

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
HCCC E860 OF 2021

**GLOBE AUTOSPARES AND
ACCESSORIES**

LTD.....PLAINTIFF

VERSUS

**HOUSING FINANCE LIMITED.....1ST
DEFENDANT**

**BENJAMIN K. SILA T/A LEGACY
AUCTIONEERING**

**SERVICES.....2ND
DEFENDANT**

RULING

Application of lis pendens

1. The plaintiff/ applicant filed the notice of motion dated 14.2.2025 seeking injunctive relief against the defendants. The application is supported by the affidavit sworn by the applicant's director, **David Njuguna Ngoi**, on 14.2.2025.

2. Through a ruling dated 27.3.2025 the court declined to grant prayer 2 of the plaintiff's application which was seeking an interim injunction to restrain the defendant from selling or disposition or otherwise interfering with the plaintiff's ownership and possession of all that land known as **Kiambu/Municipality Block 11/243** situate in Kiambu County (the subject property).
3. The reason for refusing the relief was that the temporary injunction was not feasible in the circumstances as the subject property had been sold through public auction on 2nd March 2021 in the exercise of the 1st respondent's statutory power of sale.
4. This rendered prayer 3 otiose.

5. The residual prayer 4 of the application, which is the subject of this ruling, is in the nature of lis pendens, and it seeks: -

an order under the doctrine of lis pendens and section 106 of the Land Registration Act (previously enshrined under Section 52 of the Indian Transfer Property Act (1959) (Repealed) that pending final determination of this suit in accordance with the law, ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the charged properties with any land registry, Government department and all other registering authorities be and is hereby prohibited in ALL THAT parcel of land known as L. R. Kiambu/Municipality Block II/243 situate in Kiambu.

6. The plaintiff offered the subject property to secure a Kshs. 100,000,000/- loan issued by the defendant bank to **Hannah Wairimu Mutura**. The terms of the facility included a 10-year repayment period and interest at 18% per annum and default interest at 20.75%.
7. The applicant's gravamen is that despite duly servicing the facility to the tune of Kshs. 50,000,000/-, the payments have not been incorporated into the bank statements by the 1st defendant. The applicant claims that the 1st defendant failed to reflect the timely payments in order to attract default interest and inflated the loan balance by adjusting interest rate arbitrarily without notice.
8. The applicant also contends that the 1st defendant issued interest rates that exceeded the cap set by the **Banking**

(Amendment) Act 2016 and violated **section 44 of the Banking Act** by varying the interest rates upwards without notifying it.

9. The applicant faults the 1st defendant for appointing a receiver to collect rental income from the property and remit to the loan account in 2018 contrary to **section 92 of the Land Act**. It further faults the 1st defendant for proceeding to contemporaneously exercising its statutory power of sale contrary to **section 90 (3) of the Land Act** and at a price below half the market value of the property despite having appointed a receiver. Moreover, the applicant faults the 1st defendant for selling the property to itself through its own orchestrated public auction and transfer of the property to its name.

10. The applicant submitted that it has established a *prima facie* case with a probability of success by demonstrating proof of proprietary ownership and that the loan facility agreement and terms have been violated by the 1st defendant. Illegal debits and inflation of the loan amount.

11. The applicant asserted that no amount of money can compensate for the loss of a prime 7-storey building in Kiambu town due to its commercial goodwill and strategic position.

12. The applicant further submitted that the balance of convenience favors preserving the subject property since the 1st defendant already controls the property and collects rent.

13. The applicant relied on the following cases: -

- (1) Giella v Cassman Brown & Company Limited [1973] EA**
- (2) Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**
- (3) Joseph Muriithi Gichobi v Kenya Commercial Bank Ltd & Another**
- (4) Samaki Industries Ltd v Bullion Bank Ltd**
- (5) Ecobank Kenya Limited v First Choice Mega Stores Limited [2019] eKLR**
- (6) Nguruman Limited v Jane Bonde Nielsen and 2 others [2014] eKLR**
- (7) Mbuthia v Jimba Credit C.A. No. 111 of 1986**
- (8) Spero Holdings Limited v Co-operative Bank of Kenya Ltd & Another [2016] eKLR**

(9) **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**

(10) **Bananahill Investment Limited v Pan African Bank Ltd**

(11) **Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR**

Response

14. The defendants opposed the application through a replying affidavit sworn by the 1st defendant's legal manager, **Hedaya Malesi** on 5.3.2025 and written submissions dated 26.7.2025.

15. The defendants contended that the applicant has not established a *prima facie* case with a probability of success. They also contended that the applicant has not demonstrated how they might suffer irreparable injury which cannot be

remedied by damages. They highlighted that the property was offered as security with clear understanding by the parties that the property could be sold in the event of default in the repayment of the loan facility. They further argued that the balance of convenience is against the applicant.

16. The defendants urged the court to find that the application is an abuse of the court process and without merit and to strike it out and dismiss it with costs.

17. The defendant relied on the following cases: -

(1) **Giella v Cassman Brown & Co Ltd [supra]**

(2) **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [supra]**

- (3) **Kitur v Standard Chartered Bank & 2 others [2002] 1 KLR**
- (4) **Thathy v Middle East Bank (K) Ltd [2002] 1 KLR 595**
- (5) **Bhatt v R [1957] EA 332**
- (6) **Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR 1**
- (7) **R A Cripps & Sons Ltd v Wickenden [1973] 1 WLR 944**
- (8) **Bank of Baroda v Panesar [1987] Ch D 335**

Analysis and Determination

***Res judicata* and abuse of process**

18. The preliminary issues are whether the application is *res judicata* and an abuse of the court process. I note from the record that the plaintiff previously filed a similar application dated 14th October 2021 which

was disposed of through the ruling of 21st July 2022. The application was brought after the auction sale. In the first ruling, **Justice Chepkwony'** granted an injunction to restrain the defendant from further subdividing, registering or changing registration in ownership of the charged property and to maintain the status quo pending the determination of the dispute through arbitration. Through a subsequent ruling of 14th June 2023, **Justice Chepkwony'** set aside the earlier orders as they were based on the erroneous notion that the matter was pending arbitration yet the matter had been marked not suitable for mediation during screening on 24th March 2022.

19. One of the requirements for res judicata under **Section 7 of the Civil Procedure Act** is that the matter or issue 'has been

heard and finally decided by such court' of competent jurisdiction. There was no final determination of the issue at hand which is one of the elements of *res judicata*.

Section 7 of the Civil Procedure Act.

Thus, I do not think that *res judicata* is applicable here.

20. Similarly, I do not think that the application is an abuse of the court process as the applicant has a right to be heard on the issue on the merits.

Doctrine of lis pendens

21. The substantive issue before the court is whether the applicant has met the conditions for the grant of prayer 4.

22. The Court of Appeal considered the application of the doctrine of *lis pendens* under **(Indian) Transfer of Property Act (ITPA) 1882** (now repealed) and the

current law, **Land Registration Act. Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR)**. And found that the doctrine of *lis pendens* was specifically provided for in section 52 of the former law and saved under the latter in Section 107 (1)-now s.106(3)(a)) of the Land Registration Act. More specifically the current section provides that; ‘any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act’.

23. The Court also found that; ‘Presently [meaning at the present time, now], the LRA does not prohibit the application of the doctrine of *lis pendens*; nor does any law for that matter. For this reason and in view

of Section 107 aforesaid, this Court has previously held that the doctrine of lis pendens is still applicable to this day, albeit under common law...’ **Co-operative Bank of Kenya Limited (ibid)**

24. The court noted that India has provided in legislation measures such as **levies of compensatory costs in frivolous proceedings, expedited proceedings and compensatory damages against vexatious plaintiffs (Vinod Seth v. Devinder Bajaj & Another SCC No. Civil Appeal No. 4891 of 2010)** to prevent abuse of the doctrine of lis pendens. Kenya has not.

25. In the absence of such legislative measures, the court took a practical approach to avert abuse of the doctrine of lis pendens by unscrupulous litigants whose sole aim is to frustrate legitimate owners of property from enjoying their rights.

26. Hence, borrowing from the wording of section 52 of the ITPA (now repealed), and upon careful contrast with the legislative

framework and practice in India, the court circumscribed the application of the doctrine of *lis pendens* in Kenya, thus; ‘... an automatic prohibition of dealings or transfers of the property is only during the ‘active prosecution’ of the proceedings.’ But, ruling out automatic application of *lis pendens* on ‘fresh proceedings that have just been filed and whose prosecution is yet to begin.’ **Co-operative Bank of Kenya Limited (ibid)**

27. I should add, however, that application of *lis pendens*, the scope and nature of preservation of property thereunder should be decided on the basis of the circumstances of each case.

28. In this case, the subject property was sold by public auction on 2nd March 2021 to the 1st respondent in the exercise of its statutory power of sale. In the ruling of 27.3.2025, the court in consideration of the above reality stated that the propriety

or otherwise of the said public auction should be unravelled in the trial.

29. In accordance with the above Court of Appeal decision, the doctrine of *lis pendens* is applicable automatically only upon 'active prosecution' of the suit.

30. This is an active case whose evaluation by the court upon evidence on the propriety or otherwise of the public auction herein in the trial, is 'active prosecution of the proceedings', making the relief in prayer 4 of the application appropriate and reasonable request within the doctrine of *lis pendens*. Except, however, the applicant stated that the 1st defendant/respondent sold the property to itself and transferred into its name, is in possession and control of and collects rent from the property. Thus, prayer 4 may not be granted exactly as couched in the

application as possession and control of as well as collection of rents from the property by the 1st defendant should not be interrupted whilst these proceedings are pending. Preservation of that status quo is also relevant to avoid a situation where the applicant temporizes the hearing of this case to injure the rights of the 1st defendant. Appropriate order shall therefore be given.

31. Accordingly, the notice of motion dated 14.2.2025 is allowed in the following specific terms issued under the doctrine of *lis pendens* as applicable under section 106 of the Land Registration Act, common law, in accordance with the decisional law in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR,** and as

dictated by the circumstances of this case:

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I. THAT pending final determination of this suit, ALL FURTHER REGISTRATION or change of user or change in registration in the ownership, right, interest, or title in the charged properties with any land registry, Government department and all other registering authorities be and is hereby prohibited in ALL THAT parcel of land known as L. R. Kiambu/Municipality Block II/243 situate in Kiambu. This order has effect from the date of its service and it is not retrospective.

II. The possession and control of as well as collection of rents from the property herein by the 1st defendant is not affected by this order.

III. The plaintiff must cause the suit to be set down for hearing and concluded within 6 months of this order which failing the order shall lapse unless otherwise and for good reason it is extended by the court.

IV. Costs of the application be in the cause.

Dated, signed and delivered at Nairobi this 22nd day of January, 2026 through Microsoft Teams online application

F. Gikonyo M

Judge

In the presence of:

Kimani for Defendant

Wachira for Kingara for Plaintiff

CA - Godfrey