



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Obege v Diamond Trust Bank & another (Commercial Case E238 of 2024)
[2025] KEHC 17868 (KLR) (Commercial and Tax) (28 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E238 OF 2024
MN MWANGI, J
NOVEMBER 28, 2025**

BETWEEN

JOAN SYLVIA OBEGE PLAINTIFF

AND

DIAMOND TRUST BANK 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion application dated 11th February 2025, pursuant to the provisions of Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Order 42 Rules 6(1) & (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, seeking an order for interlocutory injunction restraining the defendants, their agents or employees, from interfering with, trespassing on, auctioning, damaging, wasting, selling, alienating, removing, or otherwise disposing of Town House No. 908 on L.R No. 10209/4, Great Valley Villas, Karen, Nairobi 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 Ms Joan Sylvia Obege, the plaintiff herein. Ms Obege deposed that Town House No. 908 on L.R No. 10209/4, Great Valley Villas, Karen is her matrimonial home. She averred that she instituted this suit due to the 1st defendant's failure to disclose full information regarding the loan for which the suit property was used as security. She further averred that despite the pendency of this suit, the 2nd defendant published an Auction Notice on 10th February 2025 advertising the suit property for sale on the instructions of the 1st defendant. She asserted that she has never been served with any Statutory Notice, Proclamation or Auction Notice, despite her known address and ongoing communication with the defendants.



3. Ms Obege stated that she has repeatedly sought full loan details from the 1st defendant to no avail. She also stated that having executed a spousal consent, she is entitled to such information. She asserted that there exists a real and imminent threat of auction against the suit property since no injunctive reliefs are currently in force. Ms Obege averred that unless the orders being sought in the instant application are granted, the intended auction will render both the instant application and this suit nugatory. She asserted that she stands to suffer irreparable harm, including loss of her matrimonial home, if the orders being sought herein are not granted. Ms Obege expressed willingness to comply with any conditions the Court may ultimately impose.
4. In opposition to the application, the 1st defendant filed a replying affidavit sworn on 26th February 2025 by Ms Faith Ndonga, a Legal Officer in the 1st defendant's Legal Department & Debt Recovery Unit. Ms Ndonga averred that the instant application is fatally defective for being brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, a provision applicable to stay pending appeal, yet no appeal exists. She stated that the Court had already struck out an earlier similar application on the same basis in its Ruling of 7th February 2025.
5. Ms Ndonga deposed that Tusker Mattress Limited for whom the plaintiff's late husband was a Director, received loan facilities exceeding Kshs. 2,500,000,000/=, secured by several charges registered against the suit property. She stated the plaintiff executed spousal consents in each instance and was fully aware that default in repaying the aforesaid sum would entitle the 1st defendant to exercise its statutory power of sale over the suit property. Ms Ndonga disputed the plaintiff's claim that the suit property is her matrimonial home, stating that the plaintiff's late husband executed a deed of assignment of rental income over the same, and that the suit property has been treated as a rental/commercial asset rather than a residence. She outlined the sequence of statutory compliance steps leading to the intended auction which include issuance of a Statutory Notice under Section 90 of the *Land Act*, a Notice of Sale under Section 96, a Redemption Notice and a Public Auction Advertisement.
6. She asserted that all the aforesaid Notices were duly issued and dispatched to the plaintiff and the Administrators of the Estate of the deceased via their registered postal address, P.O. Box No. 54280-00200, though some were returned unclaimed. Ms Ndonga contended that Tusker Mattress Limited defaulted on its loan repayment obligations of the aforesaid financial facility advanced to them and the 1st defendant has no alternative means of recovering the outstanding sums other than exercising its accrued statutory power of sale over the suit property.
7. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed on 26th March 2025 by the law firm of Edward C. Asitiba & Associates Advocates, while the 1st defendant's submissions were filed on 18th September 2025 by the law firm of Mohammed Muigai LLP
8. Mr. Asitiba, learned Counsel for the plaintiff cited the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010, and the case of *Giella v Cassman Brown & Company Limited* [1973] E.A 358, and submitted that the plaintiff has met the established principles for being granted an interlocutory injunction. He argued that the plaintiff was never served with Statutory Notices as required under the *Land Act* and only became aware of the intended auction through a Newspaper Advertisement. Counsel contended that the plaintiff's right of redemption was infringed, thereby demonstrating a prima facie case with a probability of success. On the issues of irreparable harm, Mr. Asitiba submitted that the plaintiff resides in the suit property, which is her matrimonial home, thus the loss of the suit property cannot be adequately compensated by an award of damages.



9. He further submitted that the sentimental value and memories associated with the suit property cannot be quantified and that its sale would render the plaintiff destitute. Counsel referred to the case of Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] KEHC 7263 (KLR) and further submitted that the lower risk of injustice lies in preserving the suit property until this suit is heard and determined. Counsel argued that the defendants will suffer no prejudice if the intended auction is halted temporarily, whereas the plaintiff stands to suffer grave injustice should the sale proceed. He stated that the balance of convenience tilts in favour of the plaintiff.
10. Mr. Biko Angwenyi, learned Counsel for the 1st defendant relied on the Court of Appeal case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR), and submitted that this suit is incompetent and ought to be struck out for failure to disclose a reasonable cause of action. He contended that the plaintiff lacks the requisite locus standi to institute this suit and has no legal basis to restrain the 1st defendant's exercise of its statutory power of sale. Mr. Angwenyi argued that the plaintiff was neither the chargor nor the borrower in respect of the loan facilities advanced to Tusker Mattress Limited and secured by the suit property, as the banker-customer relationship existed solely between the deceased and the 1st defendant. He cited the Court of Appeal case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] KECA 784 (KLR), and maintained that under the doctrine of privity of contract, the plaintiff cannot enforce or challenge rights arising from a contract to which she was not a party.
11. Mr. Angwenyi also cited the case of Francis Muthoga Muhika v Paul Njuguna Kahia & another [2018] KEELC 2238 (KLR) and submitted that the plaintiff falls outside the categories of persons permitted to seek relief under Section 103 of the Land Act. He argued that although she signed the spousal consent, she was not a chargor and since the plaintiff voluntarily gave consent to the creation of the charge, she cannot rely on the provisions of Section 103(1)(c) of the Land Act, to restrain the defendant from exercising remedies under the said Act. It was stated by Counsel that the plaintiff lacks legal capacity to sue on behalf of the Estate of her late husband, having failed to obtain a Grant of Letters of Administration ad litem, and in the absence of such authority, any action filed touching on the Estate amounts to intermeddling and is void ab initio, as affirmed by the Court in the case of Vikash Kamalkumar Devishi Shah v Abdalla Abdulrman & 3 others [2021] KEELC 4081 (KLR).

Analysis And Determination.

12. I have considered the application herein, the grounds on the face of it and the affidavits in support thereof. I have also considered the replying affidavit filed by the 1st defendant and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the instant application is fatally defective for being brought under the wrong provisions of the law; and
 - ii. Whether the plaintiff has made out a case to warrant being granted an order of interlocutory injunction.

Whether the instant application is fatally defective for being brought under the wrong provisions of the law.

13. The instant application has been brought under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rules 6(1) & (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. While it is not disputed that Order 42 Rule 6 of the Civil Procedure Rules, 2010 empowers Courts to grant orders for stay of execution pending appeal, the reliefs being sought herein are in substance, injunctive in nature. Applications for interlocutory injunctions are brought under the provisions of



Order 40 of the Civil Procedure Rules, 2010. Consequently, save for the invocation of Sections 1A, 1B and 3A of the Civil Procedure Act together with Order 51 Rule 1 of the Civil Procedure Rules, 2010, I am satisfied that the instant application has been brought under the wrong provisions of the law.

14. As to whether the instant application is fatally defective for having been brought under the wrong provisions of the law, this Court finds it necessary to resort to Sections 1A & 1B of the Civil Procedure Act. These provisions enjoin Courts to uphold substantive justice through the application of the overriding objective, which encompasses the just determination of proceedings, the efficient and proportionate resolution of disputes, the optimal use of judicial resources and the timely, cost-effective disposal of cases. The import of the overriding objective was discussed by the Court of Appeal in the case of *Stephen Boro Gitiha v Family Finance Building Society & 3 others* [2009] KECA 44 (KLR), where the said Court stated as follows -

The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way... I must warn litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.

15. Bound by the aforementioned decision, this Court finds that the defect arising from the application herein having been brought under the wrong provisions of the law goes to the form rather than the substance. This is especially so, because the nature and substance of the reliefs being sought herein would remain unchanged even if the plaintiff was to refile the application under the correct legal provisions.
16. I am therefore satisfied that the defect complained of amounts to procedural technicality under Article 159(2)(d) of the Constitution of Kenya, 2010, and does not render the instant application fatally defective.

Whether the plaintiff has made out a case to warrant being granted an order of interlocutory injunction.

17. Interlocutory injunctions are provided for under Order 40 Rules 1(a) & (b) of the Civil Procedure Rules, 2010, which provides as hereunder -

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.

18. The leading authority on the principles governing the grant of interlocutory injunctions is *Giella v Cassman Brown & Co. Ltd* (supra), in which the Court set out the applicable tests as follows -

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.

19. The Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR), 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.

20. The plaintiff's case is that Town House No. 908 on L.R. No. 10209/4, Great Valley Villas, Karen is her matrimonial home and that she filed this suit because the 1st defendant failed to disclose full details of the loan secured by the suit property. She averred that despite the pendency of this suit, the 2nd defendant published an Auction Notice on 10th February 2025 to sell the suit property without ever serving her with any Statutory Notice, Proclamation or Auction Notice, despite them knowing her address and ongoing communication with the defendants. Ms Obege asserted that there is a real and imminent threat of auction since no injunctive orders are in place. She maintained that unless the orders being sought herein are granted, the suit property will be sold causing her to suffer irreparable harm which includes the loss of her matrimonial home.
21. The 1st defendant in opposition to the application stated that Tusker Mattress Limited, where the plaintiff's late husband was a Director, obtained loan facilities exceeding Kshs.2,500,000,000/=, secured by multiple charges over the suit property, with the plaintiff executing spousal consents and was as such fully aware that default in repayment of the aforesaid sum would entitle the 1st defendant to exercise its statutory power of sale over the said property.
22. The 1st defendant disputed that the suit property is the plaintiff's matrimonial home and asserted that the property had been assigned as a rental income generating asset. It further averred that all the Statutory Notices including those under Sections 90 and 96 of the *Land Act*, the Redemption Notice, and the Advertisement for Auction of the suit property were duly issued and dispatched to the plaintiff and the Administrators of the Estate of the deceased via their registered postal address, though some of the Notices were returned unclaimed.
23. From the foregoing, it is evident that the plaintiff derives her locus standi from her status as the wife of the chargor (now deceased) of the suit property, a fact that remains uncontroverted. The 1st defendant has acknowledged that the plaintiff executed the requisite spousal consents authorizing the charging of the suit property as security for the financial facilities advanced to Tusker Mattress Limited. In view of this admission, I am satisfied that the plaintiff's standing to institute this suit is properly founded,



and the questions of whether she lacks privity of contract or whether she can challenge rights arising from a contract to which she was not a party to, do not arise in the circumstances.

24. The plaintiff claimed that the 1st defendant failed to serve her with the requisite Statutory Notices prior to initiating the process of exercising its statutory power of sale over the suit property, thereby establishing a prima facie case with a probability of success. It is trite law that a chargee may only exercise its statutory power of sale upon demonstrating full compliance with the notice requirements set out under Sections 90 and 96 of the Land Act. Section 90(1) of the Land Act provides that -

If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

25. From the above provisions, it is clear that the Notice envisaged under Section 90 of the Land Act is required to be served solely upon the chargor, and not upon the chargor's spouse. Therefore, the 1st defendant was under no obligation to serve the said Notice upon the plaintiff.

26. Section 96(2) of the Land Act on the other hand provides that –

Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

27. Further, Section 96(3) of the Land Act provides for the persons upon whom a Notice under Section 96(2) of the said Act, must be served. It states as follows–

A copy of the notice to sell served in accordance with subsection (2) shall be served on -

- a. the Commission, if the charged land is public land;
- b. the holder of the land out of which the lease has been granted, if the charged land is a lease;
- c. a spouse of the chargor who had given the consent;
- d. any lessee and sublessee of the charged land or of any buildings on the charged land;
- e. any person who is a co-owner with the chargor;
- f. any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
- g. any guarantor of the money advanced under the charge;
- h. any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
- i. any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land. (Emphasis added).



28. Section 96(3)(c) makes it mandatory for a 40-day Notice of Sale be served upon, among others, the chargor and the chargor's spouse. Upon examining the 40-day Notification of Sale dated 19th August 2022 annexed to the 1st defendant's replying affidavit, it is apparent that the Notice was copied to, among others, the plaintiff. The postal address indicated thereon corresponds to the address appearing on the spousal consents previously executed by the plaintiff in favour of the 1st defendant. Instead of producing a receipt from the Postal Corporation of Kenya to demonstrate actual service of the Notice upon the plaintiff, the 1st defendant annexed a track summary marked as "FN-13," which merely lists the plaintiff as the addressee and reflects a series of entries showing either shipment received from customer or shipment returned to sender.
29. This Court is not satisfied that the track summary constitutes adequate proof that the Notice of Sale was dispatched to the plaintiff and received, as it does not disclose what item was received, sent, or returned. It equally fails to identify the customer involved, thereby leaving open numerous possibilities as to the nature of the item and the identity of the sender. Nothing would have been simpler than for the 1st defendant to produce postal receipts evidencing the actual postage of the Notice to the plaintiff, as contemplated under Section 96(2) of the Land Act.
30. In the said circumstances, I am not satisfied that the 1st defendant fully complied with Section 96(2) of the Land Act. Consequently, I find that the 1st defendant's statutory power of sale over the suit property has not lawfully accrued, hence the plaintiff's equity of redemption remains intact.
31. The plaintiff also contended that she was not served with a Proclamation Notice prior to the 1st defendant's attempt to exercise its statutory power of sale over the suit property. Proclamation Notices are governed by Rule 15 of the Auctioneers Rules, which provides that -

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property -

- a. record the court warrant or letter of instruction in the register;
 - b. prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
 - c. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
 - d. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
 - e. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.
32. It is evident that Rule 15(c) and (d) unequivocally provide that a Proclamation Notice is to be served only upon the registered owner of the property. Additionally, Rule 16 of the Auctioneers Rules requires that the Advertisement be placed in a Newspaper, and does not impose any requirement for personal service of such Advertisement. It therefore follows that the defendants were under no obligation to serve either the Proclamation Notice or the Advertisement Notice upon the plaintiff prior to the 1st defendant exercising its statutory power of sale over the suit property.



33. From an analysis of the evidence adduced vide the plaintiff's affidavit, and having considered the 1st defendant's response, this Court is satisfied that the plaintiff has demonstrated a prima facie case with a probability of success to warrant being granted the orders being sought herein.
34. As to whether the plaintiff stands to suffer irreparable damage that cannot be adequately compensated by an award of damages, this Court finds that the plaintiff having established a prima facie case with a probability of success; if the application herein is dismissed, the suit property might be sold amidst uncertainty, thereby infringing on the plaintiff's constitutional right to property under Article 40 of *the Constitution* of Kenya. In this regard, I am bound by the Court of Appeal's holding in the case of Margaret Njeri Muiruri (Being the Administrator of the Estate of Joseph Muiruri (Deceased)) v Bank of Baroda (Kenya) Ltd [2001] KECA 367 (KLR), where it held that –
- ...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
35. I am live to the fact that Courts must take into account that the sale of a person's property constitutes an infringement of their right to own property under Article 40 of *the Constitution* of Kenya, 2010, particularly where an applicant has demonstrated a prima facie case with a likelihood of success, as is the case herein. At this stage however, this Court is unable to determine whether the 1st defendant's exercise of its statutory power of sale over the suit property has lawfully accrued to justify the sale of the property in issue, since service was disputed and the documents in support of service relied on by the 1st defendant are unsatisfactory.
36. This Court further notes that the suit property remains charged to the 1st defendant and there is no allegation that the outstanding loan amount has exceeded, or is close to exceeding the value of the security, such that the 1st defendant would suffer prejudice if the orders being sought herein are granted. On that basis, I am persuaded that the plaintiff has demonstrated that in the event that the orders being sought herein are not granted, she will suffer damages that cannot be adequately compensated by an award of damages.
37. The issue of a balance of convenience does not arise since the Court is not in doubt. Nevertheless, having considered the circumstances of this case, the balance of convenience tilts in favour of the plaintiff.
38. The upshot is 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 defendants, their agents or employees, from interfering with, trespassing on, auctioning, damaging, wasting, selling, alienating, removing, or otherwise disposing of Town House No. 908 on L.R No. 10209/4, Great Valley Villas, Karen, Nairobi pending the hearing and determination of this suit; and
 - ii. Costs of the instant application shall abide the outcome of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF NOVEMBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Asitiba for the plaintiff/applicant



Ms Nimo Adan for the 1st defendant/respondent

Ms B. Wokabi - Court Assistant.

