



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC CASE NO. E075 OF 2025

THOMAS MUTETHIA T/A TIMES & SEASONS CHEMICALS.....
PLAINTIFF

VERSUS

ABSA BANK KENYA PLC.....1ST
DEFENDANT

REGENT AUCTIONEERS (K) LTD.....2ND
DEFENDANT

RULING

1) I am called upon to write a Ruling for the Notice of Motion dated 29/04/2025 brought under Order 40, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeking the following orders:

1. Spent.
2. Spent.
3. THAT pending the hearing and determination of the suit, the Honorable Court do issue a temporary injunction restraining the Defendants by themselves, servants, agents and/or employees or whomsoever is acting on their behalf from selling, transferring or disposing off as

property known as Kiambu/Municipality Block 111/46 (suit property).

4. The cost of this Application be provided for.
- 2) The application is premised upon the grounds on the face of it and the Supporting Affidavit of Thomas Mutethia the Plaintiff sworn on even date.
- 3) The Application is opposed vide the Replying Affidavit sworn by Samuel Njuguna on 26/05/2025 who is an employee of the 1st Defendant as Secured Lending Team Leader and he has authority to swear the Affidavit.
- 4) He avers that the Plaintiff is a chronic defaulter who was fully aware of the debt and the legal process being followed.
- 5) The Defendant argues that the Court currently handling the matter does not have the jurisdiction to hear the suit and requests that the entire case be struck out.
- 6) He avers that the Plaintiff was granted a credit facility by the 1st Defendant in the principal sum of Kesh 28,000,000 and that the sum was secured by a legal charge dated 20/12/2017 over the property title number Kiambu Municipality Block 111/46 as evidenced by annexure '**SN-1**' which is a copy of the charge.
- 7) The Defendant on behalf of the 1st Defendant disputes the Plaintiff's version of the loan history and avers the Plaintiff was issued with an initial loan of Kesh 28,000,000 in December 2017, a further loan of Kesh 9,166,666 in September 2019 and the new aggregate stood at Kesh

37,166,666 where the Plaintiff signed offer letters for the said amount as shown vide annexures '**SN-2A, 2B and 2C**'. The Defendant clarifies that the Plaintiff signed offer letters for the above stated amount.

- 8) According to the Defendant, he avers that as of 13/05/2025 the outstanding balance of the loan which was supposed to have been paid stood at Kesh 36,281,884.55 as per annexure '**SN-3**' showing that the Plaintiff has failed to meet their contractual obligations.
- 9) That following this default the Defendant issued legal notices as is required and therefore the Defendant denies the Plaintiff's claim that no notices were served. It is the Defendant's case that the 90-day statutory notice was issued on 8/05/2024, then the 40-day statutory notice for sale was issued on 3/09/2024 and the 45-day redemption notice was issued on 11/11/2024 by the auctioneers as per annexures '**SN-4, 5 and 6**'.
- 10) Further, the Defendant averred that they did a valuation which is annexed as '**SN-7**' and the property was valued at Kesh 62.5 million with a reserve price of Kesh 48 million.
- 11) The Defendant reveals that between 17/12/2024 and 7/01/ 2025, the Plaintiff engaged in email negotiations as per evidence by annexure '**SN-8**' for a payment plan to stop the auction. According to the Defendant Plaintiff reneged out of the negotiated payment plan, proving he was well aware of

the impending sale long before he claimed to find the notice at his gate.

- 12) Thus, the Defendant asserts that the Plaintiff admitted to the debt in his own Court papers. That the instant application is a carefully crafted mechanism to delay the sale and there are no legal grounds to stop the bank from exercising its Statutory Power of Sale.
- 13) The 2nd Defendant did not file any response to the application and therefore it is only the 1st Defendant who is on record opposing the application.

Analysis and Determination

- 14) I have considered the Motion, the rival Affidavits and annexures and the submissions by Counsel. Based on the Replying Affidavit of Samuel Njuguna, the 1st Defendant raises critical issues to challenge the Applicant's request for both a temporary and a permanent injunction.
- 15) Whereas careful examination of the parties' pleadings shows that although the Applicants also seek an order of permanent injunction restraining the Respondents from selling, alienating or in any way interfering with the suit property, the predominant issues that call for my determination herein from the 1st Defendant's pleadings point to three issues which are the ***jurisdiction of the Court, contractual debt admissions*** and ***procedural compliance***.

- 16) The 1st Defendant's most significant legal hurdle for the Applicant is the claim that the Honourable Court does not have the jurisdiction to handle the suit.
- 17) The 1st Defendant argues that the proceedings are misconceived and should be struck out entirely. Since the jurisdiction of this Court has been questioned, it is proper that I start by addressing the issue of jurisdiction first. If a Court lacks jurisdiction, it cannot grant any orders, including a permanent injunction, regardless of the merits of the case.
- 18) Regarding the issue of jurisdiction, it was held in **Owners of The Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited 1989 KLR 1** that:
"A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
- 19) I am therefore obligated to interrogate whether indeed I have the jurisdiction to determine this dispute or whether I should down my tools. While the Applicant believes that this Court has the requisite jurisdiction to determine this dispute, the 1st Respondent thinks otherwise.
- 20) The jurisdiction of this Court is set out in Section 13 of the Environment and Land Court Act, Section 150 of the Land Act and Article 162(2) (b) of the Constitution and does not include determining questions of accounts or outstanding debts.

- 21) The Applicant contends that this Court has the jurisdiction to enforce a charge created under the Land Act, to handle disputes relating to instruments created under the said Act and that the issue before this Court arises out of the 1st Defendant's exercise of its Statutory Power of Sale arising out of a registered interest in land.
- 22) The substantive remedies sought by the Applicants in their Complaint are:
- a) A declaration that the 1st Defendant's purported exercise of its Statutory Power of Sale over the suit property is fraudulent, illegal, unlawful and triggered with gross irregularities, illegalities and bad faith.
 - b) A permanent injunction restraining the Defendants, their surrogates, servants, agents or employees from disposing of, transferring or dealing in any manner whatsoever with the suit property.
 - c) Costs of the suit.
- 23) Paragraphs 7, 8, 9 and 10 of the Complaint primarily speak to the loan amounts and the Applicant argues that he has repaid the loan faithfully but the statement that he was given does not reflect the said payments.
- 24) It is not in doubt that the parties agree that the Applicant obtained credit facilities from the 1st Defendant which was secured using the suit property as security. That the suit property is registered in the name of the 1st Applicant is not in dispute. That is not an issue for determination by

this Court. So, from the Plaintiff I see that what will be in issue is whether the 1st Defendant should be directed to render proper accounts of the credit facility to the Applicant. That is not a matter for the determination by this Court whose jurisdiction is circumscribed by Section 13(2) of the Environment and Land Court Act which reads:

“13 (2). In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes -

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land.”

25) The Court of Appeal in the case of **Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & Others**

C.A. Civil Appeal No 83 of 2016 [2017 eKLR] had the following to say in a dispute involving the taking of accounts at paragraph 38:

“Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of the Constitution fails. In addition, the cause of action herein was not the validity of the charge but a question of accounts.”

The Court went on to add at paragraph 40 that:

“To the Appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purpose of this suit, the instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.”

- 26) Whereas the Environment and Land Court has the jurisdiction to grant the relief of a permanent injunction restraining the 1st Defendant from interfering with the suit property, the precedent cited above disclose that the issue of rendering up-dated account statements or suspending deduction or accrual of interest is the purview of the High Court. So, this is a case where both this Court and the High Court have concurrent jurisdiction.
- 27) From my understanding of the current suit, if this Court were to hear the dispute and grant the Applicant the order of permanent injunction which is prayer (c) of the Plaint, or temporary injunction which is prayer (a) in the application this will not have settled the issue of accounts since it is the reason the 1st Defendant has sought to sell by public auction the Applicant's suit property. In my view the issue of accounts is the predominant issue.
- 28) On the other hand, if the High Court determines that predominant issue of accounts, it is more likely than not, that the claim for permanent injunction may fall by the way side or, better still, be compromised because it is essentially founded on the dispute over accounts.
- 29) In the circumstances, I am not persuaded to dismiss this suit and application for lack of jurisdiction as sought by the 1st Defendant. That would be drastic. It would, in the interest of justice, be more preferable to transfer the suit to the High Court. This is because this is not a situation where it can be

said that this suit was filed in a Court without jurisdiction at all. Rather, this is a case where two Courts have concurrent jurisdiction but the predominant dispute is with the High Court. In doing so, I am persuaded by the Ruling of Justice F. Gikonyo in the case of **Dominic & 3 Others v County Government of Narok & Another Constitutional Petition No E002 of 2023 [2023 KEHC 17908 KLR]** where at paragraph 30 the judge rendered himself in the following terms:

“It should, therefore, be observed that where Courts have concurrent jurisdiction, it may be prudent to borrow from the use of Force Cases model, that, the inherent powers of the Court include that of not exercising a jurisdiction that it has in order to protect the integrity of the judicial processes, in this case ordained in the Constitution and defer to the jurisdiction of the Court with jurisdiction on the primary subject matter as well as the purpose of the Court subject matter in the litigation. This is not purely a matter of preferred choice but exercise of discretion depending on the circumstances of each case.”

The core subject in this matter, as I have already found, is the issue of accounts.

30) The upshot of all the above is that having considered the Notice of Motion Application, this Court hereby issues the following directions:

i) This suit be and is hereby transferred to the Thika High Court for Mention on 3/03/2026 for further directions as to hearing.

ii) Any temporary orders issued are hereby vacated.

iii) I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 16TH DAY OF FEBRUARY 2026.

**MOGENI J
JUDGE**

In the presence of:

Mr. Ondago for the Plaintiffs/Applicants

Ms. Kawon holding brief for Mr. Ogando for 1st and 2nd Defendants

Melita - Court Assistant

**MOGENI J
JUDGE**