

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO E019 OF 2023

FLORENCE AKINYI OHITO PLAINTIFF/APPLICANT

- VERSUS -

CREDIT BANK LIMITED 1ST DEFENDANT/RESPONDENT

HEGEONS AUCTIONEERS 2ND DEFENDANT/RESPONDENT

R U L I N G

1. This ruling is in respect of the plaintiff's application dated **29/6/2025**. The same was brought under ***sections 1A, 1B, 3A & 63 of the Civil Procedure Act & Order 40 of the Civil Procedure Rules.***
2. The plaintiff sought to restrain the respondents from selling by public auction or private treaty her property known as **East Alego/Mur Ngiya/1633, 1634, 1789 and Kisumu/Manyatta A/3495** ('the suit properties'). She also sought that the defendants withdraw the various notices to sell/auction the suit properties.
3. The application was based on the grounds set out on the face of the Motion as well as the supporting affidavit of **FLORENCE AKINYI OHITO** sworn on the **29/6/2025**. She deposed that she and her husband obtained a loan of **Kshs. 11 million** from the 1st respondent which she defaulted in payment for 4 months leading the debt to rise to **Kshs. 21 million**.

4. That the intended sale by auction is illegal as the respondents have not followed the due process as she was not served with the mandatory statutory notices nor notified of the intended auction. That she will suffer irreparable loss and damage if the auction is allowed to proceed. That the properties listed in the valuation are way above the amount in default.
5. The application was opposed by a replying affidavit of **WAINAINA FRANCIS NGARUIYA** sworn on **7/7/2025**. He deposed that vide a contract signed on **12/6/2018**, the applicant obtained credit facilities of **Kshs. 22,000,000/-** from the 1st respondent for the purposes of taking over existing facilities previously provided to the applicant by Sidian Bank in the sum of **Kshs. 15,200,000/-**.
6. That the applicant and her spouse, **James Ouma Odera**, offered up the suit properties as security for the credit facilities advanced and consequently after her default, the 1st respondent commenced the process of recovery.
7. That on the **27/8/2025**, the 1st respondent issued the applicant the requisite statutory notices in accordance with **section 90 of the Land Act** vide registered post and subsequently instructed the 2nd respondent on the **23/4/2025** to carry out further steps in realization of the securities. That the 2nd respondent issued the applicant with a redemption notice and notification of sale on the **24/4/2025**. That it also carried out a valuation over the suit properties.

8. That the present suit and application is sub judice **Siaya ELC No. James Ouma Odera v Credit Bank & Florence Akinyi Ohito** which relates to the same loan transaction and land titles in issue herein.
9. The application was disposed of by way of written submissions however none of the parties had filed any submissions as at the time of writing this ruling.
10. I have considered the application and the response filed thereto. The first issue for determination is whether the application is *sub judice*.
11. The doctrine of sub judice is a legal principle that prevents courts from hearing a case if a similar matter is already pending in another court. Its purpose is to avoid conflicting decisions, prevent duplicate litigation and ensure the efficient administration of justice. This doctrine applies when the two cases involve the same parties, the same subject matter and a court has already taken cognizance of the first case. See the case of **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR.**
12. In the present case, though *sub judice* has been pleaded, the evidence attached to the 1st respondent's replying affidavit as "WFN 11" is not **Siaya ELC No. James Ouma Odera v Credit Bank & Florence Akinyi Ohito** as alleged but the instant application. Consequently, this allegation fails.

13. The principles for grant of temporary injunctions were settled in the case of **Giella –versus- Cassman Brown and Company Limited (1973) E.A 385**. These are that first; an applicant must show a prima facie case with a probability of success. Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. And thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

14. A *prima facie* case was defined in **Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125**, to be a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case

15. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal held: -

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is 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 ... 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."

16. In the present case, the applicant based her case on the alleged fact that the defendant intended to sell the suit properties without granting her the requisite mandatory statutory notices. She averred that she was not served with the mandatory statutory notices nor notified of the intended auction. However, the 1st respondent produced Statutory Notices dated **27/8/2025** that it had allegedly issued to the applicant vide registered post as well as various notices issued by the 2nd respondent dated **15/5/2025** issued to the applicant in realization of the securities.

17. The applicant did not file any further or subsequent affidavits to counter, deny or challenge the averments of the 1st respondent or those notices. That being the case, the evidentiary burden shifted back to the applicant to discharge which she failed to. Accordingly, her averments remain unproven.

18. It is not disputed that the applicant is in arrears of the loan she obtained from the 1st respondent. The 1st respondent is in the process of exercising its

statutory power of sale to recoup its outlay. It is trite that parties are bound by their contracts. It is not part of the Court's business to interfere in such circumstances unless one of the parties want to steal a march against the other. The Court will only interfere where one party is in breach of the terms of the contract.

19. The applicant having willingly obtained a loan from the 1st respondent. She offered the suit properties as security therefor. She has a duty to settle the same and in breach, the 1st respondent has the right to exercise its statutory power of sale as agreed under the contract.

20. Consequently, the applicant has failed to prove a prima facie case in her favour.

21. On the second principle of irreparable harm, in **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR**, the Court considered the *Halsbury's laws of England* on what irreparable loss is and stated that: -

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no

objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

22. The applicant needed to demonstrate that she was likely to suffer harm that cannot be compensated on monetary sums. In NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS [2014] eKLR, it was stated as follows on irreparable injury or damage: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. 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.”

23. In this case, the properties were offered as security for the advancement of the subject loan. It was agreed by the parties that in the event of default the same be sold in realization of the amount advanced plus interest. In the circumstances, those properties became chattels capable of being realized in the event of default. There has now been default. The 1st respondent is a stable financial institution with sufficient capacity to compensate the applicant in the event that she suffers loss.

24. As to the balance of convenience, the same tilts in favour of allowing the 1st respondent to recoup its outlay before the debt outstrips the security.

25. Accordingly, I find the application dated **29/6/2025** to be without merit and dismiss the same with costs.

It is so ordered.

DATED and **DELIVERED** at Kisumu this **19th** day of **December, 2025**.

A. MABEYA, FCI Arb

JUDGE