

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E054 OF 2025**

PASAIBA TOURMALINE LIMITED.....1<sup>ST</sup> PLAINTIFF

AMOS KIPKOECH.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

BUSINESS PARTNERS INTERNATIONAL

KENYA (II) LIMITED.....1<sup>ST</sup> DEFENDANT

REGENT AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT

**RULING**

1. The plaintiffs filed a Notice of Motion application dated 30<sup>th</sup> January 2025 pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and all other enabling powers and provisions of the law. The plaintiffs seek an order of temporary injunction restraining the defendants, their servants, agents or any persons acting under their authority from proceeding with the intended auction of the property known as Apartment No. 7 on L.R. No. 330/1057, Thompson 2 Apartments, Thompson Estate, Nairobi County, pending the hearing and determination of this suit. They also seek an order restraining the defendants from evicting the 2<sup>nd</sup> plaintiff from the said apartment pending the determination of this suit.
  
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Amos Kipkoech, the 2<sup>nd</sup> plaintiff herein and a Director of the 1<sup>st</sup> plaintiff company. Mr. Kipkoech

averred that the 2<sup>nd</sup> defendant, acting as an agent of the 1<sup>st</sup> defendant, advertised the suit property, Apartment No. 7 on L.R. No. 330/1057, Thompson 2 Apartments, Nairobi, for sale by public auction vide a Newspaper Notice dated 27<sup>th</sup> January 2025. He stated that the house had been charged to the 1<sup>st</sup> defendant as security for two loan facilities advanced to the 1<sup>st</sup> plaintiff pursuant to an approval letter dated 19<sup>th</sup> September 2019, namely an Investment loan of Kshs.28,500,000/= and a technical assistance loan of Kshs.3,100,000/=, both secured by the same property.

3. Mr. Kipkoech stated that whereas the investment loan attracted interest, the technical assistance loan did not. He deposed that despite business challenges, they have diligently repaid a total of Kshs.37,103,240.85, which exceeds the cumulative principal of Kshs.31,600,000/=. He further deposed that by a letter dated 23<sup>rd</sup> January 2025, the defendants demanded Kshs.37,029,930.78 and threatened to auction the suit property on 12<sup>th</sup> February 2025. He stated that they challenge the intended sale on grounds that no Statutory Notices were served, that the technical assistance loan has been overpaid, that the total amounts demanded are grossly excessive and would result in repayment of more than double the principal sum advanced, and that the defendants are in breach of the *in duplum* rule. He stated that unless the Court grants the orders being sought herein, they will suffer irreparable loss and this suit will be rendered nugatory.
4. In opposition to the application, the defendants filed a replying affidavit sworn on 17<sup>th</sup> February 2025 by Ms Jenipher Wanjiku Odek, the 1<sup>st</sup> defendant's Portfolio Manager. Ms Odek averred that the 1<sup>st</sup> plaintiff was granted a loan facility of Kshs.28,500,000/= in September 2020, secured by a third-party charge over the 2<sup>nd</sup> plaintiff's property Apartment No. 7 on L.R. No.

330/1057, Thompson 2 Apartments, together with a debenture over movable assets and personal guarantees. She averred that the 1<sup>st</sup> plaintiff defaulted on its loan repayment obligations, prompting the 1<sup>st</sup> defendant to initiate recovery proceedings in accordance with the Land Act, 2012, including issuance of Statutory Notices, a 40-day Notice to Sell, a Redemption Notice and property valuation.

5. Ms Odek stated that despite attempts to negotiate repayment through an acknowledgment of debt and payment agreement dated 2<sup>nd</sup> April 2024, the 1<sup>st</sup> plaintiff failed to honour the repayment schedule, leading the 1<sup>st</sup> defendant to seek and obtain a Court Order on 6<sup>th</sup> December 2024 for peaceful possession of the property to facilitate its sale. She further stated that the plaintiffs have not demonstrated full repayment of the sums advanced, have not established a *prima facie* case and have misrepresented material facts to the Court, including their default status and prior proceedings in **HCCOMM Misc. App No. E420 of 2024**. She maintained that all legal prerequisites for the sale of the suit property have been met and that any loss that the plaintiffs may suffer can be compensated by damages. In addition, Ms Odek asserted that the balance of convenience tilts in favour of the defendants.
6. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed on 4<sup>th</sup> March 2025 by the law firm of Taliti Collins Advocates, while the defendants' submissions were filed on 26<sup>th</sup> March 2025 by the law firm of Kimondo, Gachoka & Company Advocates.
7. Mr. Taliti, learned Counsel for the plaintiffs submitted that the defendants' reliance on proceedings in **HCCOMM MISC. APP NO. E420 of 2024** is misplaced, as the said application dealt only with procedural issues and did not address the substantive issues surrounding the *in duplum* rule, which

remains unlitigated, thus the said Rule cannot be barred under the doctrine of *res judicata*. He argued that no defence has been filed by the defendants in this suit, therefore no valid Preliminary Objection can arise. Counsel maintained that any Agreement contrary to the *in duplum* rule is illegal and unenforceable, and urged the Court to grant the orders being sought herein.

8. Ms Mburu, learned Counsel for the defendants submitted that the plaintiffs have not satisfied the principles for being granted a temporary injunction as set out in the case of **Giella v Cassman Brown** [1973] EA 358 and reaffirmed by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] KECA 606 (KLR). She argued that the plaintiffs have not established a *prima facie* case, noting that they willingly secured the loan advanced to the 1<sup>st</sup> plaintiff, repeatedly defaulted, and subsequently acknowledged their indebtedness through the acknowledgment of debt and payment agreement dated 2<sup>nd</sup> April 2024. Counsel maintained that the plaintiffs' allegations of overpayment and disputes relating to the interest chargeable on the technical assistance loan are unsubstantiated, as the 19% interest rate was expressly provided in the term sheet and reaffirmed in the acknowledgment of debt.
9. Relying on the Court's holding in the case of **Harris Samuel Wainaina v Housing Finance Company of Kenya Limited** [2006] KEHC 1789 (KLR), Ms Mburu submitted that a dispute over the amount owing does not warrant injunctive relief. She submitted that the defendants complied with Sections 90 and 96 of the Land Act by issuing all requisite Statutory Notices, and that their statutory power of sale had lawfully crystallized due to persistent default. On the plaintiffs' reliance on the *in duplum* rule, Counsel submitted that Section 44A of the Banking Act and the Court of Appeal's decision in **Kenya**

**Hotels Ltd v Oriental Commercial Bank Limited (Formerly known as The Delphis Bank Limited)** [2019] KECA 250 (KLR), support the defendants' position, noting that the plaintiffs voluntarily acknowledged an indebtedness of Kshs.50,563,492.42 as at 27<sup>th</sup> March 2024. She stated that interest continued to accrue at the agreed contractual rate and has not exceeded the principal amount.

10. Counsel contended that the plaintiffs have not demonstrated irreparable harm, as any loss arising from a sale of the suit property is quantifiable and compensable by damages. She asserted that the balance of convenience tilts in favour of the 1<sup>st</sup> defendant, who is entitled to realize its security.
11. Ms Mburu also submitted that the plaintiffs approached the Court with unclean hands, having failed to disclose material facts including prior statutory notices, repayment proposals, their admitted indebtedness, and the Court's findings in the case of **HCCOMM E420 of 2024**. Citing the Court of Appeal case of **Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 others** [1998] KECA 255 (KLR), she argued that such non-disclosure disentitles the plaintiffs from the reliefs being sought herein.

#### **ANALYSIS AND DETERMINATION.**

12. Upon consideration of the application herein, the affidavits filed in support thereof, the replying affidavit by the defendants and the written submissions by Counsel for the parties, the issue that arises for determination is whether the plaintiffs have established a case for being granted an order of temporary injunction.
13. Interlocutory injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010, which states as hereunder –

*Where in any suit it is proved by affidavit or otherwise-*

*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.*

14. In an application for an interlocutory injunction, the onus is on the applicant to satisfy the Court that it should grant an injunction. The conditions to be considered when dealing with an application for temporary injunction were well settled in the case of **Giella v Cassman Brown & Company Limited** (supra), where the Court held as follows-

*Firstly, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.*

15. What constitutes a *prima facie* case was considered by the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] KECA 175 (KLR), as hereunder -

***So what is a prima facie case? I would say that in civil cases it 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 as 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.***

16. The plaintiffs herein have challenged the 1<sup>st</sup> defendant's exercise of its statutory power of sale over the suit property on the grounds that they were not served with the requisite Statutory Notices under Sections 90 and 96 of the Land Act, that the technical assistance loan was non-interest-bearing and has already been fully repaid, and that the total demand of Kshs.37,029,930.78 is excessive and violates the *in duplum* rule.
17. In opposition to the orders being sought herein, the defendants maintain that all Statutory Notices were duly served and that the plaintiffs persistently defaulted on their loan repayment obligations. They further asserted that the plaintiffs expressly acknowledged their indebtedness through an acknowledgment of debt dated 2<sup>nd</sup> April 2024, and contended that the agreed interest rate of 19% is contractual and remains within the limits allowed by law.

18. Upon perusal of the documents annexed to the defendants' replying affidavit, it is evident that the 1<sup>st</sup> defendant issued the plaintiffs with a 90-days' Statutory Notice dated 27<sup>th</sup> September 2021, which was dispatched to the 1<sup>st</sup> plaintiff via registered post on 5<sup>th</sup> October 2021. The 1<sup>st</sup> defendant thereafter issued a 40-days' Notice of Sale to the plaintiffs vide a letter dated 14<sup>th</sup> February 2022. The copy on record bears the 1<sup>st</sup> plaintiff's official stamp, confirming receipt. The defendants have further annexed a 45-days' Redemption Notice dated 11<sup>th</sup> October 2022 issued by the 2<sup>nd</sup> defendant to the plaintiffs. Despite the existence of the latter Notice, there is however no evidence filed before this Court to demonstrate that the 45-days' Notice Redemption was duly served upon the plaintiffs.
19. In addition to the foregoing, this Court notes from the documents filed herein that there exists a substantive dispute as to whether the plaintiffs remain indebted to the 1<sup>st</sup> defendant. The plaintiffs argued that despite financial difficulties, they have remitted a total of Kshs.37,103,240.85, an amount exceeding the cumulative principal of Kshs.31,600,000/=, and therefore contend that any further recovery is contrary to Section 44A of the Banking Act on the *in duplum* rule. The defendants, however, maintained that the plaintiffs expressly admitted their indebtedness to the 1<sup>st</sup> defendant in the acknowledgment of debt and payment agreement dated 2<sup>nd</sup> April 2024. They asserted that the applicable 19% interest rate was clearly set out in the term sheet and reaffirmed in the said acknowledgment.
20. On the *in duplum* rule, the defendants argued that since the plaintiffs voluntarily acknowledged owing the 1<sup>st</sup> defendant Kshs.50,563,492.42 as at 27<sup>th</sup> March 2024, the Rule cannot operate to bar recovery of the outstanding debt. They further contended that interest has continued to accrue strictly in

accordance with the agreed contractual rate and has not exceeded the principal amount.

21. In light of the analysis I have made herebefore, it is my finding that the issues raised involve substantive questions that must be conclusively resolved before determining whether the plaintiffs' right of redemption over the suit property had been extinguished and whether the 1<sup>st</sup> defendant's statutory power of sale had properly crystallized. Accordingly, this Court is satisfied that the plaintiffs have established an arguable claim that justifies the preservation of the suit property pending the hearing and determination of this suit.
22. In the circumstances, I am persuaded that the plaintiff has established a *prima facie* case with a probability of success.
23. As to whether the plaintiffs stand to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed, this Court finds that having demonstrated that the plaintiffs have a *prima facie* case with a probability of success, in the event that the instant application is disallowed, the suit property will be sold on an uncertainty, thus infringing on the plaintiffs' right to property enshrined under Article 40 of the Constitution of Kenya. In line with the Court of Appeal's holding in the case of **Muiruri v Bank of Baroda (Kenya) LTD** [2000] K.L.R 183 cited by the Court in the case of **Peter Kimani Nene v Kenya Commercial Bank Limited** [2016] KEELC 99 (KLR), where it was held-  
*...disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss*

24. Courts are reminded to consider the fact that selling of a person's property amounts to infringing on the person's right to own property as enshrined under Article 40 of the Constitution of Kenya, 2010, especially where an applicant has established a *prima facie* case with a probability of success. In any event, at this juncture, this Court cannot ascertain whether or not the 1<sup>st</sup> defendant's exercise of its statutory power of sale over the suit property had accrued to warrant the sale of the suit property.
25. This Court further notes that the suit property is still charged to the 1<sup>st</sup> defendant, and it has not alleged that the outstanding loan amount has outstripped, or is on the verge of outstripping the security, for this Court to conclude that the 1<sup>st</sup> defendant stands to be prejudiced in the event that the orders being sought herein are granted. In the premise, I am persuaded that the plaintiffs have demonstrated that in the event that the orders sought herein are not granted, they will suffer damages that cannot be adequately compensated by an award of damages.
26. The issue of balance of convenience does not arise since the Court is not in doubt. Nevertheless, based on the analysis I have made, the balance of convenience tilts in favour of the plaintiffs.
27. The upshot is that the plaintiffs' application dated 30<sup>th</sup> January 2025 is merited. It is hereby allowed in the following terms –
- i) I hereby grant an order of injunction restraining the defendants, their servants, agents or any persons acting under their authority from selling by public auction or private treaty, evicting or in any other manner interfering with the plaintiffs' possession of Apartment**

**No. 7 on L.R. No. 330/1057, Thompson 2 Apartments, pending the hearing and determination of this suit; and**

**ii) Costs shall be in the cause.**

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 18<sup>th</sup> day of December 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**  
**JUDGE**

**In the presence of:-**

Mr. Kuria h/b for Mr. Taliti for the plaintiff's/applicants

Ms Mbirio h/b for Ms Mburu for the defendants/respondents

Ms B. Wokabi – Court Assistant.