

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E592 OF 2024

JOSHUA MAINA NDIRITU.....PLAINTIFF/APPLICANT

-VERSUS-

KCB BANK KENYA.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 30th May 2024 pursuant to the provisions of Order 51 Rules 1 & 3 and Order 40 Rules 1, 2 & 8 of the Civil Procedure Rules, 2010, Sections 1A, 3, 3A and 63(c) & (e) of the Civil Procedure Act, Sections 90, 96 & 104 of the Land Act, No. 6 of 2012 and all other enabling provisions of the law seeking an order for temporary injunction, pending the hearing and determination of the suit, restraining the defendant and all persons acting on its behalf from advertising for sale, selling, auctioning, transferring, charging, evicting, managing, or otherwise interfering with the plaintiff's ownership, rights, and legal interests in Title L.R. No. Nairobi/Block 122/24.
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. Joshua Maina Ndiritu, the plaintiff herein. Mr. Ndiritu averred that he is the registered owner of all that parcel of land known as L.R. No. Nairobi/Block 122/24. He deposed that he obtained an initial loan facility of Kshs.7,000,000/= from the defendant in 2013 to finance the purchase of the suit property, which loan he fully repaid by around 2017. He thereafter obtained an enhancement facility of a further

Kshs.7,000,000/= in March 2018, which he serviced until he fell into arrears due to business downturns and the effects of the Covid-19 Pandemic.

3. Mr. Ndiritu contended that despite continued engagements with the bank and assurances by its Officers that no adverse action would be taken as long as he made the interim payments agreed on, he was never served with any Statutory Notices under the law. He stated that in April 2024, he was served with an Auctioneer's Notice threatening sale of the suit property by public auction. He stated that his written and verbal requests for copies of any Statutory Notices and Valuation Reports were not honoured. That instead, he was only furnished with a loan statement showing an outstanding balance of approximately Kshs.5,508,114.64 as at May 2024, which he has been making efforts to clear.
4. Mr. Ndiritu averred that the suit property situated in a prime area and valued at over Kshs.28,000,000/=: risks being sold at a gross undervalue without a proper valuation. He further averred that the Auctioneer has even attempted to sell the suit property via private sale after advertising it for a public auction scheduled for 11th June 2024. He stated that in view of the above, he is apprehensive that the defendant intends to unlawfully exercise its statutory power of sale over the suit property and clog his equitable right of redemption, causing him and his family emotional and psychological distress.
5. In opposition to the application herein, the defendant filed a replying affidavit sworn on 28th June 2024 by Ms Grace Omondi, the defendant's Credit Administration Manager. Ms Omondi averred that the plaintiff was advanced an initial loan of Kshs.7,000,000/= in July 2013, secured by a legal charge over L.R. No. Nairobi/Block 122/24, and a further loan of Kshs.7,000,000/= in 2017, secured by a further charge over the same property, bringing the total facility to Kshs.14,000,000/=. She stated that the second facility attracted

interest at the rate of 14% per annum and incorporated all the terms of the first Agreement, including default and enforcement clauses.

6. She contended that the plaintiff fell into arrears by April 2021, prompting the defendant to issue a 90-day Statutory Notice on 21st April 2021, followed by a 40-day Statutory Notice on 7th December 2021, both served by Registered Post in accordance with the charge instruments. Ms Omondi averred that despite the aforesaid Notices, the plaintiff failed to regularize the account, leading the defendant to instruct Auctioneers who issued a 45-day Redemption Notice on 3rd April 2024. She stated that the parties held discussions on possible repayment plans and the defendant formally proposed payment options which the plaintiff declined, including rejecting a proposal to pay Kshs.5,000/= per day. She maintained that the defendant fully complied with the statutory requirements under the Land Act in exercising its power of sale, lawfully instructed Auctioneers, and published the Auction Notice.
7. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Muthoga Gaturu & Company Advocates, whereas the defendant's submissions were filed by the law firm of Nyiha Mukoma & Company Advocates on 2nd July 2025.
8. Mr. Muriithi, learned Counsel for the plaintiff submitted that Section 90 of the Land Act makes service of a 90-day Statutory Notice a mandatory prerequisite in the exercise of a chargee's remedies, including the power of sale, and that such Notice must be properly served to afford the chargor an opportunity to remedy the default or redeem the property. Counsel argued that the burden of proving service of the Statutory Notice lies squarely with the bank once non-receipt is alleged, as affirmed by the Court of Appeal in the cases of **Nyagilo Ochieng & Another v Fanuel Ochieng & 2 others** [1995-1998] 2 EA 260

and **Omuom v Kenya Commercial Bank Ltd**, Civil Appeal No. 148 of 1995 [1996] eKLR.

9. Mr. Muriithi asserted that Auctioneers' Redemption Notices and/or Notifications of Sale do not satisfy the statutory requirements under Sections 90 & 96 of the Land Act. He contended that in the absence of proper Statutory Notices, the defendant's right to exercise its remedies has not accrued, rendering the intended sale unlawful and irregular. Counsel urged this Court to grant the plaintiff the injunctive relief being sought herein, having established a *prima facie* case with a probability of success, as he had demonstrated that he and his family will suffer irreparable harm through mental anguish and loss of a property of intrinsic value, and that the balance of convenience tilts in favour of granting him the order sought.
10. Mr. Ndegwa, learned Counsel for the defendant submitted that the defendant lawfully exercised its statutory power of sale over the suit property after the plaintiff admittedly defaulted under the charge. He further submitted that the plaintiff does not dispute the existence of the debt, as the only contested issue is service of a Statutory Notice under Sections 90 & 96 of the Land Act. Counsel relied on the cases of **Faulu Microfinance Bank Ltd v Wanyaga & another** [2022] KEHC 9877 and **Njeru v Housing Finance Company of Kenya & another** [2023] KEHC 24547, and maintained that valid Notices dated 21st April 2021 and 7th December 2021, were duly served by Registered Post to the plaintiff's acknowledged postal address, being the same address the plaintiff had given, and never formally changed or notified the Bank of, thereby shifting the burden of proof to him pursuant to the provisions of Section 112 of the Evidence Act.

11. Mr. Ndegwa argued that the plaintiff has failed to meet the test in the case of **Giella v Cassman Brown and Company Limited** [1973] EA 358, having not established a *prima facie* case as defined by the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] KLR 125, particularly, since the debt is admitted and not service. Counsel cited the case of **Mugo v Equity Ltd** [2023] KEHC 24167. He contended that any loss is compensable by damages. In the end, Mr. Ndegwa asserted that the balance of convenience tilts in favour of the defendant due to continued accrual of interest and risk of irrecoverable loss.

ANALYSIS AND DETERMINATION.

12. I have considered the application herein, the grounds on the face of it, and the affidavit in support thereof. I have also considered the replying affidavit by the defendant and the written submissions by Counsel for the parties. The issue that arises for determination is whether an order for temporary injunction should issue.
13. Interlocutory injunctions are provided for under Order 40 Rules 1(a) & (b) of the Civil Procedure Rules, 2010, which states that -

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. An interlocutory injunction is a discretionary remedy, to be exercised judiciously on the basis of cogent evidence and established legal principles. In an application for such relief, the burden rests upon the applicant to demonstrate that the circumstances warrant the issuance of an injunction. The applicable principles governing the grant of a temporary injunction were authoritatively set out by the Court in the case of **Giella v Cassman Brown & Company Limited** (supra) 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), where it was held that -

...“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. Upon perusal of the affidavit evidence available, it is undisputed that the suit property was charged to the defendant to secure loan facilities advanced to the plaintiff and that the plaintiff fell into arrears. It is however noteworthy that the crux of the dispute between the parties herein is not whether or not the plaintiff defaulted in his loan repayment obligations, but whether the defendant lawfully exercised its statutory power of sale in compliance with the mandatory provisions of the Land Act. The plaintiff averred that he was never served with the requisite Statutory Notices contemplated under the provisions of Sections 90 & 96 of the Land Act. The defendant on the other hand, asserted that a 90-day Statutory Notice and a subsequent 40-day Notice were duly issued and served upon the plaintiff by Registered Post.
17. Service of Statutory Notices under Sections 90 and 96 of the Land Act is not a mere procedural technicality but a substantive legal requirement that goes to the root of the chargee's right to exercise its statutory power of sale over a charged property. As correctly submitted by Counsel for the plaintiff, once a chargor alleges non-service, the burden shifts to the chargee to demonstrate, by cogent evidence, that the Notices were duly served. Upon perusal of the defendant's replying affidavit, it is manifest that annexed to that affidavit are

the 90-day Statutory Notice dated 21st April 2021 and a 40-day Statutory Notice dated 7th December 2021.

18. On the face of the said Notices, they were sent to the plaintiff's postal address, being P.O Box 976-00100, which address also appears on the mortgage facility letter dated 5th July 2013, the suit property's Certificate of Lease in the name of the plaintiff and the enhancement of banking facilities dated 9th October 2017. This Court is therefore persuaded that the postal address that appears on the 90-days' & 40-days' Statutory Notices annexed to the defendant's replying affidavit indeed belongs to the plaintiff. It is however noteworthy that although the defendant claims that the said Notices were sent to the plaintiff via Registered Post, the defendant has not demonstrated by producing copies of the Certificate of Posting evidencing that service was indeed effected. This Court therefore finds that there is no evidence in support of the defendant's allegations that it served the plaintiff with the Statutory Notices contemplated under Sections 90 & 96 of the Land Act.
19. In the absence of proof of service of the said Notices, this Court is persuaded that the defendant's exercise of its statutory power of sale over the suit property cannot be said to have accrued.
20. As a result, this Court finds that the plaintiff has established a *prima facie* case with a probability of success to warrant being granted an interlocutory injunction.
21. As to whether the plaintiff stands to suffer irreparable damage that cannot be adequately compensated by an award of damages, I am bound by 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 that -

...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

22. It is now well settled that 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 in Article 40 of the Constitution of Kenya, 2010, especially where an applicant has established a *prima facie* case with a probability of success as is the case herein. Consequently, this Court finds that the plaintiff has demonstrated that in the event that the order being sought herein is not granted, he will suffer damages that cannot be adequately compensated by an award of damages.
23. The issue of a balance of convenience does not arise since the Court is not in doubt. Nevertheless, based on the foregoing, the balance of convenience tilts in favour of the plaintiff since the 1st defendant can always be compensated by an award of damages in the event that the plaintiff's suit is unsuccessful. In addition, the defendant's rights are still secured as the suit property is still charged to the defendant and the defendant has neither alleged nor demonstrated that the loan is about to outstrip the value of the charged property.
24. In the end, this Court finds that the instant application is merited, and it is allowed in the following terms –
- i) This Court hereby grants an order of temporary injunction, restraining the defendant and all persons acting on its behalf from advertising for sale, selling, auctioning, transferring, charging,**

evicting, managing, or otherwise interfering with the plaintiff's ownership, rights, and legal interest in all that property known as L.R. No. Nairobi/Block 122/24 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 23rd day of January 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Okeyo for the plaintiff/applicant

Mr. Ndegwa for the defendant/respondent

Ms B. Wokabi – Court Assistant.