



Palker Enterprises Limited & another v Co-operative Bank of Kenya (Commercial Case E090 of 2025) [2025] KEHC 17220 (KLR) (Commercial and Tax) (20 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E090 OF 2025**

PM MULWA, J

NOVEMBER 20, 2025

BETWEEN

PALKER ENTERPRISES LIMITED 1ST PLAINTIFF

HYPERTECK ELECTRICAL SERVICES LIMITED 2ND PLAINTIFF

AND

THE CO-OPERATIVE BANK OF KENYA DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 11th February 2025 brought under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, Sections 3A of the *akn ke act 1924 3 Civil Procedure Act*, and Sections 97, 102 and 103 of the *akn ke act 2012 6 Land Act*, 2012. The Applicants seek:
 - i. A temporary injunction restraining the Respondent, its servants, auctioneers, receivers, agents or advocates from selling, interfering with, advertising, or offering for sale by public auction L.R. No. 12825 372 (Original No. 12825 353 20) (“the suit property”).
 - ii. An order to set aside, revoke or rescind the notice of sale issued by the Respondent.
 - iii. An injunction restraining the Respondent from taking any further steps in the exercise of its statutory power of sale.
 - iv. Time to undertake re-verification of the loan account and settle or mitigate the outstanding debt.
 - v. Costs.
2. The application is premised on the affidavit of Samuel Gathogo Mwangi, director of the 1st Plaintiff. The Applicants contend that the 1st Plaintiff is the registered proprietor of the suit property, while



the 2nd Plaintiff was advanced several loan facilities by the Respondent on or about 20th March 2023 to support a supply contract with Kenya Power & Lighting Company (KPLC). The facilities were secured by a legal charge over the suit property, director's guarantees, and assignment of proceeds of a Master LC of Kshs. 43,340,334.20.

3. It is alleged that the goods shipped from India are yet to be cleared at the Port of Mombasa due to the Respondent's failure to honour its obligations under the letter of credit, thereby breaching the financing arrangement. The Applicants claim that due to the Respondent's inaction, they risk penalties from KPLC in the sum of Kshs. 4,410,252.00 and loss of business estimated at Kshs. 44,102,515.60. They argue that the Respondent has commenced the process of exercising its statutory power of sale prematurely and unlawfully.
4. The application is opposed through a replying affidavit sworn on 5th March 2025 by George Chege, a Legal Officer of the Respondent. He states that the 2nd Plaintiff had three facilities: mortgage, LC post-import facility, and working capital. There was delay in manufacture and shipment of the goods, prompting the 2nd Plaintiff to request extension of the LC validity. By the time the goods arrived, the LC had expired, and the 2nd Plaintiff signed an acknowledgment accepting the discrepancy.
5. The manufacturer was paid partly through the crystallized post-import facility on 3rd January 2024 and partly by the 2nd Plaintiff on 8th February 2024. The Respondent contends that release of documents for clearing was conditional on the 2nd Plaintiff being in good standing, but the 2nd Plaintiff was already in default on other facilities and was listed with the Credit Reference Bureau (CRB). The Respondent therefore could not procure additional short-term financing for clearing and delivery. It is the Respondent's position that the Applicants' own default frustrated performance, prompting issuance of statutory notices. The application is said to be an attempt to defeat the Respondent's statutory power of sale.
6. The application was heard by way of written submission. The Defendant filed submissions dated 3rd July 2025 while the Plaintiff filed submissions dated 4th July 2025.

Analysis and determination

7. Having considered the application, the affidavit in support and in opposition, as well as the submissions, the issue for determination is whether the application is merited.
8. The principles governing grant of interlocutory injunctions are well settled in *Giella v Cassman Brown* [1973] EA 358, as reaffirmed in *Nguruman Limited v Jan Bonde Nielsen & Others* [2014] eKLR, namely:
 - i. The applicant must establish a prima facie case with a probability of success;
 - ii. The applicant must show that they stand to suffer irreparable loss not compensable by damages;
 - iii. If in doubt, the court shall decide the application on a balance of convenience.
9. A prima facie case is one which, on the material presented, shows an apparent infringement of a right (see *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR). The Applicants do not dispute the indebtedness. Their case rests on an alleged breach by the Respondent in failing to clear the goods, thereby causing financial distress.
10. The core question, therefore, is whether the alleged failure by the Respondent to honour the letter of credit or facilitate clearing of the goods constitutes a breach sufficient to impeach the statutory



power of sale. The Applicants argue that the Respondent's failure precipitated the default, while the Respondent maintains that the LC had expired due to delays attributable to the Applicants, and that the Applicants were already in default on other facilities.

11. The statutory power of sale is exercisable only upon strict compliance with the mandatory notice requirements under Sections 90 and 96 of the *Kenya Land Act, 2012*. The Court must therefore consider whether the requisite statutory notices were served. The Respondent contends that all notices were issued in accordance with the law. The Applicants, however, have not demonstrated any irregularity or non-compliance in the issuance or service of the notices. In *Trust Bank Ltd v Eros Chemists Ltd* [2000] eKLR, the Court of Appeal held that where a chargor is in admitted default and statutory notices have issued, the court will not restrain the chargee from exercising its power of sale.
12. It is trite law that even where there is a dispute on the amount owed, that alone is not a ground for injunction unless the chargor shows that the chargee acted fraudulently, illegally, or in bad faith - see *Joseph Okoth Waudi v National Bank of Kenya* [2006] eKLR.
13. In the present case, the Applicants admit that the 2nd Plaintiff was in arrears on other facilities. The alleged breach by the Respondent regarding the letter of credit is contested and not supported by concrete evidence showing that the Respondent acted in bad faith or contrary to the terms of the facilities.
14. Under Sections 102 and 103 of the *Kenya Land Act, 2012*, a chargor disputing the amount owing may seek valuation or accounts, but such dispute does not in itself bar the chargee from enforcing its remedies once default has crystallized. The Applicants' request for time to "re-verify the account" is thus not a legal basis for halting the statutory sale.
15. On irreparable harm, the suit property is charged as security for a commercial loan. It is trite law that once property is offered as security, it becomes a commodity for sale and its loss can be compensated by damages. This principle is well articulated in *Godfrey Ngumo Nyaga v Housing Finance Company of Kenya Ltd* [2008] eKLR and *Andrew Muriuki Wanjohi v Equity Building Society & Another* [2006] eKLR. The Applicants have not shown that the property has any unique, sentimental, or irreplaceable value beyond its commercial worth.
16. The Applicants allege potential penalties from KPLC and business losses. These are clearly quantifiable and compensable. In *Nguruman Ltd v Jan Bonde Nielsen* (supra), the Court of Appeal emphasized that speculative or economic loss does not constitute irreparable harm.
17. On the balance of convenience, the 2nd Plaintiff is in admitted default. The Respondent, as a financial institution, continues to suffer prejudice due to non-performance of the facilities. The balance of convenience therefore tilts in favour of allowing the Respondent to exercise its statutory power of sale, provided the statutory procedures have been complied with.
18. On the prayer to rescind the notice of sale, the law only permits such intervention where the notices are defective, irregular, or issued prematurely. No such defect has been demonstrated. A court cannot rewrite the parties' contract nor restructure commercial facilities through injunctive orders (See Court of appeal in *National Bank of Kenya v Pipeplastic Samkol & Another* [2001] eKLR).
19. The prayer for time to settle or mitigate the debt is essentially an appeal for indulgence, not a legal right. The court cannot, through an injunction, compel a lender to vary the terms of the parties' freely negotiated instruments.



20. Consequently, the Applicants have failed to establish a prima facie case with a probability of success, have not demonstrated irreparable harm, and the balance of convenience is against the grant of an injunction.
21. Accordingly, the Notice of Motion dated 11th February 2025 is dismissed in its entirety. Costs shall be in the cause.

Orders Accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 20TH DAY OF NOVEMBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Kimani for Plaintiffs Applicants

Mrs. Karanu for Defendant

Court Assistant : Carlos

