

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**MILIMANI LAW COURTS**  
**HCCC E424 OF 2024.**

VAROVIN LIMITED..... 1<sup>ST</sup> PLAINTIFF

IMMACULATE WANJERI NAMU.....2<sup>ND</sup> PLAINTIFF

VERSUS

I& M BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT

DIRECT “O” AUCTIONEERS.....2<sup>ND</sup> DEFENDANT

**RULING**

- 1.The significant order sought by the plaintiffs in the notice of motion dated 29.7.2024 is; a temporary injunction pending the hearing and determination of the suit to restrain the defendants or their agents from selling, transferring, leasing, disposing or otherwise interfering with the plaintiff’s property known as **L. R. No. Ndumberi/ Ndumberi/ 3101** and from increasing the loan amount and growth of interest.
- 2.The application is made primarily under **Order 40 Rule 1(a) and 2 (1) of the Civil Procedure Rules**, and is supported by affidavit sworn by the 2<sup>nd</sup> plaintiff on 29.7.2024. Grounds thereof have been adumbrated in the written submissions dated 7.5.2025.
- 3.The application is opposed by the 1<sup>st</sup> defendant/ respondent through a replying affidavit sworn by its assistant manager,

debt recovery, **Enock Kimutai Rono** on 13.9.2024 and written submissions dated 30.4.2025.

### **Applicant's case**

4. The applicant's case is that: -

- (1) The Defendant's agents namely Direct "O" Auctioneers have put up a notice in the Daily Nation Newspaper of 15<sup>th</sup> July, 2024 purporting that the subject property will be sold by public auction on 2<sup>nd</sup> August 2024 at 11am.
- (2) The plaintiffs have not been served by the defendant with any notice to pay as required by the mandatory provisions of Section 90(1) of the Land Act specifying the nature and extent of the default and specifying the amount that must be paid to rectify the default.
- (3) The plaintiffs offered the subject property together with motor vehicle registration number Isuzu NKR KCR 906R, KCT 101B, KCT 102B, and KCW 050T to the defendant as security for the business loan granted.
- (4) The defendant has repossessed the motor vehicles and sold them by public auction but have not given plaintiff statements of accounts of the funds realized from the said sales which would have paid off the arrears owed in full.
- (5) A valuation has not been undertaken by a valuer contrary to Section 97(2) of the Land Act.

- (6) The sale of the Plaintiff's property will be a loss that cannot be compensated by damages.
5. The applicants relied on *Giella v Cassman Brown & Co. Ltd [1973] EA 358* on the conditions for grant of a temporary injunction.
6. They also relied on *Nancy Kahoya Amadiva v Expert Credit Limited [2015] eKLR*, to argue that a mortgagee must strictly comply with statutory conditions before exercising the power of sale and that the absence of such compliance invalidates the process.
7. They submitted that the threatened sale of land without due process may lead to loss of proprietary rights, which the court in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR* confirmed as irreparable.
8. The applicants claimed that motor vehicles were sold without rendering an account. They submitted that the right to an account of sale proceeds is entrenched under **Section 97(3) of the Land Act** and failure to account may constitute unjust enrichment.
9. The applicants submitted that the subject property is a matrimonial home and that its sale would render her children homeless. They further submitted that the emotional and familial loss cannot be compensated by monetary damages.

10. The applicants asserted that the balance of convenience tilts in favor of preserving the status quo pending hearing. They relied on **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, for the proposition that a party's proprietary interest must be protected where procedural lapses by the chargor are evident.

11. The applicants stated that they continue to repay the loan in installments and are willing to rectify any arrears if properly informed. They also intimated that they have also sought restructuring options which the respondents have failed to respond to, despite formal requests.

### **Response**

12. The salient points by the respondent are: -

(1) On 1<sup>st</sup> November 2023, it issued the 2<sup>nd</sup> Applicant with a 90 days Statutory Demand to rectify the default and settle the total outstanding debt of Kes. 31,317,495.58/= as at 19<sup>th</sup> October 2023.

(2) Upon the lapse of more than 90 days granted to the 2<sup>nd</sup> Applicant, as per the Statutory Notice and failure to regularize the accounts, on 7<sup>th</sup> March 2024 it proceeded to issue the 40 days Statutory Notice.

(3) Statutory Notices were issued to the 2<sup>nd</sup> applicant through her registered Postal Office Addresses provided.

- (4) Despite the issuance of the notices, applicants failed and neglected to regularize the account, and the account remained in arrears.
- (5) It proceeded to auction the Motor Vehicles Registration Number Isuzu NKR KCR 906R, KCT 101B, and KCW 050T but there was a shortfall.
- (6) It denied repossessing Motor Vehicle KCT 102B.
- (7) It instructed the 2<sup>nd</sup> respondent to issue the 2<sup>nd</sup> applicant with a 45 days Redemption Notice demanding for settlement of the outstanding sum of Kshs 35,549,842.77/= failure to which the auction would proceed on 2<sup>nd</sup> August 2024 and a notification of sale.
- (8) The 2<sup>nd</sup> applicant declined to sign the 45 days Redemption Notice.
- (9) It instructed **Kenya Valuers & Estate Agents Limited** to value the property and a Valuation Report was supplied.
- (10) Upon lapse of 45 days, the 2<sup>nd</sup> respondent advertised the suit property in the *Daily Nation Newspaper* on 15<sup>th</sup> July 2024, but the sale did not proceed as no bids were recorded.
- 13.** The 1<sup>st</sup> respondent asserted that the 1<sup>st</sup> applicant defaulted in repaying the facilities as and when they fall due. Consequently, the outstanding loan together with accruals became payable immediately. It issued the applicants with several demand letters to regularize their accounts. Upon lapse of the demand

letters and the applicants' persistent default, its right to exercise its statutory power of sale crystallized.

14. The 1<sup>st</sup> respondent highlighted that the applicants have acknowledged the debt. Thus, it contended that injunctive orders should not be granted as this will be in violation of its right to exercise its statutory power of sale.

15. The 1<sup>st</sup> respondent argued that there is no evidence to show that further payments have been made since demands were made. Moreover, there are no documents attached to the 2<sup>nd</sup> applicant's affidavit to prove that payments have been made since the demand was issued.

16. The 1<sup>st</sup> respondent asserted that it has complied with the in duplum rule and that interest charged on the facilities was at a minimum rate of 13.5% per annum and 10% per annum on the arrears or excess. It highlighted that the applicants have not made any payment since the loan fell due. It cited **Mohammed Khaled Khashoggi v Equity Bank Limited [2013] eKLR** for the proposition that the issue of disputed accounts and interest cannot be a ground for the issuance of injunctive orders.

17. The 1<sup>st</sup> respondent argued that the applicants have not met the conditions for the grant of the reliefs sought. It relied on **Giella v Cassman Brown & Co. Ltd [supra]** **Nguruman Limited v Jan Bonde Nielsen & 2 others [supra]** and **Kenya**

**Commercial Finance Company Ltd v Afraha Stadium Society [2001] 1 EA 86.**

18. The 1<sup>st</sup> respondent relied on **Mrao Ltd v First American Bank of Kenya Ltd** as to what a *prima facie* case entails.

19. The 1<sup>st</sup> respondent submitted that the applicant has all along been aware that a property becomes a commodity of sale once offered as security for a Loan Facility. It relied on **Abuldirahim v Eco Bank Kenya Ltd & Another (2012) eKLR, Maloba v Standard Chartered Bank Limited & Another [2024] KEHC 13983 (KLR) and Matex Commercial Supplies Limited a Another v Euro Bank Limited (In Liquidation) [2007] KEHC 2428 (KLR) and M'mbwani M'njau v K-Rep Bank Ltd & 2 others [2013] eKLR.**

20. The 1<sup>st</sup> respondent relied on **Rryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another [20191 KEELC 3435 (KLR)** to assert that the balance of convenience does not tilt in the applicant's favour. It submitted that if the injunctive orders are granted, the 2<sup>nd</sup> applicant will continue to default on repayment of the facilities and it will be blocked from exercising its statutory power of sale. In addition, the 2<sup>nd</sup> applicant will be unable to compensate it if the suit fails, owing that the applicants are still indebted.

#### **Analysis and Determination**

21. The issue for determination is whether temporary injunctive reliefs sought should issue.

22. The light and threshold of whether an interlocutory injunction should issue derive from the circumstances of the case whilst asking traditional questions set out in **Giella v Cassman Brown [supra]** to wit: - whether the applicant has established a *prima facie* case with a probability of success, irreparable harm that cannot be compensated by way of damages if the injunction is not granted and that the balance of convenience tilts in favour of granting the injunction.

#### **Prima facie case**

23. Is there a right which has apparently been infringed by the opposite party? **Mrao Ltd v First American Bank of Kenya Ltd [supra]**

24. I am acutely aware that, "...in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely." **Nguruman Limited v Jan Bonde Nielsen & 2 Others**

25. At the core of this application is the complaint that the 2<sup>nd</sup> respondent advertised the subject charged property without issuing the applicants with the requisite mandatory statutory notices.

26. In answer to these complaints, the 1<sup>st</sup> respondent stated that the requisite 90 day and 40 day's statutory notices were issued to the 2<sup>nd</sup> applicant, the chargor and director of the 1<sup>st</sup> applicant company through registered post through the address that she provided.
27. The 1<sup>st</sup> respondent claimed that however, the applicants persisted with default leading to it instructing the 2<sup>nd</sup> respondent to issue the 2<sup>nd</sup> applicant with the 45-day redemption notice and notification of sale. Due to non-compliance, the 2<sup>nd</sup> respondent advertised the subject property for sale by public auction.
28. The other complaint is that the 1<sup>st</sup> respondent repossessed the motor vehicles offered as security for the loan facility and sold them by public auction but have not furnished statements of accounts of the funds realized from the said sales which would have paid off the arrears owed in full.
29. The 1<sup>st</sup> respondent replied to the claim and stated that it auctioned the Motor Vehicles Registration Number Isuzu NKR KCR 906R, KCT 101B, and KCW 050T but there was a shortfall. It denied repossessing Motor Vehicle KCT 102B.
30. Additional complaint; that a valuation has not been undertaken by a valuer contrary to Section 97(2) of the Land Act. But, the 1<sup>st</sup> respondent asserted that it instructed **Kenya**

**Valuers & Estate Agents Limited** to value the property and a Valuation Report was supplied.

31. The applicants acknowledged that they are indebted to the 1<sup>st</sup> respondent. Although they stated that they are continuing to repay the facility, the 1<sup>st</sup> respondent disputed this, and no evidence was offered by the applicant in support of their claim.

32. I should state however; the bank has a duty to render accounts to the borrower. Nonetheless, disputed accounts or amounts owing *per se* cannot be a ground for the issuance of temporary injunctive orders. **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] KEHC 4811 (KLR)**

33. Although the applicant claimed that a valuation has not been undertaken by a valuer contrary to Section 97(2) of the Land Act, material before the court show that the 1<sup>st</sup> respondent asserted that it instructed **Kenya Valuers & Estate Agents Limited** to value the property and a Valuation Report was supplied.

34. The applicant claimed that no statutory notices that were issued before the property was advertised for sale.

35. According to the 1<sup>st</sup> respondent, the requisite 90 days and 40 days statutory notices were issued to the 2<sup>nd</sup> applicant, the chargor and director of the 1<sup>st</sup> applicant company through registered post through the address that she provided.

36. The 1<sup>st</sup> respondent claimed that however, the applicants persisted with default leading to it instructing the 2<sup>nd</sup> respondent to issue the 2<sup>nd</sup> applicant with the 45-day redemption notice and notification of sale. Due to non-compliance, the 2<sup>nd</sup> respondent advertised the subject property for sale by public auction.
37. At the core of this application is the complaint that the 2<sup>nd</sup> respondent advertised the subject charged property without issuing the applicants with the requisite mandatory statutory notices.
38. In answer to these complaints, the 1<sup>st</sup> respondent stated that the requisite 90 day and 40 day's statutory notices were issued to the 2<sup>nd</sup> applicant, the chargor and director of the 1<sup>st</sup> applicant company through registered post through the address that she provided.
39. The 1<sup>st</sup> respondent claimed that however, the applicants persisted with default leading to it instructing the 2<sup>nd</sup> respondent to issue the 2<sup>nd</sup> applicant with the 45-day redemption notice and notification of sale. Due to non-compliance, the 2<sup>nd</sup> respondent advertised the subject property for sale by public auction.
40. In light thereof, the applicant did not substantiate his claims that statutory notices were not issued.

41. Exercise of the mortgagee's statutory power of sale in circumstances where it is proved that proper statutory notices were not given or valuation of the property was not done in accordance with the law, will be improper and unlawful; it vitiates the chargor's right to property constituting a *prima facie* case for which a temporary injunction should be issued.

42. In this case, upon consideration of the parties' respective arguments and the relevant material presented, I am not satisfied that the applicants have established a *prima facie* case with a probability of success. Absent *prima facie* case, scarcely will the applicant establish that they will suffer irreparable harm that cannot be compensated by damages if the orders sought are not granted.

**Disposal**

43. In the upshot, the balance of convenience lies in declining the relief. Consequently, the application dated 29.7.2024 is dismissed with costs to the 1<sup>st</sup> respondent.

**Dated, signed and delivered at Nairobi through  
Microsoft Teams online application this 19<sup>th</sup>  
day of February, 2026**

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**F. Gikonyo M  
Judge**

**In the presence of: -**

**Ms. Aura for 1<sup>st</sup> defendant/Respondent**

**Jonathan Law Advocates for Plaintiff/Applicant**

**CA - Ivan/Aggrey**