



**Mwangi v Co-operative Bank of Kenya Limited (Civil Case  
E001 of 2025) [2025] KEHC 18780 (KLR) (16 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18780 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL CASE E001 OF 2025  
JN KAMAU, J  
DECEMBER 16, 2025**

**BETWEEN**

**ANTONY NYAGA MWANGI ..... PLAINTIFF**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... DEFENDANT**

**RULING**

**Introduction**

1. In his Notice of Motion application dated and filed on 6<sup>th</sup> February 2025, the Plaintiff herein sought orders that pending the hearing and determination of this suit, this court be pleased to issue temporary injunctive orders restraining the Defendant whether acting by itself or through its appointed agents, servants and/or assigns from exercising its statutory power of sale scheduled for 11<sup>th</sup> February 2025 in respect of charged property known as South Maragoli/Logovo/2055 (hereinafter referred to as the “subject property”) registered in his name.
2. He swore an affidavit in support of the said Notice of Motion application on 6<sup>th</sup> February 2025. He also swore a Further Affidavit on 11<sup>th</sup> February 2025. The same was filed on 12<sup>th</sup> February 2025.
3. He averred that on 10<sup>th</sup> of November 2015, he approached the Defendant through its Mbale Branch for a mortgage finance facility of Kshs 19,000,000/= against the subject property.
4. He contended that through an acceptance letter dated 18<sup>th</sup> May 2016, the Defendant agreed to advance to him the said facility of Kshs 19,000,000/= and offered to liquidate his other loan facility of Kshs 3,000,000/= against his other property which had been charged known as North Maragoli/Mbale/1483.
5. He stated that despite having offset the loan facility against his other property known as North Maragoli/Mbale/1483 to include the Kshs 3,000,000/= on the principal amount Kshs 19,000,000/



- = the Defendant did not proceed to discharge that property. He added that in the acceptance letter, the Defendant agreed that the repayment period of the loan facility would be one hundred and eighty (180) months with a moratorium of nine (9) months on the principal amount.
6. He further averred that the monthly repayment sum was Kshs 354,243.00 with the applicable interest per annum at eighteen point eight three (18.83%) per cent which was revised by the Central Bank of Kenya. He asserted that he had been repaying the loan facility and had paid in excess of Twenty One million Seven Hundred and Twenty One Thousand and Forty Two shillings (Kshs 21,721,042/=) despite the repayment period being one hundred and eighty (180) months minus the moratorium period of nine (9) months on the principal sum.
  7. He further contended that as of June 2017, the property that was estimated roughly at Twenty Million Shillings (Kshs 24,000,000/=) before completion was Thirty Million Five Hundred Thousand Shillings (Kshs 30,500,000/=) on completion. He contended that despite his efforts to repay the loan following the recent global pandemic, the Defendant had gone ahead to issue the statutory notice to sell his subject property in exercise of its statutory powers.
  8. He asserted that he had on several occasions pleaded with the Defendant to restructure, renegotiate and/or adjust the amount or period of payment due to the current tough economic conditions in vain. He explained that the premises were not occupied to full capacity hence raising the sum of Kshs 324,000/= monthly together with the penalty became almost impossible.
  9. He pleaded with the court to restrain the Defendant from selling his subject property by Public Auction until his suit was heard and determined. He believed that he had established a prima facie case against the Defendant herein and sought to be allowed to exercise his power of redemption of his subject property. He asserted that he would suffer irreparable loss should the auction proceed. He pointed out that he had engaged Chrisca Real Estate Valuer to determine the current value of the property which was estimated at Thirty two Million (Kshs 32,000,000/=).
  10. Rex Ekambi, a business banker at the Defendant swore a Replying Affidavit on 4<sup>th</sup> April 2025 on behalf of the Defendant. The same was filed on even date.
  11. It was the Defendant's case that it advanced various banking facilities to the Plaintiff apart from the Legal Charge of Kshs 19,000,000/= that the Plaintiff was referring to. It asserted that the Plaintiff read and understood the terms of the said Charges and agreed to be bound by those terms by executing the said legal documents.
  12. It contended that subsequently, the Plaintiff breached the terms of the Letter of Offer, the Charges and the bank's general terms and conditions by failing, neglecting and/or refusing to make payment of the agreed monthly instalment amounts and/or making payments below the agreed and stipulated monthly instalment amounts.
  13. It stated that in light of the default, it issued the Plaintiff with a letter on 8<sup>th</sup> May 2018 demanding the immediate payment of the outstanding arrears within a period of fourteen (14) days but he failed to rectify his default which prompted it to do another Demand Letter and Pre-Listing Notification dated 15<sup>th</sup> January 2019 and 31<sup>st</sup> May 2022 respectively. It stated that he persisted in his default and it was thus constrained to realise its security. It averred that it proceeded to issue him with a three (3) months, ninety (90) days, Statutory Demand Notice dated 20<sup>th</sup> June 2023.
  14. It further stated that despite the issuance of the ninety (90) days Statutory Demand Notice, he did not take any steps to regularise his account. It added that it notified him by a letter dated 4<sup>th</sup> December 2023 that it would forward his information to the Credit Reference Bureau as well as take action to



- recover the outstanding amount if payment was not made within a period of thirty (30) days. It added that it also issued him with a forty (40) days' Statutory Demand Notice dated 4<sup>th</sup> December 2023.
15. It asserted that notwithstanding the issuance and lapse of the statutory notices, to wit, the demand letters, the pre-listing notifications and the auctioneers' notices, the Plaintiff failed, neglected and/or refused to clear his outstanding loan arrears. It added that it was, therefore, apparent that by law, it had the right to exercise its statutory power of sale.
  16. It pointed out that it proceeded to instruct its valuers to value the subject property and submit the Valuation Report and further instructed its Auctioneers to advertise the subject property for sale by way of public auction.
  17. It was categorical that on 27<sup>th</sup> November 2024, the Auctioneers proceeded to serve the Plaintiff with a forty-five (45) days Redemption Notice and the Notification of Sale of the sale on 27<sup>th</sup> January 2025 and that at the time the outstanding loan amount was Twenty One Million Two hundred and Fourteen Fifty-five and Eighteen Cents (Kshs 21,214,55.18) (sic).
  18. It contended that in an escapist approach to the matter, the Plaintiff rushed to court seeking injunctive orders to restrain it from exercising its right of statutory power of sale. It denied the averments in his Supporting Affidavit and was emphatic that he had persistently defaulted on his loan obligations and since he had only repaid a sum of Four Million Five Hundred and Eighteen Thousand Six Hundred and Seven Shillings and Twenty-One Cents (Kshs 4,518,607.21) and the was default of Twenty-One Million Nine Hundred and Five and Forty- Eight Shillings and Seventy Nine cents (Kshs 21,905,048.79), the default had outstripped both the market value which was Twenty-One Million (Kshs 21,000,000/=) and the forced value which was Fifteen Million Eight Hundred Thousand Shillings (Kshs 15,800,000 /)=) exposing it to risk of being unable to recover the full outstanding loan amount.
  19. It was its contention that the Plaintiff had approached the court with unclean hands and was guilty of non-disclosure of the above material facts. It was emphatic that he was unworthy of the equitable remedy he had sought. It asserted that he had also failed to meet the requirements for granting of injunctive relief or any other reliefs as sought herein.
  20. It pointed out that a court of law could not be compelled to rewrite a contract between the parties as they were bound by the terms of their contract but its duty was to legitimise the terms of the contract. It believed that the application herein had been brought in bad faith and ought to be dismissed with costs.
  21. The Plaintiff's Written Submissions were dated 20<sup>th</sup> May 2025. They did not bear a court stamp. However, in view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood that the Registry may have omitted to stamp the same. The Respondent's Written Submissions were dated and filed 21<sup>st</sup> May 2025. This Ruling is based on the said parties' Written Submissions that they both relied on in their entirety.

### **Legal Analysis**

22. The Plaintiff submitted that he had so far repaid the principal sum to the Defendant to wit Twenty-One Million Shillings (Kshs 21,000,000/=) and the outstanding amount was the interest on the loan facility which the Defendant had capped at Five Million Six Hundred and Forty-Seven Thousand Two Hundred and Seventy Three Shillings and Forty Nine Cents (Kshs 5,647,273.49). He denied that he had not been repaying the loan amount but that the Defendant had refused to disclose to him the



- outstanding amount he owed it and that the interest imposed exceeded the one agreed upon by the Defendant.
23. He pointed out that the value of the subject property as valued by the Defendant stood at Twenty-One Million Nine Hundred and Five and Forty-Eight Shillings and Seventy-Nine Cents (Kshs 21, 905,048.79) with a forced value of Fifteen Million Eight Hundred Thousand Shillings (Kshs 15,800,000/=). He added that he had come to court with clean hands having demonstrated that he had been repaying the loan amount and had already surpassed the principal sum advanced to him.
  24. He pointed out that the notice by the Defendant was not only irregular but illegal since it referred to recovery of a sum of Kshs 21,905,048.79 when in essence he had repaid more than Kshs 21,000,000/=. In this regard, he placed reliance on the cases of *Cordeiro & Another vs Shanji Civil Suit No 39 of 2014* and *Juja Coffee Exporters Ltd & Another vs Bank of Africa Ltd & Others HCCC No 57 of 2016* (eKLR citations not given) where the courts therein granted temporary injunction against the sale of charged properties.
  25. He argued that it would be unfair to allow the sale of his subject property valued at Twenty One Million Shillings (Kshs 21,000,000/=) against a claim of Kshs Five Million Six Hundred and Forty-Seven Two Hundred and Seventy Three Shillings (Kshs 5,647,273/=) that was being claimed by the Defendant.
  26. On its part, the Defendant placed reliance on the case of *Giella vs Cassman Brown & Co Ltd[1973]* which set out the criteria to be satisfied by any applicant seeking for an interlocutory injunction. He added that an applicant had to establish a prima facie case, demonstrate that he would suffer irreparable loss should the court deny to grant the injunction and that where the court was in doubt, it would grant the interlocutory injunction on a balance of convenience.
  27. It contended that an interlocutory injunction was an equitable relief falling squarely within the court's discretion which was a judicial function that must be exercised judiciously.
  28. It further relied on the case of *Mrao vs First American Bank of Kenya Ltd & 2 Others[2003]*eKLR where it was held that a prima facie case was one in which on the material presented to the court properly directing itself would conclude that there existed a right which had been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
  29. It submitted that the Plaintiff voluntarily offered the subject property as collateral with full knowledge that it would be subjected to realisation in the event he defaulted on his loan obligations. It added that he obtained funds from the bank and had failed to honour his contractual obligation to repay the loan facilities despite having been afforded adequate opportunity to redeem the subject property through issuance of the demand notices, the pre-listing notifications and the statutory notices.
  30. It contended that its right as a bank to exercise its statutory power of sale was triggered by the Plaintiff's own admitted acts of default as was evidenced by the Statement of Accounts that it annexed in its affidavit. It added that prior to instructing its Valuers, it complied with Section 90 and Section 96 of the *Land Act*. It pointed out that he disregarded all the demand notices and took no steps to address his default.
  31. It further submitted that he only moved the court at the eleventh hour after it had taken measures to realise its security following the events of the default. It asserted that as observed by this court on 11<sup>th</sup> February 2025, the Plaintiff failed to act diligently as he had the opportunity to move this court as early as 27<sup>th</sup> November 2024 when the Redemption Notice was issued but he instead chose to wait to rush to court at the very last minute on 6<sup>th</sup> February 2025 to file the instant application. It termed his application as an afterthought.



32. It was categorical that it had annexed the Statement of Loan Account to prove his indebtedness and that such a Statement of Account in law was considered prima facie evidence under Section 176 of the *Evidence Act*. In the premises, it argued that the burden, therefore, shifted to him to disprove or dispute the contents thereof which he had completely failed to do.
33. It was emphatic that he owed it a substantial amount of money which was secured by a valid and enforceable Charge whose validity had not been challenged. It asserted that it had stepped up to recover the sums owed and it could not be said to have infringed any of his rights. It added that precedent had upheld boldly that as long as there was default, then the right of a chargee, like itself, to exercise the statutory power of sale crystallised.
34. To buttress its point, it relied on several cases, among them the cases of Andrew Kengere Kimonge vs Equity Bank Ltd & Another[2017]eKLR, Maize Milling Company Limited & Another vs Spire Bank Kenya Limited[2019]eKLR and Tengeri N. Osoro vs Standard Chartered Bank Limited & Legacy Auctioneering Services Milimani HCCOM Case No E120 of 2022(eKLR citation not given) where the courts therein held that the chargee's right to exercise its statutory power of sale had accrued and found no basis to restrain the same holding that by offering the suit properties as security, the chargor equated them to commodities which the charge could dispose of so as to recover the loan together with interest thereon.
35. It further contended that it was trite law that parties were bound by the terms of their contract and that a court could not amend or rewrite the terms of a contract between parties particularly at the behest of a defaulting party as was held in the case of National Bank of Kenya Ltd vs Pipelastik Samkolit & Another(2001) KLR 112. It added that the Plaintiff could not use the global pandemic as an excuse to repay the loan in the year 2025. In this regard, it cited the case of HFC Limited vs Njora (Environment & Land Case E027 of 2023 [2024] KEELC 3255 (KLR) where it was held that the economic disturbance of the COVID-19 pandemic could not justify failure to service a loan in the year 2024.
36. It further submitted that it had not violated the in duplum rule as set out in Section 44A of the *Banking Act* and that in any event, a dispute over the quantum of the outstanding amount did not justify the grant of an injunction, as was held in the cases of John Nduati t/a Johester Merchants vs National Bank of Kenya Ltd[2006]eKLR and Jamii Bora Bank Limited vs Wapak Developers[2018]eKLR.
37. It was categorical that the Plaintiff had not proved a prima facie case and/or demonstrated that he would suffer irreparable harm or loss that could not be compensated by way of damages. To buttress its argument, it invoked Section 99(4) of the *Land Act*, 2012 and placed reliance on several cases among them, the case of Agnes Nyang'anyi Omwamba vs Samuel Bosire Nyaruna[2022]eKLR where the common thread was that a financial loss was not irreparable since it was monetary in nature and quantifiable and hence, a party seeking an interlocutory injunction could be adequately compensated by an award of damages.
38. It asserted that as it currently stood, the Plaintiff was in default the tune of Twenty One Million Nine Hundred and Five Thousand and Forty Eight Shillings and Seventy-Nine Cents (Kshs 21, 905,048.79) and that the Valuation Report had indicated that the market value of the subject property was Twenty One Million Shillings (Kshs 21,000,000/=) with a forced sale value stood at Fifteen Million Eight Hundred Thousand Shillings (Kshs 15,800,000/=). It, therefore, argued that it was evident that the outstanding debt had already outstripped both the market value and forced sale value of the charged property.



39. It was, therefore, its contention that the stoppage of the intended sale would result in the continued accumulation of the debt further exposing it to potentially irrecoverable financial loss as was held in the case of Andrew Muriuki Wanjohi vs Equity Building Society Limited & Others[2006]eKLR. It added that this court should not be a place of refuge where iniquitous litigants such as the Plaintiff sought protection in order to ostensibly continue defaulting as was held in the cases of Elizabeth Wanjiku Kariungi vs Equity Bank (Kenya) Limited[2017]eKLR and James Bichage Kenyariri vs CFC Stanbic Bank Limited[2017]eKLR.
40. It was emphatic that it was the Plaintiff's defaulting that necessitated it to serve him with the requisite statutory notices in order to realise the security of the Charge. It annexed the Statements of Accounts to that effect. It urged the court to dismiss the Plaintiff's application with costs to it and invoked Section 27 of the *Civil Procedure Act*.
41. Section 90 of the *Land Act* Cap 280 (Laws of Kenya) provides as follows:-
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 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.
  2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—
    - a. the nature and extent of the default by the chargor;
    - 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;
    - 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 at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
    - d. the consequence 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.
42. In addition to the Statutory Notices under Section 90 of the *Land Act*, its Auctioneers also issued the Plaintiff with the forty-five (45) days' Redemption Notice and Notification of Sale on 27<sup>th</sup> November 2024 giving notice of the sale of the subject property by way of public auction on 11<sup>th</sup> February 2025.
43. The said Redemption Notice was issued pursuant to Rule 15(d) of the Auctioneers Rules, 1997 that stipulates that:-
- “Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property give in writing to the owner of the property a notice of not less than



forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction”

44. The Plaintiff did not dispute that there was an existing Legal Charge that was binding on him and the Defendant herein and that he was served with the requisite Statutory Notices. However, he questioned the validity, regularity and legality of the said Statutory Notices as they referred to recovery of Twenty One Million Nine Hundred and Five Thousand and Forty Eight Shillings and Seventy-Nine Cents (Kshs 21,905,048.79) when in essence he had repaid more than Twenty One Million Shillings (Kshs 21,000,000/=).
45. This was matter of evidence to be determined during trial. Indeed, both both the Plaintiff and the Defendant were required to prove their respective assertions as was envisaged in Section 107 (1) of the Evidence Act Cap 80 (Laws of Kenya) which states that:-
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of any facts which he asserts must prove that those facts exist.”
46. If at the conclusion of a trial a court was to determine that the statutory power of power had not crystallised, it would cause irreparable loss to a plaintiff. Indeed, the Plaintiff’s argument regarding the in duplum rule was pertinent to answer the question of how much was payable to the Defendant, it at all. There was need for the court to interrogate the same.
47. It was not enough that the Defendant was a stable national bank that would be able to monetarily compensate the Plaintiff at the conclusion of the trial. It was, therefore, in the interests of justice that this court exercises its discretion, on a balance of convenience, to issue an interlocutory order to conserve and preserve the subject property pending hearing and determination of the suit.
48. In arriving at the said conclusion, this court had due regard to the case of *Giella vs Cassman Brown* (1973) EA 360 that set out the conditions that must be met before an applicant could be granted an interlocutory injunction. These were as follows that an applicant must show:-
- a. That he had demonstrated a prima facie case with a probability of success.
  - b. That he would suffer irreparable injury, which could not adequately be compensated by an award of damages if the interlocutory injunction is not granted.
  - c. That if the court was in doubt, it would decide an application on the balance of convenience.”

## **Disposition**

49. For the foregoing reasons, the upshot of this court’s ruling was that the Plaintiff’s Notice of Motion application dated and filed on 6<sup>th</sup> February 2025 was merited and the same be and is hereby allowed in terms of Prayer No (3) therein on the following terms:-
1. That the Plaintiff files an Undertaking on payment of damages to the Defendant within thirty (30) days from the date of this Ruling.
  2. That as the interlocutory injunction cannot subsist beyond twelve (12) months, unless with the consent of the parties and/or further orders and/or directions of the court, it is hereby directed that the Plaintiff takes all necessary steps to prosecute his suit without any delay.
  3. That for the avoidance of doubt, in the event the Plaintiff shall not prosecute his case within the twelve (12) months as stipulated hereinabove, the interlocutory injunction will automatically lapse and the Defendant will be at liberty to realise its security without issuing the Statutory



Ninety (90) days' notice, forty (40) days' notice and forty-five (45) days Notification of Sale by the Auctioneers. The Defendant will, however, be required to notify the Plaintiff the date, time and venue of sale as he will still have the right to redeem the security before the Auctioneer's hammer falls.

4. That the costs of the said application will be in the cause.
  5. That pending the hearing and determination of the suit herein, the Plaintiff will deposit a sum of Kshs 100,000/= into a joint interest earning account in the name of his advocates and that of the advocates of the Defendant with effect from 5<sup>th</sup> January 2026 and on every 5<sup>th</sup> day of every subsequent month pending the hearing and determination of the suit herein and/or until further orders of the court.
50. To progress this matter further, it is hereby directed that the matter be listed for Pre-Trial Directions on 18<sup>th</sup> March 2026.
51. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 16<sup>TH</sup> DAY OF DECEMBER 2025**

**J. KAMAU**

**JUDGE**

