



REPUBLIC OF KENYA



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**Miheso v Rafiki Microfinance Bank Limited & 2 others (Constitutional
Petition E002 of 2025) [2026] KEHC 1025 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E002 OF 2025**

AC BETT, J

FEBRUARY 5, 2026

BETWEEN

CLEMENT CHOMU MIHESO PETITIONER

AND

RAFIKI MICROFINANCE BANK LIMITED 1ST RESPONDENT

THE CENTRAL BANK OF KENYA 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Petitioner filed an application vide a Notice of Motion dated 19th December 2024 seeking for orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the Petition herein, there be a temporary order of injunction restraining the 1st Respondent (Rafiki Microfinance Bank Limited), whether by itself, its servants and/or agents from advertising and/or selling the land parcel comprised in the title number Lugari/likuyani Block 1 (vihiga)/694 registered in the name of the Petitioner/Applicant
 - d. That costs of the application be provided for.
 - e. That the Honourable Court be pleased to make such further or other orders as it may deem fit and expedient in the circumstances.
2. The application is supported by an affidavit sworn by the Petitioner and is predicated on the grounds that on 24th February 2020, the Petitioner applied for and was advanced a loan of Ksh. 3,000,000/= at



- an interest rate of 23% per annum on a reducing balance payable in 60 equal monthly instalments of Ksh. 84,572 with effect from the month of drawdown until payment in full and in the event of default, a penal interest of 1.5% per month over and above the normal interest would apply.
3. It is the Petitioner's case that the facility was secured by a first charge over L.R. No. Lugari/lukuyani Block 1 (vihiga)/694 and a deed of rental assessment over L.R. No. Soy/soy Block 10 (navllus)/848. The Petitioner avers that on 30th July 2020, the 1st Respondent disbursed the sum of Ksh. 3,039,000/= to his account.
 4. The Petitioner avers that on 12th May 2021, he was served with a first Statutory Notice that required him to pay a sum of Ksh. 194,796.30 and he paid a sum of Ksh. 307,130/= in three (3) months thereby regularising his account. That on 11th May 2023, he wrote a letter seeking restructuring of the loan but his request was declined vide a letter dated 17th May 2023.
 5. The Petitioner further depones that on 18th July 2023, he was served with a 45 days redemption notice together with a Notification of Sale of Property indicating that his property was scheduled to be sold on 29th September 2023. The Petitioner later on 29th October 2024 received a loan statement for the period between 1st July 2020 to 16th July 2024 which indicated that he had paid a total of Ksh. 5,032,733.86 and as at the 29th October 2024, he still owed a sum of Ksh. 1,285,464.49 making the total loan payable Ksh. 6,318,198.35 which is an excess of the agreed loan amount by Ksh. 1,243,878.35 and more than double the disbursed loan amount.
 6. The Petitioner was aggrieved by the computation of the outstanding loan despite a consultative meeting in which he raised his concerns regarding what he viewed as skewed calculation of penal interest between 30th April 2022 and 31st January 2024 resulting in an excess amount of Ksh. 507,313.40, and a questionable amount of Ksh. 232,996.45 posted as interest on 30th November 2020. According to the Petitioner, considering that he was supposed to pay the sum of Ksh. 5,157,554.43 in 60 months and he had paid Ksh. 5,122,733/= within 48 months, the balance owing, according to the loan schedule, should have been Ksh. 34,820.57. The Petitioner urges the court to write off the excessive amount of Ksh. 1,259,724.34.
 7. It is the Petitioner's case that if the sale were to proceed, he would suffer irreparable loss and damage arising from an unfair, unlawful and unconstitutional exercise.
 8. The 1st Respondent opposed the application. They filed a preliminary objection in which they assert that the issues in dispute in the Petition are similar to issues in Kakamega CMCC. No. E211 of 2023 which was conclusively determined and Judgement delivered on 16th July 2024 and therefore offends the provisions of Section 7 and 8 of the *Civil Procedure Act*. The 1st Respondent further asserts that the Petitioner's claim is purely a civil claim and does not disclose any constitutional issues.
 9. The 1st Respondent also filed a Replying Affidavit sworn by Kosgei Isaiah Kanda, a Senior Relationship Manager of the 1st Respondent. He depones that on 12th May 2021, the Petitioner defaulted in his obligation to settle the loan, a fact he admitted vide his letter dated 29th August 2023, and that on 12th May 2021, he was served with notice to rectify the default by settling the arrears of Ksh. 194,796.30 within 90 days, with the outstanding loan amount being Ksh. 3,215,402.58. It is the deponent's averment that the Petitioner did not rectify the default and a notice of intention to sell the suit property dated 10th December 2021 was served upon him by which time the outstanding loan was Ksh 3,144,582.13.



10. The 1st Respondent further avers that the Petitioner did not honour the terms of the statutory notice and so they engaged the services of Philips International Auctioneers to proceed with the realization of the security in exercise of the 1st Respondent's statutory power of sale.
11. The 1st Respondent avers that the Petitioner was served with the 45 days redemption notice on 18/7/2023 and that since he failed to disclose that he had been served with the requisite notices under the Land Act and Auctioneer's Rules, he is not deserving of any equitable remedy.
12. Further, the 1st Respondent avers that the interest rate for the loan at 23% per annum and the default interest rate at 1.5% per month was properly disclosed in the letter of offer dated 24th February 2020 and the loan restructure letter of offer dated 23rd July 2020. The 1st Respondent avers that the aforesaid rates to translate to 1.92% per month and in the case of default, 3.42% per month.
13. It is the 1st Respondent's averments that the Petitioner's assertion that he has paid the entire loan amount overlooks significant costs occasioned by delay in servicing the loan which include default interests which were legitimately added to the outstanding loan balance.
14. The application was canvassed through written submissions and each party filed well researched and detailed submissions.

Analysis and Determination

15. After considering the parties pleadings, the written submissions and the applicable law, the issues that are deducible are:-
 - i. Whether the Petition is barred by the doctrine of res judicata.
 - ii. Whether the Petitioner has met the threshold for grant of conservatory orders.
16. The Petitioner alleges that Section 54 of the Banking Act is unconstitutional as it limits the protection provided under Sections 31A, 44 and 44A of Banking Act to borrowers or institutions under the Act and thus contravenes Article 27, 28, 43 (1) (e) and (3), 46 (1) (e) and 231 of the Constitution. In seeking these declarations, the Petitioner has enjoined the Central Bank of Kenya, and the Attorney General.
17. Suffice to say that the Petition raises constitutional issues that would require the court to determine whether the Petitioner's constitutional rights have been violated by the 1st Respondent. Such issues are distinct from the issues raised in the previously determined suit albeit the subject matter is the same. Courts have held that the doctrine of res judicata should be applied sparingly and with caution in constitutional litigation and should only be invoked in the clearest of cases: See Communications Commission of Kenya & 5 others v. Royal Media services Limited and 5 others [2014] KESC 53 (KLR) and Okiya Omtatah Okoiti and Another v. A.G. & 6 others [2014] KEHC 8157 (KLR). In the latter suit, Lenaola J, as he then was held that whereas res judicata is a doctrine of general application, "it must be sparingly invoked in rights-based litigation."
18. I have considered the authorities cited by the 1st Respondent and find that the same can be distinguished for reasons that they essentially involve the same subject matter resulting in duplication of claims. In the present case, issues of inadequate consumer protection and discriminatory banking legislation has been raised. These issues are distinguishable from the issues determined by the subordinate court and in the premises, I find that the preliminary objection must fail.



19. The threshold of grant of conservatory orders in a Constitutional Petition were considered in *Mwaniki v. Ndiga & 3 others* [2025] KEHC 9562 (KLR) where the court held as follows:-

“...The issue for determination is whether the application meets the threshold for the issuance of conservatory orders. The principles for granting conservatory orders were stated in the case of *Board of Management of Uhuru Secondary School -vs- City County Director of Education and 2 Others* (2015) eKLR where the court summarized the principles for the grant of conservatory orders and stated as follows:

- “(i) The needs for the applicant to demonstrate an arguable prima facie case with likely hood of success and to show that in the absence of the conservatory orders he is likely to suffer prejudice.
- (ii) The secondary principal in whether the denial of the conservatory order will enhance the constitutional values and objects of the specific right or freedom in the bill of rights.
- (iii) The court should consider whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
- (iv) Whether the public interest would be prejudiced by a decision to exercise discretion to grant or deny conservatory order.”

20. The Petitioner has not prayed for conservatory orders seeking to suspend the impugned provisions but has chosen to seek injunctive relief limited to his property which was used to secure the loan.

21. Essentially, the grounds for issuing conservatory orders are not far removed from the principles of injunction. See *Nguruman Limited v. Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR).

22. The principles that govern the granting of an injunction are predominately derived from the celebrated case of *Giella v. Cassman Brown* [1973] EA 358 and are well settled. They are:-

- a. That the applicant must establish a prima facie case with a probability of success.
- b. The applicant must demonstrate that he stands to suffer irreparable loss unless the injunction is granted.
- c. If there is doubt the court will weigh the balance of convenience.

23. A prima facie case was defined in *Mrao Ltd v. First American Bank of Kenya Limited and 2 others* [2003] KECA 175 (KLR) as:-

“...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.”

24. An analysis of the Petition discloses a prima facie case as the Petitioner seeks a declaration that being a borrower from the 1st Respondent, he is entitled to equal treatment as borrowers from institutions governed by the *Banking Act*. This invites the court to consider whether the 2nd and 3rd Respondents have acted contrary to *the Constitution* of Kenya by enacting laws that result in discriminating against certain segments of borrowers by limiting the in duplum protection only to bank borrowers and in failing to afford the Petitioner adequate consumer protection.



25. What constitutes irreparable loss as established in the land mark case of *Giella v. Cassman Brown & Co. Ltd* (Supra) is dependent on the specific facts of each case but an applicant must demonstrate that the anticipated loss would not be adequately compensated by an award of monetary damages. Where the damages can be quantified and the respondent has ability to pay, an injunction will generally not issue.
26. The Applicant needs to establish real, actual or demonstrable harm that would render a final victory hollow. In the case of *Nguruman Limited v. Bonde Nielsen & 2 others* (Supra), the court rendered itself thus:-
- “...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.”
27. The final test in an injunction application is the balance of convenience. The question before the court is who between the Petitioner and the 1st Respondent stands to suffer greater inconvenience or prejudice were the injunction not to issue and the Petition ultimately decided in favour of the Petitioner.
28. The 1st Respondent did not contest the Petitioner’s averment that the property is valued at Ksh. 16,500,000/= with a forced value of Ksh. 12,375,000/=. It is not disputed that out of the original loan, the Petitioner has paid Ksh. 5,074,320/= whereas the 1st Respondent sets the loan balance at Ksh. 1,285,464.49 bringing the aggregate total to Ksh. 6,318,198.35. The question is, would the Petitioner suffer irreparable loss if the 1st Respondent was to exercise its statutory power of sale?
29. There is no doubt that the Petitioner has paid a significant amount of the loan. He has expended energy on developing the property. His claim is that his fundamental rights have been violated and if the proposed sale were to proceed, he would suffer prejudice.
30. On the other hand, the 1st Respondent is owed money by the Petitioner, who has defaulted in repayment of the loan. The 1st Respondent has issued the Petitioner with the requisite statutory notice and has commenced the process of exercising its statutory power of sale. It is well settled that once a debt is admitted, an injunction should not issue on account of a dispute as to the amount owed. See *Mrao Ltd v. First American Bank of Kenya Limited and 2 others* (Supra) and *National Bank of Kenya v. Juja Coffee Exports Limited* [2021] eKLR.
31. Be that as it may, where grave issues touching on the violation of an individual’s fundamental rights are concerned, the court should adopt a progressive approach that balances the standard civil procedure with the unique constitutional doctrines. Under Article 23 (3) of *the Constitution*, courts have broad authority to grant appropriate relief which includes injunctions and conservatory orders to protect the Bill of Rights.



32. After carefully evaluating the parties' rival submissions and the applicable law, I am of the view that this being a Constitutional Petition, the substratum of the petition needs to be preserved so that in the event of a victory, the Applicant does not find himself having been deprived of his property by reason of sale by the financing institution. Further, the objects of the right to equal treatment and consumer protection as anchored in *the Constitution* need to be enhanced. I therefore find that the balance of convenience tilts in favour of the Petitioner.
33. Consequently, I allow the application for injunction but being mindful of the 1st Respondent's legitimate expectation that the court should not fetter its rights to recover loans, the order of injunction is subject to the Petitioner depositing with the 1st Respondent a sum of Ksh. 300,000/= within thirty (30) days and in default, the order of injunction shall stand discharged.
34. The parties shall take steps to fast track the Petition which has been pending for an inordinately long time, so as to have it disposed of within the next three (3) months.
35. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 5TH DAY OF FEBRUARY 2026.

A. C. BETT

JUDGE

In the presence of:

No appearance for Wanyama for the Petitioner

Mr Wesonga for 1st Respondent

No appearance for Mr. Simiyu for 2nd and 3rd Respondent

Petitioner present in person

Court Assistant: Polycap

