

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL SUIT NO. E016 OF 2025**

**NAOMI GACHERI MITHIKA**

**.....PLAINTIFF/APPLICANT**

**VERSUS**

**EQUITY BANK**

**LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. Coming up for determination is the plaintiff/applicant's application dated 4<sup>th</sup> August 2025, in which she seeks the following orders;
  - a) Spent
  - b) Spent
  - c) THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the defendant by itself, its agents, employees, successors, legal representatives, assigns or through anybody else whomsoever acting on its behalf from exercising its power of sale appropriating, attaching, auctioning or selling the following parcels of land

pending the hearing and determination of this suit;

**i. Land Parcel Nos. NJIA/BURIERURI/5895  
and 6296.**

**ii. Land Parcel Nos. NJIA/BURIERURI/5571 and  
6138.**

**iii. Land Parcel Nos. NJIA/BURIERURI/4954  
and 4955.**

**iv. Land Parcel No.  
KAJIADO/KITENGELA/20091.**

**v. Land Parcel No. MWIMBI/S.  
MUGUMANGO/1567.**

**vi. Land Parcel No. IGEMBE/AMWATHI/MAUA/  
940.**

d) THAT the costs of this application be provided for.

2. The application is premised on the grounds set out on the face of it and the applicant's affidavit sworn on even date.
3. The applicant's case is that she obtained a loan facility of Kshs. 23,000,000/= vide the account referenced as 075MERL240250008 and Kshs. 20,700,000/= vide the account referenced as 075SERL233280001 from the

respondent herein using the listed parcels of land as security thereof. That the loan was a business facility loan, which she intended to pay back using proceeds from her business which information was well within the knowledge of the respondent during the execution of the said agreement.

4. The applicant further avers that she has religiously paid part of the said loan as per their agreement with the respondent to the tune of more than Kshs. 22,000,000/=. That despite to the above, the respondent has issued statutory notices under sections 90 and 96 of the Land Act intimating the intention to sell the aforesaid parcels of land.
5. The applicant further avers that as at 22<sup>nd</sup> April, 2025 when the 90 days statutory notice was issued, the arrears stood at Kshs. 1, 777,065.56/= however the respondent has claimed the entire outstanding balance. That after receipt of the aforesaid 90 days statutory notice, she proceeded to make a payment of Kshs. 1, 200,000/= towards settling the arrears, but the respondent has gone ahead to issue a notice of intention to sell the aforesaid

properties.

6. The applicant further avers that the amount claimed is excessive and as such disputed however she is willing to settle the arrears upon proper reconciliation.
7. The applicant avers that if the respondent is not stopped, the aforesaid properties illegally advertised will be sold through public auction. That the respondent's action are despite the applicant requesting for a loan restructure to enable her pay it back as per her earning capacity, hence the respondent's actions are harsh unfair and unlawful.
8. The respondent opposed the application, through a replying affidavit sworn on 25<sup>th</sup> August 2025 by Sylvia Wambani, its Manager, Legal Services.
9. She depones that the applicant has admitted that she was advanced loan facilities totalling **Kshs. 43,700,000/=** repayable at a monthly instalment of Kshs. 545,305.00 and Kshs. 625,306.00 for Facility 1 (Mortgage loan) and Facility 2 (secured loan) respectively. That the Applicant defaulted towards the repayment of the loan as a result of

which the Bank commenced the recovery process as mutually agreed in the loan agreement and the charge instruments.

10. It is further deponed that the Applicant was issued with the requisite 90-day statutory notice dated 22<sup>nd</sup> April, 2025 which required her to pay a sum of Kshs. 38,179,033.78 to rectify the default. That as admitted by the applicant in her supporting affidavit, she did not clear the arrears within the stated time frame. That as a result of failure to rectify the default, the Bank proceeded to issue the Applicant with a 40-days' Notice of Intention to Sell dated 29<sup>th</sup> July, 2025. That the said notice was clear that the only way for the applicant to stop the respondent from the intended action was to make full payment the arrears and the outstanding balance of **Kshs. 38,717,0029.85.**

11. It is further deponed that a perusal of the loan statements reveals that the Applicant has not been diligently servicing the loans advanced to her which is a breach of the loan

agreement dated 7<sup>th</sup> October, 2023. The Respondent asserts that it has statutory rights to sell the parcels of land in light of the admitted default by the Applicant and this court should disregard the sentiments expressed in paragraph 14 of the Applicant's Affidavit.

12. It is further deponed that the Applicant does not deserve any injunctive orders for the reason that she has admitted being truly indebted to the Respondent and any delay will result in the continued accrual of the loan balance to the detriment of the Bank. That a careful perusal of the loan statements show that the Applicant has not been repaying the loans as required and as of 13<sup>th</sup> August 2025, the loan outstanding balance for account 075MERL240250008 was Kshs. **21,164,030.96** and account 075SERL233280001 was **Kshs. 16,624,425.**
13. The application was argued by way of written submissions.
14. The applicant framed the following issues for determination;

- a) Whether the Applicant has established a prima facie case.
- b) Whether the Applicant will suffer irreparable harm.
- c) Whether the balance of convenience lies in her favour.

15. It was submitted that the Respondent has failed to render a full reconciliation or transparent account, despite the Applicant's demand. That Courts have held that exaggerated and unverified demands are unlawful and cannot anchor a valid statutory notice and that such notice cannot properly trigger the statutory power of sale. Cited in support of this submission was **Trust Bank Ltd v Eros Chemists Ltd (2000] eKLR.**

16. The Applicant further submitted that she has made substantial payments and continues to express willingness to pay. The figures provided by the Bank are contested, vague, and unsupported by full documentation and cannot be a basis of a claim by the respondent. Cited in support was the decision in

**Robert Mugo Wa Karania v Ecobank (Kenya) Ltd (2019) eKLR.** It was further submitted that the notices issued under Sections 90 and 96 of the Land Act must comply with both form and substance. In this case, the 90-day and 40-day notices were issued and acted upon despite payment of arrears, without acknowledgment or reconciliation. Cited in support was Nyagilo **Ochieng & Another v Fanuel Ochieng & 2 Others (1996) eKLR,** and **Basil Criticos v National Bank of Kenya Ltd Civil Appeal No.80 of 2017),** where the Court of Appeal emphasized that failure to serve notices in strict accordance with the law invalidates the sale.

17. The applicant also submitted that he right to redeem should not be extinguished without a fair opportunity. The applicant cited **National Bank of Kenya Ltd v Shimmers Plaza Ltd (2009) eKLR,** where the Court held that notices served on an inflated amount cannot activate the

statutory power of sale.

18. It was further submitted that the intended sale would dispossess the Applicant of multiple parcels of land, including those tied to her family, business, and future earnings. That the Applicant's parcels are unique and integral to her livelihood. She cited **Waithaka v Industrial and Commercial Development Corporation (2001) KLR 374** where Ringera J. emphasized that loss of land is irreparable due to its non-substitutive nature.
19. The applicant submitted that in this case damages would not be adequate compensation. Cited was **Siro Mosioma v Housing Finance Co. of Kenya (2008) eKLR**, and **Nguruman Ltd v Jan Bonde Nielsen (2014) eKLR**.
20. The applicant submitted that the balance of convenience tilts in her favour in that the respondent's interest is protected by the existing securities. On the other hand, if the injunction is denied, the Applicant will lose her land

permanently-before the case is heard. In support of this submission the applicant cited the decisions in **Amir Suleiman v Amboseli Resort Ltd (2004) eKLR** where the court in determining a matter on a balance of convenience the held that the court should take whichever course appears to carry the lower risk of injustice.

21. Lastly, it is submitted that the Applicant undertakes to settle the balance of the loan before 31<sup>st</sup> December 2025, and requests the indulgence of the Court to allow her to do so without loss of her properties. That this Court is empowered under Article 159 of the Constitution to administer justice without undue technicality and to uphold the principles of fairness, equity, and proportionality.
22. The Respondent submitted that the Applicant has not satisfied the threshold for issuance of an injunction as was laid down in the celebrated case of **Giella vs Cassman Brown 1973 EA**.

23. As to what constitutes a *prima facie* case the respondent cited the case of **Megashell Transpoters Limited v Co-operative Bank Limited [2021] eKLR.**
24. It was submitted that in paragraph 12 of the Supporting Affidavit, the Applicant admits default by pleading that- *'... the arrears stood at Kshs. 1,777,065.56/= however the Defendant/Respondent has claimed the entire outstanding balance'*.
25. It was submitted that this is an admission that there is an outstanding loan balance which entitled the respondent to exercise its statutory power of sale as agreed between it and the Applicant.
26. It is further submitted that the Applicant's request to be allowed "pay back the loan as per my earning capacity" is untenable as the court cannot rewrite the loan agreement mutually executed between the parties.
27. In response to the claim by the Applicant that the amount claimed by the Respondent is excessive and disputed it was submitted that this is not bar to the respondent's right to sell the charged property. That the Respondent

exhibited the bank statements **showing** the balances in the two accounts as at 13<sup>th</sup> August 2025, the authenticity of which have not been contested. That the contention that no proper reconciliation of the account has been done before the action complained of has no basis as there is no such legal requirement before the bank can exercise its statutory power of sale. Cited in support of this submission were the decisions in **Labelle International Limited and another versus Fidelity Commercial Bank & Another, Civil Case No. 786 of 2002** as cited in **Muli v Kenya Commercial Bank Kenya Limited & another (Civil Case E016 of 2021)[2025] KEHC 10511 (KLR)** . In light of the foregoing, we submit that the Applicant does not have a *prima facie* case with any probability of success deserving an order of interlocutory injunction based on the grounds upon which the Motion is premised.

28. Relying further on **Susan Wanjira Gategwa v Unaitas Sacco Society Limited & another [2021] eKLR** and **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,** the applicant submitted that

the applicant has failed to demonstrate a prima facie case with a probability of success.

29. It was further submitted that Courts have acknowledged that once a property is offered as security it becomes commercial in nature and therefore it can be adequately compensated by way of damages in the event this Court finds in the favour of the Applicant upon hearing the main case. As such, the contention by the Applicant that she will suffer irreparable harm and damage lacks merit. Cited in support was **Josephat Mwangi Moracha & another v HFC Limited [2021] eKLR** which cited with approval the case in **Bii v Kenya Commercial Bank Ltd [2001] KLR 458** and **Anthon Ongori Otundo & 2 others v Co-operative Bank of Kenya & another [2021]eKLR**. The respondent further submitted that the balance of convenience tilts in its favour as it is a lawful and secured creditor. That the applicant has not been making the required monthly instalments of **Kshs. 545,305.00** & **Kshs. 625,306.00** respectively as evidenced by the loan statements exhibited. That the Applicant has actually

admitted to being in default of the loan.

30. It was further submitted the respondent's right having crystallized, the Applicant was properly made aware of the said right to exercise its statutory power of sale over the suit property in the event of default. That the respondent duly served the notices under section 90(1), 90(3) and 96 (2) of the Land Act and Rule 15 (d) of the Auctioneer Rules, 1997.
31. The respondent also submitted that in the further affidavit filed pursuant to the leave of this court, the applicant has not contested the respondent's right to sell the charged properties.
32. The respondent further submitted that the burden lay on the applicant to show that the notices were not served as alleged. Cited in support of this submission was the decision in Susan **Wanjira Gategwa v Unaitas Sacco Society Limited & another [2021] eKLR.**
33. Being an application for interlocutory injunction, the applicant has the onus to present a case that meets the threshold set out in the well known case of **Giella vs**

**Cassman Brown Ltd(supra)**, where it held as follows ;

***“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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

34. Therefore, the applicant is bound to exhibit that;

- a) *A prima facie case with a probability of success*
- b) *That damages would not be adequate compensation*
- c) *If in doubt the court is decide the matter on a balance of convenience.*

35. As to what constitutes a prima facie case, the parties have correctly cited **Mrao Limited v First American Bank of Kenya Limited (supra)**, where it was held as follows;

***A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter."***

37. The applicant admits that she has defaulted on the payment as agreed in the loan agreement between the parties. Her case is that there has been no reconciliation of her accounts.
38. Now, the applicant borrowed a total of Ksh. 43,700,000/-. She avers that she has only paid Ksh. 22,000,000/=. When she came to court, she stated that she had arrears of Ksh. 1,777, 065.56 as at 22<sup>nd</sup> April 2025. It is thus clear that she was well aware of the actual arrears owed to the respondent. Therefore, in my view, the applicant's assertion that the amount claimed is excessive and that accounts have not been reconciled is neither here nor there. That admission

alone is enough to find that no prima facie case has been established.

39. The claim that the applicant appears to be geared at asking the court to rewrite the contract between the parties. As correctly submitted by the respondent, this court cannot be called upon to do so. Once the parties execute a contract between them, it is their duty to perform their obligations therein. The court is only called upon to enforce a contract, not to alter it to the advantage of one party. The applicant was the one in breach of the contract and the respondent was correct to invoke its statutory power of sale.
40. The applicant, in her submissions, claims that she was never issued with the statutory notices. It is noted that her suit and application are not based on non-service of the said notices. This averment, in my view has no foundation in the pleadings and could not be relied on by the applicant. In any case, the respondent has clearly exhibited all the notices issued and they are all in compliance with the provisions of sections 90 and 96 of the Land Act. This is another ground to find that no prima facie case has been established.

41. On whether there will be substantial loss incapable of compensation by way of damages, the court is guided by several authorities. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen (supra)**, had this to say as to what amounts to an irreparable injury: -

***“ An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”***

42. Equally, in the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** the court defined an irreparable injury as follows;

***“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not***

***granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”***

43. It is trite law that once a party offers a security for a loan that security becomes a commodity for sale. This was reiterated in **Bii v Kenya Commercial Bank Limited (supra)** where it was held as follows;

***“Is the applicant’s probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. So, although Mr. Wandaba’s eloquence nearly induced in me tears of sympathy for the applicant, I am on a rational***

***consideration of the matter impelled to conclude that the applicant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award. The Application fails on this ground too."***

44. In Kihara v Barclays Bank (K) Ltd (2001) 2 EA 420, the Court addressed the same issue and held thus: -

***"The mere fact that a borrower has a claim in damages against a lender which is equal to or in excess of the debt due does not at law entitle it to resist the lender's attempt to exercise its statutory power of sale when this has properly arisen...As the Plaintiff had put up the property as security for the loan with full knowledge that should he default it would be sold, he had converted it into a commodity for sale and there was no commodity for sale the loss of which could not be adequately compensated in damages."***

45. The Applicant voluntarily charged the property with full knowledge that, in the event of default, it would be subject to sale. It is thus my view that the applicant has also failed the second test under **Giella v Cassman Brown Limited** (supra).

46. In **Amir Suleiman - Versus - Amboseli Resort Limited** (supra) the learned judge offered elaboration on what is meant by “balance of convenience” and stated; -

***“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”***

47. Even if one is to look at the matter on a balance of convenience, the same tilts in favour of the respondent who advanced the applicant funds with the expectation that the applicant would observe her obligations, which did not happen. The respondent has the right to exercise the power of sale as agreed. Once the applicant fell into arrears, then under the contract between the parties, the entire balance became due and payable.

48. It is evident that the applicant only came to court to buy time. She had no valid reason to stop the proposed sale of the securities that she had offered as security.
49. From the foregoing, I find that the application lacks any merit and it is dismissed with costs.
50. The respondent is at liberty, should there still be default of payment, to proceed to exercise its statutory power of sale.
51. For the avoidance of any doubt, the respondent need not issue any fresh statutory notices, having duly issued them when applicant defaulted. It should just comply with the law on advertisement of the property.
52. Orders accordingly.

**Dated, signed and delivered at Meru this 4<sup>th</sup> day of March 2026.**

**H.M. NYAGA**

**JUDGE**













