 of the Constitution of Kenya, 2010. In answering this issue, especially where an applicant has established a *prima facie* case with a probability of success, this Court notes that the suit property is not the only security still charged to the 1st defendant to secure the loan in question. I therefore hold that granting the orders being sought herein does not stand to prejudice the 1st defendant in any way.
38. I am as such persuaded that the plaintiff has demonstrated that in the event that the order being sought herein is not granted, he will suffer damages that cannot be adequately compensated by an award of damages.
39. The issue of balance of convenience does not arise since this Court is not in doubt. Nevertheless, based on my analysis in this Ruling, the balance of convenience tilts in favour of the plaintiff.

40. In the circumstances, this Court finds that the application herein is merited. It is hereby allowed in the following terms –

- i) I hereby grant an order of temporary injunction restraining the 1st & 2nd defendants, their agents, employees, servants or any other person or entity claiming through them from selling, alienating, disposing of, or interfering with the quiet possession of property L.R. No. 10901/214 Kahawa Sukari, registered in the name of the plaintiff and charged to the 1st defendant, pending the hearing and determination of this suit; and**
- ii) Costs of the application dated 6th August 2024 shall be in the cause.**

It is so ordered.

DELIVERED, DATED and SIGNED at NAIROBI on this 7th day of November 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of;-

Mr. Ochieng h/b for Prof. Tom Ojienda (SC) for the plaintiff/applicant

Ms Masara h/b for Mr. Wakwaya for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Ms Mukoba for the 3rd & 4th defendants/respondents

Ms B. Wokabi – Court Assistant.