



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MILIMANI LAW COURTS, NAIROBI
ELCLC CASE NO. E122 OF 2025

**CARNATION PROPERTIES
MANAGEMENT COMPANY LIMITED1ST
PLAINTIFF
DREAM INVESTMENTS LIMITED2ND
PLAINTIFF
TULIP TOWER HOLDINGS LIMITED3RD
PLAINTIFF**

-VERSUS-

**CARNATION PROPERTIES LIMITED1ST
DEFENDANT
DIAMOND TRUST BANK KENYA LIMITED2ND
DEFENDANT
DALALI TRADERS AUCTIONEERS3RD
DEFENDANT**

RULING

Introduction

1. I am called upon to determine two (2) applications filed in this suit. The first is the Plaintiffs' Notice of Motion dated 24th March 2025, while the second is the Notice of Motion dated 16th September 2025 filed by the 2nd and 3rd Defendants. Pursuant to directions given by the Court, the two

applications were heard together and disposed of by way of written submissions, which are on record.

2. The Plaintiffs' application seeks interim injunctive relief restraining the Defendants from proceeding with the advertised sale by public auction of Land Reference Number 1870/IX/189, pending the hearing and determination of the suit. The 2nd and 3rd Defendants' application, on the other hand, seeks orders striking out the suit on the grounds that this Court lacks jurisdiction to entertain the dispute and that the suit is sub judice contrary to section 6 of the Civil Procedure Act.
3. The two applications arise from the same set of facts and are closely intertwined. In particular, the question of whether this Court has jurisdiction, and whether the suit is barred by the doctrine of sub judice, must necessarily be resolved before the Court can consider the merits of the Plaintiffs' application for injunctive relief. It is on that basis that the Court proceeds to determine both applications in this single ruling.

The Plaintiffs' Application:(Notice of Motion dated 24th March 2025)

4. The Plaintiffs' Notice of Motion dated 24th March 2025 is brought under Articles 40, 50 and 162(2)(b) of the Constitution, sections 13 of the Environment and Land Court Act, sections 150 of the Land Act and 101 of the Land Registration Act, Order 40 of the Civil Procedure Rules, and all other enabling provisions of the law.
5. In the application, the Plaintiffs seek, inter alia, orders that pending the hearing and determination of the suit, the Defendants be restrained from advertising for sale, selling by public auction or private treaty, transferring, alienating, charging, or otherwise dealing with Land Reference Number 1870/IX/189, in a manner that interferes with the

Plaintiffs' registered sub-leases and reversionary interest therein.

6. The application is supported by affidavits sworn by Prof. Tula Bowry and Neelesh Aggarwal, together with the documents annexed thereto. The Plaintiffs' case, as deponed, is that the 1st Defendant was the registered proprietor of the head lease over L.R. No. 1870/IX/189, from which it granted registered sub-leases over defined portions of the property in favour of the 2nd and 3rd Plaintiffs in the years 2007 and 2010 respectively.
7. The Plaintiffs further depone that following the grant of the sub-leases, the 1st Defendant incorporated the 1st Plaintiff, Carnation Properties Management Company Limited, for the purpose of taking over and holding the reversionary interest in the head lease in trust for the sub-lessees. According to the Plaintiffs, upon completion of the sub-leases, the 1st Defendant ceased to have any beneficial interest in the sub-leased portions of the suit property.
8. It is the Plaintiffs' case that notwithstanding the existence of the registered sub-leases and the reversionary interest, the 1st Defendant proceeded to execute a charge and a further charge in favour of the 2nd Defendant in the years 2015 and 2016 respectively. The Plaintiffs aver that while the charge instruments expressly excluded their sub-leased portions, the Defendants nevertheless caused the entire parcel of land to be advertised for sale by public auction.
9. The Plaintiffs state that they became aware of the intended sale through an advertisement published in the Daily Nation Newspaper on 10th March 2025, which advertised the entire land parcel measuring approximately 0.1013 hectares for sale without any delineation or exclusion of the sub-

leased portions.

10. The Plaintiffs contend that the intended sale, if allowed to proceed, would unlawfully interfere with their registered proprietary interests, occupation, and use of the sub-leased portions of the suit property, notwithstanding the express exclusion of those portions from the charge instruments. They aver that the Defendants' actions are illegal, null and void, and in violation of their constitutional and statutory right to property.
11. The Plaintiffs further aver that damages would not be an adequate remedy in the circumstances, as the sale of the entire property would expose their registered interests to third parties and occasion irreversible prejudice. They therefore urge the Court to grant the injunctive orders sought in order to preserve the suit property pending the determination of the suit.

Opposition to the Plaintiffs' Application

12. The Plaintiffs' application is opposed by the 2nd and 3rd Defendants through a replying affidavit and the written submissions filed on their behalf. The Defendants contend that the Plaintiffs have not satisfied the legal threshold for the grant of interlocutory injunctive relief.
13. The 2nd and 3rd Defendants' position is that the suit property was lawfully charged to the 2nd Defendant to secure financial facilities advanced to the 1st Defendant, and that the 1st Defendant defaulted in repayment. They aver that all statutory notices required under the Land Act and the Auctioneers Act were duly issued and served, and that the statutory power of sale has lawfully arisen.

14. The Defendants contend that the Plaintiffs lack locus standi to challenge the exercise of the statutory power of sale, as they are not parties to the charge instruments. They further assert that the Plaintiffs' sub-leased portions were expressly excluded from the charge, and that any sale would be subject to existing leases, thereby occasioning no prejudice to the Plaintiffs.
15. It is also the Defendants' case that the Plaintiffs' application is an abuse of the court process, as disputes relating to the exercise of the statutory power of sale have previously been litigated before the High Court. They contend that the balance of convenience tilts in favour of allowing the 2nd Defendant to realise its security, and urge the Court to dismiss the Plaintiffs' application with costs.

The Second Application: (Notice of Motion dated 16th September 2025)

16. The second application before the Court is the Notice of Motion dated 16th September 2025 filed by the 2nd and 3rd Defendants. The application is brought under sections 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15 of the Civil Procedure Rules, and all other enabling provisions of the law.
17. In the application, the 2nd and 3rd Defendants seek orders that the Plaintiffs' suit be struck out on the grounds that this Court lacks jurisdiction to hear and determine the dispute, and that the suit is sub judice in contravention of section 6 of the Civil Procedure Act.
18. The Defendants contend that the dominant issue in the suit arises from the 2nd Defendant's exercise of its statutory power of sale pursuant to registered charges, and that disputes relating to the enforcement of banking securities and recovery of loan facilities fall within the jurisdiction

of the High Court and not the Environment and Land Court.

19. The Defendants further assert that there exist previously instituted proceedings before the High Court between the 1st Defendant and the 2nd Defendant in which issues relating to the loan facilities, statutory notices, and the exercise of the statutory power of sale were directly and substantially in issue. On that basis, they contend that the present suit is barred by the doctrine of sub judice.

Response to the Second Application

20. The Plaintiffs oppose the application dated 16th September 2025 through replying affidavits sworn by Prof. Tula Bowry and Neelesh Aggarwal, and the written submissions filed on their behalf.

21. The Plaintiffs contend that this Court has jurisdiction to hear and determine the suit, as the dispute before Court concerns the protection of registered proprietary interests in land, including sub-leases and a reversionary interest, and not the settlement of accounts or the enforcement of loan contracts.

22. On the plea of sub judice, the Plaintiffs assert that they were not parties to the previously instituted proceedings relied upon by the Defendants, and that the issues in those suits are distinct from those arising in the present matter. They contend that the earlier proceedings related to disputes over loan facilities and access to information, whereas the present suit arose following the advertisement for sale of the entire suit property on 10th March 2025, which directly affected their registered interests.

23. The Plaintiffs therefore urge the Court to find that the Defendants have failed to establish any basis for striking out the suit, and to dismiss the application dated 16th September 2025 with costs.

Disposal of the Applications

24. Following the filing of the two applications, the Court gave directions that the same be heard and determined together by way of written submissions. The parties duly complied and placed before the Court their respective affidavits and written submissions. The Court has considered all the material on record in arriving at this ruling.

Issues for Determination

25. Having considered the pleadings, the two applications, the affidavits on record, and the rival submissions by the parties, the Court is of the view that the following issues arise for determination:

- a) Whether this Court has jurisdiction to hear and determine the suit and the applications herein;
- b) Whether the suit is sub judice within the meaning of section 6 of the Civil Procedure Act;
- c) Whether the Plaintiffs have established a basis for the grant of interlocutory injunctive relief as sought in the Notice of Motion dated 24th March 2025; and
- d) What orders ought to issue on costs.

Analysis and Determination

Issue 1: Whether this Court has jurisdiction to hear and determine the suit and the applications herein;

26. Jurisdiction is a threshold issue and must be determined at the earliest opportunity. A court must first satisfy itself that it is properly seized of jurisdiction before proceeding to determine any other matter.
27. The jurisdiction of this Court is anchored in **Article 162(2)(b) of the Constitution**, which mandates the establishment of courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. The jurisdiction is further delineated under **section 13 of the Environment and Land Court Act**, which empowers this Court to hear and determine disputes relating to interests in land.
28. It is, however, settled law that not every dispute in which land is the subject matter falls within the jurisdiction of this Court. In particular, disputes whose dominant issue concerns the recovery of loan facilities, settlement of accounts, or the contractual relationship between a borrower and a lender fall within the jurisdiction of the High Court.
29. In determining jurisdiction, the Court must therefore interrogate the pleadings and the reliefs sought in order to ascertain the *dominant issue* in dispute. In the present suit, the Plaintiffs are not the chargor and do not challenge the validity of the charge instruments executed between the 1st and 2nd Defendants. They do not contest the existence of the loan facilities, the indebtedness, or the 2nd Defendant's statutory power of sale as against the chargor.
30. The Plaintiffs' case is that they hold registered sub-leases over defined portions of L.R. No. 1870/IX/189, and that the 1st Plaintiff holds the

reversionary interest thereto. It is not disputed that these interests predate the charges and were expressly excluded from the charge instruments.

31. The gravamen of the Plaintiffs' complaint is that notwithstanding the express exclusion of their registered interests, the Defendants caused the *entire parcel of land* to be advertised for sale by public auction, without delineation of the excluded portions, thereby exposing the Plaintiffs' proprietary interests to unlawful interference.
32. The dispute before the Court therefore does not concern accounts, indebtedness, or the enforcement of the banker-customer relationship. Rather, it concerns the protection of registered third-party proprietary interests in land and the legality of actions taken in relation to land subject to those interests.
33. Questions as to whether registered sub-leases and a reversionary interest may be imperilled through the exercise of a statutory power of sale, and whether such power may lawfully be exercised in a manner that affects excluded interests, are questions that directly implicate interests in land and fall within the mandate of this Court.
34. In the circumstances, the dominant issue in this suit relates to interests in land within the meaning of **Article 162(2)(b) of the Constitution** and **section 13 of the Environment and Land Court Act**, and not to the settlement of accounts or enforcement of a charge as between a lender and a borrower. The Court therefore finds that it has jurisdiction to hear and determine the suit and the applications herein.

ISSUE 2: Whether the suit is sub judice within the meaning of section 6 of the Civil Procedure Act;

35. The 2nd and 3rd Defendants contend that the present suit is barred by the doctrine of sub judice on the basis that there exist previously instituted proceedings before the High Court touching on the exercise of the statutory power of sale in respect of the suit property.
36. The doctrine of sub judice is anchored in **section 6 of the Civil Procedure Act**, which bars a court from proceeding with a suit or proceeding in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties, or parties litigating under the same title, pending before a court of competent jurisdiction.
37. On whether a matter is sub judice, the Court in the case of ***Showcase Properties Limited v Kenya Commercial Bank Ltd & another [2023] KEHC 24601 (KLR)*** stated: -*"The rationale behind the doctrine of subjudice is to prevent situations of having conflicting orders emanating from two or more different Courts over the same subject matter. A five-judge bench in the case of David Ndi & others versus Attorney General & others 2021 eKLR, had this to say in regard to the doctrine of subjudice "The rationale behind this provision (Section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will...."For the doctrine of subjudice to be successfully invoked, the person seeking to invoke it has to demonstrate that the matter in issue in the subsequent suit is directly and substantially in issue in a previously instituted suit, proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title and such suit or proceeding must be pending in the same or any other Court having jurisdiction in Kenya to*

grant the relief claimed.”

38. From the foregoing, it is clear that for the doctrine of sub judice to apply, the following elements must be satisfied: the matter in issue in the subsequent suit must be directly and substantially the same as that in the earlier suit; the parties must be the same or litigating under the same title; and the earlier suit must be pending before a court of competent jurisdiction.
39. In the present suit, the Plaintiffs were not parties to the previously instituted proceedings relied upon by the Defendants. Further, the issues in those proceedings related to disputes between the chargor and the chargee concerning the loan facilities and the exercise of the statutory power of sale as between those parties.
40. The cause of action in the present suit arose following the advertisement for sale of the entire parcel of land, which the Plaintiffs contend imperils their registered sub-leases and reversionary interest. Those proprietary interests, and the legality of actions taken in relation to them, were not directly or substantially in issue in the earlier proceedings.
41. The parties in the two sets of proceedings are therefore not the same, nor are they litigating under the same title. Additionally, the subject matter and the issues for determination in the present suit are distinct from those in the previously instituted proceedings.
42. In the circumstances, the Court finds that the Defendants have failed to demonstrate that the present suit is directly and substantially in issue in a previously instituted suit within the meaning of **section 6 of the Civil**

Procedure Act. Accordingly, the plea of sub judice is without merit and is rejected.

Issue 3: Whether the Plaintiffs have established a basis for the grant of interlocutory injunctive relief as sought in the Notice of Motion dated 24th March 2025;

43. The Plaintiffs seek interim injunctive relief restraining the Defendants from proceeding with the advertised sale of L.R. No. 1870/IX/189 pending the hearing and determination of the suit.
44. The principles governing the grant of interlocutory injunctions are well settled. They were enunciated by the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR, and Giella Vs. Cassman Brown (Supra)** where the Court stated: *“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, 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 damages; and if the court is in doubt, then it can decide the application on a balance of convenience.”*
45. These principles are sequential and not conjunctive. An applicant who fails to establish a prima facie case with a probability of success cannot obtain an injunction, and the Court need not consider the other limbs.
46. In the present case, the Plaintiffs’ claim is anchored on their assertion that they hold registered sub-leases over defined portions of the suit property and that the 1st Plaintiff holds the reversionary interest thereto. It is not disputed that these interests predate the charges and were expressly

excluded from the charge instruments executed in favour of the 2nd Defendant.

47. The Plaintiffs have placed before the Court evidence showing that notwithstanding the exclusion of their registered interests from the charge, the Defendants caused the *entire parcel of land* to be advertised for sale by public auction, without delineation or reservation of the excluded portions. On the material placed before the Court, this raises a legitimate question as to whether the intended sale unlawfully imperils the Plaintiffs' proprietary interests.
48. At this interlocutory stage, the Court is not required to make definitive findings on the merits of the competing claims. It is sufficient that the Plaintiffs have demonstrated an arguable case, grounded on registered interests in land, calling for an explanation at trial. The Court is satisfied that the Plaintiffs have established a prima facie case with a probability of success.
49. On the second limb, the Plaintiffs contend that if the sale is allowed to proceed, their registered interests will be exposed to third parties, thereby occasioning prejudice that cannot be adequately remedied by an award of damages. Land, and particularly registered proprietary interests therein, is unique, and once sold, the substratum of the suit would be irreversibly altered.
50. As regards the balance of convenience, the purpose of an interlocutory injunction is to preserve the subject matter of the dispute pending determination of the suit. In the circumstances of this case, the balance of convenience tilts in favour of preserving the status quo so that the Plaintiffs' registered interests are not rendered nugatory before the issues

in dispute are conclusively determined.

51. Without making any conclusive findings on the merits of the suit, the Court is satisfied that the Plaintiffs have met the threshold for the grant of interlocutory injunctive relief.

Final Orders

52. In the result, and for the reasons set out hereinabove, the Court makes the following orders:

- a) The Plaintiffs' Notice of Motion dated 24th March 2025 is hereby allowed to the extent that a temporary injunction is issued restraining the Defendants, whether by themselves, their agents, servants, auctioneers or any other persons acting under their authority, from advertising, offering for sale, selling by public auction or otherwise howsoever disposing of Land Reference Number 1870/IX/189, insofar as such sale affects or includes the Plaintiffs' registered sub-leases and reversionary interests, pending the hearing and determination of the suit.
- b) The 2nd and 3rd Defendants' Notice of Motion dated 16th September 2025 seeking to strike out the suit is hereby dismissed.
- c) Costs of both applications shall be in the cause.

It is so ordered!

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **13TH** day of **FEBRUARY, 2026.**

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Ms. Ogoti..... for Plaintiffs

Mr. Baraka..... for 1st Defendant

Mr. Kisinga..... for 2nd and 3rd Defendants

Philomena W...... Court Assistant

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