



**I & M Bank Limited v Yakub & 2 others (Commercial Case E690 of 2024)
[2026] KEHC 1476 (KLR) (Commercial and Tax) (12 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E690 OF 2024
PM MULWA, J
FEBRUARY 12, 2026**

BETWEEN

I & M BANK LIMITED PLAINTIFF

AND

OMAR RAHEMTULLA YAKUB 1ST DEFENDANT

ORY INVESTMENTS LIMITED 2ND DEFENDANT

ROY HAULIESR LIMITED 3RD DEFENDANT

RULING

1. This ruling determines two applications filed in this suit. The first is the Plaintiff's Notice of Motion dated 11th November 2024. The second is the 2nd and 3rd Defendants' Notice of Motion dated 2nd December 2024. The two applications were canvassed together by way of written submissions.

Application dated 11th November 2024

2. The application is brought pursuant to Articles 10(b) and 40 of *the Constitution*, Sections 26 & 68 *Land Registration Act*, Sections 1A, & 1B,3A & 63 of the *Civil Procedure Act*, Order 40 rule 1,2,3,4 & 11 of the Civil Procedure Rules.
3. The Plaintiff bank seeks, principally:
 - i. An injunction restraining the Defendants from dealing with Title No. Mombasa/MS/Block V/163, L.R. No. 9042/682, L.R. No. 9042/683 and L.R. No. 9042/684 pending determination of the suit;
 - ii. Orders of inhibition against the said titles; and



- iii. Costs.
4. The application is premised on the grounds on the face of the record and supported by the annexed affidavit sworn by Peris Wairimu Chege, a Senior Legal Manager of I&M Bank Limited. She deposes that pursuant to a Letter of Offer dated 25th May 2023, the Bank advanced various credit facilities to Roy Hauliers Limited secured by properties registered in the names of the 1st and 2nd Defendants. That the Borrower and chargors executed the Letter of Offer, passed requisite board resolutions, and deposited original title documents with the Bank with the intention of creating formal legal charges, but subsequently failed and/or neglected to execute the formal charge instruments. By virtue of Sections 79(6) and (7) of the Land Act, informal charges arose upon deposit of the titles and written undertakings; that the Borrower is in default in the sum of approximately Kshs. 350,680,566/= and that there is apprehension the properties may be transferred to third parties unless restrained, thereby defeating the Bank's security and rendering recovery of the outstanding debt irrecoverable, hence the need for leave to enforce the informal charges and preserve the securities.
 5. The application is opposed by the affidavits of Safaraz Omar Yakub sworn on 18th December 2024 and 8th October 2025. The deponent states that he is a director of the 2nd and 3rd Defendant companies and was authorized to swear the affidavit on their behalf. He avers that the 1st Defendant is deceased and annexes a death certificate. He contends that the Plaintiff's suit is sub judice in light of Nairobi High Court Civil Suit No. E553 of 2024 (Roy Hauliers Limited v I&M Bank Limited), where issues concerning the indebtedness and legality of enforcement are pending determination. He further deposes that interim status quo orders were issued in that suit restraining adverse action against the guarantors. He disputes the alleged indebtedness and challenges the Plaintiff's reliance on informal charges, asserting that the titles were never deposited with I&M Bank and that no valid informal charges arose under Section 79 of the Land Act. He maintains that L.R. Nos. 18995/15 are irrelevant to the present application and annexed corporate resolutions, guarantee documents, and correspondence in support of the Defendants' position that the Plaintiff's application is misconceived and ought to be struck out.
 6. The deponent further states that he is a director of the 2nd Defendant and confirms that the charged properties, namely L.R. Nos. 9042/682, 9042/683 and 9042/684, have been in the possession of Bank of Africa (BOA) since the charges were registered. He refers to email correspondence and a confirmation letter dated 8th October 2025 from BOA (annexed as exhibit "SOY-3") confirming that the Bank holds the original titles as security for credit facilities extended to Roy Hauliers Limited. The affidavit is intended to demonstrate that the titles are already charged to BOA and remain in its custody, thereby contesting the Plaintiff's claim regarding the nature or validity of the securities.

Application dated 2nd December 2024

7. The second application is the 2nd and 3rd Defendant's Notice of Motion brought under section 6 of the Civil Procedure Act, Order 2 Rule 15(2) (c) & (d) of the Civil Procedure Rules. The applicants, in a nutshell, seek that the interim orders issued on 20th November 2024, restraining dealings with parcels L.R. Nos. 9042/682, 9042/683 and 9042/684 be discharged, stayed or vacated; that the Originating Summons and Notice of Motion dated 11th November 2024 be struck out; that, in the alternative, the present suit be stayed pending the determination of Nairobi High Court (Commercial Division) Civil Suit No. E535 of 2024 (Roy Hauliers Limited v I&M Bank Limited); that the 1st Defendant be struck out on account of death; and that costs be borne by the Plaintiff.
8. The application is premised on the grounds that there exists a pending suit between substantially the same parties concerning the same indebtedness and securities; that interim status quo orders had



already been issued on 28th October 2024 restraining the Plaintiff from calling up the guarantees; that the present proceedings amount to sub judice and an abuse of the court process; and that the interim injunctive orders currently in force unfairly bar the 3rd Defendant and its directors from accessing and operating from the suit properties. The Applicants therefore seek discharge of the interim orders and a stay or striking out of the suit on grounds of duplicity and procedural impropriety.

9. The application is supported by the annexed affidavit sworn by Sarfaraz Omar Yakub mirroring the grounds of opposition.
10. In opposition, the Plaintiff, through a replying affidavit sworn by Lilian Omani, sworn on 2nd July 2025, contends that the doctrine of sub judice does not apply because the issues and reliefs in the two suits are distinct. The Plaintiff deposes that the earlier suit (Civil Suit No. E535 of 2024) concerns the alleged undervaluation and sale of motor vehicles and trailers and seeks monetary compensation and injunctive relief relating to personal guarantees, whereas the present suit seeks declaratory orders on the existence of informal charges over specified properties, inhibition orders, and leave to exercise the statutory power of sale under Section 90 of the Land Act.
11. The Plaintiff further avers that the charges arose pursuant to a Letter of Offer dated 25th May 2023 and the deposit of title documents, thereby creating enforceable security interests. It is therefore contended that the subject matter and reliefs are different, the issues are not directly and substantially in issue in both suits, and the present application ought to be dismissed with costs.
12. Both applications were canvassed together by way of written submissions. The Plaintiff submits that the doctrine of sub judice is inapplicable because the two suits are fundamentally distinct in subject matter and reliefs sought. It argues that Civil Suit No. E535 of 2024 concerns the sale and valuation of motor vehicles and the enforcement of guarantees, whereas the present suit seeks declaratory reliefs regarding the existence of informal charges. The Plaintiff relies on *Maina v Wamala (2023) KEELC 22496 (KLR)* and *Kenya National Human Rights Commission v Attorney General & 16 Others (2020) eKLR* to submit that for sub judice to apply, the issues and parties must be directly and substantially the same in both suits. It maintains that the Defendants have failed to demonstrate identity of issues or parties and that the present proceedings raise distinct legal questions concerning informal charges under Section 79 of the Land Act. The Plaintiff therefore urges the Court to dismiss the application with costs.
13. The 2nd and 3rd Defendants submit that the present suit is sub judice Nairobi High Court (Commercial & Tax Division) Civil Suit No. E535 of 2024: *Roy Hauliers Limited v I&M Bank Limited*, arguing that both matters revolve around the same indebtedness and the Bank's enforcement measures. They rely on Section 6 of the Civil Procedure Act and authorities including *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga (2013) eKLR* and *Chase International Investment Corporation v Laxman Keshra & Others (1978) eKLR* to contend that courts should not proceed where the matter in issue is directly and substantially in issue in a previously instituted suit.
14. The Defendants argue that the Plaintiff's claim in this suit, seeking leave to exercise the statutory power of sale is dependent on the determination of the debt in the earlier suit, and that proceeding with both matters risks conflicting findings. They further submit that the alleged informal charge is invalid for non-compliance with Section 79 of the Land Act and that no enforceable security exists, urging the Court to strike out or stay the suit.

Analysis and determination

15. The issues for determination are:



- i. Whether the suit offends the doctrine of sub judice;
- ii. Whether the Plaintiff has satisfied the threshold for grant of interlocutory injunction
- iii. Whether the Originating Summons is liable to be struck out

On whether the suit offends the doctrine of sub judice

16. Section 6 of the *Civil Procedure Act* provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

17. Suffice it to state that, sub judice is a factual phenomenon that should be established through evidence by the party alleging it. Secondly, the party alleging sub judice has an evidential obligation to demonstrate that the claimant who initiated the offending suit was aware of the preceding suit.
18. The Courts have pronounced themselves aptly on the issue of sub judice and the decisions are best summarized in the decision in *Thiba Min Hydro Ltd vs Josphat Karu Ndwiga* (2013) eKLR which held inter alia that:

“It is not the form in which suit is framed that determines whether it is sub judice, rather it is the substance of the suit and that there can be no justification in having the two cases being heard parallel to each other.”

19. The earlier suit, Nairobi HCCC No. E535 of 2024, concerns the same lending transaction, the same indebtedness, and enforcement measures taken by the Plaintiff. The Defendants argue that determination of indebtedness in that suit is foundational to enforcement in this suit.
20. The Plaintiff attempts to distinguish the reliefs, arguing that the earlier suit concerns sale of motor vehicles and guarantees, whereas this suit concerns informal charges over land.
21. However, the substratum in both suits is the same loan facility advanced under the Letter of Offer dated 25th May 2023 and the legality of enforcement measures. The existence and quantum of the debt are central to both proceedings.
22. It is trite law that parallel proceedings touching on the same subject matter risk inconsistent findings.
23. I am satisfied that the issues relating to indebtedness and enforceability of securities are directly and substantially intertwined in issue in the earlier suit. The present proceedings, if allowed to proceed, would risk conflicting determinations.

On whether the Plaintiff has established a basis for injunctive relief

24. The issue of temporary injunctions is well settled and set out in the judicial decision of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions by Kenyan courts and



more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements that is to, a) establishes his case only at a prima facie level, b) demonstrates irreparable injury if a temporary injunction is not granted and, c) allay any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

25. Consequently, the Plaintiff ought to, first, establish a prima facie case. In *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. The Plaintiff's claim is predicated on Section 79(6) of the *Land Act* which provides that:

An informal charge may be created where –

- a. a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the chargee;
- b. the chargor deposits any of the following-
 - i. a certificate of title to the land;
 - ii. a document of lease of land;
 - iii. any other document which it is agreed evidences ownership of land or a right to interest in land.

27. The Defendants, however, have exhibited correspondence from Bank of Africa confirming that L.R. Nos. 9042/682, 9042/683 and 9042/684 are already subject to registered charges and that the original titles are in its custody.

28. The existence of an informal charge under Section 79 requires proof of deposit of title and intention to create security in favour of the chargee. An informal charge presupposes deposit of title documents by the chargor with the chargee. Where prima facie evidence shows that the titles are held by another chargee pursuant to registered charges, serious doubt is cast on the existence of the alleged informal charge.

29. At this interlocutory stage, the Court does not make definitive findings. However, the evidentiary material placed before the Court does not establish, on a prima facie basis, that valid informal charges arose.

30. Accordingly, where a court finds that no prima facie case has been demonstrated, that finding alone is sufficient to dispose of the application for injunction. The court is not required to interrogate the issues of irreparable harm or balance of convenience. (See *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR).



31. In addition, in light of the sub judice finding, it would be inappropriate to grant injunctive relief that effectively sanctions enforcement pending the determination of the earlier suit.
32. I therefore find that the Plaintiff has failed to satisfy the threshold for granting an injunction. In the circumstances the court finds that the application dated 11th November 2024 is without merit and is dismissed.
33. Having dismissed the Plaintiff's application for injunction, the interim orders issued on 20th November 2024 cannot stand. They are hereby discharged.

On whether the suit should be struck out

34. Striking out is a draconian remedy. In *DT Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR 1, the Court of Appeal held:

“The power to strike out should be exercised sparingly and only in plain and obvious cases.”

35. Although the matter is sub judice, it cannot be said that the suit is so hopeless as to warrant striking out. The appropriate remedy is a stay.
36. Accordingly, this suit is stayed pending the determination of Nairobi HCCC No. E535 of 2024.
37. It is not disputed that the 1st Defendant is deceased. No substitution has been effected under Order 24 of the Civil Procedure Rules. The suit against the 1st Defendant is therefore struck out.
38. In the result, the Court makes the following orders:
 - i. The Plaintiff's Notice of Motion dated 11th November 2024 is dismissed.
 - ii. The interim orders issued on 20th November 2024 are hereby discharged.
 - iii. This suit is stayed pending determination of Nairobi High Court (Commercial & Tax Division) Civil Suit No. E535 of 2024: *Roy Hauliers Limited v I&M Bank Limited*.
 - iv. The 1st Defendant is struck out from these proceedings on account of death.
 - v. Costs be in the cause.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2026.

P.M. MULWA

JUDGE

In the presence of:

Mr. Wawire for Plaintiff

Mr. Owiti & Ms. Masaki 2nd & 3rd for Defendants

Court Assistant: Carlos

