

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION

HCCOMM NO. 063 OF 2020

DICKWAYS CONSTRUCTION COMPANY LIMITED.....1ST
PLAINTIFF
JOSEPH GITHEHU KARIUKI.....2ND
PLAINTIFF

—VERSUS—

EQUITY BANK (KENYA) LIMITED.....1ST
DEFENDANT
INTEGRA AUCTIONEERING (K) LIMITED.....
INTERESTED PARTY

RULING

Introduction

1. Before Court is the Plaintiffs’/Applicants’ Notice of Motion dated **26th November 2020** seeking, in the main, interlocutory and mandatory injunctive orders restraining the Respondent and the Interested Party from dealing with **L.R. No. 1/707 (Original No. 1/248/2)** pending the hearing and determination of the suit.
2. The application is premised on the assertion that although the Applicants obtained various loan facilities from the Respondent secured by charges over the suit property, the Respondent irregularly and fraudulently registered a **3rd Further Charge dated 8th September 2016** for **Kshs.186,000,000/=** without the Applicants’ consent. It is

contended that the alleged further charge and the consequent statutory notices are unlawful, that the amount outstanding is disputed, and that the Respondent's statutory power of sale has not lawfully crystallised.

3. The Respondent opposes the Application vide a replying affidavit dated 13 January 2021. According to the Respondent, all charges, including the impugned 3rd Further Charge, were duly executed, registered, and funds accordingly disbursed. It is argued that the Applicants are in persistent default, that a dispute as to accounts or interest cannot bar the exercise of the statutory power of sale, and that damages would be an adequate remedy.
4. The Respondents maintain that the Applicants are in default of a debt totaling **KES 566,186,923.24** as of August 2020, and that the statutory power of sale has matured, and is therefore exercisable.
5. The Application proceeded by way of written submissions. The Plaintiffs filed their submissions dated 25 October 2021, whilst the Respondent's submissions are dated 10 March 2021.
6. The submissions were briefly highlighted by the parties on 9 July 2025. In his submissions, Mr. Harrison Kinyajui, Counsel for the Plaintiffs/Applicants, made reference to a supplementary affidavit dated 5 June 2025 and supplementary submissions dated the same date. However, as at the date of writing this Ruling (10 February 2026), no such supplementary affidavit or submissions have been duly filed and uploaded on the CTS. Consequently, this Ruling is premised solely on the submissions on record.

Analysis and Determination

7. From the pleadings and the parties' submissions, the court finds that the sole issue for determination is whether the application for a temporary injunctive order is merited.
8. The governing legal test in applications such as the present one is the well-established three-limb standard articulated in **Giella v Cassman Brown (1973) EA 358**, namely:
 - i. whether the Applicants have established a prima facie case with a probability of success;
 - ii. whether they stand to suffer irreparable harm that cannot be compensated by damages; and
 - iii. where the balance of convenience lies.
9. Both sides anchored their submissions on these principles. The Court will now address each limb in turn.

Whether the Applicants have established a prima facie case with a probability of success.

10. The Applicants' core contention is that the third further charge dated 8 September 2016 for KES 186,000,000 was registered without their authority or consent, and therefore any interest computations, penalties, or statutory notices premised upon it are fundamentally flawed. They insist that their signatures were never appended to the disputed instrument and that its existence only came to their attention in September 2018.

11. They argue that a charge registered without the chargor's consent is illegal ab initio, citing decisions such as **Joseph Mbugua Gichanga v Co-operative Bank of Kenya Ltd [2005] eKLR**, where the Court held that a sale predicated upon an illegal or void charge cannot stand. They also rely on **Standard Chartered Bank v Intercom Services Ltd & 4 Others [2014] eKLR**, which restated the principle that no court will enforce an illegal contract.
12. The Respondent adopts the opposite view, asserting that the third further charge was duly executed, duly registered, and funds fully disbursed thereunder, and that the Applicants benefited from the proceeds. It faults the Applicants for what it terms a "late-in-the-day" challenge after enjoying the facility. It cites **Kyundai Motors Kenya Ltd v East African Development Bank [2007]eKLR**, where the court condemned borrowers who seek injunctive relief as a means of postponing payment of admitted debts through technicalities.
13. Further, the Respondent highlights admissions of indebtedness within the Applicants' own papers — in particular, the averment that they "are willing to pay the owed amount subject to harmonization of accounts" and the 2nd Plaintiff's acknowledgment that he intends to settle the charge. These admissions, the Respondent argues, negate the existence of a prima facie case. It also tenders a bank statement covering 2018–2021, which shows no loan servicing payments, and asserts an outstanding balance of **KES 566,186,923.24** as at 5 August 2020.
14. However, central to the prima facie inquiry is whether there is a **serious question to be tried**, and not whether the Applicants will ultimately succeed. As Bosire JA stated in **Mrao Ltd v First American Bank of Kenya Ltd [2003] KLR 125**, the issue is whether the

evidence demonstrates an infringement of a right and the likelihood that the Applicant could succeed at trial if the allegations are proven.

15. In the present case, the Applicants have raised:

- i. a direct challenge to the validity of the 2016 further charge,
- ii. an objection to the accuracy of the indebtedness in light of a significant alleged payment of KES 130,000,000 made on 17 September 2018, and
- iii. allegations that interest and penalties were levied on a potentially defective instrument

16. The above issues go to the root of the Respondent's statutory notices, and thus to the legality of the impending sale. Even if the Applicants later fail to substantiate the allegation of fraud, at this stage, the challenge is neither frivolous nor vexatious. It raises a bona fide dispute suitable for ventilation at trial.

17. In the premises, the Court finds that the Applicants have established a prima facie case, but only with respect to the narrow issues concerning the validity of the third further charge, and the correctness of the outstanding loan balance in light of the alleged 2018 payment. This finding is, however, not a determination on the merits, but a recognition that a real controversy exists requiring a full trial.

Whether the Applicants will suffer Irreparable Injury if the Injunction is not Granted

18. The second Giella limb requires the Applicants to demonstrate that they stand to suffer harm which monetary compensation cannot adequately remedy.

19. The Respondent argues that once property is offered as security, it becomes a “commodity for sale,” and therefore any loss can be compensated in damages. It relies on, among others, [Kitur v Standard Chartered Bank & 2 others \[2002\] KEHC 1128 \(KLR\)](#), which stands for the proposition that loss of charged property is normally quantifiable and therefore not irreparable.
20. The Applicants argue the contrary. They submit that the equity of redemption, once extinguished by a sale, cannot be restored, and that land is unique, irreplaceable, and infused with constitutional protection under Article 40. They cite, among others, **Stars & Garters Restaurant v National Bank [2019] eKLR**, where courts recognized that a sale undertaken in breach of statutory requirements inflicts harm not adequately compensable by damages.
21. In this case, if the sale proceeds on the basis of a charge whose validity is under active and serious challenge, and before the accounts are properly reconciled, the Applicants risk permanent deprivation of their property rights based on a potentially defective process. The Court notes that once a sale is completed, especially by public auction, the property cannot ordinarily be recovered from an innocent purchaser. The resulting loss is therefore irretrievable.
22. Given the documented dispute over the authenticity and effect of the 2016 further charge and the Applicants’ detailed objections to account accuracy, the Court finds that the Applicants have established that they stand to suffer irreparable harm if the sale proceeds before these matters are resolved.

Where the Balance of Convenience Lies

23. Where doubt exists on the first two limbs, the Court must consider which party will suffer greater hardship from the grant or refusal of the injunction.
24. The Respondent urged that the Applicants have been in default for years, that no reasonable proposals have been made to settle indebtedness amounting to over Kshs. 566 million, and that the Bank should not be restrained indefinitely from realizing its security. The Respondent relied on authorities emphasizing that a defaulting borrower who comes to court without clean hands should not expect equitable relief.
25. The Applicants, on the other hand, insisted that maintaining the status quo is essential to prevent an unjustified sale of the suit property arising out of disputed and allegedly illegal charges and account computations. They emphasize that preservation will not prejudice the Bank materially, as the property remains intact as security, and an audit will clarify the indebtedness. They rely on, among others, the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 others [2016] eKLR**, where the court held that in situations of competing risks, preference is given to the option that minimizes the potential for irreversible injustice.
26. The Court agrees that the Bank is entitled to enforce its security where default is established. However, the issues raised here, including the validity of the underlying instrument and whether a significant payment was properly credited, materially affect the legality of the enforcement process itself.

27. The Court is of the considered view that in the circumstances of this case, granting a conditional injunction preserves the property, protects the equity of redemption, and ensures a fair and transparent account reconciliation, while still recognizing and safeguarding the Bank's ultimate right to realize the security if the debt is proven and proper notices are issued.

28. In these circumstances, the balance of convenience favors the preservation of the status quo, subject to reasonable conditions to prevent prejudice to the Respondent. Accordingly, the present application is hereby allowed on the following terms:

i. A temporary injunction is hereby issued restraining the Respondent, its agents, servants, or the Interested Party from selling, disposing, or otherwise interfering with **LR No. 1/707 (Original No. 1/248/2)** pending determination of the suit, on the following conditions:

(a) The Applicants shall, within **45 days, deposit Kshs. 20,000,000** into a **joint interest-earning account** held in the names of counsel for both parties.

(b) The Applicants shall, from the date of this ruling, **keep current any instalments contractually falling due**, without prejudice to their right to challenge the final quantum after reconciliation.

(c) Failure to comply with (a) or (b) above shall result in automatic lapse of the injunction upon the Respondent filing an affidavit of non-compliance.

ii. Costs of the application shall abide the outcome of the main suit.

29. It is so ordered.

**SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS
12TH DAY OF FEBRUARY, 2026**

**ADO MOSES
JUDGE**

In the presence of:

N/A...for Plaintiff/Applicant

Mbaji h/b for Ngugifor Defendant/Respondent

Moses.....C/A

ORIGIN