



**Mongare & another v Lonehill Estate Limited & 2 others (Commercial Case E747 of 2024)  
[2025] KEHC 17187 (KLR) (Commercial and Tax) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17187 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E747 OF 2024  
PM MULWA, J  
NOVEMBER 20, 2025**

**BETWEEN**

**SAMUEL GESIRE MONGARE ..... 1<sup>ST</sup> PLAINTIFF  
STEPHEN KANYONYO CHEGE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LONEHILL ESTATE LIMITED ..... 1<sup>ST</sup> DEFENDANT  
SURAYA SALES LIMITED ..... 2<sup>ND</sup> DEFENDANT  
DIAMOND TRUST BANK KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Court is called upon to determine two applications: the first by the Plaintiffs dated 5<sup>th</sup> December 2024, and the second by the 1<sup>st</sup> Defendant dated 27<sup>th</sup> January 2025. Both seek substantially similar injunctive orders restraining the 3<sup>rd</sup> Defendant (the Bank) and its auctioneers from disposing of L.R. No. 209 6705 6 (“the suit property”), and from creating further charges or interests pending the determination of the suit.
2. The Plaintiffs’ application is supported by the affidavits of Samuel Gesire Mong’are and Stephen Kanyonyo Chege. The 1<sup>st</sup> Defendant’s application is supported by the affidavit of Peter Muraya Kiarie, and opposed by the Replying Affidavit of Faith Ndonga, sworn on behalf of the 3<sup>rd</sup> Defendant.

**Plaintiffs’ Case**

3. The Plaintiffs aver that each entered into valid agreements for sale with the 1<sup>st</sup> Defendant to purchase apartments known as SPG 12 L2 04 and SPG 12 L5 30 within a development known as The Lynx at



Mbagathi Road constructed on the suit property. They paid the deposit and were issued with receipts by the 2<sup>nd</sup> Defendant, alleged to be the agent of the 1<sup>st</sup> Defendant.

4. They contend that upon payment of the deposit, they acquired a purchaser's lien and equitable interest over the suit property. Thus, the 3<sup>rd</sup> Defendant could not create any registrable interest capable of defeating these rights without their consent.
5. The Plaintiffs assert that the 3<sup>rd</sup> Defendant's intended auction was illegal because the Bank failed to issue notices to all persons with an interest in the property as required under Sections 90, 96 and 97 of the *akn ke act 2012 6 Land Act* and the *akn ke act 2012 3 Land Registration Act*. They argue that the auction violates Article 40 of *akn ke act 2010 constitution the Constitution*, which protects the property right.
6. They submit that the sale of the property to third parties would irreparably deprive them of their homes and their only security for the deposits paid; damages would be inadequate.

### **1<sup>st</sup> Defendant's Position**

7. Through the affidavit of its director, Peter Muraya Kiarie, the 1<sup>st</sup> Defendant supports the grant of an injunction. It states that the project is substantially complete and occupied, but the Bank has refused to release completion documents, thereby frustrating payment of the outstanding purchase balances. It is further contended that the Bank failed to notify purchasers and is therefore conducting an illegal sale.
8. The 1<sup>st</sup> Defendant additionally asserts that the purchase prices were paid directly to the Bank, and hence the Bank lacks a lawful basis for exercising its statutory power of sale.

### **3<sup>rd</sup> Defendant's (Bank's) position**

9. The Bank opposes the applications and states that it advanced the 1<sup>st</sup> Defendant and its related entities' financial facilities amounting to USD 37,000,000 between 2014 and 2018, secured by a charge over the suit property.
10. The borrowers persistently defaulted, accruing arrears of USD 36,999,900.01 as at 5<sup>th</sup> October 2022. The Bank issued all statutory notices under Sections 90 and 96 of the *akn ke act 2012 6 Land Act*, followed by a 45-day redemption notice and auction advertisement. The property was auctioned on 28<sup>th</sup> January 2025, and the Bank asserts that upon the fall of the hammer the equity of redemption was extinguished.
11. The Bank argues that the Plaintiffs lack locus standi to challenge the statutory power of sale under Section 103(1) of the *akn ke act 2012 6 Land Act*, as they are neither chargors nor borrowers. Reliance is placed on *Diamond Trust Bank v Kaminara Agencies (CA E144 2023)*, *Nairobi Mamba Village v NBK*, and *Venture Capital v Consolidated Bank*, which hold that only a chargor may challenge a chargee's exercise of statutory power of sale.
12. The Bank submits that the 1<sup>st</sup> Defendant admitted massive default, abandoned works, and financial inability in a letter dated 7<sup>th</sup> February 2023. It argues that a party who admits indebtedness cannot show a prima facie case.
13. On irreparable harm, the Bank cites *Andrew Muriuki Wanjohi v Equity Bank*, which held that property offered as security becomes a commodity for sale whose value is quantifiable; thus, damages are an adequate remedy. Section 99(4) of the *akn ke act 2012 6 Land Act* also provides damages as the statutory remedy for wrongful sale.



14. The Bank argues that the balance of convenience favours it because the debt continues to grow, the property was already auctioned, and restraining the Bank would cause irrecoverable financial loss.

### **Analysis and determination**

15. The law on granting of a temporary injunction is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010, which provides:

“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.”

16. The conditions for consideration further in granting an injunction is now well settled in the case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction:

“First, 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.”

17. A party seeking a temporary injunction must demonstrate that the property is at the verge of being wasted, damaged or alienated by any party to the suit. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 3<sup>rd</sup> defendant does not deny that but contends that it has a legal right to exercise a statutory power of sale, whereas the Plaintiff Applicant challenges such a right claim protection of purchasers’ liens. The 1st Defendant similarly challenges the Bank’s right, alleging repayment and failure to discharge security.

18. In *Mrao Ltd v Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 the Court of Appeal defined a prima facie case as:

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. The Bank contends that section 103(1) of the *akn ke act 2012 6 Land Act* limits challenges to statutory notices to the chargor. The Plaintiffs rely on their equitable liens arising from sale agreements.



20. The Court accepts that under Kenyan law, purchasers under a sale agreement acquire an equitable lien (see *Savings & Loan (K) Ltd v Odongo* [1987] KLR 294). However, the statutory framework on challenges to statutory sale expressly recognizes the chargor, not third-party purchasers, as the party entitled to challenge the notices and exercise of power. Thus, the Plaintiffs lack statutory standing to challenge the notices or the Bank's exercise of statutory power of sale.
21. In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*, (1990) eKLR the court held as follows on what a party seeking an injunction must demonstrate:

“To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”
22. The Plaintiffs' rights, while equitable, are subordinate to the registered charge and cannot override the Bank's statutory remedies.
23. It is undisputed that the auction took place on 28<sup>th</sup> January 2025. Upon the fall of the hammer, the equity of redemption was extinguished.
24. An injunction cannot restrain that which has already occurred. The appropriate remedy would be damages under section 99(4) of the *akn ke act 2012 6 Land Act*.
25. The Plaintiffs' claims arise from contractual arrangements between themselves and the 1<sup>st</sup> Defendant to which the Bank was not privy. No allegation of fraud, collusion, or mala fides has been proved against the Bank. Therefore, equitable relief cannot issue in the absence of such elements.
26. Moreover, the 1<sup>st</sup> Defendant has expressly admitted indebtedness. A debtor who admits default cannot establish a prima facie case restraining enforcement. In *Mrao Limited v First American Bank of Kenya Ltd & others* (supra) the court address and itself thus:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”
27. Having considered the parties' arguments, the Court finds that neither the Plaintiffs nor the 1<sup>st</sup> Defendant has established a prima facie case.

### **Irreparable harm**

28. The Plaintiffs argue that they will lose their homes and deposits. The Bank counters that the property is security, a commodity of sale, and that damages suffice.
29. In *Andrew Muriuki Wanjohi v Equity Bank* [2006] eKLR, the Court held that when a property is offered as security, it becomes a commodity for sale, and its loss is compensable by damages. Further, Section 99(4) of the *akn ke act 2012 6 Land Act* statutorily grants purchasers and affected persons the right to damages for irregular sale.



30. In *Kitur vs Standard Chartered Bank & 2 others* (2002) 1KLR where the court opined as follows:

“It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits.”

31. The Plaintiffs have not acquired title; their claim is for refund of deposits, an inherently quantifiable financial loss. The Court therefore finds that irreparable harm is not established.

### **Balance of convenience**

32. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue on balance of convenience expressed itself thus:

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right...Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion...The court will seek to maintain the status quo in determining where the balance on convenience lies.”

33. The Bank is owed over USD 36 million. Interest continues to accrue. The auction of some units has already taken place. Stopping the process at this stage would expose the Bank to significant and irrecoverable loss. I find the balance of convenience therefore favours the Bank, not the Plaintiffs or the 1st Defendant.

34. For the foregoing reasons, the Court finds no merit in the Plaintiffs’ application dated 5<sup>th</sup> December 2024 or the 1<sup>st</sup> Defendant’s application dated 27<sup>th</sup> January 2025. Both applications are hereby dismissed.

25. Costs shall follow the event and are awarded to the 3<sup>rd</sup> Defendant (the Bank).

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI**

**THIS 20<sup>TH</sup> DAY OF NOVEMBER 2025.**

**P.M. MULWA**

**JUDGE**

In the presence of:

Ms. Kasyoka h b for Mr. Gecaga for 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Mr. Kisinga for 3<sup>rd</sup> Defendant

Court Assistant : Carlos.

