

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E354 OF 2024**

RUDUFU LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

SBM BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT

KEYSIAN AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT/RESPONDENT

EIN GEID LIMITED.....3<sup>RD</sup> DEFENDANT/RESPONDENT

STANLEY OLONANA OLE NTUTU.....<sup>TH</sup> DEFENDANT/RESPONDENT

AGNES JANE NJOROGE.....5<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

1. The plaintiff/applicant filed a Notice of Motion application dated 6<sup>th</sup> June 2024 under the provisions of Articles 159 & 165(3)(a) of the Constitution of Kenya, Sections 1A, 1B, 3A and 63(c) & (e) of the Civil Procedure Act, Order 40 Rules 1, 2 & 4, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 68 & 69 of the Land Registration Act, and any other enabling laws. The plaintiff seeks an order that pending the hearing and determination of this suit, an inhibition be granted restraining the registration of any further dealings in respect to the parcels of land known as L.R. Nos. CIS-Mara/Ngorengore/54, 47, 39 & 8, all situated in Ngorengore, Narok County. He also seeks orders restraining the defendant, their agents or assigns, from disposing of, transferring, leasing, trespassing upon, evicting the plaintiff from, or otherwise interfering with the plaintiff's quiet possession and occupation of the aforementioned parcels of land. He also prays for the setting aside, reviewing, or varying

of the auctioneering processes undertaken by the 1<sup>st</sup> defendant on the instructions of the 2<sup>nd</sup> defendant on 6<sup>th</sup> August 2021 and 17<sup>th</sup> May 2023.

2. The application is premised on the grounds on the face of the Motion, and it is supported by affidavits sworn on 6<sup>th</sup> June 2024 & 23<sup>rd</sup> September 2024 by Mr. Simon Ngigi Kimani, a Director of the applicant company. Mr. Kimani averred that the plaintiff is the lawful proprietor of parcels of land known as L.R. Nos. CIS-Mara/Ngorengore/54, 47, 39 & 8. That in 2015, the plaintiff obtained loan facilities from the 1<sup>st</sup> defendant amounting to USD 2,784,000.00 secured by charges over the said parcels, which was duly serviced until 2021, when the 1<sup>st</sup> defendant issued Statutory Notices demanding recovery through auction. He averred that following negotiations, the parties agreed to restructure the loan repayment terms, reduce instalments and suspend the auction upon payment of Auctioneer's fees.
3. He stated that the plaintiff continued servicing the loan under the restructured terms, but despite this, the 2<sup>nd</sup> defendant scheduled an auction for 6<sup>th</sup> August 2021 on a day's Notice and subsequently issued a Memorandum of Sale indicating that the 3<sup>rd</sup> defendant had purportedly purchased all four parcels of land as a single block. Mr. Kimani stated that the plaintiff later established that the 3<sup>rd</sup> defendant had failed to comply with the conditions of sale by not completing payment within the stipulated 90 days. He further stated that although an extension was granted, the 3<sup>rd</sup> defendant still defaulted, leading the 1<sup>st</sup> defendant to rescind the sale and for the 3<sup>rd</sup> defendant to forfeit 10% of the purchase price. The plaintiff contended that despite this rescission, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants (sic) in a private treaty purported to sell and transfer three parcels of land to the 3<sup>rd</sup> defendant by private treaty, without conducting a fresh auction as required by law. He stated that the remaining parcel

being L.R. No. CIS-Mara/Ngorengore/8, was sold to the 4<sup>th</sup> & 5<sup>th</sup> defendants through an irregular process.

4. Mr. Kimani contended that the defendants acted illegally and fraudulently, in violation of the provisions of Sections 90, 96 & 97(2) of the Land Act, and Rules 11, 15 & 16 of the Auctioneer Rules, 1997, including failure to issue fresh Statutory Notices after the loan restructuring, failure to re-advertise the properties after rescission of the sale, failure to conduct proper valuation, and auctioning the suit parcels of land at grossly undervalued prices.
5. He averred that in December 2023 the plaintiff discovered that the suit properties had been transferred to the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants based on the impugned processes. He contended that the plaintiff faces imminent and irreparable harm, having invested heavily in developing an aircraft maintenance facility on the suit parcels of land. Mr. Kimani averred that the defendants have repeatedly invaded the suit properties, commenced construction activities and issued threats to the current occupants. He stated that unless the Court grants the injunctive orders being sought, the defendants' actions will defeat the substratum of this suit and render the proceedings nugatory.
6. In opposition to the application, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 28<sup>th</sup> October 2024 by Ms Juliet W. Mwangi, the 1<sup>st</sup> defendant's Debt Recovery Officer. Ms Mwangi averred that the plaintiff was advanced two loan facilities on 31<sup>st</sup> December 2014, a term loan I of USD 1,840,000.00 and a term loan II of USD 894,000.00 secured by aircraft mortgage, legal charges over various parcels of land including the suit properties and personal guarantees by the plaintiff's Directors. She deposed that the plaintiff began defaulting on its loan repayment obligations from January 2017, prompting the 1<sup>st</sup> defendant to issue a 90-

day Statutory Notice in August 2017 and a 40-day Notice in February 2018. That due to continued default, the 1<sup>st</sup> defendant exercised its statutory power of sale over the suit properties, disposing of several charged properties between 2020 and 2023, thereby recovering Kshs.50,375,000/=.

7. Ms Mwangi stated that the plaintiff never challenged the auction processes when they occurred. She further stated that the 1<sup>st</sup> defendant commissioned a valuation of the aircraft in 2020, which placed its market value at USD 800,000.00. She claimed that the plaintiff was in breach of regulatory requirements issued by the Kenya Civil Aviation Authority, further violating the Aircraft Mortgage Agreement. She claimed that Private Investigators were engaged to trace the aircraft due to concerns over the plaintiff's compliance and the security's whereabouts. She asserted that as at 19<sup>th</sup> June 2024, the plaintiff's cumulative outstanding loan balance was USD 3,524,950.00.00, which was duly communicated to the plaintiff's Directors. She maintained that the plaintiff remains indebted for this amount. She asserted that the instant application is an attempt by the plaintiff to evade its loan obligations and conceal material facts.
8. The 2<sup>nd</sup> defendant also opposed the application herein vide a replying affidavit sworn on 7<sup>th</sup> February 2025 by Mr. Muganda Wasulwa, the proprietor of the 2<sup>nd</sup> defendant. He averred that the auction processes were undertaken pursuant to instructions from the 1<sup>st</sup> defendant. He stated that a 45-day Notification of Sale was served on 10<sup>th</sup> September 2020, followed by express instructions on 3<sup>rd</sup> September 2020 to proceed with recovery of outstanding arrears amounting to USD 2,896,786.50 and Kshs.2,800,996.00. He further averred that the public auction was duly advertised on 2<sup>nd</sup> November 2020, resulting in the successful sale of only

one property being Dagoretti/Riruta/1668, on 25<sup>th</sup> November 2020. He asserted that subsequent Notices were served and additional auctions scheduled, but some were halted due to negotiations between the plaintiff and the 1<sup>st</sup> defendant.

9. Mr. Muganda deposed that upon the collapse of negotiations, renewed instructions were issued in July 2021, leading to the successful sale by public auction on 6<sup>th</sup> August 2021 of parcel Nos. CIS-Mara/Ngorengore/54, 47 & 39, with parcel No. 8 reverting to the 1<sup>st</sup> defendant after the purchaser failed to complete payment. He claimed that fresh instructions were later issued in January 2023 to re-advertise parcel No. 8, followed by service of a 21-day courtesy Notice and advertisement of auctions scheduled for 3<sup>rd</sup> March 2023, which did not proceed due to a temporary stay. He stated that after the orders for stay lapsed, renewed instructions were issued, culminating in the successful auction of parcel No. 8 on 17<sup>th</sup> May 2023 to Keylinks Logistics Limited. He maintained that all auctions were guided by valid Valuation Reports. Further, that the plaintiff has not demonstrated any illegality or irregularity in the auction processes capable of warranting the setting aside of the same, and that all statutory requirements, including service of Notices were fully complied with.
10. In response to the application herein, the 3<sup>rd</sup> defendant filed a replying affidavit sworn on 4<sup>th</sup> November 2024 by Mr. Peter Nalianya Chemwile, the 3<sup>rd</sup> defendant's Director and Shareholder. Mr. Chemwile deposed that the 1<sup>st</sup> & 2<sup>nd</sup> defendants advertised four parcels of land being L.R. Nos. CIS-Mara/Ngorengore/8, 39, 47 and 54, for sale by public auction. He stated that the auction took place on 6<sup>th</sup> August 2021, where he emerged the highest bidder for each parcel of land at individual bid prices. That he paid the required 10% deposits and executed separate Memoranda of Sale

for each of the four parcels of land. He stated that between August and October 2021, he personally paid Kshs.16,478,000/=, thereby fully settling the purchase price for parcels numbers 39, 47 & 54. He admitted that he was unable to promptly complete payment for parcel number 8 due to delays at the Lands Registry caused by digitization initiatives, though he had secured loan financing from the Co-operative Bank.

11. Mr. Chemwile averred that on 10<sup>th</sup> December 2021, the 1<sup>st</sup> defendant purported to rescind all four sales and forfeit 10% of the aggregate purchase prices. That he filed **Nairobi ELC Case No. E434 of 2022** challenging the rescission, arguing that the three fully paid properties could not be rescinded and that no contractual basis existed for forfeiture of 10% on parcel number 8. He indicated that the parties compromised the matter in the following terms; the sale of parcel number 8 was rescinded and the deposit refunded, while the sale of parcels 39, 47 & 54 were upheld. He further averred that the Titles for the said parcels were consequently transferred to him and he took possession.
12. He asserted that he has since fenced and developed the land, constructed structures and undertaken farming activities. He maintained that each property was sold separately, each had a separate Memorandum of Sale and there was no contractual provision for block sale. Mr. Chemwile stated that a valuation was conducted prior to the auction of the suit properties and that his highest bids exceeded the forced sale values, undermining allegations of undervalue. He asserted that the plaintiff has provided no evidence of loan repayments to the 1<sup>st</sup> defendant and admits indebtedness, making the suit an abuse of the Court process.
13. The 4<sup>th</sup> & 5<sup>th</sup> defendants also filed a replying affidavit in opposition to the application herein, sworn on 6<sup>th</sup> February 2025 by Mr. Stanley Olonana Ntutu, the 4<sup>th</sup> defendant herein and a Co-Director of Key Links Logistics

Limited. Mr. Ntutu confirmed that the plaintiff charged the property known as CIS-Mara/Ngorengore/8 to the 1<sup>st</sup> defendant to secure a loan of Kshs.95,000,000/=, but subsequently defaulted, prompting the 1<sup>st</sup> defendant to exercise its statutory power of sale. He stated that pursuant to the default, the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to advertise the suit property for auction, and a public auction Notice was published in the Daily Nation on 8<sup>th</sup> May 2023 and an auction was held on 17<sup>th</sup> May 2023, where Key Links Logistics Limited successfully bid for the property, paid the requisite deposits, and a Memorandum of Sale was duly executed.

14. Mr. Ntutu averred that thereafter, the 4<sup>th</sup> & 5<sup>th</sup> defendants approached the 1<sup>st</sup> defendant for financing to complete the purchase and the 1<sup>st</sup> defendant issued a conditional offer letter advancing Kshs.26,650,000/=, which was executed by both parties. He stated that the aforesaid transaction was completed, a transfer was effected and a Title Deed was issued jointly to the 4<sup>th</sup> & 5<sup>th</sup> defendants on 11<sup>th</sup> December 2023. He maintained that he and the 5<sup>th</sup> defendant only learnt of this suit after transfer had been completed.
15. He denied allegations of fraud or illegality in the auction and asserted that the plaintiff has provided no evidence to demonstrate any impropriety. Mr. Ntutu deposed that under Section 99 of the Land Act, he and the 5<sup>th</sup> defendant are protected as innocent purchasers for value at a statutory sale and that the plaintiff's equity of redemption was extinguished once the auction took place, and the plaintiff's remedy, if any, lies only in damages.
16. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed on 21<sup>st</sup> January 2025 by the law firm of Etyang & Company Advocates, the 1<sup>st</sup> defendant's submissions were filed

on 14<sup>th</sup> March 2025 by the law firm of Muchemi & Company Advocates, the 2<sup>nd</sup> defendant's submissions were filed on 7<sup>th</sup> February 2025 by the law firm of A. A. Mudanya & Company Advocates, the 3<sup>rd</sup> defendant's submissions were filed by the law firm of Kipkorir Cheruiyot, Chivai & Kigen Advocates LLP on 21<sup>st</sup> February 2025 and the 4<sup>th</sup> & 5<sup>th</sup> defendants' submissions were filed on 7<sup>th</sup> February 2025 by the law firm of Kinoti & Kibe Company Advocates

17. Mr. Okok, learned Counsel for the plaintiff relied on the case of **Giella v Cassman Brown & Company Limited** [1973] EA 358 and submitted that the plaintiff has made out a case to warrant being granted the orders being sought herein. He cited the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] KECA 175 (KLR) and submitted that the plaintiff has established a *prima facie* case. He also cited the case of **Harbert Ponyochi Kunyobo v National Housing Corporation & another** [2019] KEHC 1663 (KLR), and contended that the defendants infringed on the plaintiff's rights by failing to issue fresh Statutory Notices under Sections 90 & 96 of the Land Act, following the restructuring of the loan repayment terms. He argued that the earlier issued Notices were rendered void once the default was remedied and that no valid Notices were subsequently issued before the advertisement and scheduling of the auction.
18. Mr. Okok stated that the auction process was irregular and unlawful, citing breach of statutory requirements under Sections 96 and 97 of the Land Act, lack of a fresh public auction following rescission of the earlier sale, gross undervaluation of the charged properties and non-compliance with the provisions of Rules 11, 15 & 16 of the Auctioneers Rules. Counsel referred to the case of **Joseph Siro Mosioma v Housing**

**Finance Company of Kenya & 3 others** [2008] KEHC 3673 (KLR), and submitted that the plaintiff has invested substantially in constructing an aircraft maintenance facility on the suit properties, therefore loss of the suit properties would occasion the plaintiff to suffer irreparable injury that cannot be adequately compensated by an award of damages. Mr. Okok asserted that the balance of convenience favours the plaintiff as greater prejudice would be suffered if the properties are disposed of, before determination of this suit.

19. Mr. Obura, learned Counsel for the 1<sup>st</sup> defendant submitted that although the plaintiff claims that no Statutory Notices under the Land Act were issued or served upon it prior to the scheduled sale of the suit properties, as the said Notices were issued and served via registered post as evidenced by the postal receipts annexed to the 1<sup>st</sup> defendant's replying affidavit. He stated that the plaintiff's default under the charge is the sole reason for the dispute between the parties herein. Counsel cited the case of **Giella v Cassman Brown & Company Ltd** (supra) and asserted that the plaintiff has not demonstrated a *prima facie* case with a probability of success to warrant being granted the reliefs being sought herein.
20. He argued that the plaintiff admitted the existence of a valid legal charge, acknowledged the outstanding indebtedness, and that it continued to be in default, as such, the plaintiff cannot claim that the 1<sup>st</sup> defendant's rights under the contract were being violated. Mr. Obura contended that the suit properties having been offered as security, became commodities for sale upon default, and any loss the plaintiff may claim, is compensable through damages, which are not only adequate but also quantifiable. He asserted that the balance of convenience favours allowing the chargee to enforce its contractual and statutory rights under the charge.

21. Mr. Mudanya, learned Counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff has not satisfied the established principles for being granted an interlocutory injunction as set out by the Court in the case of **Giella v Cassman Brown & Company Limited** (supra). He further submitted that the plaintiff has failed to demonstrate a *prima facie* case with a probability of success as defined by the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** (supra). Counsel contended that the plaintiff was clearly in default of its loan obligations, a fact demonstrated through statements of account and service of all the requisite Statutory Notices. He relied on the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro** [2015] KEHC 8440 (KLR) and asserted that the burden of proof lies with the party alleging infringement, and since the 1<sup>st</sup> defendant had demonstrated the posting of the requisite Statutory Notices, the plaintiff had not discharged its burden of proof.
22. Mr. Mudanya cited the case of **Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others** [2006] KEHC 2727 (KLR), and argued that a charged property such as the suit properties herein, becomes a commodity for sale, thus any loss arising from their sale is quantifiable and compensable in damages. For this reason, Counsel asserted that the plaintiff would not suffer any irreparable injury in the event that the orders being sought herein are not granted. He submitted that the balance of convenience favours allowing the chargee and subsequent purchasers to enjoy the rights accrued under the sale of the suit properties.
23. Mr. Khayega, learned Counsel for the 3<sup>rd</sup> defendant cited the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** (supra) and submitted that the plaintiff had not established a *prima facie* case, having admitted that the suit properties were charged to secure

a loan, he defaulted in his loan repayment obligations, and all the requisite Statutory Notices were duly issued. He referred to the Court of Appeal case of **Eric V J. Makokha & 4 others v Lawrence Sagini & 2 others** [1994] KECA 60 (KLR) and contended that plaintiff also failed to provide evidence of payments made, and his allegations of irregularity in the sale process were contradicted by the defendants' evidence, which shows that the suit properties were sold as distinct parcels of land through a lawful auction, and are now registered in the name of the 3<sup>rd</sup> defendant, who is in lawful possession of the parcels and has developed them.

24. Mr. Khayega relied on the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others** [2016] KEHC 7263 (KLR), and asserted that any loss claimed by the plaintiff is compensable in damages. He submitted that the balance of convenience favours maintaining the status quo, leaving the 3<sup>rd</sup> defendant in occupation of the suit properties. Counsel cited Section 99 of the Land Act and stated that it protects purchasers at a lawful auction as is the case herein, in the absence of evidence of fraud or misrepresentation to justify setting aside a sale.
25. Mr. Kibe, learned Counsel for the 4<sup>th</sup> & 5<sup>th</sup> defendants submitted that the plaintiff is not entitled to orders of temporary injunction, inhibition, setting aside or varying the auction process over property L.R. No. CIS-Mara/Ngorengore/8, as it has not met the necessary legal or evidentiary threshold. He argued that the plaintiff has failed to establish a *prima facie* case as it defaulted on a Kshs.95,000,000/= loan secured by the aforesaid property, thus the 1<sup>st</sup> defendant lawfully exercised its statutory power of sale over it, culminating in a public auction on 17<sup>th</sup> May 2023, wherein the 4<sup>th</sup> & 5<sup>th</sup> defendants, through Key Links Logistics Limited, purchased the property, completed the transaction, and were issued with a valid Title Deed on 11<sup>th</sup> December 2023.

26. He maintained that the plaintiff has no possession or lawful interest in the property and cannot demonstrate irreparable harm, as explained by the Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] KECA 606 (KLR). In conclusion, Counsel asserted that the balance of convenience favours the 4<sup>th</sup> & 5<sup>th</sup> defendants, who are *bona fide* purchasers for value entitled to quiet possession and development of the property. Mr. Kibe submitted that the plaintiff is not entitled to an order of inhibition under Section 68(1) of the Land Registration Act, 2012, as it has not demonstrated a risk of alienation or that refusal of inhibition would render its suit nugatory, consistent with the principles laid down in the case of **Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria** [2012] KEHC 4369 (KLR).

#### **ANALYSIS AND DETERMINATION.**

27. Upon consideration of the application herein, the affidavit filed in support thereof, the replying affidavit by the defendants and the written submissions by Counsel for the parties, the issue that arises for determination is whether the plaintiff should be granted an order of injunction pending the hearing and determination of the case.
28. Temporary injunctions are provided for under Order 40 Rules 1(a) & (b) of the Civil Procedure Rules, 2010, which states 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.*

29. An injunction is an equitable remedy that the Court will only issue upon being satisfied on the basis of credible evidence and established legal principles, that it is justified to do so. The burden lies squarely on the applicant to demonstrate entitlement to such relief. In granting an interlocutory injunction, a Court exercises its discretion. The conditions to be considered when dealing with an application for an interlocutory injunction were laid down 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.*

30. 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** (supra), where it was held as follows-

*...“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.***

31. Upon perusal of the pleadings filed by the parties herein, it is evident that the plaintiff did not contest its indebtedness to the 1<sup>st</sup> defendant nor its default in meeting the loan repayment obligations, which led to the issuance of the requisite Statutory Notices by the 1<sup>st</sup> defendant. The plaintiff instead challenged the subsequent sale of the charged properties on grounds *inter alia*, that the suit properties were disposed of at a value far below their actual market value and were therefore grossly undervalued and that the 1<sup>st</sup> & 2<sup>nd</sup> defendants failed to conduct proper and up-to-date valuations on the suit properties prior to the auction. He contended that the 1<sup>st</sup> & 2<sup>nd</sup> defendants neglected to re-issue Statutory Notices under Sections 90 & 96 of the Land Act, following the restructuring of the loan facilities. The plaintiff further contended that the auction process was tainted by fraud, irregularities and illegality.
32. In response to the application herein, the defendants asserted that the plaintiff defaulted in its loan repayment obligations as early as 2017 and was duly served with all the requisite Statutory Notices. They asserted that owing to the plaintiff's continued non-compliance, the charged properties were properly advertised and subsequently sold through lawful public auctions conducted on 6<sup>th</sup> August 2021 and 17<sup>th</sup> May 2023, which the plaintiff did not challenge at the time. The defendants denied any irregularity in the auction process and maintained that the plaintiff remained indebted to the 1<sup>st</sup> defendant in the sum of USD 3,524,950.00.

They further denied the allegations of fraud, insisting that the sale of the suit properties was conducted in full compliance with the law. Relying on the provisions of Section 99 of the Land Act, the defendants argued that the plaintiff's equity of redemption was extinguished and that the only remedy available to it, if any, would be an award in damages.

33. The plaintiff did not dispute having been served with the requisite Statutory Notices under Sections 90 & 96 of the Land Act. Instead, the plaintiff asserted that the 1<sup>st</sup> defendant was obligated to issue fresh Notices following the restructuring of the loan facilities. The Court of Appeal, in the case of **Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others** [2020] KECA 516 (KLR), addressed the question of Statutory Notices in a case of similar circumstances and held as hereunder-

*From the record it is clear that after receiving the notice giving (whether it was for the 14 days or 90 days), the advocates on record for the mortgagor engaged counsel for the Bank with proposals on how to liquidate the loan. They did not complain at all that the notice they had been given was invalid. They actually acted on it. Following the discussions, the auctioneers were advised to hold any advertisement for the sale of the suit property. That was in November 1998. The property was not re-advertised until April 2001. The question we should be asking, in our view is whether in these circumstances, it was necessary to re-issue another statutory notice. The answer to this is in the negative as the default in payment had continued for more than 3 months following the notice in view of Section 69A(1) (a).*

34. Further in **Nyando Enterprises Limited v Barclays Bank Kenya Limited** [2018] KEHC 7021 (KLR), the Court when faced with a similar issue held as follows-

*In the premises, any averment that no Statutory Notice was served under Section 90 of the Land Act is clearly untenable. It is also immaterial that the Section 90 Notice was issued on 7 June 2016, for, once a valid notice has been given, there is no obligation in law for a Chargee to re-issue a notice, even where the sale is not conducted as initially scheduled. In this respect, I would agree with and endorse the expressions of Warsame, J in Executive Curtains & Furnishings Ltd vs. Family Finance Building Society [2007] eKLR in which he had the following to say:*

*"The plaintiff was given an opportunity to redeem the charge property through the statutory notice dated 24th February, 2006. I am not aware of any law requiring the defendant to repeat or reissue the statutory notice once it is issued and served upon the borrower. The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charged property is out of the hands of the borrower.*

35. Based on the foregoing authorities, this Court finds that the 1<sup>st</sup> defendant was under no obligation to re-issue fresh Statutory Notices once the plaintiff fell into arrears after the loan facilities were restructured, given

that all the requisite Statutory Notices had already been properly served prior to the restructuring.

36. The plaintiff also challenged the sale of the suit properties on the basis that they were disposed of at grossly undervalued prices, that the auction process was tainted by fraud and illegality and that the 1<sup>st</sup> & 2<sup>nd</sup> defendants failed to undertake a proper valuation prior to the auction. This Court is of the considered view that such allegations can only be conclusively determined at the full hearing of the suit, upon evaluation of witness testimony and documentary evidence. Section 99(4) of the Land Act, 2012 stipulates that any person prejudiced by an unauthorized, improper, or irregular exercise of the statutory power of sale is entitled to seek damages against the party responsible. The Court in the case of **Bomet Beer Distributors Ltd & another v Kenya Commercial Bank Ltd & 4 others** [2005] KEHC 2932 (KLR), as later affirmed by the Court of Appeal in the case of **Etrade Limited & another v Thrift Estates Limited & 2 others** [2019] KECA 557 (KLR), held as follows in regard to claims of undervaluation and applications for injunctive relief that -

*In the present case, the chargee in exercise of its powers of sale under a charge sold the suit properties in a public auction.*

*The plaintiffs are now complaining that the said sale was irregularly conducted. They are seeking injunctive orders of this court to restrain the said property from being transferred to the transferee who purchased the said properties in a public auction...*

*The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie prove that they are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is*

*aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages. The plaintiffs cannot therefore say that they would suffer irreparable loss which cannot be compensated by damages if the order of injunction is not granted. Damages will be adequate compensation to them. Further, the balance of convenience tilts in favour of the 5<sup>th</sup> defendant who purchased the property in the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5<sup>th</sup> defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction. In the premises therefore and for the reasons stated, the application for injunction must fail. It lacks merit. It is hereby dismissed with costs to the defendants.*

37. In the circumstances herein, this Court finds that the plaintiff's assertions that the suit properties were sold at prices significantly below their actual market value, that the auction process was tainted by fraud and illegality and that the 1<sup>st</sup> & 2<sup>nd</sup> defendants failed to conduct proper valuation of the suit properties are insufficient to justify being granted an interlocutory injunction, particularly given the plaintiff's undisputed indebtedness to the 1<sup>st</sup> defendant.
38. In addition, it is evident that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants demonstrated that the suit properties were duly advertised for sale by public auction and that the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants placed the highest bids. The Court of Appeal in the case of **Nancy Kahoya Amadiva v Expert Credit Limited & another** [2015] KECA 373 (KLR), while considering the scope of due diligence required of a purchaser at an auction held that -

*The 2<sup>nd</sup> respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; “what is the extent of due diligence to be exercised by a purchaser. In Captain Patrick Kanyagia and Another -v- Damaris Wangeci and others, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR. In Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported), this court held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the appellant has not demonstrated that the 2<sup>nd</sup> respondent had any notice of irregular exercise of the statutory power of sale by the 1<sup>st</sup> respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 2<sup>nd</sup> respondent before the trial court, the 2<sup>nd</sup> respondent’s action to purchase was based on the advertisement for sale advertised in the newspaper. The 2<sup>nd</sup> respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would*

*in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security.*

39. From the pleadings filed, the plaintiff has neither alleged nor demonstrated any fraud on the part of the purchasers, nor demonstrated that the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants had notice of any alleged irregularity in the 1<sup>st</sup> defendant's exercise of its statutory power of sale or impropriety in the auction process, if any. Consequently, this Court is persuaded that the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants qualify as *bona fide* purchasers for value of the suit properties without notice, and that the plaintiff's only recourse, if any, is against the 1<sup>st</sup> defendant for an action in damages.
40. I am therefore satisfied that the plaintiff has failed to discharge the burden of establishing a *prima facie* case with a likelihood of success sufficient to warrant being granted the orders being sought herein.
41. As to whether the plaintiff will suffer irreparable harm in the event that the application herein is not allowed, I am not persuaded that this is the case. This is particularly so, since the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> defendants were *bona fide* purchasers for value of the suit properties without notice of fraud or irregularity in its sale, and the plaintiff's only available remedy is an award of damages. This Court finds that any loss the plaintiff has incurred as a result of the defendants' actions can be adequately compensated through damages in accordance with the provisions of Section 99(4) of the Land Act.
42. Additionally, it is trite law that once a property is offered as security, it effectively becomes a commodity available for sale in the event of default. In **Shimmers Plaza Limited v National Bank of Kenya Ltd** [2013] KECA 359 (KLR), the Court of Appeal affirmed the High Court's finding that damages could adequately compensate the chargor, as the

secured property had by virtue of being charged, effectively assumed the character of a saleable commodity. Bound by this authority and considering that the value of the suit properties in issue herein, can be readily ascertained through valuation, this Court finds that the defendant, being a financial institution, would be capable of compensating the plaintiff should the plaintiff's suit ultimately succeed.

43. As a result, this Court is satisfied that the plaintiff does not stand to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed.
44. In regard to the balance of convenience, although this Court is not in doubt, the balance of convenience tilts in favour of the defendants who have expended money in purchase of the suit properties.
45. This Court finds that the instant application is devoid of merits. It is hereby dismissed with costs to the defendants.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 23<sup>rd</sup> day of January 2026. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff

Mr. Obura for the 1<sup>st</sup> defendant

Mr. Mudanya for the 2<sup>nd</sup> defendant

Ms Chepkurui h/b for Mr. Khayega for the 3<sup>rd</sup> defendant

Mr. Muturi h/b for Mr. Kibe Mungai for the 4<sup>th</sup> & 5<sup>th</sup> defendants

Ms B. Wokabi – Court Assistant.

ORIGINAL