

**IN THE COURT OF  
APPEAL AT  
NAIROBI**

**(CORAM: MUSINGA (P), KIAGE & M'INOTI, JJ.A.)**

**CIVIL APPLICATION NO. NAI E175 OF 2025**

**BETWEEN**

**ERDEMANN PROPERTY LIMITED.....APPLICANT**

**AND**

**CREDIT BANK LIMITED ..... 1<sup>ST</sup>  
RESPONDENT MAVOKO WATER & SEWERAGE  
COMPANY LIMITED.....2<sup>ND</sup>  
RESPONDENT**

*(Being an application for injunction pending appeal from the Ruling and order of the High Court of Kenya (Commercial & Tax Division) (A. Mabeya, J.) delivered on 13<sup>th</sup> March 2025*

**in**

***HCCOM No. E419 of 2022)***

**\*\*\*\*\***

**RULING OF THE COURT**

1. The applicant's notice of motion dated 17<sup>th</sup> March 2025 has two substantive prayers, which are:

***"3. This Honourable Court be pleased to issue an injunction restraining the 1<sup>st</sup> respondent, its agents, officers, assigns, employees or anyone claiming under or through it howsoever from any interference with the applicant and its tenants' quiet possession of the property comprising LR 12876/13(IR 36277) Mavoko Municipality including imposing a restraint on any onward sale, transfer or otherwise, disposal of rights and interest in the subject property pursuant to the impugned auction***

***that occurred on 5<sup>th</sup> June 2024 pending the hearing and determination of the appeal as against the ruling of the Justice A. Mabeya delivered***

**on 13<sup>th</sup> March 2025 in Milimani HCCOMM Case No. E419 of 2022.**

**4. This Honourable Court be pleased to grant an order staying the proceedings before the High Court in Milimani HCCOMM Case No. E419 of 2022 between the parties herein pending the hearing and determination of the appeal as against the ruling of Justice A. Mabeya delivered on 13<sup>th</sup> March 2025 in Milimani HCCOMM Case No. E419 of 2022.”**

2. The application is supported by a lengthy affidavit sworn by **Zeyun Yang**, the applicant’s managing director. The applicant has also filed written submissions in support of the application.
3. The application was opposed by the 1<sup>st</sup> respondent, who filed a replying affidavit sworn by **Wainaina Francis Ngaruiya**, its head of legal services. The 1<sup>st</sup> respondent also filed written submissions.
4. The 2<sup>nd</sup> respondent supports the application, but did not file any papers at all.
5. When the application came up for hearing on 8<sup>th</sup> July 2025, **Mr. Lusi** Advocate appeared for the applicant and **Mr. Alphonse Mutinda** showed up for the 2<sup>nd</sup> respondent. There was no appearance for the 1<sup>st</sup> respondent despite service of a hearing notice upon its Advocates, **M/s Kimani & Michuki**, on 27<sup>th</sup> June 2025.
6. The dispute between the applicant and the 1<sup>st</sup> respondent over a property known as LR 12876/13 (IR 36277) in Mavoko

Municipality, (**the suit property**), has had a checkered history,

and this is the eighth application filed by the applicant seeking injunctive orders against the 1<sup>st</sup> respondent to restrain it from disposing of the suit property. It is not in dispute that due to the applicant's default in servicing a loan facility that it had obtained from the 1<sup>st</sup> respondent which stood at **Kshs. 817,819,352.06** as at 16<sup>th</sup> August 2023, the suit property was sold by public auction on 5<sup>th</sup> June 2024. The property was sold at **Kshs. 1,125,000,000**. Prior to the said sale, the High Court had directed the applicant and an interested party to deposit **Kshs. 530,000,000** as a condition for an injunction against the sale, but that condition was not complied with.

7. The applicant's main argument in this application is that the 1<sup>st</sup> respondent sold the property to itself in a manner it alleges reeks of fraud, misrepresentation or other dishonest conduct. The applicant contends that it has an arguable appeal, and it faults the High Court's ruling of 13<sup>th</sup> March 2025 dismissing its application dated 5<sup>th</sup> July 2024 on the ground that the court was *functus officio*. There are also other grounds of appeal as disclosed in a draft memorandum of appeal annexed to the applicant's affidavit in support of the application.
8. On the nugatory aspect, the applicant argues that unless the orders sought are granted, the intended appeal will be rendered

nugatory because the 1<sup>st</sup> respondent is likely to dispose of the  
suit

property to third parties, thereby complicating the dispute further. The applicant also contends that the 1<sup>st</sup> respondent lacks financial capacity to compensate it for the value of the suit property, which it puts at **Kshs. 2 billion**, arguing that the 1<sup>st</sup> respondent's net profit of **Kshs. 32.4 million** for the year ending December 2023 is testament of its inability to compensate it for any loss it will suffer if the appeal is successful.

9. On its part, the 1<sup>st</sup> respondent's contention is that the suit property, having been lawfully sold, the applicant's remedy lies in damages. It cites the provisions of **section 99(4)** of the **Land Act** which state that:

**“A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”**

10. It is further contended that the suit property was lawfully purchased by the 1<sup>st</sup> respondent pursuant to the provisions of **section 100(3)** of the Land Act, and since it is indubitable that the applicant had defaulted in servicing its loan and statutory notices had been served, the appeal is not arguable and therefore the injunctive orders sought cannot be granted.
11. On the nugatory aspect, the 1<sup>st</sup> respondent submits that the factors that can render an appeal nugatory are considered

within the circumstances of each case. The 1<sup>st</sup> respondent further states

that the applicant has totally failed to service its loan facility and its actions are merely intended to frustrate it from exercising its statutory power of sale. However, the 1<sup>st</sup> respondent is silent as to whether it is in a position to compensate the applicant in damages in the event that the appeal is successful.

12. We have considered the application, including the lengthy affidavits and submissions filed by the applicant and the 1<sup>st</sup> respondent. In an application under **rule 5(2)(b)** of this Court's Rules, the applicant must satisfy the Court that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. (See

**Trust Bank Limited & Another vs Investech Bank Limited & 3**

**Others** [2000] eKLR.)

13. As already stated, it is not in dispute that the suit property was sold on 5<sup>th</sup> June 2024 at a price of Kshs. 1,125,000,000. The applicant contends that the 1<sup>st</sup> respondent's act of selling the property to itself was fraudulent, as it was sold at an undervalue. In response, the 1<sup>st</sup> respondent states that the allegation is dishonest and untruthful, because the property was sold subject to a valid valuation dated 4<sup>th</sup> December 2023,

which was within the one year as required under the Auctioneers' Rules.

The valuation report shows that the market value of the suit

property was **Kshs. 1,500,000,000**, and the forced sale value was

**Kshs. 1,125,000,000.** Whether the suit property was sold at an undervalue is not an issue for our determination at this stage. It is an arguable issue.

14. Regarding the argument that the 1<sup>st</sup> respondent sold the suit property to itself, **section 100(3)** of the **Land Act** provides as follows:

**“If the charged land is to be sold by public auction, the chargee may bid for and purchase the charged land at that public auction so long as the price bid for the charged land by the chargee is the greater of—**

**(a) the highest price bid for that land at the auction; and**

**(b) an amount equal to or higher than the reserve price, if any, put upon the land before the auction, whichever amount is the greater.”**

15. The 1<sup>st</sup> respondent’s affidavit shows that the suit property was advertised for sale by public auction a number of times, but the applicant kept on running full page adverts of a *caveat emptor* in local newspapers, a move that was calculated to scare prospective purchasers from participating in the auction. That may be the reason that caused the 1<sup>st</sup> respondent to purchase the suit property.
16. However, it is not clear how the public auction was conducted on 5<sup>th</sup> June 2024. The Court was not told whether there were other bidders and what the highest bid price was. Where a

chargee

purchases a charged property at a public auction, it must be

demonstrated that the provisions of **section 100(3)** of the **Land Act** were strictly complied with. This, in our view, is an arguable ground.

17. As regards the nugatory aspect, the 1<sup>st</sup> respondent did not challenge the applicant's contention that if the appeal succeeds, it will not be able to compensate the applicant for any loss it may have suffered. The applicant argued that the open market value of the property is **Kshs. 2 billion**, yet the 1<sup>st</sup> respondent's net profit for the year ending December 2023 was **Kshs. 32.4 million**. The applicant has therefore satisfied both limbs for grant of an injunction under rule 5(2)(b) of this Court's Rules.
18. That notwithstanding, it is not in dispute that the suit property has already been bought by the 1<sup>st</sup> respondent. But we are persuaded that in the prevailing circumstances, it is necessary to inhibit any onward sale or transfer of the suit property pending hearing and determination of the appeal or intended appeal, and we so order.
19. We also stay proceedings before the High Court in Milimani **HCCOMM Case No. E419 of 2022** pending hearing and determination of the applicant's appeal or intended appeal.
20. Further, we direct that if the appeal has not been filed, the same be filed and served within **fourteen (14)** days from the

date hereof. But if the appeal has been filed, parties should file and serve their respective submissions within **fourteen (14)** days from the date of

delivery of this ruling so that the appeal is listed for hearing on priority basis within the next **sixty (60)** working days from the date hereof. We think these directions are necessary in view of the nature of the dispute and the amounts involved.

Each party shall bear their own costs of the application.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of November 2025.**

**D. K. MUSINGA, (PRESIDENT)**

.....  
**JUDGE OF APPEAL**

**P. O. KIAGE**

.....  
**JUDGE OF APPEAL**

**K. M'INOTI**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**Signed**

**DEPUTY REGISTRAR.**