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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL CASE NO. E027 OF 2022**

**EQUIP AGENCIES LIMITED ..... 1<sup>ST</sup>**  
**PLAINTIFF/APPLICANT**

**DAVYESH INDUBHAI PATEL ..... 2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**

**VEENAY DIVYESH PATEL ..... 3<sup>RD</sup>**  
**PLAINTIFF/APPLICANT**

**=VERSUS=**

**BANK OF INDIA ..... 1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**

**HEZRON GETUMA ONSONGO T/A**

**HEGEONS AUCTIONEERS ..... 2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**  
**M/S Omondi Odegi & Co. Advocates**  
**M/S Mahida & Maina Co. Advocates**

**RULING**

1. Before the Court is a notice of motion under certificate of urgency dated 15<sup>th</sup> October 2025 expressed under Section 1A, 1B and 3A of the Civil Procedure Act and Pursuant to Sections 90, 96 & 97 of the Land act 2012 and pursuant to Order 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and pursuant to Article 40, 47, 48 and 50[1] and 258 of the Constitution 2010 and all enabling provisions of the Law. The application is seeking for the following orders:

- (a) Spent
- (b) Pending the hearing and determination of the instant application, this Honourable court be do issue and/or grant an order of temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/ Respondents, its servants, agents from advertising for sale, selling vide Public Auction and/or Private Treaty disposing of, alienating, interfering, taking possession of, or in any way interfering with the Plaintiff/Applicant's property known as ELDORET MUNICIPALITY/ BLOCK 4/28.
- (c) In the alternative and without prejudice to the foregoing, this Honourable Court do issue and/or grant an order of maintenance of status quo with a view to preserve and/or conserve the suit property known as ELDORET MUNICIPALITY/BLOCK 4/28, pending the hearing and determination of the instant application.
- (d) The Honourable Court do issue and/or grant an Order of temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents, its servants, agents from advertising for sale, selling vide Public Auction and/or Private Treaty, disposing or alienating, transferring, taking possession of, or in any way interfering with the Plaintiffs'/Applicants' property known as ELDORET MUNICIPALITY/BLOCK 4/28 pending the hearing and determination of the instant suit.
- (e) Further in the alternative and without prejudice to the foregoing prayers, this Honourable Court do issue and/or grant an order of maintenance of status quo with a view to preserve and/or conserve the suit property known as ELDORET MUNICIPALITY/BLOCK 4/28 pending the hearing and determination of the instant suit.
- (f) Costs of this application be borne by the Defendants/Respondents.
- (g) Any other or further orders as this Honourable Court may deem fit and expedient so to grant.

2. Which application is premised and/or based on the following grounds:

- (a) The 1<sup>st</sup> Defendant/Respondent advanced to and in favour of the Plaintiff's loan facility of Kshs 32,000,000.00 secured by a legal charge over and in respect of property known as Eldoret Municipality/Block 4/28.
- (b) Moreover, 1<sup>st</sup> Defendant/Respondent has unlawfully purported to and indeed recalled the entire facility and commenced realization of the security without compliance with the mandatory provisions of the Land Act 2012 [2016].
- (c) Additionally, the 1<sup>st</sup> Defendant/Respondent issued a purported 90-day statutory notice contrary to the provisions of Section 90(2) of the Land Act, which mandatorily requires a notice period of three calendar months, thus rendering the notice defective and invalid.
- (d) For clarity, the 1<sup>st</sup> Defendant/Respondent has not issued a Secondary Notice under provisions of Section 96(2) of the Land Act, being the notice of intention to sell, before instructing the 2<sup>nd</sup> Defendant/Respondent to issue and serve a 45-day redemption notice.
- (e) Arising from the failure the secondary notice pursuant to Section 96(2) of the Land Act, the 1<sup>st</sup> Defendant/Respondent through the 2<sup>nd</sup> Defendant/Respondent has since issued a Redemption Notice dated 8<sup>th</sup> September 2025, which is premature, illegal, and of no legal effect, having been issued in absence of a valid Section 96(2) notice.
- (f) Furthermore, the 1<sup>st</sup> Defendant/Respondent has failed to comply with the provisions of Section 97(2) of the Land Act by not undertaking a current independent valuation to determine the market and forced sale value of the charged property before the purported sale.
- (g) Notwithstanding the foregoing the 1<sup>st</sup> Defendant/Respondent has mismanaged the loan account by prematurely recalling the entire outstanding sum and failing to account for substantial repayments

made by the Plaintiffs/Applicants totaling Kshs 19,416,000.00 between January 2024 and October 2025.

(h) Simply put, that the purported realization process is tainted with illegality, procedural impropriety and bad faith, and if not stopped, will result in the unlawful loss of the Plaintiffs'/Applicants' valuable property.

(i) At any rate, the Plaintiffs/Applicants stand to suffer irreparable loss and damage, incapable of being adequately compensated by damages, should the 1<sup>st</sup> Defendant/Respondent proceed with the impugned sale.

(j) In the premises, it is in the interest of justice that this Honourable Court intervenes to preserve the subject property pending the determination of this suit.

(k) In a nutshell this Honourable Court do grant the orders sought herein above ex-Debito-Justitiae.

3. The application is supported by an affidavit sworn by Divyesh Indubhai Patel who depones as follows:

(a) That I am a Director of the 1<sup>st</sup> Plaintiff/Applicant duly authorized to swear this affidavit on my own and on behalf of the other Plaintiffs hence competent to depone hereto.

(b) That by a letter of offer dated 12<sup>th</sup> September 2023 the 1<sup>st</sup> Defendant/Respondent advanced to the Plaintiffs a financial facility of Kenya Shillings Thirty-Two Million (Kshs 32,000,000.00) secured by a Legal Charge registered over and in respect of Title No. Eldoret Municipality/Block 4/28 in the name of the 1<sup>st</sup> Plaintiff.

(c) That the said [sic] facility was to be served through the Plaintiffs'/Applicants' business proceeds in a structured manner, and the Plaintiff/Applicants have since made several payments and partial settlements toward realization and/or reduction of the loan account. For clarity, the Plaintiffs/Applicants have made substantial payments to the tune of Kshs 19,416,000.00/= only to date.

- (d) That other than the foregoing on or about 30<sup>th</sup> January 2025, the 1<sup>st</sup> Defendant/Respondent without justification, recalled the entire outstanding sum of Kshs 32,273,589.00 demanding full settlement contrary to the agreed repayment structure and despite ongoing payments.
- (e) That subsequent to the recall, the 1<sup>st</sup> Defendant/Respondent further issued a purported 90-day statutory notice, which was not compliant with the provisions of Section 90(2)(b) of the Land Act 2012. For clarity, the said Section mandatorily requires a three-month notice, and therefore the notice issued is defective, invalid and of no legal consequence.
- (f) That further, no secondary notice under the provisions of Section 96(2) of the Land Act was ever served upon the Plaintiffs/Respondents notifying of the 1<sup>st</sup> Defendant's/Respondent's intention to sell the charged property. To this end, the absence of this notice renders the 1<sup>st</sup> defendant's/Respondent's subsequent actions illegal and premature.
- (g) That despite the foregoing, the 1<sup>st</sup> Defendant/Respondent has since retained and/or instructed the 2<sup>nd</sup> Defendant/Respondent, who proceeded to issue a 45-day redemption notice dated 8<sup>th</sup> September 2025, scheduling a Public Auction for 7<sup>th</sup> November 2025 in blatant violation of the mandatory statutory procedure.
- (h) That suffice to say that the 1<sup>st</sup> Defendant/Respondent herein has failed to comply with the mandatory provisions of Section 97(2) of the Land Act, which requires a current independent valuation to determine the market and forced sale value before any intended sale.
- (i) That the only valuation relied upon by the 2<sup>nd</sup> Defendant/Respondent is the one embedded in the Redemption Notice indicating a "forced sale value" of Kshs 41,350,000,00 which

is not a professional or current report as envisaged and/or required by law.

- (j) That other than the foregoing irregularities, the 1<sup>st</sup> Defendant/Respondent has mismanaged the loan account by prematurely recalling the entire facility and falling to properly account for repayments made by the Plaintiffs/Applicants. To this end, the account statements have not been availed despite repeated requests.
- (k) That in view of the foregoing, the 1<sup>st</sup> Defendant's/Respondent's conduct has caused the Plaintiffs/Applicants immense financial distress and uncertainty, and unless restrained by this Honourable Court, the 1<sup>st</sup> Defendant's/Respondent's illegal actions will result in the loss of the Plaintiffs'/Applicants' valuable property.
- (l) That unless this Honourable Court intervenes and issues injunctive orders, the 1<sup>st</sup> Defendant/Respondent will unlawfully sell the Plaintiffs'/Applicants' property, causing irreparable loss that cannot be compensated by damages.
- (m) That it is therefore just, fair and in the interest of justice that the orders sought in the Notice of Motion dated the 15<sup>th</sup> October 2025 be granted.
- (n) That I swear this affidavit in support of the Plaintiffs'/Applicants' application seeking temporary injunctive orders to with a view to restrain the Defendants/Respondents, its agents and auctioneers from selling, alienating or interfering with the property Eldoret Municipality/Block 4/28 pending the hearing and determination of this suit.
- (o) That what is deponed to herein above are true and within my knowledge save where otherwise stated in which case the averments are true to the best of my information and belief sources thereof having being provided.

**2.** In opposition to the Notice of Motion the 1<sup>st</sup> Respondent filed a replying affidavit sworn by Sanjei Kumar in which he stated as follows on oath:

- a) THAT I have read and understood the Plaintiffs' /Applicants' (hereinafter 'the Applicants') Notice of Motion application dated 15th October 2025 (hereinafter "the application") alongside the Supporting Affidavit of DIVYESH INDUBHAI PATEL and swear this Replying Affidavit in response to and in opposition to the said application and the averments in the supporting affidavit.
- b) THAT the Respondent presents that the Applicants' application is an abuse of this Honourable Courts process and the same should be dismissed with costs to the Respondents.
- c) THAT the Applicants have, in their application, misrepresented and/or concealed material facts pertaining to this matter in a veiled attempt to mislead this Honourable Court.
- d) THAT by way of background and summary. I present the following as regards the facts of this matter
  - a. The 2<sup>nd</sup> and 3<sup>rd</sup> Applicants are the Borrowers in the instant transaction
  - b. The Bank of India, vide its Letter of Offer dated 20th September 2023, sanctioned and granted Banking Facilities to the Borrower. (Annexed hereto and marked as SK 1 is a copy of the Offer letter dated 20<sup>th</sup> September 2023)
  - c. The banking facilities, aggregating to the total sum of Kenya Shillings Thirty-Two Million Only (KShs. 32,000,000.00), was secured by a charge over the property title No., Eldoret Municipality/Block 4/28, registered in the name of the 1<sup>st</sup> Applicant, with the charge indicated in the encumbrance section of the title. (Annexed hereto and marked ay SK 2 a is a copy of the charge dated 3<sup>rd</sup> October 2023 registered over the property and SK 3 is a copy of the Title charged to the Rank)

- d. The Applicant breached the terms of the facilities granted by the Bank by being in persistent default in repaying the mentioned facilities, with arrears amounting to Kshs. 32,273,589.00, exclusive of accrued interest from the date the account was classified as a non-performing account on 29<sup>th</sup> January 2025. (Annexed hereto and marked as SK4 are copies of the Applicant's Bank account statements showing the outstanding amount as of 7<sup>th</sup> November 2025)
- e. The last payment to the Applicants' loan account was made on 30<sup>th</sup> December 2024, and since then, the Applicant has failed to make any further payments toward settlement of the arrears.
- e) THAT in response to paragraph 4 of the Supporting Affidavit, the Letter of Offer expressly provided that the Applicant was to repay the facilities in Ninety-six (96) equal monthly installments of Kenya Shillings Five Hundred Sixty-Five Thousand and Thirty-Three (Kshs.565,033.00) each. and that any default in payment of the said installments entitled the 1<sup>st</sup> Respondent to demand immediate repayment of the entire outstanding amount.
- f) THAT the Applicant failed, neglected and or refused to repay the facilities as per the required monthly instalment. as evidenced by the ledger account/schedule annexed to the Applicant's supporting affidavit, thereby rendering the recall of the facility lawful, justified, and in accordance with the terms and conditions of the Letter of Offer and Charge.
- g) THAT the payments allegedly made by the Applicant are not sufficient to offset the outstanding loan balance, and the amount owed to the 1<sup>st</sup> Respondent therefore remains due and outstanding.
- h) THAT despite several reminders by the Bank to the Applicant to make repayments. And regularize their account, the Applicant continued to be in default and failed to pay the outstanding

amount after which the Bank issued the Applicant with a thirty (30) day notice dated 30th January 2025 notifying the Applicant that its account had been classified as non-performing which notice was ignored. (Annexed hereto and marked as SK.5 is the thirty (30) days' Notice).

- i) THAT the Applicant's persistent breach of the terms of the facilities as granted compelled the Bank to institute and exercise the remedies available to it by law and as condensed in Sections 90 and 96 of the Land Act, No.6 of 2012 by issuance of the Statutory Demand Notice dated 4<sup>th</sup> March 2025 and Statutory Notice of Intention to Sell dated 25<sup>th</sup> June 2025. (Annexed hereto and marked as SK 6/a and are the Statutory Demand Notice dated 4<sup>th</sup> March 2025 and Statutory Notice of Intention to Sell dated 25<sup>th</sup> June 2025).
- j) THAT the Statutory Demand Notice and Statutory Notice of Intention to Sell were duly served upon the Applicant through registered post to the Applicants' registered postal address, as indicated in the official CR12 for Equip Agencies Ltd, the Applicant herein, and via the Applicants' email address. (Annexed hereto and marked as SK7 is a copy of the official CR12 search for Equip Agencies Ltd. SK8(a and b) are the corresponding payment receipts for postage of the Statutory Demand Notice and Statutory Notice of Intention to Sell and SK 9 is a copy of the email forwarding the said notices to the Applicants)
- k) THAT I am advised by my advocates on record which advice I believe to be true that contrary to paragraphs 5 and 6 of the Supporting Affidavit, the 1<sup>st</sup> Respondent duly issued all the requisite statutory notices to the Applicant as required by law and in accordance with the terms of the Charge, having issued the Notice of Intention to Sell upon the lapse of the Statutory Notice to Exercise the Statutory Power of Sale, and further

granted the Applicant sufficient time, exceeding three calendar months, to regularize their loan account.

- l) THAT despite issuance of the two statutory notices as described hereinabove, the Applicant failed to regularize the accounts with the 1<sup>st</sup> Respondent and the default of the aforementioned banking facilities continued subsisted to the 1st Respondent's detriment.
- m) THAT the 1<sup>st</sup> Respondent instructed the 2nd Respondent, to proceed and advertise and sell the suit properly through public auction.
- n) THAT the 2nd Respondent issued the forty-five (45) days redemption notice and notification of sale through post and email
- o) THAT despite the issuance of the notices by the 2nd Respondent, the Applicant failed to regularize the accounts with the 1<sup>st</sup> Respondent
- p) THAT the notification of sale that stated that the public auction of the subject property was scheduled to take place on 7th November 2025.
- q) THAT it is clear from the aforesaid facts that the Applicant was given sufficient notice and an adequate opportunity to rectify the default but neglected and/or failed to do so, necessitating the 1<sup>st</sup> Respondent exercise its power of sale as the charge.
- r) THAT in response to paragraphs 8 and 9 of the Applicant's Supporting Affidavit, the property has been duly valued, which enabled the 2nd Respondent to indicate both the market and forced sale value of the property in the notices, and in any event, I am advised by my advocates on record, which advice I believe to be true, that the law only requires a valuation to be available at the time of sale. Making any assertion to the contrary at this stage, when the sale has yet to occur, both premature and speculative. /Annexed hereto and marked as SK10 is a copy of

the valuation report dated 21<sup>st</sup> August 2025 prepared by Highland Valuers Ltd.)

- s) 20. THAT indeed, the 1<sup>st</sup> Respondent's remedies now stand fully crystallized and the Applicant has no other remedy available to them outside regularizing his accounts with the Bank.
- t) THAT the Applicants have brought the instant application with a view to unjustifiably impede the 1<sup>st</sup> Respondent from exercising its remedies as rightfully accrued by law.
- u) THAT the instant application therefore is a response from the Applicant to the maturity and failure to comply with the notices issued and has therefore been brought in bad faith to frustrate the 1<sup>st</sup> Respondent from exercising its remedies as a charge in accordance with the law.
- v) THAT the Respondent invites this Honourable Court to as well examine the conduct of the Applicant who now seeks equitable relief while coming to this Honourable Court with unclean hands, stained with continued and persistent breach and default of express terms of financial facilities and obligations and a further concealment of material facts in its pleadings vis-à-vis the Respondent's which have at all material times complied with Legal obligations and established lawful procedure.
- w) THAT the 1<sup>st</sup> Respondent presents that the balance of convenience in the instant matter should shift to the Respondents and prays that this Honourable Court affirms this position by dismissing the instant Application.
- x) THAT consequently, I am advised by the 1<sup>st</sup> Respondent's advocates on record, which I verily believe to be true that, the application does not meet the mandatory standards and requirements for grant of injunctive relief as sought by the Applicants and humbly pray that this Honourable Court dismisses the instant application in its totality.

- y) THAT I am also well advised by the 1<sup>st</sup> Respondent's advocates on record, which advise I verily believe to be true that since costs follow the event, the Applicant's failure in establishing the standards required of an application for injunctive relief and subsequent dismissal has the knock-on effect of warranting this Honourable Court to as well issue costs of the Application to the Respondents, which grant of costs the Respondents hereby pray.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent canvassed the application by the way of written submissions by answering the following questions:
- (a) Has the Applicant presented a prima facie case with a probability of success?*
  - (b) Shall the Applicant suffer irreparable injury which would not be adequately be compensated by an award of damages if the Application is dismissed?*
  - (c) Whether the Honourable court is still in doubt regarding the foregoing and on which side the lance of convenience tilts and*
  - (d) To whom costs should be awarded,*
5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent placed reliance on the following authorities:
- a) *Giella vs Cassman Brown & Company Limited (1973 EA 358, Nairobi COACA No 77 OF 2012- Ngurruma Limited -vs- Jan Bonde Nielsen and 2 Others (2014) Cieni Plains Company Ltd & 2 Others v Ecobank Kenya Ltd (2017) eKLR, Mlimani Motors (k) Limited v Kenya Commercial Bank Limited (2014) Albert Mario Cordeiro and Another vs Vishram Shamji (2015) eKLR 9. Nairobi COACA No 77 OF 2012 Nguruman Limited -vs Jan Bonde Nielsen and 2 Others (2014) eKLR, Muga Developer Limited vs Equity Bank of Kenya Ltd & 4 Others, Giella vs Cassman Brown & Company Limited (1973).* The gist of the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is to invite this Court to decline exercising discretion to grant any interlocutory injunctive orders as prayed for by the Applicant/Plaintiff.

6. The carrier provisions on interlocutory injunctions is typically Order 40 Rule 1 and 2 of the Civil Procedure Rules which provides as follows:

*(a) Where in any suit it is proved by affidavit or otherwise—*

- i. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree;*
- ii. 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.*

7. The general rule in mortgage cases is that a Court will not grant an injunction to restrain a mortgagee from exercising their power of sale unless the mortgagor pays the amount of the debt claimed by the Mortgagee to court. In the celebrated case of **American Cyanamid Co. v Ethicon Limited [1975] 1 All ER 504** adopting the privy council decision in **NCB Limited v Olint Corporation CA No. 61/2008** outlined the following considerations on matters of interlocutory injunction:

- (i) Is the Claimant's case frivolous or vexatious? Meaning, is there a serious issue to be tried?*
- (ii) If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider whether or not damages would be an adequate remedy.*
- (iii) If there is no clear answer to the question of whether or not damages would be an adequate remedy to compensate either the*

- Plaintiff or the Defendant, then I will go on to examine the balance of convenience generally;*
- (iv) *If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain.*
8. In considering where the balance of convenience lies, the court must have regard to the following:

*Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted. If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case.*

9. In the claim filed by the Applicant/Plaintiff in a suit dated 15.10.2025 the following orders are contemplated to be determined by this court at an opportune time:
- (a) A declaration that the Defendant's 90-day statutory notice and subsequent 45 day redemption notice are defective unlawful, and null and void for non-compliance with Section 90(2) (b) 96(2) and 97 of the Land Act.
- (b) A permanent injunction restraining the Defendant, its servants, agents or auctioneers from advertising for sale, selling, transferring, alienating, or in any other manner interfering with the plaintiffs property known as Eldoret Municipality/Block 4/28 pending full compliance with the law.
- (c) *An order directing the 1<sup>st</sup> Defendant to supply a proper and detailed statement of account of the loan facility*

*(d) A declaration that the Defendant's recall of the entire loan was premature, unlawful and contrary to the facility letter dated 20<sup>th</sup> September, 2023*

*(e) Payment of general damages for mental anguish and undue harassment*

*(f) Costs of the suit and*

*(g) Any other relief that this Honourable court may deem just and equitable to grant*

10. It is on this claim the 1<sup>st</sup> Respondent filed affidavits against the Notice of Motion seeking grant of temporary injunction as stipulated in Order 40 Rule 1 & 2 and the settled principles in the various jurisprudential decisions in which the court is mandated to consider whether there is existence of a prima-facie case, or if this ground lacks merit in the alternative whether if the order of injunction is denied there is a likelihood of the Applicant suffering irremediable harm not capable of being compensated by way of damages and finally if the court is in doubt it has to evaluate the competing rights of both parties within the scale of a balance of convenience. On the part of the 1<sup>st</sup> Respondent, the arguments and material evidence filed points to the aspect of the principal Sam borrowed by the Applicants/Plaintiffs, costs incurred in relation to the loan, and post maturity interest on the principal balance which is due and remain sub standing is a clear demonstration that the Application has not met the threshold of the law and should be dismissed. In essence, from a legal perspective the 1<sup>st</sup> Respondent/Defendant is asking this court to refrain itself from taking any steps of issuing and injunction which will deny its rights of exercising the statutory power of sale of the security deposited by the Applicant/Plaintiff within the terms of the loan agreement.

**11.** Bearing in mind the pleadings in the Notice of Motion as supported by the affidavit sworn by the Applicant, and the re-joinder affidavits by the Respondents it is apparent from the 1<sup>st</sup> Respondent whether

rightly or wrongly so it has already treated the contract as at an end, arising from the alleged failure of the Applicants/Plaintiffs to meet their part of the bargain as covenanted in the contract. Admittedly from the rival affidavit evidence there are serious contestations between the Applicants/Plaintiffs and the 1<sup>st</sup> Respondent/Defendant with regard to the obligations set out in the loan agreement. Those issues cannot be settled at this interlocutory state without the court having an advantage to subject the entire evidence within the standard and burden of proof set out in Section 107 (1), 108 & 109 of the Evidence. In matters of injunction what constitutes a prima facie case as set out on **Giella v Casman Brown (1973) EA** is a case that on the material presented to the court demonstrates a genuine and an arguable right which has been infringed by the opposite party and for our situation allegedly the Respondents/Defendants to the suit. What are the key characteristics of a prima- facie case likely to influence the court to exercise judicial discretion to grant the remedy of injunction.

- **A Genuine and Argable Case:** *It is more than just a weak case; the applicant must show a sufficient likelihood of success to justify preserving the status quo pending the full trial.*
- **Not a Guaranteed Win:** *It does not mean a case proved to the hilt, nor does it require the applicant to demonstrate that they are more likely than not to succeed at trial.*
- **Evidence of Infringement:** *The applicant must show a clear and unmistakable right that is being directly threatened by the action sought to be restrained. The invasion of the right must be material and substantive.*
- **No Mini-Trial:** *The court considering the injunction application does not hold a mini-trial or examine the merits of the case too closely. Its role is merely to weigh the relative strength of the parties' cases to see if there is a bona fide question to raise.*

12. The hurdle on a prima facie case has to be weighted within the above parameters. The courts therefore has to have an interactive evaluation of the issues raised in the main suit and in applying distributive analysis with the Notice of Motion exercised judicial discretion to the facts and the law on grant of interlocutory injunction. As reiterated in the case of **Kiyimba Kaggwa vs Hajji Katende Abdu Nasser H.C.C.S NO 2109 of 1984**. The court held as follows:-

*“...The granting of a temporary injunction in an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.*

*2. The conditions for the grant of the interlocutory injunction are*

*(i) Firstly, that the applicant must show a prima face case with a probability of success*

*(ii) Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by award of damages.*

*(ii) Thirdly if the court is in doubt, it would decide an application on the balance of convenience....”*

**13.** Therefore, from the lens of these principles the class of temporary injunctions being issued by trial courts adjudicating the dispute is to preserve the Res so that the main suit is not rendered nugatory. It should be noted that where there is a legal right either at law or in equity both the constitution and statute law as donated immense powers to be judiciously exercised to grant orders in protection of those competing rights pending the determination of the issues on the merits. What is of significance in that balancing act is for the court to be satisfied that the claim in question all dispute is not frivolous or vexatious and whichever way the scope of the claim is assessed there is a serious question to be tried. In another language

of the law, the Res is about Status quo which denotes the existing state of affairs before a given particular pointing time. When it comes to our case, the Status Quo in this matter is for each parties rights to be temporarily stayed more so on the part of the first Respondent/Defendant invoking the provisions of the Land Act 2012 to trigger the statutory power of sale of the securities offered by the Applicants/Plaintiffs pending the hearing and determination of the suit. It is also a general principle of law that a prima facie case with a probability of Success as long established in various case law, it does not mean the court has to be satisfied that there is merit in the case and it does not mean that the issues raised by the Applicants/Plaintiffs it is one which must succeed. (***See Giella v Gassman Brown (1973) EA 358, Mrao Ltd v First American Bank of Kenya Ltd (2003) eKLR, Nguruman Ltd vs Jan Bond (2014), Pius Kipchirchir Kogeo v Republic (2005) eKLR, Murithi t/a Design Mate Enterprises v Family Bank Limited (2024)***)

14. As it is in mortgage contracts or where loan agreements are concerned with financial institutions which offer credit facilities repayment is an obligation of the borrower and in the event that the facility is not repaid as stipulated in the terms of the contract, the lender is at liberty to declare default to pursue the remedies available in law. This is where the trigger of the bank or financial institution is commenced for a recovery process which includes foreclosure on the properties provided by the borrowers securities.
15. I am obliged by the prism of the law at the interlocutory stage not to make findings of the contested facts and law but only to weigh the relative strength of both the Applicants/Plaintiffs and the Respondents/Defendants pleaded issues in the pleadings and corresponding affidavits. The strength of probability and discharged the burden of proof on matters of this nature is vested with the Applicants/Plaintiffs. As for the court it should whichever course that

appears to carry the lower risk of injustice if it should turn out to have been wrong remains the one to tilt the scale in granting or declaiming the injunction.

16. I have cumulatively reviewed the material evidence from both parties at this interlocutory stage and I am inspired by the principles laid down in 7<sup>th</sup> edition of Black's Law dictionary by Bryan A. Garner in which discretion is defined as "*A public official's power or right to act in certain circumstances according to personal judgement and conscience. At the same page, judicial Discretion is defined as the exercise of judgement by a judge or court based on what is fair under the circumstances and guided by rule and principles of law a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right*". Similarly in the case of **Omovo & Ors v Mba & Ors (2014) LPELR-23035 (sc) @ page 66**. The court remarked as follows on the concept of discretion of a court. "*Discretion when applied to a court of justice, means sound discretion guided by law....Discretion means equitable decision of what is just and proper under the circumstances or a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar case guided by the principle of law.*"
17. For those reasons, and within the guidelines, under Article 40 Rule 1 & 2 of the Civil Procedure Rules as read with Section 1(A) 1(B), 3 & 3A of the Civil Procedure Act and the conception of the principles in the cited case law, the following orders shall abide:

- (a) That I exercise discretion to grant an interlocutory injunction as formulated in the Notice of Motion dated 15.10.2025 to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Defendants, its servants, Agents, from advertising for sale, or selling vide public auction, and or private treaty, disposing of, alienating, transferring, taking possession of or in any way interfering with the plaintiffs/Applicants property known as LR ELDORET

MUNICIPALITY/BLOCK 4 /28 pending the hearing and determination of the suit dated 15.10.2025.

- (b) That the parties shall move with speed and expediency to comply with order 11 of the Civil Procedure Rules for the main suit to be determined on or about 30 days from today's date.
- (c) That a pre-trial conference be held on 23.1.2026 to set down the suit for hearing.
- (d) The costs of this application to abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 14<sup>TH</sup> DAY OF JANUARY 2026**

.....

**R. NYAKUNDI**

**JUDGE**