



Mediheal Hospital & Fertility Centre Limited & another v Legacy Auctioneering Services (Civil Suit E010 of 2025) [2026] KEHC 844 (KLR) (30 January 2026) (Ruling)

Neutral citation: [2026] KEHC 844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E010 OF 2025
JRA WANANDA, J
JANUARY 30, 2026**

BETWEEN

MEDIHEAL HOSPITAL & FERTILITY CENTRE LIMITED 1ST PLAINTIFF

SWARUP RANJAN MISHRA 2ND PLAINTIFF

AND

LEGACY AUCTIONEERING SERVICES DEFENDANT

RULING

1. The Plaintiffs filed this suit by way of the Plaint dated 10/03/2025. Together with the Plaint and the other usual Pleadings accompanying it, the Plaintiffs also filed the Notice of Motion the subject of this Ruling, dated 17/03/2025. The remaining prayers sought in the Application are now as follows:
 4. That a permanent injunction do issue to restrain and prevent the Defendants/ Respondents by themselves and/or their agents, servants, employees, assigns or otherwise howsoever from proceeding with the intended public auction scheduled for 26th February, 2025 over Kapsaret/Kapsaret Block 2 (Kaptuiwo)/14 or any or any other auction pending the hearing and determination of the main suit.
 5. That the costs be provided for.”
2. The Application is filed through Messrs Aloo Romanus & Co. Advocates and is supported by the Affidavit sworn by one Maryline Chepkosgei Lang’at who described himself as the Vice-President of the 1st Plaintiff. She deponed that the Plaintiffs acknowledge having taken facilities with various creditors and have been servicing the same but lately, due the harsh business conditions, they delayed in making payments on time, that recently, one of their employees came across a newspaper advert intimating that the Defendant intended to sell the Plaintiffs’ said property by way of public auction



on 26/02/2025, despite the fact that no notices were issued prior to the advertisement. She stated that upon inquiry from the bank, the Plaintiffs were notified that the auction did not take place and the same was to be rescheduled. She contended that there was need to maintain the status quo so as not to render this suit nugatory. She deponed further that of concern is that no notice was ever served upon the Plaintiffs, that to the Plaintiffs' knowledge, the account is not in default, and if it is, the Plaintiffs call forth statement of accounts which the bank has constantly failed to supply despite requests.

3. In opposing the Application, the Defendant filed the Replying Affidavit sworn by one Benjamin Sila who described himself as the its Director. The same is filed through Messrs Olendo, Olare & Samba Advocates. He deponent that he was contacted by his principal, Commercial International Bank Kenya Limited in July 2013 to proceed with sale of the suit property upon which the Defendant served the 45-days Redemption Notice under Section 15(d) of the Auctioneers Act on 14/08/2023, by which date the outstanding loan amount was Kshs 62,263,571.44 and USD 926,241.05, which amount continues to attract interest. He deponed that upon expiry of the 45 days period, the Plaintiffs not having made good the demand, the Defendant issued a courtesy notice on 13/10/2023 informing the Plaintiffs of the scheduled auction and by which date the amount outstanding was Kshs 61,479,973.46 and USD 943,089.04. He stated that upon expiry of the notice, the Defendant advertised the property for sale for 3/11/2023 but the sale was arrested by an ex parte Court injunction order issued on 2/11/2023 and later confirmed on 11/12/2023. He stated further that subsequently, upon lapse of the injunction orders, the principal issued fresh instructions in February 2023, that this is because where a suit in which an interlocutory injunction is issued is not determined within a period of 12 months from the date of grant of the injunction, the injunction shall lapse unless for any sufficient reason, the Court orders otherwise. He then reiterated that the notices were issued but contended that in any event, there was no requirement for the Chargee/Auctioneer to re-issue the Redemption Notice. He thus contended that the sale was conducted successfully on 26/02/2025 and the purchasers met the requirements. He then exhibited a copy of, among other documents, the Auction Report, to demonstrate that the sale already took place.
4. With leave of the Court, the Plaintiffs, through the same Maryline Chepkosgei Langat, filed the Supplementary Affidavit sworn on 6/10/2025. She deponed that the Defendant's Affidavit admits that indeed the first document served upon the Plaintiffs was a 45 days Redemption Notice, and not the 90 days statutory notice as required under Section 90 of the Land Act.
5. The parties then filed written Submissions. The Plaintiff's Submissions is dated 5/10/2025 while the Defendants is dated 12/11/2025.

Plaintiff's Submissions

6. Mr. Aloo, Counsel for the Plaintiff, cited the usual authorities of *Giella v Cassman Brown & Company Limited* (1973) EA 358, the case of *Nguruman Limited v Jane Bonde Nielsen and 2 Others*, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, and the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 and others, applied in cases dealing with injunctions. He then observed that although the Defendant asserts that notices were duly served, no such notices were attached, and submitted that the Plaintiffs having demonstrated ownership of the suit property, have established a prima facie case and the fact that they shall suffer "irreparable harm" should the property be sold, and also that the "balance of convenience" favours grant of the injunction. Counsel also submitted that the Defendant had a duty to conduct a Valuation under the provisions of Section 97(2) of the Land Act, which it also did not comply with.



Defendant's Submissions

7. On his part, Mr. Orare, Counsel for the Defendant, submitted that the Defendant has exhibited copies of the Notification of Sale and Redemption Notice and the Plaintiffs cannot now feign ignorance. He cited the case of Muthoni v K-Unity Sacco Limited (Commercial Case E003 of 2023) [2024] KEHC 3638 (KLR) on the burden of proof on issues of service. He also contended that the Plaintiffs have not shown any violation of by the Defendant, who only acted as an agent executing lawful instructions of a Chargee, and that no fraud, illegality or bad faith has been demonstrated. He submitted further that the Plaintiffs' complaint, if any, lies with the Chargee on issues relating to the loan facility, and not the Defendant, and that therefore, no prima facie case has been established. On "irreparable harm", he submitted that once a property has been charged as security for a loan, it becomes a commodity for sale, and any loss occasioned by its realization is compensable in damages. He cited the case of Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 Others [2006] KEHC 2727 (KLR). In the end, he submitted that the "balance of convenience" tilts in favour of the Defendant.

Determination

8. The issue herein is "whether an interim injunction should issue to restrain the Defendant from selling by public auction, the Plaintiff's parcel of land the subject hereof in execution of instructions from the Chargee exercising its statutory power of sale, pending hearing and determination of the suit"
9. Determination on whether to grant interim injunctions is governed by Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

"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.
10. The principles that apply applications for injunctions were well settled in the case of Giella –vs- Cassman Brown and Company Limited, Civil Appeal No. 51 of 1972, in which it was held that the Applicant must establish or demonstrate; (i) the existence of a prima facie case with a probability of success, (ii) that he will suffer irreparable injury which cannot be compensated by damages, and (iii) that balance of convenience tilts in its favour.
 11. Further, in Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

"These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected



to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

12. It is also settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact made on the basis of the conflicting Affidavit evidence. In connection thereto, in *Mbuthia vs Jimba Credit Finance Corporation & Another* [1988] KLR 1, the Court of Appeal guided as follows:

"...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

13. The first limb that I have to therefore determine is whether the Plaintiffs have established a prima facie case. What constitutes a "prima facie" case was discussed in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, in which the Court of Appeal held as follows:

"It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence ... The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two ... In civil cases a prima facie case 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 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."

14. The Plaintiffs have pegged their case on the ground that they were never served with any statutory notices which is mandatory under the provisions of Section 90 of the *Land Act* before a Chargee can exercise its statutory power of sale. The Plaintiffs have also urged that there is no evidence of any valuation of the suit property conducted before the sale as required under Section 97 of the *Land Act*.

15. It is indeed true that before a Chargee can exercise its statutory power of sale, the law requires it to issues notices to the Chargor as follows:

- a. 90 days' statutory notice of default, pursuant to Section 90(1) and (2) of the *Land Act*, 2012.



- b. 40 days' notice of intention to sell, pursuant to Section 96(2) of the Land Act, 2012.
 - c. 45 days' redemption notice pursuant to Rule 15(d) of the Auctioneers' Rules, 1997.
 - d. 14 days' notification of sale, pursuant to Rule 25(e) of the Auctioneers' Rules, 1997.
16. Although the Defendant vehemently contends that service of the 45 days Redemption Notice was effected, and although its Affidavit alludes that a copy has been exhibited thereto, none has in reality been so exhibited. The same applies to the contention in the Defendant's Submissions that a copy of the Notification of Sale has also been exhibited. There is none. What the Defendant has exhibited are copies of the public auction adverts.
17. The Defendant has however exhibited a copy of its Report of the Public Auction said to have been conducted and concluded on 26/02/2025. The Report is addressed to the Defendant's Principal, Commercial International Bank Kenya Limited (CIB), and indicates that the suit property was sold at the public auction on that date to the highest bidder, one Jackson Kiplimo Chebett, at a purchase price of Kshs 18,500,000/-. Also exhibited are copies of Memorandum of Sale and Agreement of Sale demonstrating the above. These allegations and documents have not been challenged or controverted. I therefore have no reason to doubt or disbelieve them. Under these circumstances, I accept the allegation of sale of the suit property to a third party and authenticity of the said documents. The Application has therefore been clearly overtaken by events, and it will be futile to grant the order of injunction sought. On this ground alone, the instant Application cannot succeed.
18. There is also the question of only the Auctioneer having been sued herein. I raise this issue because the Plaintiff's cause of action is clearly based on a claim of unlawful exercise of a chargee's statutory power of sale. From the Plaintiffs' Affidavits, it is clear that the principal, the Chargee, is well-known to the Plaintiff as being Commercial International Bank Kenya Limited (CIB), I say so because at paragraphs 3, 5 and 8 of the Plaintiffs' Supporting Affidavit sworn by Maryline Chepkosgei Langat, she depones:
- " 3. That the applicants acknowledge having taken a facility with various creditors and have been servicing the same of late but due to harsh business condition they delayed a bit in having the loan paid on time.
.....
 - " 5. That upon inquiry from the banks, we were notified that the said auction did not take place hence the applicants are in the process of scheduling another action."
.....
 - " 5. That ... according to us, our account is not in default and if it is, then the applicants call the respondent to bring forth statements of accounts which they have been consistently failing to provide despite their requests."
19. It is therefore clear that the Plaintiffs were at all times fully aware which loan was in issue and from which bank. It is also clear that the Plaintiffs were in touch with the Principal, the Chargee bank over the same. There was therefore a well-known disclosed Principal. The question therefore is why the Plaintiffs, with full knowledge of the existence of the principal, chose to only sue the Auctioneer, a mere agent, and exclude the principal from the suit.



20. The Court of Appeal dealt with an issue of this nature in the case of *City Council of Nairobi vs Wilfred Kamau Githua t/a Githua Associates & Another* [2016] eKLR, in which it found as follows:

“In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinder of the 2nd respondent in this case is unwarranted.”

21. Similarly, the Court of Appeal, in Civil Application No. Nai 5 and 48 of 2002, *Anthony Francis Wareheim t/a A. F. Wareheim & 2 Others vs Kenya Post Office Savings Bank* held as follows:

“It was also prima facie imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.”

22. As aforesaid, the Plaintiff’s cause of action is based on a claim of unlawful exercise of a chargee’s statutory power of sale, namely absence of service of statutory notices. An Auctioneer’s role in the process of exercise of a Chargee’s statutory power of sale is only at the tail-end, namely, to sell the charged security on the Chargee’s behalf, and this he only does upon receiving instructions from the Chargee. How then can the Plaintiffs require answers from the Auctioneer on questions to do with service of notices effected, or ought to have been effected even before the Auctioneer was instructed? The Plaintiffs seek answers on the issue of service yet they refuse to join the party which, to their knowledge, carries all the answers. If excluding the principal was a deliberate tactical litigation move by the Plaintiffs to spread out their options or “litigate in instalments”, then that tactic has fallen flat. It just cannot work.

23. I am aware of my sister, Ominde J’s, decision in the case of *Mediheal Group Limited v Jomuki Auctioneers* (Civil Suit E010 of 2024) [2024] KEHC 17050 (KLR) (13 November 2024) (Ruling), another one of the many recent “Mediheal” cases filed at this station. Dealing with a similar issue of only the Auctioneer having been sued without joining the bank, she found as follows:

53. It is important in my view to disclose which type of principal an auctioneer is acting on behalf of so as to enable the party against whom it is proceeding to appreciate which of their lenders, financiers, creditors etc they are dealing with, given that it is a matter of public notoriety that one property can be used to secure several financial facilities from different institutions and/or persons. It is therefore not enough for an auctioneer the state they are “under instructions from their client...” without disclosing the nature of that client vis a vis the debtor and presume that to be deemed to be sufficient disclosure.

54. Much as the Respondent states that the Principal is disclosed and that it is the Bank which the borrower is in a contractual relationship with and who they can therefore not claim not to know, the Court notes that the Applicant states that they are indebted to various creditors, a fact that was not denied and/or contradicted by the Respondents.”.

24. The above decision is easily distinguishable from this instant case in that in this case, unlike the one before E. Ominde J, I have already found that the Plaintiff was at all times aware of the particular loan



that was in issue and also the particular bank seeking to exercise its statutory power of sale. I have thus already found that this was a case of a disclosed principal.

25. I am not at all saying that an Auctioneer cannot at any times be sued alone and that the instructing bank must always be joined as a party. Not at all. Where the circumstances allow for it, and particularly, where the Auctioneer is deemed personally liable for his own actions, nothing stops him from being sued alone, without the principal. What I am saying is that in this case, the Plaintiff's grievance being basically failure to serve statutory notices, and it being not denied that, in conducting the public auction, the Auctioneer was simply acting as an agent of a disclosed principal, the bank, it is illogical and unfair to direct questions about service of the statutory notices or lack thereof to the Auctioneer yet no one alleges that he was the one required to have served such notices in the first place. Considering the circumstances of the matter, and although a suit should not be defeated because of mere non-joinder of a party, the bank is, in my view, a necessary party to the suit as what is being challenged is exercise of the bank's statutory power of sale, not really personal commission of any irregular actions by the Auctioneer. In this case, the bank clearly has a direct interest in the suit and I do not "see" how the matters raised by the Plaintiff can be fairly and conclusively determined without bringing in the bank.
26. Another issue is that there seems to be other cases between the same parties or parties acting under, or for them, involving the same matters as herein. I say so because in ground 9 of the Application, (and repeated at paragraph 10 of the Supporting Affidavit) it is stated:
- “9. That currently there are subsisting preservative court orders issued in other matters of the same nature and parties and unless the intended sale is stayed, then there shall be contradictory orders which can leave the Court in dilemma.”
27. The Plaintiff has however not made disclosure on which these other cases are. On the part of the Defendant, although he has referred to an earlier Ruling rendered by R. Nyakundi J on 11/12/2023 in another suit involving the same parties, he did not annex any pleadings or the Ruling. The Defendant has also not revealed the citation or case number of that case. I am however aware, as a Judge sitting in this station, of at least one other earlier suit filed by the same Plaintiffs herein together with a third Plaintiff, against the same Defendant as herein together with the said CIB Bank Kenya Limited, and which seems to touch on the same matters as herein and seeks similar reliefs, if not the same. The same Advocates herein are also the same involved in the said case. That suit is Eldoret High Court Civil Case No. E019 of 2023, Mediheal Diagnostics & Fertility Centre, Swarun Ranjan Mishra & Pallavi Jodhipur Rajthan v Legacy Auctioneer Services & CIB Kenya Limited.
28. With the above factual situation, I have no explanation why the Plaintiffs find it fit to spread out multiple suits touching on the same issues and involving the same parties. The Plaintiffs may as well have valid reasons for doing so but having chosen not to give any explanations to this Court, I find it sounding "mischievous" to file a multiplicity of suits yet they all involve the same parties and raise the same issues. While I cannot make a conclusive determination on that issue, the parties not having submitted on it, the same does not paint the Plaintiffs in good light, and also attracts suspicions of forum shopping. To show good faith, the Plaintiffs ought to have disclosed the existence of those other similar suits and given an explanation why they could not have all been filed as one suit, or at least why no effort has been made to consolidate them.
29. For the above reasons, my finding is that the Plaintiffs have failed to demonstrate the existence of a prima facie case.



30. Having found that no prima facie case has been established, it is no longer necessary to consider the second and third limbs of the rule in *Giella vs Cassman Brown*. For this position, I refer to the case of *Nguruman Limited v Jane Bonde Nielsen and 2 Others*, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, where the Court of Appeal reiterated as follows:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86). If prima facie case is not established, then irreparable injury and balance of convenience need no consideration

31. In any event, regarding the limb of “irreparable loss”, it cannot be a point of debate that a person who receives a loan from a lender and who voluntarily and lawfully gives out his property as collateral or security for the loan is presumed to be fully aware that in the event of default in repayment of the loan within the terms and timelines agreed, the lender is at liberty to sell off the property to recover the money lent out. On this point, Pall J in *Muhani & Another vs. National Bank of Kenya Ltd* [1990] KLR 73 held as follows;

“The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale”.

32. Further, in the case of *Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation)*, HCCC No. 82 of 2006, Warsame J (as he then was) held that:

“..... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

33. Similarly, Ringera J, in the case of *Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001* [2001] 2 EA 540, also held as follows:

“Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them.”

34. Further, having found the existence of evidence that the property has already been sold and purchased by a third party at the public auction conducted on 26/02/2025, the “balance of convenience” does not also favour granting the injunction as the prayer seems to have already been overtaken by events.

35. For the above reasons, it is clear that the Plaintiffs’ have failed to satisfy the principles guiding the grant of interlocutory injunctions pending Appeal. The Application therefore fails.



Final Orders

36. The upshot of my findings above is that the Plaintiff's Notice of Motion dated 17/03/2025 is hereby dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY 2026

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Aloo for the Plaintiff

Mr. Orare for the Defendant

Court Assistant: Brian Kimathi 10 of 2025

