



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HCCC NO. E003 OF 2025

**JOHN MWANGI KAMAU-----
PLAINTIFF/APPLICANT**

VERSUS

**EQUITY BANK (K) LIMITED ----- 1ST DEFENDANT/
RESPONDENT**

**J.K WANDERI AUCTIONEERS-----2ND
DEFENDANT/RESPONDENT**

RULING

1. The Plaintiff brings a Notice of Motion Application dated 24th January 2025 for reliefs as herein below;-

1. **Spent.**
2. **Spent.**
3. **THAT pending the hearing and determination of this suit the Honourable Court be pleased to issue temporary orders of injunction restraining the 1st and 2nd defendants/respondents either by themselves, servants, agents or auctioneers from advertising for sale, selling, disposing**

of or in any other way interfering with parcels of land known as LR No. KIAMBOGO/KIAMBOGO BLOCK 2(MWARIKI)/586 and L.R NO. NAKURU MUNICIPALITY BLOCK 23/88.

4. THAT cost of this application be provided for. (sic)

2. The Application is supported by an affidavit sworn by the Plaintiff. It is averred that the 1st Defendant bank advanced a loan of Kshs. 6,000,000/= to the Plaintiff on 25/02/2022 secured by the above described property known as **NAKURU MUNICIPALITY BLOCK 23/88**. A second facility of Ksh. 5,163,000 was further made available to the Plaintiff on 30/06/2023 with **L.R NO. KIAMBOGO/KIAMBOGO BLOCK 2(MWARIKI)5846** as security.
3. According to the Plaintiff, he fully repaid the first loan advancement, making what he believed to be the last amount due of Ksh. 92,800 on 21/12/2024. He contends that an amount of Ksh. 22,689,276 he paid to settle this loan is more than double the principal amount. On advice of his Counsel, the plaintiff states that lenders are barred

from recovering interest that is more than the principal amount advanced.

4. In regard to the second loan, he contends that he has repaid a sum of Ksh. 8,466,614 and is up to date as far as settlement of this loan is concerned. Notwithstanding, the plaintiff laments that on 14/01/2025 the 2nd Defendant, by advertisement appearing on the Standard Newspaper, scheduled a public auction of the charged properties for 28/01/2025.
5. The Plaintiff further avers that he protested the planned auction and asserts that he was never served with requisite statutory notices of sale of the loan securities, including the Auctioneers redemption notice. He therefore faults the auction as unlawful and prejudicial to him and his family, hence this Application.
6. *Inter alia*, the Plaintiff exhibits copies of the loan statements purporting to evidence payments he made to the 1st Defendant to clear the indebtedness.
7. The 1st Defendant opposes the Application *vide* an affidavit in reply sworn by **Samuel Wamaita**, the Bank's Assistant Manager (Legal Services). The witness avers

inter alia that on 26/01/2022 the Plaintiff was extended a business loan facility of Ksh. 10,000,000/= followed by a further advancement of Ksh. 5,630,000 availed to him on 19/06/2023. On 01/12/2023 the terms of the loan facilities as stated in previous Letters of Offer are said to have been varied, at the Plaintiff's request, after which they were secured by the following securities;

a. An existing legal charge of Ksh. 6,270,000 over the Plaintiff's Title No. KIAMBOGO/KIAMBOGO BLOCK 2/5846 in favour of the 1st Defendant.

b. An existing legal charge of Ksh. 6,000,000 over the Plaintiff's Title No. NAKURU MUNICIPALITY BLOCK 23/88 in favour of the 1st Defendant.

And

c. Corporate guarantee by Glazers General Supplies and Construction Limited, Jotech Construction Limited and Citrus Villa Lounge Limited of Ksh. 11,473,252 to be executed in favour of the 1st Defendant.

8. The agreed variation of the terms of the facilities required the Plaintiff to make repayments in 24 equal monthly instalments and/or fully clear the same upon receipt of

pending payments from Nakuru County, according to the 1st Defendant's witness. It is, however, contended that the Plaintiff made default in honouring instalments due under the facilities.

9. Contrary to the Plaintiff's claim, the 1st Defendant affirms that the 90 days statutory notice of sale of the charged properties was in fact issued to the former who failed to comply. This prompted issuance of the other 40 days and 45 days notices as well as Notification of Sale which were purportedly served upon the Plaintiff by registered post as per the contract. The charged properties were also valued before advertisement for sale by public auction. The 1st Defendant therefore asserts that it exercised its statutory power of sale of the charged properties lawfully in light of the Plaintiffs' default on the loan repayment.

10. The Plaintiff reacted by putting in a further affidavit in answer to the 1st Defendant's deposition in which he reiterates his contentions. He faults the 1st Defendant for not indicating the second loan's account number and the outstanding amount in the 90 days statutory notice of sale. The account number is

only said to be disclosed in the 40 days statutory notice issued after the 90 days notice. The Plaintiff therefore dismisses the notice as “vague, defective and incapable of triggering the Statutory power of Sale under the Land Act”.

11. Furthermore, the Plaintiff contends that there is no proof of service of purported 45 days redemption notice. He adds that he could not have been indebted to the 1st Defendant as at the time of alleged issuance of the 90 days statutory notice dated 20/06/2023 considering that the second loan facility was advanced on 30/06/2023.
12. While stating that the charged properties are matrimonial properties, his spouse having given consent to the transaction, the Plaintiff complains that his wife was not served with the statutory notices contrary to the requirement of the law. He therefore maintains his stance that the statutory power of sale of the charged properties had not accrued to the 1st Defendant in the circumstances.
13. Learned Counsel for the parties filed Written Submissions which I have read through against the rival affidavit evidence and the entire record. The Plaintiff's advocates

submit *inter alia* that the 90 days statutory notice in respect of the 2nd loan facility was not served or was not properly served. The account number and the amount owed are not shown. It is further contended that there is no proof of service of the 45 days Auctioneers redemption notice purportedly served by WhatsApp. It is not shown that the notice was in fact received.

14. Moreover, the Plaintiff's spouse was not served with statutory notices contrary to provisions of **Section 96(3) (c) Land Act**, according to Counsel.

15. Making reference to the famous case of **Giella V. Cassman Brown & Company**, the Plaintiff pointed out as follows;

- a. **That a *prima facie* case for grant of temporary injunction has been made out.**
- b. **That irreparable loss will result because charged property comprises the matrimonial home and therefore the couple could be rendered destitute.**

and;

- c. **That the balance of convenience tilts in favour of the Plaintiff.**

16. The defence Counsel counter that a *prima facie* with a probability of success at trial case has not been established.
17. Placing reliance on case law in **Showind Industries vs Guardian Bank Limited & Another [2002] 1 EA** among other decisions, Counsel submit that temporary injunction pending trial is granted very sparingly, and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. As an equitable remedy, injunction may be denied where there is misconduct by the Applicant or his equity has been defeated by *laches*.
18. The Defendants' Advocates further pitch tent on the case of **Mohamed Khalid Khashoggi vs Equity Bank Limited [2013]** where it was observed that disputed accounts and interest are not a ground for grant of injunction. The same opinion was expressed in **Habib Bank Ag. vs POPFNK Limited Civil Appeal No. 147 of 1989**) also cited by Counsel.
19. It is also submitted that no irreparable loss would result to the Plaintiff as any damages were foreseeable owing to

voluntary charging of property to the

1st

Defendant (see **Wanjohi vs Equity Bank Building Society Limited & 2 Others (2006) eKLR** cited by Counsel).

20. The Defendants therefore want the Application to be dismissed.

21. Determination of injunction applications including mandatory, prohibitory and permanent injunctions were long settled in the often quoted case of **Giella vs Cassman Brown & Company supra** cited in the 1st Defendant's submissions. The principles are;

"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."

22. Case law in **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) eKLR** explains a *prima facie* case in civil cases as;

“A case which on the material presented, the court or tribunal properly directing itself will conclude that there exists a right which had apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter.”

23. The three limbs above are required to be surmounted sequentially (see Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR). This means that the Applicant has to satisfy each of the three elements to obtain injunction orders.
24. Having considered the parties' arguments, it is confirmed that account numbers and amounts in default are shown in the 90 days statutory notice dated 20/6/2023 contrary to the Plaintiff's contentions. The account number in respect of the 2nd loan is, however, different from the one shown in the 40 days statutory notice of sale of the charged properties. The statutory notices were not served on the Plaintiff's spouse as pointed out. The 45 days redemption notice dated 21/11/2024 issued together with notification of sale were purportedly issued by the 2nd Defendant.

25. Because of non-service of the statutory notices upon the Plaintiff's spouse contrary to the law, the notices are faulty and incapable of permitting sale of the charged property, also considering that the account number of the second loan purportedly in default is not also clear as noted herein above. It is undisputed that valuation of the charged properties was done before the attempted sale in compliance with the mandatory requirement of section **97(2) of the Land Act.**

26. A *Prima Facie* case has therefore been made out.

27. Irreparable loss would also arise given the Plaintiff's claim that one of charged properties is matrimonial. Irreparable loss could also result where there is violation of the law as in failing to serve the Plaintiff's wife with statutory notices of sale as found above **{(see Case Law in Sunya Holdings Limited & 4 Others vs KICI Bank Limited & Another (2015) KEHC 8257 (KLR))}**

28. Given the court's pronouncement on the first and second limbs of **Giella vs Cassman Brown & Company supra**, it is necessary to consider the question of where the balance of convenience tilts to.

29. The Application is accordingly allowed in terms of prayer
3, and the costs of the Application shall be in the Cause.

J. M. NANG'EA - JUDGE

Ruling delivered virtually this 19th day of January, 2026

in the presence of:

**Mr. Njoroge Advocate for Mr. Mwangi Advocate for the
Plaintiff.**

Mr. Ojou Advocate for the Defendants/Respondents.

The Court Assistant (Jeniffer).

J.M. NANG'EA - JUDGE.