

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E050 OF 2025

BETWEEN

JOSEPH KARICHU WANJIRU.....
PLAINTIFF

AND

HFC LIMITED.....1ST
DEFENDANT

**MUGA AUCTIONEERS &
GENERAL MERCHANTS.....2ND**
DEFENDANT

HECTARES & ASSOCIATES.....3RD
DEFENDANT

RULING

Introduction & Background

1. The present application for determination has been filed by the Plaintiff and is dated 23rd January 2025. It seeks that the court do restrain the Defendants from advertising, selling, transferring, or trespassing on his property known as Land Parcel No. Nairobi/Block 116/592 until the main suit is determined. The application is supported by his two affidavits sworn on 23rd January

2025 and 18th March 2025 and it is opposed by the Defendants through the replying affidavit of the 1st Defendant's ("the Bank") Director-Legal and Company Secretary, REGINA ANYIKA, sworn on 14th February 2025 and the replying affidavit of NELSON KOMEN, a valuer retainer by the 3rd Defendant ("the Valuers"), sworn on 17th February 2025.

2. When the matter came up for direction, the court directed that the application be disposed by way of written submissions which are on record and which, together with the pleadings I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. From the parties' pleadings and submissions, I note that the main issue for the court's determination is whether an injunction should issue to restrain the Defendants from selling or in any way dealing with the subject property. The parties agree that for an order of injunction to issue, the Plaintiff is required to satisfy the conditions set out in the case of **Giella v Cassman Brown & Co., Ltd. [1973] E.A. 358** by demonstrating a prima facie case with a probability of success, that he will suffer irreparable injury which would not adequately be compensated by an award of damages

and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if he does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration (see **Nguruman Limited v Jan Bonde Nielsen & 2 others**

[2013] KECA 347 (KLR)

4. The parties also agree that what constitutes “a prima facie case” was set out by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)** as follows:

A prima facie case in a civil application includes but is 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 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.

5. The Plaintiff’s case is that the Bank appointed the Valuers without giving the Plaintiff his usual right to choose from its panel. That the Valuers conducted the inspection without notifying or involving the Plaintiff, his agent, or tenants, and did not have proper access to

the subject property. The resulting valuation report is alleged to be inaccurate and outdated, as it used old photographs and omitted significant recent improvements such as a borehole and CCTV cameras, leading to an undervaluation of the subject property.

6. The Plaintiff claims that the Bank debited the Plaintiff's loan account with the valuation fee of Kshs.142,300.00/= without his consent and that this unauthorized charge pushed his loan account into arrears, creating a default that did not previously exist. That after the Plaintiff challenged the valuation through his advocates, the Bank held a meeting and verbally agreed to remove the valuation fee and conduct a new valuation but despite this agreement, the Bank proceeded to appoint an auctioneer and advertised the subject property for a public auction that was scheduled on 5th February 2025. The Plaintiff further claims he was not served with a statutory notice of the intended sale by the auctioneer, as required by law
7. In response, the Bank contends that it duly served all required statutory notices on the Plaintiff including a 3-month notice dated 29th April 2024, as per **section 90(2)** of the **Land Act**, a 40-day notice dated 12th September 2024 and a 45-day redemption notice issued through the auctioneers in November 2024. It states

that all notices were sent to the Plaintiff's official postal address, P.O. Box 266-0625 Nairobi, as provided in the charge document, and none were returned undelivered.

8. The Bank states that the Plaintiff is in significant default and that the outstanding loan balance is Kshs.10,968,390.85/= as of 17th February 2025 and it argues that granting an injunction would be unjust and highly prejudicial to the Bank, given the substantial risk of not recovering the loan. On the valuation of the subject property, the Bank confirms it commissioned a valuation from the Valuers as required by **section 97** of the **Land Act** and the valuation report dated 16th May 2024 gave a market value of Kshs.32,000,000.00/= and a forced sale value of Kshs.24,000,000.00/=. In response to the Plaintiff's claim that the valuation is inaccurate, the Bank shifts responsibility to the Plaintiff, pointing out that the valuer's report explicitly states that they "were not allowed full access into the premises." The Bank argues that the Plaintiff cannot benefit from his own misdeeds by denying access and then complaining about the report's accuracy.

9. On the valuation fees, the Bank defends the charge of Kshs.142,300.00/= stating that the fees are calculated in accordance with the legally prescribed scale under the **Valuers (Forms and Fees) Rules** and that the charge document explicitly stipulates that valuation costs are to be borne by the borrower. The Bank asserts it has complied with all legal prerequisites for exercising its statutory power of sale and it argues that the Plaintiff, having defaulted and expressly agreed to a sale in case of default in the charge document, cannot now claim irreparable injury from the sale. For these reasons, the Bank urges the Court to dismiss the Plaintiff's application with costs.
10. On their part, the Valuers depone that they called the Plaintiff on 13th May 2024 to inform him of the valuation visit on 14th May 2024 but because the Plaintiff denied full access, the valuer visited the subject property disguised as a tenant to take photographs and these photos were used in the valuation report. Regarding the valuation fees, they aver that these was calculated according to the **Valuers (Forms and Fees) Rules** and were drawn to scale and that the Valuation Report is current and reflects the condition of the subject property as of the inspection date. The Valuers state that the Plaintiff has provided no evidence to support the claim

that the subject property was undervalued and in summary states that the Plaintiff's application is without merit, lacks evidence, and is an abuse of the court process.

11. I have gone through the pleadings and the submissions. It is admittedly clear that the Plaintiff is indebted to the Bank as evidenced by the Loan Statement and the Plaintiff's own letter requesting for a restructure of the loan. The Bank has stated that it has issued and served the requisite statutory notices upon the Plaintiff and this is evidenced by the Certificates of Postage which is prima facie proof that the said notices were served and received by the Plaintiff (see **Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others [1996] KECA 205 (KLR)**). In any case, the Plaintiff has annexed email correspondence from the Bank which confirms that he received the statutory notices and was aware of the Bank's intention to value the subject property.
12. Regarding the valuation, it is trite law that a valuation report is a product of professional and expert opinion by a duly qualified valuer, conducted based on accepted parameters. Courts are slow to interfere with such expert opinions unless clear and compelling evidence is presented to show that the valuation was conducted in bad faith, was grossly erroneous, or was based on a fundamental

mistake (see **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] KEHC 4811 (KLR)**). In the present application, the Applicant has provided his own assertions and photographs. However, he has not provided a counter-valuation report from a qualified valuer to objectively challenge the findings of the Valuers. His allegations, while strongly worded, remain in the realm of assertions. Without expert evidence to contradict the Valuers' professional opinion, this court has no basis upon which to find that the valuation is wrong or doubtful. Consequently, the Applicant has failed to lay a prima facie foundation to displace the professional valuation report.

13. On the valuation fees, the Charge at Clause 6.3.1 provides that the Plaintiff is the one to bear the costs of such valuation as follows:

6.3 Right of Inspection

During the subsistence of this security:

6.3.1 the Chargee is authorised (should the Chargee so require) at any time and from time to time during the continuance of this security to instruct a surveyor or valuer to inspect and report on the Charged Property (at the expense of the Chargor) and all monies paid by the Chargee for that purpose shall be deemed to be expenses properly incurred by the Chargee in relation to the security hereby created repayable in full by the Chargor on demand with interest as aforesaid...

14. The aforementioned clause explicitly grants the Bank, as the Chargee, the right to appoint a valuer to inspect the subject property at the Plaintiff's expense since he is the borrower. Furthermore, it states that any money the Bank pays for this purpose is considered a legitimate expense related to the security and must be repaid in full by the Plaintiff upon the Bank's demand, along with interest. The question of whether the said costs were in excess or sufficient is a matter for trial.
15. In any event, even if I were to assume, without finding, that the subject property was undervalued, such undervaluation does not, by itself, entitle a debtor in default to an injunction. The remedy for a perceived undervaluation lies in challenging the sale price at the auction or in a claim for damages, not necessarily in stopping the sale altogether.
16. In light of the foregoing, I find that the Plaintiff has not demonstrated a prima facie case with a probability of success. His case is fraught with contested facts that cannot be determined at this interlocutory stage without a trial. Having failed on the first pillar, the application must necessarily fail in line with the dicta in ***Nguruman(supra)***. The second principle on irreparable injury

does not therefore strictly arise for consideration. Suffice to state that the injury the Plaintiff alleges, that is the loss of his property, is quantifiable in monetary terms. If he were to ultimately succeed at the trial, his loss could be compensated by an award of damages against the Bank (See **Esso Kenya Ltd v Mark Makwata Okiya [1992] KECA 53 (KLR)**).

Conclusion and Disposition

17. Consequently, the Plaintiff's application dated 23rd January 2025 is without merit and it is hereby dismissed with costs to the defendants.

**DATED SIGNED and DELIVERED virtually at NAIROBI this
1ST DAY of DECEMBER 2025**

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. N/A for the Plaintiff.

2. Ms. Diru holding brief for Ms. Muthee for the Defendants.
3. Ivan - Court Assistant

ORIGINAL