Mturi & another v Diamond Trust Bank Limited & another (Case E009 of 2025) [2025] KEHC 18572 (KLR) (16 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18572 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CASE E009 OF 2025

J NGAAH, J

DECEMBER 16, 2025

BETWEEN

JONATHAN DANIEL MTURI ..... 1ST PLAINTIFF

PATIENCE SIKUKUU MTURI ..... 2ND PLAINTIFF

AND

DIAMOND TRUST BANK LIMITED ..... 1ST DEFENDANT

STEPHEN KARANJA KANGETHE T/A DALALI AUCTIONEERS .... 2ND DEFENDANT

RULING

1. The application before court is a motion dated 26 February 2025. The prayers with which the court is concerned at this stage have been couched in the application as follows:

> " 3. That pending the hearing and determination of this Suit, this Honourable court be pleased to issue a temporary injunction restraining the Defendant/ Respondents herein or their servants, and/or employees and/or authorized agents, or any other persons acting on their behalf from carrying out a public auction, on the property known as L.R. (Original No. 67Rev/493), Subdivision No. 1202, Section 1, Mainland North Mombasa, which measures approximately 0.983 acres.
>
> 5. That pending the hearing and determination of this Suit, this Honourable court be pleased to issue a temporary injunction restraining the Defendant/ Respondents herein or their servants, and/or employees and/or authorized agents, or any other persons acting on their behalf from trespassing on, disposing, alienating, interfering or dealing, with the property known as L.R.

(Original No. 67Rev/493), Subdivision No. 1202, Section 1, Mainland North Mombasa, which measures approximately 0.983 acres."

The applicant has also asked for costs.

2. The application is expressed to be brought under Section lA, 1B, 3 and 3A of the *Civil Procedure Act*, cap. 21 and Order 40 Rules 1, 2, 3, 4 and 10 (1) (a), Order 51 Rule 1 and 4 of the Civil Procedure Rules, and Section 103 (3) and (4) and 104 (2) (d) (ii), of the *Land Act*, Cap. 280. It is supported by the applicants' own affidavit sworn by the 1st applicant. He has sworn the affidavit on his own behalf and on behalf of the 2nd respondent.

3. According to the applicants, they are the registered proprietors of the property known as L.R. (Original No. 67Rev/493), Subdivision No. 1202, Section 1, Mainland North Mombasa, which measures approximately 0.983 acres (hereinafter "the suit property).

4. The suit property, it is claimed, comprises the applicants' matrimonial home and that they have lived there since 1983. It is a home in which they have raised their children.

5. The applicants are the guarantors of a Term Loan Facility amounting to Kshs.70,000,000.00 advanced by the 1st Defendant (hereinafter also referred to as "the bank") to M/s. Quantum Petroleum Limited, in which the subject suit property was used, inter alia, as a First Legal Charge to secure the Term Loan Facility. The applicants swear that the borrower of the Term Loan Facility, M/s. Quantum Petroleum Limited has over the years been servicing the loan facility.

6. However, despite the borrower making payments to the 1st Defendant, the latter, without due authorization misallocated the payments towards reducing the interest on the Loan facility, instead of reducing the principal amount of the Facility. The Borrower has questioned the application of his payments of the loan and although he has requested the bank to furnish it with a detailed and particularized loan statement, it has never been availed.

7. The impasse between the borrower and the bank, precipitated the institution of a suit in the High Court of Mombasa, by the Borrower against the bank. This is High Court Civil Case Number 97 of 2015 – Quantum Petroleum Limited vs. Diamond Trust Bank Limited. The case was dismissed for want of prosecution. Nevertheless, while the suit was pending and even after it had been dismissed, there had been concerted attempts made by the Borrower to try and resolve the impasse with the 1st Defendant. These efforts have not borne fruit despite the good will demonstrated by the Plaintiff/ Applicants.

8. On 11 February 2025, the agents or employees of the 2nd Defendant placed an advertisement outside the gate of the suit property indicating that the subject property L.R. (Original No. 67Rev/493), Subdivision No. 1202, Section 1, Mainland North Mombasa, which measures approximately 0.983 acres, will be subjected to a public auction on 28 February 2025 at the 2nd Defendant's office at 11a.m.

9. It is the applicants' case that prior to the advertisement of sale the 1st Defendant has breached the law in the following respects:

"a. The 1st Defendant failed to issue to the 1st and 2nd Plaintiff, a statutory ninety (90) day demand notice as expressly required by Section 90 (1) of the *Land Act*, Cap. 280 Laws of Kenya, thus denying the Plaintiffs the first right of redemption.

b. The 1st Defendant failed to issue to the 1st and 2nd Plaintiff, a statutory notice to sell contrary to Section 96 (2) of the *Land Act*, Cap. 280 Laws of Kenya.

c. The 1st Defendant failed to serve the statutory notice to sell on the 1st and 2nd Plaintiffs as the guarantors of the money advanced under the charge contrary to Section 96 (3) (h) of the *Land Act*".

10. It is also alleged that the defendants have failed to serve the following notices contrary to the express provisions of Rule 15 (b), (c) and (d) of the Auctioneers Rules:

    a. a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule of the Auctioneers Rules, which indicates the value of the property to be sold contrary to the express provisions of Rule 15 (b) of the Auctioneers Rules.

    b. the notification of sale drawn up in the prescribed form Sale Form 4 on the 1st and 2nd Plaintiff, who are the registered owners of the suit property contrary to the express provisions of Rule 15 (c) of the Auctioneers Rules.

    c. a notice in writing to the 1st and 2nd Plaintiff of not less than 45 days within which the owner may redeem the subject suit property by payment of the outstanding amount set forth in the letter of instruction contrary to the express provisions of Rule 15 (d) of the Auctioneers Rules.

11. The applicants contend that they have a right to own property; this right is enshrined in Article 40 of *the Constitution* of Kenya, and while it is not absolute, *the Constitution* of Kenya guarantees that any process that deprives the applicants of their right to property should not be arbitrarily done but should be sacrosanct and above board.

12. The applicants claim that due to the 1st and 2nd Defendant/Respondent's express failure to follow due process, they run the risk of losing their matrimonial home to a process that is fraught with irregularities and illegalities. Accordingly, the Applicants stand to be prejudiced if the prayers sought are not granted by this Honourable Court.

13. The respondents opposed the application and filed a replying affidavit in that regard. The affidavit has been sworn by Faith Ndonga who has introduced herself as the Legal Manager in the Debt Recovery Unit with the 1st Defendant.

14. The respondents acknowledge that the Plaintiffs were the registered proprietors of the suit property.At the instance of a company known as Quantum Petroleum Limited or the borrower, the 1st Defendant extended various Banking Facility to the Borrower, specifically a Term Loan facility of Kshs, 70.000.000/- and Term Loan facility of Kshs. 7,500,000/- as follows: -

    a) An initial overdraft facility of Kshs. 18,000,000/- granted pursuant to a let of offer dated 31st July 2009;

    b) A renewal of the overdraft facility of Kshs. 18,000,000/- and reduction of t approved limit to Kshs. 15,000,000/- granted pursuant to a letter of off dated 22nd February 2010;

    c) A renewal and enhancement of the overdraft facility from Kshs. 15,000,000/-to on overdraft cum letter of credit cum Bank Guarantee of Kshs. 45,000,000/-granted pursuant to a letter of offer dated 1st September 2010;

    d) A renewal and enhancement of the overdraft cum letter of credit cum Bonk Guarantee from Kshs. 45,000,000/- with enhancement of the limit to Kshs. 70,000,000/- granted pursuant to a letter of offer dated 25th May 2011;

e) Conversion of the Overdraft cum Letters of Credit cum Bank Guarantee of Kshs. 70,000,000/- into a Term Loan facility of Kshs. 70,000,000/- granted pursuant to a letter of offer doted 13th August 2012;

f) A Continuation of the existing Term Loon I facility of Kshs. 70,000,000/- with an outstanding balance of Kshs. 69,296,589.02 and establishment of a Term Loan II facility of Kshs. 7,500,000/- pursuant to a Letter of Offer dated 12th February 2013.

15. The Letter of Offer dated 13th August 2012 it was expressly agreed that the following terms and conditions would apply to Term Loan I: -

a) The Term Loan I facility of Kshs. 70,000,000/- would be utilized to pay off the existing overdraft facility of Kshs. 70,000,000/-.

b) The Term Loan I would be repaid in a maximum period of seven (7) years in eighty-four equal monthly instalments comprising principal and interest commencing one month after conversion by debiting from the borrowers current account No. 0203384004 held at the Bank's Mombasa Branch.

c) Interest on the Term Loan I would be at the Bank's base rate of 24% p.a. charged monthly in arrears on a monthly reducing balance basis or on such other basis as the Bank may determine from time to time.

d) That the Term Loan I facility would be secured by a First Legal Charge over the suit property and Joint, several and personal guarantees of the borrower's directors being the 1st and 2nd Plaintiffs.

16. Under the Letter of Offer dated 12th February 2013 it was expressly agreed that the following terms and conditions would apply to Term Loan II: -

a) The Term Loan II facility of Kshs. 7,500,000/- would be utilized to liquidate the arrears on existing loans.

b) The Term Loan II facility would be repaid in a maximum period of four years and was subject to review on or before the 3 1st January 20 14.

c) That there would be a moratorium on the repayment of principal in Term Loans I & II for a period of three (3) months after which the Term Loan II would be repaid in forty-eight (48) monthly instalments.

d) Interest on the Term Loan II would be at the Bank's base rate of 18% p.a. charged monthly in arrears on a monthly reducing balance basis or on such other basis as the Bank may determine from time to time.

e) That Term Loan II would be secured by the existing securities and a Second Further Charge over the suit property and Joint, several and several and personal guarantees of the borrower's directors being the 1st and 2nd Defendants.

17. In accordance with the terms of the aforementioned Letters of Offer the facilities were secured, inter-alia, by: -

a) A First Legal Charge dated 29 August 2009 over the property known as Subdivision No. 1202 Section I Mainland North, Mombasa.

b) A Further Legal Charge dated 20th June 2011 over the suit property.

c) A Second Further Legal Charge dated 13th August 2013 over the suit property.

18. The above facilities were also secured by joint and several guarantees by James Daniel Mturi, John Evans Mturi, Patience S. Mturi and Jonathan Daniel Mturi.

19. In breach of the express terms of the aforesaid facilities, the borrower failed or neglected to make payment punctually as and when the same fell due thus causing the Term loan facilities to be in arrears and as a result the Bank duly commenced recovery procedures by exercising its statutory power of sale in March, 2014.

20. In accordance with the provisions of Section 90(3) of the *Land Act* 2012, the Bank issued a Statutory Notice to the Plaintiffs/Borrower dated 10 March 2014 informing the borrower, 1st and 2nd Plaintiffs that it would exercise its Statutory power of Sale if the said default was not remedied within three (3) months from the date of service of the Statutory Notice.

21. Upon receipt of the Section 90(3) Statutory Notice the Plaintiffs responded via a Letter dated 31 March 2014 in which they confirmed receipt of the aforementioned statutory notice on the 27 March 2014 and sought more time to address the issue. Despite being granted more time, the borrower yet again failed or neglected to pay the outstanding loan. Pursuant to the provisions of Section 90(3) of the *Land Act* 2012, the Bank issued a Statutory Notice to the Plaintiffs and Borrower dated 27 September 2021 informing the borrower, 1st and 2nd Plaintiffs that it would exercise its Statutory power of Sale if the said default was not remedied within three (3) months from the date of service of the Statutory Notice.

22. The Statutory Notice under Section 90 of the *Land Act* was sent to the Borrower and its directors through their address disclosed in the Charges aforesaid to wit, P.O. Box 88471 - 80100, Mombasa and was also copied to the borrower and its directors. The borrower failed to settle the arrears within the Stipulated period of ninety (90) days, the Bank proceeded to issue a Notification of Sale under Section 96(2) of the *Land Act* 2012 dated 30 December 2021 notifying the borrower of its intention to dispose of the charged property by way of public auction if the default was not remedied within a further period of 40 days.

23. Upon the expiry of the period stipulated in the Notification of Sale, the Bank instructed Messrs. Keysian Auctioneers, a firm of auctioneers, to sell the Property by way of public auction after issuing the 1st and 2nd Plaintiff with the requisite Redemption Notice via a Letter dated 16 February 2022 and Sale Form l dated 16 February 2022.

24. Acting on the Bank's instructions, Messrs. Keysian Auctioneers served the 1st and 2nd Plaintiffs with a copy of the Notification of Sale on the 18 February 2022. The Bank proceeded to advertise the charged property on the 10 February 2025 and the auction was scheduled for the 28 February 2025 however the same didn't proceed due to the injunctive orders issued by this Honourable Court.

25. According to the defendants, the Plaintiffs have been served with all the requisite notices required in law, all of which are proper and have been sent through their postal address and that the Plaintiffs have been aware of the Bank's intention to exercise its Statutory Power of Sale.

26. Besides this suit, the applicants had previously filed another suit against the bank when the Bank commenced recovery procedures in respect to the other security being the property known as Title No. Subdivision No. 4112, MN Mombasa hence the Borrower. This suit was Mombasa Hccc No, 97 Of 2015 -quantum Petroleum Limited -versus- Diamond Trust Bank Kenya Limited and was filed on the 23 July 2015. In that suit, the applicants challenged the Bank's exercise of its statutory power of sale. Following lengthy litigation, the borrower's application dated 23 July 2015 was dismissed on the 31 March 2017.

27. Still the Plaintiffs filed yet another suit being Malindi Elc Case No E054 Of 2023 - Jonathan Daniel Mturi & Patience Shikuku Mturi -versus- Diamond Trust Bank Kenya Limited challenging the Banks attempt to auction the charged property known as Title No. Subdivision No. 4112, MN Mombasa. The suit was struck out with costs for want of jurisdiction through a Ruling dated 26 September 2024.

28. Following the dismissal of the application, the Bank proceeded to advertise the charged property known as Title No. Subdivision No. 4112, MN Mombasa on the 13 December 2024 and the auction was scheduled for the 23 January 2025.

29. On the 23 January 2025, the scheduled auction duly proceeded and the Charged property known as Title No. Subdivision No. 4112, MN Mombasa was sold for the sum of Kshs. 72,000,000/- (Seventy-two million shillings only) to the highest bidders known as Ravji Karsan Sanghani & Harishchandra Gajpara.

30. The Plaintiffs yet again filed another suit being Mombasa Hccomm Suit No. E003 Of 2025 - Jonathan Daniel Mturi & Another ~ys~ Diamond Trust Bank Kenya Limited & ANOTHER seeking to bar the Bank from exercising its statutory power of sale together with an application for injunction dated 31 January 2025 which application was heard by the Hon. Lady Justice Florence Wangari and dismissed on the 13 March 2025.

31. The amounts realized from the auction of the property known as Title No. Subdivision No. 4112, MN Mombasa were applied towards clearing the Term Loan 1 and were received in a Loan Repayment Account No. 0203384002 and applied towards the outstanding amount. Upon application of the amount realized from the sale of the property known as Title No. Subdivision No. 4112, MN Mombasa, the borrower still owes the sum of Kshs. 49,551, 165.12/- as at 22 April 2025 and their Account Number 0203384004 was overdrawn to the tune of Kshs. 21,831,241.48 as at 22 April 2025. The Bank opted to proceed with the auction of the Charged property to realize the difference made up of Kshs. 49,551,165.12 being the total outstanding on Term Loan 1 and Kshs. 21, 831, 241.48 being the overdraft on account no. 02033384004.

32. In addition to the above, the borrower has, on numerous instances, sought and has been granted more time to enable the applicants meet their obligations towards the Bank by regularizing the accounts. However, despite being accorded the indulgences sought, the borrower has still failed to regularize accounts by clearing the arrears.

33. In the circumstances, the respondents contend, the Plaintiffs' application is not meritorious at all; there is no prima facie case and the application is only meant to prevent the Bank from enforcing its legal right to call in its security. It is the respondents' position that there is no legal basis to warrant the granting of prayers sought in the Plaintiffs' application.

34. I have had occasion to consider the submissions filed on behalf of the respective parties in this suit. It is the law on injunctions that comes to the fore in applications of this nature. According to Order 40 rule 1 of the Civil Procedure Rules which the applicants have invoked in their application, temporary injunctions pending hearing and determination of suits may be granted; the rule reads as follows:

> Cases in which temporary injunction may be granted [Order 40, rule 1] Where in any suit it is proved by affidavit or otherwise—
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> (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.

35. The principles upon which an injunction pending the hearing and determination of a suit may be granted were clearly set out in Giella V. Cassman Brown & Co. Ltd (1973) EA 358. The Court of Appeal revisited these principles in Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR. At the very beginning of its judgment, the Court of Appeal summarised the case before them in the following terms:

> " The sole issue raised in this interlocutory appeal is whether the learned Judge of the High Court (Odunga, J.) in granting the 1st respondent's prayer to restrain the appellant by an order of temporary injunction properly exercised his discretion or whether he misdirected himself in some matter and arrived at a wrong decision. Put differently, this court is being asked to determine whether the 1st respondent presented a prima facie case with a probability of success before the High Court; whether irreparable injury would result if the injunction was not granted and whether there was evidence that the balance of convenience was in favour of the 1st respondent. See Giella V. Cassman Brown [1973] EA 358."

36. In disposing of the appeal, the court, in a way, recast the principles in Giella versus Cassman Brown (supra) and held:

> " Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:
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> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> (a) establish his case only at a prima facie level,
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> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
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> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86".

37. The court explained that if an applicant for an injunction establishes a prima facie case, that, in itself, is not enough for the court to grant an interlocutory injunction. Besides establishing a prima facie case, the court must go further and satisfy itself that if the injunction is declined, the injury the applicant

for injunction will suffer, will be irreparable. And by this it is meant that if damages recoverable in law is an adequate remedy and that, in any event, the respondent is disposed to pay those damages, no interlocutory order of injunction should be granted, irrespective of how weighty the applicant's claim may appear to be.

38. According to the learned judges of Appeal, if a prima facie case is not established, then the conditions of irreparable injury and balance of convenience need not be considered. In judges' words "the existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

39. And as to what a prima facie case entails, the Court adopted the definition given to this phrase in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125. The Court of Appeal defined the phrase in the following terms:

> " In civil cases, a prima facie case 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 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."

40. The learned judges of appeal explained this to mean that the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected. This right must be directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive; and, there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

41. The court reiterated that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and it must not examine the merits of the case closely. All that the court is to consider is that, on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. The position of the parties is not to be proved in such a manner as to give a final decision on disputed facts. In particular, an applicant need not establish title but it is enough if he can demonstrate that he has a fair and bona fide question to raise as to the existence of the right which he alleges.

42. The court further explained that, the standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

43. As to the condition of irreparable damage, the court held that it is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. The court noted further:

> " Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

44. On the question of balance of convenience, the court held that:

> " It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

45. If I may digress, where the court harbours doubt and has to resort to balance of convenience to determine whether or not to grant an injunction, is the "doubt" on whether a prima facie case exists or is it on whether damages are an adequate remedy? In Thathy v Middle East Bank (K) Ltd & another [2002] KEHC 1159 (KLR), a case in which, as then an advocate of this Honourable Court, I represented the applicant, Ringera, J. (as he then was) held the view that the doubt is attributed to whether a prima facie case exists and not to whether damages are an adequate remedy as the learned judges held in Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR. In the Thathy case, the learned judge held as follows:

> " I have now to weigh the above submissions in the light of the settled principles for the grant of interlocutory injunctive relief. Those principles are as follows. First, the applicant must show a prima facie case with a probability of success at the trial. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience. Secondly, a court will not normally grant an interlocutory injunction unless it can be shown that the applicant is likely to suffer an injury which cannot adequately be compensated in damages: see Giella v Cassman Brown & Co Ltd [1973] EA 358. (Emphasis added).

46. Besides the conditions of prima facie case and that of irreparable damage, the learned judge also added another angle to the conditions that an applicant must meet before an order for injunction can be made in his favour. The learned judge held:

> " Those two (i.e. the condition for prima facie case and irreparable damage) are, if I may so say, the necessary but not the sufficient conditions for grant of interlocutory injunctive relief. Of equal importance is this: an injunction is an equitable remedy and the court may decline to grant the same if it is shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a court of equity."

47. The applicants' application has to be considered from the foregoing legal perspective.

48. I begin with the caveat that it is not open for me to make any conclusions on disputed facts at this stage of the proceedings in this matter. Bearing that in mind, my attention has been drawn to the respondents' own depositions that, owing to intervening circumstances, the applicants' liability to the bank is not as represented in the statutory notices issued to the applicants and basis upon which the notification of sale has been issued as a precursor to the intended auction of the suit property. To be precise, this is what has been sworn in paragraphs 27 and 28 of the respondents' affidavit.

> "
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> " 27. That the amounts realized from the auction of the property known as Title No. Subdivision No. 4112, MN Mombasa were applied towards clearing the Term Loan 1 and were received in a Loan Repayment Account No. 0203384002 and applied towards the outstanding amount.

28. That upon application of the amount realized from the sale of the property known as Title No. Subdivision No. 4112, MN Mombasa the borrower still owes the sum of Kshs. 49,551, 165.12/- as at 22nd April 2025 and their Account Number 0203384004 was overdrawn to the tune of Kshs. 21,831,241.48 as at 22nd April 2025 hence the Bank opted to proceed with the auction of the Charged property herein to realize the difference as Follows..."

49. Yet in the statutory notice dated 27 September 2021, addressed to the applicants, the bank demanded Kshs. 132,108,145.44. The notice read in part as follows:

> "We issue this notice as a result of the default by the Borrower in payment of the monthly instalments and arrears on the said financial facilities which arrears stood at Kshs.132,108,145.44 plus other charges thereon as at 27th September 2021.We hereby demand the payment of the aforesaid arrears by the Borrower which sum continues to accrue interest at the prevailing rate until payment in full.
>
> TAKE NOTICE that the amount that must be paid to rectify the default is the said sum of KSbs.132,108,145.44 plus other charges thereon due and owing as at 27th September 2021 which amount must be paid within Three (3) months from the date of service upon you of this notice."

50. The notification of sale of the suit property issued by the bank on 30 December 2021 is, more or less, in the same terms and reads as follows:

> "Notification Of Sale Under Section 96(2) Of The *Land Act* 2012 Chargee: Diamond Trust Bank Kenya Limited
>
> Chargors: Jonathan Daniel Mturl-and-patience Sikukuu Mturi Borrower: Quantum Petroleum Limited
>
> Property: Title No. Subdivision No. 1202, Section I, Mn, Mombasa
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> We refer to a First Legal (Continuous) Charge dated First Legal Charge dated 29 August 2009, a Further Legal Charge dated 20 June 2011 and a Second Further Charge dated 13 August2013 created over your property known as Subdivision No. 1202, Section I, MN, Mombasa in favour of Diamond Trust Bank Kenya Limited drawn and stamped to secure financial facilities in the aggregate principal amount ofKShs.77,500,000.00 advanced to Quantum Petroleum Limited (the Borrower).
>
> We issue this notice as a result of the Borrower's default in payment of the monthly instalments and arrears on the said financial facilities which arrears stood at KShs.132,108,145.44 plus other charges thereon as at 27 September 2021, which resulted in our issuing of a Statutory Notice dated 27 September 2021 requiring the Borrower to remedy the default, which they are fully aware.
>
> TAKE NOTICE that it is now over Three (3) months since the issuance of the said Statutory Notice and they have failed to remedy the default by failing to pay the arrears of KSbs.132,108,145.44 plus other charges thereon due and owing as at 27 September 2021.
>
> Take Further Notice That after the expiry of Forty (40) days from the date of service of his notice the Bank shall proceed to exercise any of the remedies referred to under Section 90(3)

of the *Land Act* and/or provided for in the Charge instruments and in particular exercise its Statutory power of sale and sell the charged property Subdivision No. 1202, Section I, MN, Mombasa, so as to recover the entire outstanding amount owed to the Bank and secured by the said Charge instruments plus interest which continues to accrue thereon at the contractual rate until the amount outstanding is received in full.

Yours faithfully

Signed Signed

Maryanne Mbugua Tarminder Umesh

Debt Recovery Unit Debt Recovery Unit

51. In the letter dated 16 February 2022 addressed to the auctioneers by the bank, the latter instructed the auctioneers to auction the suit property to recover the sum of Kshs. 132, 108,145.11.

52. No doubt, it is on the basis of these instructions that the auctioneers advertised the suit property for auction on 28 February 2025. But going by the respondents' own depositions, the amount that is due and owing in the wake of the auction of Title No. Subdivision No. 4112, MN Mombasa, is less than Kshs. 132,108,145.11.

53. Section 90 of the *Land Act* under which the chargee exercises the statutory power of sale provides, inter alia, that the security may be sold after a notice has been served informing the chargee the nature and extent of default of the terms of the charge. Where the default is non-payment of the principal amount or any part thereof or interest, the amount must be shown in the notice. This section reads as follows:

> 90. Remedies of a chargee
>
> (1) 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.
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> (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
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> (a) the nature and extent of the default by the chargor;
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> (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
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> (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
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> (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may—

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to—

(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

(5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section.

(Emphasis added)

54. It is not in dispute that where the default is failure to pay the outstanding amount "the nature and extent of default" in this respect would only mean specifying the amount due and owing and which the chargor is to pay within a prescribed timeline failure of which the security would be realised.

55. Without belabouring the point, there is a strong case for the applicants that the statutory notice or notices, the notification of sale and subsequently the redemption notice issued to pave way for the auction of the suit property are a misrepresentation of "the nature and extent of the default", which in this case, is the amount due and owing from the applicants. It follows that, based on the material before court, it is less probable than not, that the bank has complied with section 90(1) and (2) of the *Land Act* and, to this extent, I am persuaded that the applicants have demonstrated a prima facie case with a probability of success.

56. As to the question whether the applicants will suffer irreparable harm that cannot be adequately compensated by award of damages if the injunction is not granted, they have not sworn that they will suffer such damage but that the intended auction is unlawful. I understand them to urge that if the auction is unlawful, it should not be allowed to proceed irrespective of whether they will suffer irreparable harm.

57. The respondents on the other hand, have exhibited a valuation report showing that as at 25 February 2025 the market value of the property was Kshs. 130,000,000/= making a case that the injury the applicants are likely to suffer if the injunction is not granted is ascertainable. Ringera, J (as he then was)

seemed to have taken position in Thathy v Middle East Bank (K) Ltd & another [2002] eKLR. While addressing the issue whether the applicant had satisfied the condition that he would suffer irreparable damage in the event a residential house he had mortgaged was sold in exercise of the mortgagee's exercise of its statutory power of sale, the learned judge held as follows:

> " The compessability or otherwise in damages as a condition for the grant of an interlocutory injunction is an old one which is firmly rooted in the history of an injunction as an equitable remedy. In the matter at hand, the property sought to be sold is a residential house which the plaintiff leases out for economic gain. Its value is easily ascertainable. It has been mortgaged to the bank with full knowledge that if the mortgage debt is not paid as covenanted in the contract, the same would be sold. In those circumstances, it does not lie in the mouth of the mortgagor to say that if he is in default, as he undoubtedly is, the sale of the security would result in irreparable harm to him. In my opinion, his loss is perfectly capable of being compensated in damages and it has not even been suggested by his advocate that the defendant Bank is incapable of so compensating him. The plaintiff does not therefore surmount this hurdle."

58. Nevertheless, the learned judge agreed with the learned counsel for the applicant that where there is infraction in the notice or service thereof or where there is a breach of the auctioneers rules, the court can intervene and stop the sale. In this regard the learned judge held:

> " As regard the service of the notification of sale, I have already expressed the view that once the mortgagee opts to exercise the power of sale through a licensed auctioneer in a public auction, the Auctioneers Rules become relevant and applicable. Accordingly, a valid notification of sale should be served on the mortgagor."

59. On whether the notice was properly served, the learned judge held as follows:

> " The second mode of service is attacked on more substantial ground, namely that the relationship of the Asian lady allegedly served with the notice with the plaintiff is not disclosed. Rule 15 (c) requires the notice to be served either on the registered owner of the property or an adult member of his family residing or working with him. In the instant matter, it is not clear whether or not the lady served was a member of the plaintiff's family. She may or she may not be. Two conclusions may in my view be properly drawn from the above facts. One, the first mode of service is not recognised by the Auctioneers Rules, 1997. Two, on the auctioneer's own affidavit, there is doubt whether or not the notification of sale was served on the plaintiff as required by rule 15 (c). Counsel for the bank argued that non-compliance with the Auctioneers Rules cannot derogate from an otherwise lawful exercise of a statutory power. The plaintiff's advocate for his part drew a distinction between situations where a security has been realized in contravention of the Auctioneers Rules and situations where it is sought to restrain the exercise of the power of sale which is manifestly in violation of the Auctioneers Rules. I accept that distinction myself. It appears to stand to reason and to be in conformity with both the provisions of Section 26 of the *Auctioneers Act* and Section 69 B 1 (2) of the TPA to hold that anybody who suffers injury or loss as a result of the wrongful or improper exercise of the powers of an auctioneer or the power of sale generally has his remedy in damages only. However, it is a non sequitor to suggest that one who is about to be damnified by such an improper or irregular exercise of either the powers of an auctioneer or the general power of sale isn't entitled to stop the intended injury on its tracks particularly where the intended breach is a serious one."

60. Having come to the conclusion that the notices claimed to have been served upon the applicants may be tainted and contrary to section 90 of the *Land Act*, I would adopt the position taken by the learned judge that the applicants may possibly be damnified by improper or irregular exercise of statutory power of sale or the auctioneers rules. If property is disposed of contrary to the law, the property may be deemed to have been unlawfully acquired, and, therefore, in contravention of article 40 of *the Constitution* which is to the effect that the right to own property does not extend to property that has been unlawfully acquired. Accordingly, there is a case to stop the intended injury by way of grant of an injunction. I hereby allow the application in terms of prayer 3 and 5 of the motion. Costs will abide the outcome of the suit. It is so ordered.

SIGNED, DATED AND DELIVERED ON 16 DECEMBER 2025

NGAAH JAIRUS

JUDGE