REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. E032 OF 2025

OKICON GENERAL WORKS LIMITED.....1ST PLAINTIFF

MOSES RONGOEI.....2ND PLAINTIFF

VERSUS

SBM BANK KENYA LIMITED.....1ST DEFENDANT

COLLINET AUCTIONEERS.....2ND DEFENDANT

RULING

1. Th Plaintiff's notice of motion dated 15th December, 2025 is expressed to be brought under *Order 40 Rules 1, 2, 3* and *4(1)* and *Order 50* of the *Civil Procedure Rules* and *Sections 1A, 3A* and *63(e)* of the *Civil Procedure Act* and all other enabling provisions of the law and seeks the following prayers:

    a. ***[Spent].***

    b. ***[Spent].***

    c. **The court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their agents or servants, officers, agents, employees from proceeding with the public auction of all that property known as Kisumu/Municipality/Block 12/434 scheduled for 19th December, 2025 pending the hearing and determination of this suit.**

d. The court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their agents or servants, officers, agents, employees from entering, trespassing, possessing, allocating, selling or offering for sale, constructing, developing or in any other manner whatsoever interfering with the Plaintiffs' quiet possession, use and enjoyment of all that property known as Kisumu/Municipality/Block 12/434 pending the hearing and determination of this suit.

e. That costs of this application be provided for.

2. The grounds on which the application is premised are set out on its face and are in precis that the Defendants have advertised the Plaintiffs' charged suit property in exercise of the 1st Defendant's exercise of its statutory power of sale yet there is an agreement between the parties executed on 6th October, 2025 that gives the Plaintiffs 90 days within which to redeem the property by paying an agreed amount of Ksh.62,000,000/-, which period has not lapsed.

3. The application is supported by the 2nd Plaintiff's affidavit sworn on 15th December, 2025, which in precis restates and expounds on the above grounds.

4. The application is opposed and to that end the Defendants filed a replying affidavit sworn by **Martha Kanyinge** on 18th December, 2025.

5. In her affidavit, **Ms. Kanyinge** states on oath that the Plaintiffs have previously filed two other suits that have been determined by this court and hence that the matters raised in the suit and the application are *res judicata.*

6. The said deponent further states that the parties herein entered into an agreement dated 6th October, 2025 pursuant to which the 1st Defendant agreed to withhold the exercise of its statutory power of sale, subject to compliance by the Plaintiff of the terms of the agreement and that following the failure by the Plaintiffs to comply with the same, the exercise of the 1st Defendant's statutory power of sale crystallized.

7. The application was canvassed by way of brief oral submissions.

8. **Mr. Kipkorir,** learned Counsel for the Plaintiffs readily admitted that there have been two previous suits between the parties over the same subject matter, save that the two suits were not premised on the agreement of 6th October, 2025.

9. While conceding that the issues of statutory notices have previously been determined in the past suits, Counsel urged that the reliefs sought be granted, basing the same on two pronged arguments, first, that the agreement gave the Plaintiffs 90 days to complete the sale by private treaty and that the period has not lapsed and second, that the 2nd Plaintiff

is a person living with disabilities and resides on the suit property with his family and is likely to lose his home if injunctive relief is not granted.

10. On his part, in opposing the application, **Mr. Bwire,** learned Counsel for the Respondents submitted that whereas the agreement of 6th October, 2025 provided for a period of 90 days for completion, the Plaintiffs were in breach of clause 4 thereof, despite reminders by the 1st Defendant. Clause 4 dictated that:

> **"4. Release and discharge of title relating to property LR. No. Kisumu Municipality Block 12/434 currently held by the bank be done upon receipt of Ksh.62,000,000/- being the full and final settlement amount from sale proceeds of property LR. No. Kisumu Municipality Block 12/434 or an acceptable bank undertaking within 7 days from the date of this offer."**

11. **Mr. Bwire** further submitted that the 1st Plaintiffs' ground that he is disabled and may lose his home is not tenable as he knowingly offered the property as security and the natural consequences of defaulting – the exercise of statutory power of sale – then follows.

12. Counsel relied on the case of ***Andrew Muriuki Wanjohi v Equity Building Society [2006] eKLR*** in which the Court of Appeal addressed the legal position of a person who

voluntarily offers property as security for a loan and later seeks to restrain the chargee from exercising its statutory power of sale.

13. The court held that once a chargor offers property as security, that property becomes a commercial commodity, whose value is ascertainable in monetary terms.

14. Consequently, the chargor cannot later turn around and claim irreparable loss on the basis that the property is unique, sentimental, ancestral or of special personal attachment. By charging the property, the chargor converts it into a negotiable asset meant to answer for the debt in the event of default.

15. The court further stated that the loss of charged property is compensable by damages, and therefore does not ordinarily meet the threshold of irreparable harm required for the grant of an injunction. Equity will not intervene to protect a party from the consequences of a contract freely entered into, particularly where the borrower is in default and the lender is merely seeking to realize its security in accordance with the law.

16. In essence, the holding underscores the principle that a chargor cannot approbate and reprobate, having enjoyed the benefit of the loan secured by the property, they must also

bear the risk of losing that property upon default, subject only to the chargee's compliance with the law.

17. I have considered the application, the affidavits by the parties and the annextures thereto. The issue for determination is whether the Plaintiffs have met the requisite conditions for the grant of temporary injunctive relief.

18. I will first want to state that the Plaintiffs are guilty of material non-disclosure for failing to plead in the plaint that there have been previous suits pitting the same parties over the same subject matter.

19. The courts have held that a litigant is under an obligation to disclose all material facts, including the existence of prior or pending suits on the same matter, when instituting proceedings.

20. In ***Munene v Church Commissioner for Kenya & 3 others [2023],*** the court reiterated that the duty to disclose the existence of a previous suit exists to protect judicial process from being "clogged" by multiplicity of suits and to uphold doctrines that prevent inconsistent judgments.

21. The failure by the Plaintiffs to disclose, in their plaint, the existence of two previous suits between the same parties over the same subject matter is not a trivial omission. It goes to the root of the court's process. Litigation is not a game of hide and

seek, and a party who approaches the court is under a duty of full and frank disclosure. The omission was only brought to light through the replying affidavit and candid concession by Counsel for the Plaintiffs. Such conduct borders on abuse of the court process and disentitles a party from equitable relief, for equity aids the vigilant, not the indolent, and demands clean hands.

22. That notwithstanding, even if I were to overlook the Plaintiffs' material non-disclosure, this application must still stand or fall on the well-settled principles governing the grant of interlocutory injunctions. Those principles were enunciated in ***Giella v Cassman Brown & Co. Ltd [1973] EA 358*** and later restated and clarified by the Court of Appeal in ***Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR.***

23. Under ***Giella*****,** an applicant must first establish a *prima facie* case with a probability of success. Secondly, the applicant must demonstrate that unless the injunction is granted, he will suffer irreparable injury that cannot be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

24. In ***Nguruman*****,** the Court of Appeal emphasized that these conditions are sequential and distinct and that the second and

third limbs cannot be considered unless the first limb is satisfied.

25. I therefore begin with the question whether the Plaintiffs have established a prima facie case. It is not in dispute that the suit property was offered as security for a loan. It is also not in dispute that the Plaintiffs defaulted and that the 1st Defendant commenced the process of realization of the security.

26. Indeed, Counsel for the Plaintiffs conceded that issues relating to statutory notices and the exercise of the statutory power of sale have been litigated before and determined in previous suits between the same parties.

27. The Plaintiffs anchor their present case on the agreement dated 6th October, 2025. However, that agreement was not unconditional. Clause 4 thereof was explicit that the release of the title was contingent upon receipt of Ksh.62,000,000/- being the full and final settlement amount or an acceptable bank undertaking within seven days.

28. It is not contested that the Plaintiffs did not comply with that clause. In those circumstances, the indulgence extended by the 1st Defendant stood withdrawn and the statutory power of sale re-crystallized.

29. A *prima facie* case is not established by mere assertions or sympathy-inducing circumstances. It must be grounded on a demonstrable infringement of a legal right that calls for rebuttal. On the material placed before this court, I am unable to discern any right of the Plaintiffs that has been violated or is threatened with violation unlawfully. The Defendants are merely seeking to exercise a contractual and statutory right arising from the Plaintiffs' own default. I therefore find that no *prima facie* case with a probability of success has been established.

30. Having failed on the first limb, the application would ordinarily fail outright, as held in ***Nguruman*** where the Court of Appeal stated that if no *prima facie* case is shown, the court should not proceed to consider irreparable harm or balance of convenience. However, even if I were to consider the second limb, the application would still falter.

31. The Plaintiffs urged that the 2nd Plaintiff is a person living with disabilities and that the suit property is his family home. While this court is not insensitive to such circumstances, the law on this point is settled. In ***Andrew Muriuki Wanjohi*** (supra), the Court of Appeal held that once a chargor voluntarily offers property as security, that property becomes a commercial commodity and its loss is compensable by damages.

32. Sentiment, attachment or the fact that it is a family home does not convert such loss into irreparable harm. What the Plaintiffs are asking the court to do is to re-write the contract of 6th October, 2025, which this court has no mandate to do. The principle that the court cannot rewrite a contract for the parties is clearly stated in ***Andrew Muriuki Wanjohi.***

33. The Plaintiffs knowingly charged the suit property and enjoyed the benefit of the loan. They cannot now approbate and reprobate by seeking the court's protection from the very consequences they contemplated at the time of contracting. Any loss they may suffer is quantifiable and compensable in damages. Irreparable harm has therefore not been demonstrated.

34. On the balance of convenience, even if this court were in doubt, which it is not, the scale would still tilt in favour of the Defendants. The Plaintiffs are in admitted default, have previously litigated the same issues, failed to honour the terms of the agreement they now rely on and withheld material facts from the court. On the other hand, the Defendants are seeking to realize their security in accordance with the law. To restrain them would be to rewrite the parties' contract and reward default.

35. In the totality of the foregoing, I find that the Plaintiffs have failed to satisfy any of the conditions set out in ***Giella*** and

reaffirmed in ***Nguruman*****.** The application is further tainted by material non-disclosure and abuse of the court process.

36. The notice of motion dated 15th December, 2025 is devoid of merit and is hereby dismissed with costs to the Respondents.

DELIVERED (virtually), DATED & SIGNED this 19th December, 2025.

JOE M. OMIDO

JUDGE

FOR PLAINTIFFS: **Mr. Kipkorir.**

FOR DEFENDANTS: **Mr. Bwire.**

COURT ASSISTANTS: **Mr. Juma** & **Mr. Ngoge.**

Court: This matter will be mentioned on 12th February, 2026 for pretrial directions.

JOE M. OMIDO

JUDGE