

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E769 OF 2024

CHIBUNE AIR LIMITED.....1ST PLAINTIFF/APPLICANT
JAMES KIMONYE.....2ND PLAINTIFF/APPLICANT
PHILIP GACIITHIRE NJUKI.....3RD PLAINTIFF/APPLICANT

-VERSUS-

CREDIT BANK LTD.....DEFENDANT/RESPONDENT

RULING

1. The plaintiffs/applicants filed a Notice of Motion application dated 18th December 2024 pursuant to the provisions of Articles 40 & 159(2)(d) of the Constitution of Kenya, Sections 1A, 1B, 3A & 63(c) of the Civil Procedure Act, Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010, and Sections 103 & 104 of the Land Act. The plaintiffs pray for an order of temporary injunction restraining the defendant/respondent and/or its agents from advertising, transferring, appointing a Receiver, leasing, or selling the properties known as Abothuguchi/Katheri/3732 and Nairobi Block 90/168 pending the hearing and 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. James Kimonye, the 2nd plaintiff herein and a Director of the 1st plaintiff company. Mr. Kimonye averred that on 29th January 2016 and 11th June 2020, the defendant offered the 1st plaintiff bank guarantees' facility of USD 200,000.00 and USD 285,365.00 in favour of its client, Air Arabia. He further averred that the said facilities which totaled USD 485,365.00 were secured by charges over

Abothuguchi/Katheri/3732 and Nairobi Block 90/168 which belonged to the 2nd & 3rd plaintiffs, respectively, and guarantees and indemnity executed by the 2nd & 3rd plaintiffs in favour of the defendant. He stated that the facilities were issued to support Air Arabia's air ticketing business under a GSA Agreement.

3. Mr. Kimonye deposed that the 1st plaintiff successfully applied for renewal of the aforesaid guarantees upon provision of financial statements and General Sales Agent Agreement (GSA) between the 1st plaintiff and Air Arabia. He contended that the bank guarantees issued by the defendant were wrongly issued in the name of Chibune Holdings Ltd instead of Chibune Air Ltd, and that the defendant delayed correcting the error despite timely notification. Mr. Kimonye stated that the defendant belatedly applied to amend the name of the plaintiff in the said guarantees, and failed to renew/issue the guarantees within the claim period as provided for in the GSA Agreement causing Air Arabia to call up the guarantee previously issued in the name of Chibune Holdings Ltd. He further stated that even though the amendment was eventually effected by the defendant, the same was done on 22nd April 2021, long after Air Arabia encashed the guarantee for USD 204,543.00 and terminated its contract with the 1st plaintiff.
4. Mr. Kimonye averred that the defendant admitted that the 1st plaintiff's default was due to the encashment of the guarantee, but it still proceeded to issue statutory sale notices dated 10th June 2024 & 30th September 2024 against the plaintiffs' charged properties to recover Kshs.120,939,060.80 as at 11th September 2024. He maintained that he and the 3rd plaintiff had guaranteed by charging their properties for facilities advanced to the 1st plaintiff, not to Chibune Holdings Ltd. Mr. Kimonye asserted that the defendant is seeking to benefit from its own negligence and breach of duty. Further, that efforts for amicable settlement in December 2024 were rejected by the defendant. He

averred that the property he charged to the defendant is his rural home, whereas that of the 3rd plaintiff is his matrimonial home, thus in the event that the instant application is not allowed, they will suffer irreparable loss.

5. The application herein was also supported by an affidavit sworn on 18th December 2024 by Mr. Philip Gaciithire Njuki, the 3rd plaintiff and a Director of the 1st plaintiff company. In the said affidavit, Mr. Njuki confirmed and adopted the contents of the supporting affidavit sworn by Mr. James Kimonye, the 2nd plaintiff herein. He averred that he always understood that the borrower and contracting party was Chibune Air Ltd and that informed his decision to provide the guarantee and charge his property in favour of the defendant. He asserted that he is at a loss as to why the defendant acted negligently and now seeks to benefit from its own mistake by attempting to sell the charged properties.
6. In opposition to the application, the defendant filed a replying affidavit sworn on 14th January 2025 by Mr. Wainaina Francis Ngaruiya, the defendant's Head of Legal. Mr. Ngaruiya averred that the instant application is fatally defective for being *res judicata* **Nairobi HCCC No. E561 of 2021**, where the issues raised herein were determined vide a Consent Order dated 28th June 2021, thus this Court is *functus officio*. He deposed that the first bank guarantee was issued in 2010 to Chibune Holdings Ltd for USD 200,000.00 with successive renewals in 2017, 2018, 2019, 2020, which guarantee was secured by charges over Abothuguchi/Katheri/3732 registered in the name of the 2nd plaintiff and Nairobi Block 90/168 registered in the name of the 3rd plaintiff, and corporate and Directors' guarantees.
7. Mr. Ngaruiya contended that in February 2021, the 1st plaintiff requested for a renewal of the bank guarantee with alteration only on the dates for re-issue and

expiry. He stated that later on, Chibune Holdings Limited informed the defendant that the guarantee to Air Arabia was drawn between the 1st plaintiff and Air Arabia not Chibune Holdings Limited and Air Arabia, at which point the defendant was requested to cause an amendment in the bank guarantee and issue the same in favour of Chibune Air Limited as opposed to Chibune Holdings Ltd. That on 26th March 2021, the defendant bank issued a renewal guarantee with similar terms save for change of dates and the applicant's name was amended from Chibune Holdings Limited to Chibune Air Limited. He stated that the amendment process required correspondent and advising bank approval, which was eventually approved and adopted by the advising bank on 22nd April 2021, attracting additional charges of USD 4,543.00.

8. Mr. Ngaruiya averred that the plaintiffs knew that the amendment process takes at least thirty (30) days, hence cannot claim negligence. He further averred that the plaintiffs failed to honour their obligations to Air Arabia, leading to call-ups of the guarantees on 27th April 2021 and 12th July 2021. He averred that for that reason, the defendant had to overdraw the 1st plaintiff's account to pay the beneficiary as the plaintiffs failed to fund their account despite being advised to do so on several occasions. He deposed that the 1st plaintiff filed Nairobi **HCCC No. E561 of 2021** against the defendant seeking to stop and/or reverse the said payment, but the said suit was however amicably settled vide a consent dated 28th June 2021. Mr. Ngaruiya stated that prior to, and after the recall of the bank guarantee, the plaintiffs sought for accommodation and restructuring of the facilities advanced to them since they did not have sufficient funds, which request was granted severally, but they still defaulted in their obligations repeatedly.

9. Mr. Ngaruiya contended that as at 10th January 2025, the plaintiffs' debt stood at Kshs.126,487,225.49, accruing further interest. He stated that the defendant

served upon them with 90-day and 40-day Notices in 2024 before taking steps to realize securities. He further stated that the subject properties have not yet been attached or advertised, so there is no imminent threat of sale to warrant the plaintiffs being granted the Orders being sought herein. He averred that the plaintiffs were fully aware that the subject guarantees were always in the name of Chibune Holdings Ltd until 2021, thus their claims of bank error is not only false and misleading but also unsubstantiated. He deposed that the real issue in controversy between the parties herein is the plaintiffs' failure to pay debts, not the defendant bank's conduct. Mr. Ngaruiya asserted that since the plaintiffs admit their indebtedness, the instant application ought to be dismissed.

10. In a rejoinder, the plaintiffs filed a supplementary affidavit sworn on 28th January 2025 by Mr. James Kimonye, the 2nd plaintiff herein and a Director of the 1st plaintiff company. He contended that the initial borrower of the bank guarantee was Chibune Holdings Limited in the year 2010, however in the year 2016, the air ticketing business was transferred to the 1st plaintiff making it the applicant of the guarantee as at 2016. He deposed that this led to execution and registration of a deed of variation and a further charge dated 28th June 2016 on all that property known as Nairobi Block 90/168. He stated that letters of offer from 2016 onwards show Chibune Air Ltd as the borrower. Mr. Kimonye denied that the plaintiffs were financially incapable of servicing their accounts and stated that the USD 50,000.00 demand by Air Arabia was a normal business balancing request, not related to guarantee renewal.
11. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Munga Kibanga & Company Advocates on 29th January 2025, while the defendant's submissions were filed on 4th March 2025 by the law firm of Nyaanga & Mugisha Advocates.

12. Mr. Mogire, learned Counsel for the plaintiffs cited Section 7 of the Civil Procedure Act and the Court of Appeal case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others** [2017] KECA 477 (KLR), and submitted that in order for one to successfully plead a defence of *res judicata*, all 5 elements of *res judicata* must be conjunctively satisfied, and the absence of even one of the elements defeats the plea. He argued that the application in **HCCC No. E561 of 2021** was in respect to failure to renew a bank guarantee of USD 285,365.00 to Air Arabia PJSC, while this suit challenges the defendant's negligence in issuing a bank guarantee in the wrong applicant's name. Further, that **HCCC No. E561 of 2021** was withdrawn by consent, it was never heard and no determination on merits was made. He stated that a plea of *res judicata* cannot be successfully raised in this case.
13. Counsel cited the case of **Giella v Cassman Brown & Co. Ltd** [1973] EA 358 and submitted that the plaintiffs have established a case for being granted an order of interlocutory injunction. He argued that the 1st plaintiff was the borrower of the bank guarantee facilities in favour of Air Arabia, but the defendant wrongly included Chibune Holdings Limited as the borrower, demonstrating negligence and sloppiness. He further stated that the plaintiffs have demonstrated written Notices to the defendant pointing out the error and delay in renewal, affirming that the correct applicant was the 1st plaintiff. Counsel referred to the Court of Appeal case of **Mrao Ltd. v First American Bank of Kenya Ltd & 2 others** [2003] KLR 125 and asserted that the plaintiffs have demonstrated a *prima facie* case with a probability of success to warrant being granted the Orders being sought herein.
14. Mr. Mogire submitted that the defendants had issued statutory notices to sell the suit properties which consist of the 2nd plaintiff's rural home and the 3rd plaintiff's matrimonial home, and if the Orders being sought herein are not

granted, the loss of the said properties would cause them to suffer irreparable harm since they hold immense sentimental value and cannot be recovered once sold. Counsel argued that if the Orders being sought herein are denied and the suit properties sold, the plaintiffs' rights would be permanently prejudiced, but if the Orders are granted and the defendant is successful in the suit, it can still exercise its statutory power of sale over the suit properties in accordance with the law. Mr. Mogire contended that the balance of convenience tilts in favour of the plaintiffs.

15. Mr. Mugisha, learned Counsel for the defendant submitted that this application is *res judicata* as it seeks to re-litigate issues already determined in **Milimani HCCC No. E561 of 2021** where the plaintiffs sought similar injunction orders to stop the bank from exercising its statutory power of sale over the suit properties. He argued that **Milimani HCCC No. E561 of 2021** was conclusively settled by a Consent Order which has neither been set aside nor reviewed. Counsel relied on the case of **Gabriella Susat v Cosimo Rosafio & another** [2021] KEELC 1551 (KLR), and contended that since a Consent Judgment/Order is final, this Court is *functus officio* and it has no jurisdiction to reopen or reconsider the same issues.
16. Counsel cited the case of **Kenleb Cons Ltd v New Gatitu Service Station Ltd & another** [1990] KEHC 53 (KLR), and submitted that a party seeking an order for an interlocutory injunction must make full and frank disclosure of all material facts. Mr. Mugisha contended that in this case, the plaintiffs failed to disclose about the existence of the **Milimani HCCC No. E561 of 2021**, the Consent Order of 28th June 2021, demand notices, outstanding loan arrears, statutory notices served and amendments to the letter of credit. He referred to the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya)**

Ltd [1989] KECA 48 (KLR), and stated that non-disclosure of material facts discharges *ex parte* Orders, thus the instant application ought to be dismissed.

17. Mr. Mugisha relied on the decisions made in **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] eKLR and **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** (supra), and submitted that the plaintiffs have not demonstrated any violation and/or infringement of their statutory rights. He further submitted that the plaintiffs do not dispute the loan, interest, or statutory notices served, as their only claim is that the bank guarantees were wrongly issued in the name of Chibune Holdings Ltd instead of Chibune Air Ltd. He contended that the defendant had demonstrated that the plaintiffs knew that the guarantees were in the name of Chibune Holdings Limited and even renewed them from 2010 to 2021 without objection. He stated that the issue of the borrower's change of name was only raised in March 2021 during renewal of the guarantee, triggering amendments that were duly effected.
18. Counsel contended that although the plaintiffs claim that the 1st plaintiff changed its name around the year 2015, they never notified the defendant and instead, they continued to benefit from the facilities. He asserted that after the amendments were effected, the loan was restructured under a new letter of offer dated 23rd February 2023, which superseded prior guarantees. He cited the cases of **Mahesh Kumar v Oriental Commercial Bank Ltd & 2 others** [2017] KEELC 2830 (KLR) and **King'orani Investments Co. Ltd v Kenya Commercial Bank of Kenya Limited & Another** [2007] KEHC 1347 (KLR), and maintained that a borrower cannot challenge validity of Agreement after enjoying facilities and defaulting, which is no ground for injunction. Mr. Mugisha submitted that the defendant's statutory power of sale crystallized in June 2024 after the plaintiffs defaulted on a loan of Kshs.115,240,932.17 but

the plaintiffs failed to redeem the suit properties despite being indulged by the defendant.

19. Counsel contended that the plaintiffs do not dispute indebtedness or service of statutory notices under Sections 90, 96 & 97 of the Land Act. He referred to the case of **Muga Developers Limited v Equity Bank of Kenya Limited & 4 others** [2020] KEHC 1065 (KLR), and asserted that once a chargee's power of sale arises, Courts cannot restrain it unless the debt is paid into Court. Mr. Mugisha maintained that the plaintiffs have not shown irreparable harm and in any event, the defendant is a reputable financial institution capable of compensating the plaintiffs through damages since the value of the suit properties can be ascertained by valuation. He contended that the balance of convenience tilts in favour of the defendant, and that it is not disputed that the plaintiffs owed the defendant Kshs.126,487,225.00 as at 10th January 2025, which sum continues to accrue interest.

ANALYSIS AND DETERMINATION.

20. Upon consideration of the instant application, the grounds on the face of the Motion and the affidavits filed in support thereof, as well as the replying affidavit by the defendant and the written submissions by Counsel for the parties, the issues that arise for determination are –
- i) Whether a plea of *res judicata* can be raised successfully in this case;**
and
 - ii) Whether an order for temporary injunction should issue against the defendant bank.**

Whether a plea of *res judicata* can be raised successfully in this case.

21. The doctrine of *res judicata* is provided for under Section 7 of the Civil Procedure Act, which states that -

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 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.

22. The doctrine of *res judicata* was discussed extensively by the Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others** (supra) as follows -

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

23. The defendant contends that this suit is *res judicata* **Nairobi HCCC No. E561 of 2021** as it seeks to re-litigate issues already conclusively determined in the said suit vide a Consent Order dated 28th June 2021, where the plaintiffs sought

similar injunctive Orders to restrain the bank from exercising its statutory power of sale over the suit properties, and the said Order has neither been set aside nor reviewed. The plaintiffs on the other hand submitted that the application in **HCCC No. E561 of 2021** was in respect to failure to renew a bank guarantee of USD 285,365.00 to Air Arabia PJSC, while this suit challenges the defendant's negligence in issuing a bank guarantee in the wrong applicant's name. They further submit that **HCCC No. E561 of 2021** was withdrawn by consent and was never heard or determined on merits, hence this suit cannot be barred by the doctrine of *res judicata*.

24. In the case of **Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)** [2022] KEHC 2227 (KLR) Odunga. J (as he then was), in declining to invoke the doctrine of *res judicata* cited the case of **Abok James Odera vs. John Patrick Machira** Civil Application No. Nai. 49 of 2001, where the Court stated that in order to rely on the defence of *res judicata* there must be -

- i) *a previous suit in which the matter was in issue;*
- ii) *the parties were the same or litigating under the same title;*
- iii) *a competent court heard the matter in issue;*
- iv) *the issue had been raised once again in a fresh suit.*

25. This Court has had an opportunity to review some the pleadings filed in **HCCC No. E561 of 2021** annexed to the defendant's replying affidavit. It is evident from the said pleadings that in the said suit, the 1st plaintiff sought orders to restrain the defendant from exercising its statutory power of sale over the charged properties and for the Court to compel the defendant to renew a bank guarantee of USD 285,365.00 in favour of Air Arabia PJSC. The 1st plaintiff claimed that the defendant had refused to renew the guarantee thus exposing the 1st plaintiff to loss of business.

26. In this case, the gravamen of the plaintiffs' claim is that the defendant negligently issued the subject bank guarantees in the name of Chibune Holdings Limited instead of Chibune Air Limited and thereafter failed to promptly rectify the error despite being duly notified in good time. They asserted that the defendant belatedly applied for amendment of the name and in the process, failed to renew or issue the guarantee within the claim period stipulated under the GSA Agreement. As a result, Air Arabia encashed the guarantee earlier issued in the name of Chibune Holdings Limited and subsequently terminated its contract with the 1st plaintiff. Although the amendment was eventually effected, the plaintiffs contend that this was only done on 22nd April 2021, long after the loss had occurred.
27. From the foregoing, it is evident that although there is some overlap between this suit and **Nairobi HCCC No. E561 of 2021**, the two matters are founded on distinct causes of action. Whereas **HCCC No. E561 of 2021** revolved around the defendant's refusal to renew a bank guarantee of USD 285,365.00 in favour of Air Arabia, the present suit is anchored on allegations of negligence in issuing the guarantee in the wrong name and the delay in rectifying that error, which is said to have resulted in the encashment of USD 204,543.00 and termination of the 1st plaintiff's business contract. Additionally, it is now well settled that in order for the doctrine of *res judicata* to apply, the issues in question must have been heard and conclusively determined by a Court of competent jurisdiction.
28. It is common ground that **Nairobi HCCC No. E561 of 2021** was marked as settled with costs to the defendant pursuant to a consent dated 28th June 2021. This Court notes that the said consent was entered into, prior to the suit being set down for hearing. A review of its terms does not suggest that it conclusively resolved the dispute between the parties herein. Accordingly, since **HCCC No.**

E561 of 2021 was merely marked as settled shortly after its filing, it cannot be said that the consent of 28th June 2021 finally determined the issues therein so as to sustain a plea of *res judicata* in this case.

29. As a result of the foregoing, this Court holds that a plea of *res judicata* cannot be raised successfully in this case.

Whether an order for temporary injunction should issue against the defendant bank.

30. 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.

31. The conditions to be considered when dealing with an application for interlocutory injunction were settled in the case of **Giella v Cassman Brown & Company Limited** [1973] EA 358, where the Court held that -

Firstly, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

32. The plaintiffs' case is that the 1st plaintiff obtained two bank guarantee facilities from the defendant totaling USD 485,365.00 in favour of Air Arabia, secured by charges over the 2nd & 3rd plaintiffs' properties and their personal guarantees. They claim that the defendant negligently issued the guarantees in the name of Chibune Holdings Ltd instead of Chibune Air Ltd, delayed correcting the error, and failed to renew the guarantee on time, leading Air Arabia to encash USD 204,543.00 and to terminate its contract with the 1st plaintiff. They assert that the defendant admitted that the default in the plaintiffs' obligations arose from the encashment but it still went ahead and issued statutory notices to sell the suit properties to recover a debt of Kshs.120,939,060.80. They contend that in trying to exercise their statutory power of sale over the suit properties, the defendant seeks to benefit from its own mistake since the facilities in question were advanced to Chibune Air Ltd, the 1st plaintiff herein, and not Chibune Holdings Ltd.
33. The defendant stated that the guarantees issued by the defendant were always in the name of Chibune Holdings Ltd until 2021 when the 1st plaintiff sought renewal of the guarantee with the name amended to Chibune Air Ltd. They

further stated that the plaintiffs were fully aware that the amendment in the borrower's name required approval from correspondent and advising banks, but it was eventually finalized on 22nd April 2021, and the plaintiffs incurred extra charges. The defendant asserted that the plaintiffs cannot allege negligence on its part.

34. The defendant's case is that the plaintiffs defaulted on their obligations, leading to Air Arabia calling up the guarantees, forcing the bank to overdraw the plaintiffs' account. It asserted that despite multiple restructurings, the plaintiffs continued defaulting and as at 10th January 2025, their debt stood at Kshs.126,487,225.49 plus interest hence the plaintiffs were issued with statutory notices.
35. In a rejoinder, the plaintiffs admitted that initially, the borrower of the bank guarantee was Chibune Holdings Limited in the year 2010. They asserted that in 2016 the air ticketing business was transferred to the 1st plaintiff making it the applicant of the guarantee from that year onwards. They further pointed out that this transition was formalized through the execution and registration of a deed of variation and further charge dated 28th June 2016 over the property known as Nairobi Block 90/168. In addition, they averred that all letters of offer issued from 2016 onwards reflected Chibune Air Ltd as the borrower.
36. This Court notes that it is not disputed that the bank guarantees were initially issued in 2010 in the name of Chibune Holdings Limited. The issue for determination therefore is when the borrower under the guarantees changed from Chibune Holdings Limited to Chibune Air Limited and/or when the defendant received a request from the plaintiffs to effect the aforesaid change. This notwithstanding, the plaintiffs do not deny that they obtained financial facilities from the defendant, secured the same by charging their respective

parcels of land, and utilized the facilities for the 1st plaintiff's air ticking business. It is thus evident and as correctly stated by the defendant that the debt is not disputed.

37. I am therefore of the considered view that at the hearing of the main suit, the parties herein will adduce evidence on when the plaintiff sought a change of the borrower's name in the guarantees, whether there was any delay in effecting the said amendment, who bore responsibility for such delay, and whether the delay, if established, together with the alleged failure to renew the guarantee in time, led to the encashment of USD 204,543.00 by Air Arabia and the termination of its contract with the 1st plaintiff.
38. From the foregoing, this Court is of the finding that even if the aforestated questions were to be resolved in favour of the plaintiffs, that alone would not suffice to restrain the defendant from exercising its statutory power of sale over the charged properties which is the order sought in the plaint filed in this suit, alongside an order for discharge of all the charges and encumbrances registered by the defendant over the suit properties. This is because the plaintiffs' indebtedness is not disputed and the 1st plaintiff undeniably benefited from the financial facilities advanced to it, irrespective of whether or not the guarantees were issued in the wrong name.
39. The Court of Appeal in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others** (supra), considered what constitutes a *prima facie* case and held that -

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.

40. In the **Mrao Ltd** case above , Kwach JA., (as he then was) held that -

I listened to the submissions of Mr Wasuna, for the appellant, and he seemed to place a great deal of emphasis on the allegation that the securities were invalid for one reason or another. And that because of that, his client is under no obligation to repay the debt. At no point in the course of argument did Mr Wasuna indicate to the Court when this alleged invalidity first came to the knowledge of the appellant. The appellant took a large amount of money on the strength of these securities. It has not paid back even a single cent. When First American asked for payment the appellant rushed to a court of equity and in effect told the judge, it is true I took the money, I have not paid it back but First American is precluded from realising its security because both the charge and debenture are invalid. And for good measure the appellant adds that if First American is minded to recover the debt it can file a suit in the normal way for recovery as money had and received.

This kind of attitude, prima facie, shows that when the appellant took the money on the strength of those securities it had no intention of repaying it under the terms agreed with First American. This was a

clear case of default, and as the appellant admitted this, there was no basis, on the authorities, upon which the appellant could obtain an order of injunction against First American. ...

41. In this matter, I am not persuaded that the plaintiffs have demonstrated a *prima facie* case with a probability of success sufficient to warrant being granted an interlocutory injunction against the defendant.
42. Once a property is offered as security, it assumes the character of a commodity for sale in the event of default. In **Shimmers Plaza Limited v National Bank of Kenya Limited** [2013] eKLR, the Court of Appeal upheld the High Court's finding that damages could adequately compensate the chargor since the secured property had effectively been converted into a commodity for sale upon being charged. Bound by the aforesaid decision and given that the value of the suit properties can readily be ascertained through valuation, this Court finds that the defendant being a financial institution, would be in a position to compensate the plaintiffs should the suit ultimately be determined in their favour.
43. In the circumstances, I am persuaded that the plaintiffs do not stand to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed.
44. It is my finding that the balance of convenience tilts in favour of the defendant since the plaintiffs can always be compensated by an award of damages in the event that this suit is successful.
45. This Court finds that the instant application is not merited. It is hereby dismissed with costs to the defendant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 14th day of November 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Omagwa h/b for Mr. Mogire for the plaintiffs/applicants

Mr. Rotich for the defendant/respondent

Ms B. Wokabi – Court Assistant.