THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. E013 OF 2025

THATCHER NDANU LAZARUS.................................APPLICANT

Versus

ABSA BANK KENYA PLC.................................1ST RESPONDENT

REGENT AUCTIONEERS................................2ND RESPONDENT

RULING

1. **Thatcher Ndanu Lazarus**, the Plaintiff/ Applicant herein (hereafter the Applicant) instituted this suit by a plaint contemporaneously filed with the motion dated 15.04.2025. The key prayer in the motion seeks a temporary injunction to restrain **Absa Bank Kenya PLC** and **Regent Auctioneers**, (hereafter the 1st and 2nd Respondents respectively/Respondents), their agents, servants, employees or assigns from advertising for sale, selling by public auction, transferring, charging, leasing or in any other manner dealing with the Applicant's property known as **Ngong/Ngong/90586** (hereafter the suit property). The second prayer seeks an order to compel the 1st Respondent to render to the Applicant a full, proper and transparent statement of accounts indicating the actual loan

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arrears, payments, penalties, interest, charges and balances in respect of her loan account.

2. The motion was based on the grounds on its face, as amplified in the supporting affidavit sworn by the Applicant, which is to the effect that sometime in December, 2021 the 1st Respondent advanced a loan facility of Kes. 25,600,000/- to **Medley Merchants Limited** in which the Applicant is a director; that the Applicant executed a personal guarantee and charge over the suit property; that the monthly payment instalments of Kes. 383,000/- were duly paid as they fell due; and the total repayments made so far amount to Kes.13, 925,224.54/. The Applicant further deposes that, acting without notice, the 1st Respondent had altered the compounded monthly installments from Kes. 383,000/- to Kes. 518,806.50/- thereby imposing an additional financial burden on her, and she thereafter became aware through a third party, of an auction of the suit property scheduled for 30.04.2025 had been advertised in the Daily Nation.

3. She averred further that she had not been served with the requisite statutory notices under Sections 90(1) and 96(2) of the Land Act, nor the notification of sale under the Auctioneers Rules. She therefore contended that the scheduled sale of the suit property by public

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auction was illegal, irregular, premature, and in gross violation of the mandatory legal requirements of the Land Act and Auctioneer Rules. Asserting further that the 1st Respondent was unlawfully demanding a grossly inflated sum of Kes. 26,220,661.05/- despite the substantial payments already made, and that unless the court grants the orders sought, she would suffer irreparable damage that cannot be adequately compensated by damages. And finally, expressing her willingness to redeem any genuine arrears, upon a proper, full and transparent statement of account being rendered; and contending that the balance of convenience tilts in her favour.

4. The motion was opposed through a replying affidavit sworn by **Samuel Njuguna**, who described himself as a Legal Officer at the 1st Respondent. He deposed that the Applicant was granted a financial facility of Kes. 25.6 million secured by a charge created over the suit property, which allowed the bank to sell the property upon default.

5. Detailing the Applicant's irregular loan repayments, culminating in arrears of over Kes. 25.8 million as of February 2025, he stated that as a consequence, the 90-day notice was issued on 5.08.2024, the 40-day statutory notice on 7.01.2025 , and the 45-day redemption notice on 19.02.2025, all of which were duly served on the Applicant before the 1st Respondent instructed the auctioneer to proceed with

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the sale, which was advertised for 30th April 2025. He stated that the Applicant only moved to court after the advertisement of the public auction of the suit property.

6. The deponent denied allegations of unfair treatment levelled by the Applicant against the 1st Respondent, abrupt changes in loan terms, and failure to issue proper notices, while asserting that, the charge terms permitted changes to interest rates and that all necessary notices were duly served. He disputed that the Applicant has demonstrated irreparable damage that cannot be compensated by damages, contending that the 1st Respondent as a financial institution, is capable of compensating the Applicant in the event that damages were awarded.

7. The deponent further pointed out that the Applicant, despite admitting indebtedness failed to propose a viable repayment plan, and has therefore approached the court with unclean hands. Thus, he contended that the 1st Respondent's exercise of its statutory power of sale is lawful and that the Applicant is bound by the terms of the charge instrument. He therefore urged the court to dismiss the motion with costs.

8. The motion was canvassed by way of written submissions. The Applicant's counsel after restating her affidavit material anchored her

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submissions on constitutional principles, equitable doctrines, and statutory requirements under the Land Act.

9. Concerning demonstration of a prima facie case, the Applicant denying receipt of the statutory notice envisaged in Section 96(2) of the Land Act which requires a chargee to serve a notice to sell in the prescribed form, and wait forty days before proceeding with a sale, accused the 1st Respondent of non-compliance. Counsel contended that no proof of service has been provided. Counsel relied on the case of **David Ngugi Ngaari v Kenya Commercial Bank Ltd [2015] eKLR**, where the court held that even where a notice under Section 90 of the Land Act had been issued, the chargee's power of sale does not crystallize until the chargee issues and serves the notice under Section 96(2) of the Land Act, and that failure to serve such notice invalidates a subsequent sale. A position reinforced in the case of **Elizabeth Wambui Njuguna v Housing Finance Co. of Kenya [2006] eKLR and Kyangaro v Kenya Commercial Bank Ltd [2004] eKLR**.

10. Regarding the unlawful variation of loan terms, counsel for the Applicant cited **Rainbow Acres Limited v NIC Bank Ltd [2015] eKLR**, for the proposition that a mortgage instrument supersedes all other agreements between the parties, and any additional charges,

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including default interest, must be expressly provided for to be legal. Counsel also cited the case of **Francis Kamau Ichatha v Housing Finance Co. of Kenya [2014] eKLR** to support the submission that unilateral variation of interest rates without the borrower's consent constitutes a breach of the parties' contract.

11. On the question of irreparable harm, counsel asserted that the suit property is the Applicant's sole residence and her eviction would occasion her irreparable injury. Here citing **Lilian Mercy Mutua v Elizabeth Olonginda [2013] eKLR**, where the court in similar circumstances held that the loss of shelter cannot be compensated by damages, and that the balance of convenience lay in preserving the status quo. Also cited was the case of **George Nakulo Ogallo v Barclays Bank of Kenya & 2 Others [2014] eKLR**.

12. Finally, the Applicant's counsel invoking the principles spelt out in **Giella v Cassman Brown [1973] EA 358**, argued that a prima facie case, irreparable harm, and a balance of convenience in favour of the Applicant had been demonstrated, and that no prejudice would be occasioned to the Respondents if the status quo were maintained. In conclusion, the Applicant's counsel prayed that the motion be granted pending the determination of the suit.

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13. Counsel for the Respondents took the position that the motion is without merit, having failed to meet the legal threshold for the grant of interlocutory injunctive relief. Addressing the question whether a prima facie case has been established, counsel argued that the Applicant's claims of non-service of notices and unilateral variation of loan terms are unsubstantiated. And citing the case of **Mrao Ltd v First American Bank of Kenya Ltd & Others [2003] KLR 125**, stated that in demonstrating a prima facie case, an applicant must show "*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.*"

14. Counsel contended that no such right and infringement has been demonstrated in this instance where, the 1st Respondent acted in accordance with the terms of the charge instrument, which expressly allowed for variation of interest rates upon default. He cited the case of **Francis J.K Ichatha v Housing Finance Company of Kenya Ltd [2005] eKLR**, where the court held that a dispute concerning sums due is not a valid ground for restraining the chargee from exercising its statutory power of sale. And the holding in **Labelle International Ltd v Fidelity Commercial Ltd & Another (2003) Z.E.A.**, that where any sum of the amount claimed is admitted by a

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chargor or proved to be due, a chargee cannot be restrained by an injunction.

15. Counsel further submitted that the Applicant has not shown that she would suffer damage incapable of compensation by damages, citing in support the holding in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, that where the value of the charged property was quantifiable, damages would suffice as compensation in the event that the chargor's suit eventually succeeded. More so where in addition, the respondent was a financial institution capable of paying such damages, as held in **Obama Enterprises Limited & 2 others v Kenya Women Microfinance Bank Limited [2021] KEHC 351 (KLR.**

16. Counsel posited that the Applicant having failed to establish a prima facie case or irreparable damage, the balance of convenience need not be considered. And citing the exhortation in **Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR** that in an application of this nature, the Court must be wary of the risk of the debt outstripping the value of the suit property, urged that the court ought to allow realization of the security, provided the chargee complies with all other legal

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requirements. To avert a situation of exposing the charge to irrecoverable losses.

17. Finally, counsel reiterated that the Applicant was bound by the terms of the charge instrument in keeping with the legal principle underscoring the sanctity of contracts, as stated in **First Choice Mega Store Limited v Ecobank Kenya Limited [2017] eKLR.** In counsel's view, the motion before the court is a misuse of the process of the court , aimed at frustrating the 1st Respondent's lawful exercise of its statutory power of sale.

18. The court has considered the rival material and submissions canvassed in respect of the motion. The sole question to be determined is whether the Applicant has brought her case within settled principles that govern the grant of interlocutory injunctions. The court's power to grant temporary injunctions is donated by Order 40 Rules 1 and 2 of the Civil Procedure Rules. The now settled principles governing the grant of interlocutory injunctions were spelt out in **Giella v Cassman Brown & Co. Limited [1973] EA 358** [supra] as reiterated in **Nguruman Limited** (supra).

19. The latter decision is particularly illuminating. In that case, the Court of Appeal described the role of the court in an application seeking temporary injunction to be merely to consider whether the

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principles for the grant of the interlocutory injunction were met. The Court further observing that:

> **"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ...... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:**
>
> **In an interlocutory injunction application, the Appellants has to satisfy the triple requirements to:**
>
> **a. establish his case only at a prima facie level**
>
> **b. demonstrate irreparable injury if a temporary injunction is not granted.**
>
> **c. allay any doubts as to (b) by showing that the balance of convenience is in his favor."**

20. The Court explained that the three conditions above apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. Such that, it was not enough for the applicant to establish a prima facie case, they must further successfully establish irreparable injury, that is, injury for which

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damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the Court will consider the balance of convenience. Conversely, where no prima facie case is established, the court need not consider irreparable injury or the balance of convenience. The Court of Appeal emphasized that the standard of proof is to prima facie standard.

21. Thus, questions falling to be answered here are whether the Applicant has established a *prima facie* case with a probability of success; the possibility of suffering irreparable injury incapable of being compensated by damages if the orders sought are denied; and that the balance of convenience tilts in her favour.

22. In the case of **Mrao Limited v First American Bank of Kenya and 2 Others (2003) KLR 12**5[supra], the Court of Appeal defined what amounts to a prima facie case as follows:

> **"A prima facie case in a civil case includes but is not confined to a "genuine or arguable" case. <u>It is a case which on the material presented to the court, a tribunal properly directing itself will conclude 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</u>**

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<u>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."</u>

23. There is no dispute that in 2021 the Applicant created a charge in favour of the 1st Respondent over the suit property, to secure a loan facility in the sum of Kes. 25,600,000/ to the company in which the Applicant, as director, stood as a guarantee. There is no dispute that as of February 2025, the loan account was in default. The Applicant's complaints and contestation revolve around the alleged failure by the 1st Respondent to serve her with the requisite statutory notices under the Land Act and Auctioneers Rules; unlawful changes to compounded monthly installments from Kes.383,000/- to Kes. 518,806.50/- and the amount owed in arrears, while asserting to have repaid an amount of Kes. 13,925,224.54/-. And expressing willingness to pay over any *"genuine arrears"* upon a statement of accounts being rendered by the 1st Respondent.

24. It is trite that the statutory power of sale crystallizes when the requisite statutory notices are properly served upon the chargor. **Section 90(1)** of the Land Act provides as follows:

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''If the 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 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 the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.''

25. Here, the 1st Respondent has exhibited as annexures to the replying affidavit, a copy of the 90 day statutory notice under Section 90(1) of the Land Act, dated 5/8/2024, which was evidently sent via email to the Applicant on 6/8/2024. In **Nyangilo Ochieng & Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260**, the Court of Appeal held that the chargee bears the burden of showing that the statutory notice has been served on the chargor upon the chargor disputing receipt of the statutory notice. The Applicant does not dispute the email address to which the notice was sent. The annexed material in the court's view satisfies the requirements of Section 90(1) of the Land Act .

26. In addition, the 1st Respondent's affidavit material shows that the 1st Respondent similarly served the 40-day statutory notice under

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Section 96(2) of the Land Act, and dated 7.01.2025 upon the Applicant via her email address (both notice and email are annexed to the replying affidavit), while the redemption notice dated 19/2/2025 was served via registered post as evidenced by the copy of certificate of postage (of even date) exhibited in the replying affidavit together with the notice. The auctioneers equally filed an affidavit of service indicating that service was effected on the Applicant both physically and via WhatsApp messaging.

27. Section 3(5) of the Interpretation General Provisions Act states that:

> **"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, <u>the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document,</u> and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post".**

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28. Where proof of effective service is provided by a respondent, the burden to disapprove such service falls on the applicant. (See **Nyangilo Ocheng' & another -vs- Fanuel Ochieng & 2 Others (1996) eKLR** ; **Maithya –vs- Housing Finance Corporation of Kenya HCCC No. 1129 of 2002**). In the latter case, the court observed as follows: -

> **"It is the Plaintiff who alleged that he was not served with the Statutory Notice. <u>Once the Defendant provided evidence of that service, the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that "he who asserts must prove." See the book of Principles of Evidence by Alan Taylor 2nd Edition. The onus was on the Plaintiff to prove non-service of the Plaintiff.</u> In view of the fact that the Plaintiff failed to prove the same the Plaintiff has failed to satisfy that burden. It is obvious that the Plaintiff could have obtained information from the Postmaster General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on prima facie basis do so."**

29. Similarly, in this case, upon the 1st Respondent demonstrating service of the statutory notices upon the Applicant, the burden of

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proof shifted upon the Applicant to prove otherwise. She has not discharged that burden, in the court's considered view. This evidence rebuts the Applicant's claims that the statutory notices had never been served on her.

30. Concerning the Applicant's claims that monthly installments were raised by the 1st Respondent from Kes. 383,000/- to Kes. 518,806.50/, a perusal of the charge document, a copy of which is annexed to the replying affidavit as annexure **"SN -01",** reveals that clause 4 provided that the consent of the chargor or any principal debtor was not a prerequisite to any change in rate and method of calculating interest payable.

31. Equally, nothing turns on the Applicant's complaint that under clause 4(d) of the charge document the bank failed to seek her consent, and to give notice of the change in the interest payable, for two reasons. While her prior consent was not necessary under the cited clause, according to the averments in the replying affidavit she was already in default. True, an appropriate formal notice as envisaged in the charge instrument should have been served upon the Applicant, however, it appears that the Applicant continued to receive regular bank statements, which form the basis of her contestation of the sums due and owing.

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32. That being said, a dispute concerning amounts due, where a chargor is in admitted default cannot be a ground for granting an injunction against the chargee who is seeking to exercise its power of sale. The Court of Appeal in **Habib Bank A. C. Zurich –vs- Pop in Kenya Limited and Others [1995]EKLR**, held;

> **"...in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage."**

33. Similarly, in **Orion East Africa Ltd v Eco Bank Kenya Ltd and Another [2015] eKLR** the Court of Appeal set out the circumstances in which a mortgagee may be restrained from exercising its statutory power of sale. The Court stated: -

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"The circumstances in which a mortgagee may be retrained from exercising its statutory power of sale are set out in Halsbury's Laws of England, volume 32 (4th Edition) paragraph 725 as follows:

"725. When mortgagee may be restrained from exercising statutory power of power of sale.

<u>The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged.</u> He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

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34. As to the question of irreparable injury, the Applicant argued that the suit property was her residence and that its sale would render her homeless; that the loss of shelter cannot be adequately compensated by an award of damages. This argument was opposed by the Respondents who contend that the Applicant is bound by the terms

of the charge instrument, which she voluntarily executed, including the consequences of default.

35. It is now settled that the moment a chargor places his property, residential or other, in the hands of a financial institution as security as collateral for a loan, such property becomes a ready commodity for sale upon his default. Moreover, courts must be wary of granting injunctions where it appears that the debt in question may outstrip the value of the property charged, thereby exposing the chargee to more losses. See **Christopher Muroki v Housing Finance Company of Kenya and Another [2006] e KLR** and **Andrew M. Wanjohi v Equity Building Society Ltd and Another [2006] e KLR.**

36. Equally, the court is not persuaded by the argument that damages would not be adequate compensation for the Applicant in this case. *Ex facie,* any losses resulting from an irregular realization of the security whose value can be determined, are quantifiable in damages and the 1st Respondent, as a financial institution, capable of making restitution to the Applicant. On the other hand, the growing debt may soon outstrip the value of the suit property, thereby exposing the bank to more losses. See **Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR**.

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37. Despite the notices served upon the Applicant by the chargee between August 2024 and February 2025, there is no evidence that she has made any effort to make good her default, by making payments towards the debt admittedly outstanding. Her expression of willingness before this court, to settle the debt upon being furnished with a statement of accounts, hence rings hollow. Clearly therefore, the balance of convenience tilts in favour of the 1st Respondent.

38. The Court of Appeal stated in **Orion East Africa Ltd v Ecobank Ltd and Another [2015] e KLR** that:

> **"In an application for an interlocutory injunction it is good practice for the trial court to look at the whole case, not only to the strength of the Applicant but also to the strength of the defence advanced by the Respondent, then make an appropriate order. In Hubbard v Vosper [1972] I ALL ER, 1023 at page 1029 Lord Denning MR, in setting aside an interlocutory injunction granted by a trial court stated:**
>
> ***"We are told that practitioners have been treating these cases as deciding that, if the Plaintiff has an arguable case, an injunction should be granted so***

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that the status quo may be maintained. The judge was so told in the present case, and that is why he granted the injunction.

I would like to say at once that I cannot accept the proposition stated in those two cases. In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done.

Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the Defendant but leave him free to go ahead."

39. In this case, the court upon reviewing all the foregoing, is not satisfied that the Applicant has made out a case for the granting of the orders sought in the motion dated 15.04.2025. The motion is hereby dismissed with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 19TH DAY OF DECEMBER 2025.

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C.MEOLI

JUDGE

In the presence of:

For the Plaintiff/Applicant: Mr. Munene

For the Respondents: Mr. Mbira holding brief for Mr. Kimiti

C/A: Lepatei

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