

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & TAX DIVISION
HCCC NO. E291 OF 2025

REX DEVELOPERS
LIMITED.....1ST
PLAINTIFF

AVIASPEN KENYA
LIMITED.....2ND PLAINTIFF

NAVEEN PRAKASH
SHARMA.....3RD
PLAINTIFF

-VS-

KENYA COMMERCIAL BANK
LIMITED.....1ST DEFENDANT

LEGACY AUCTIONEERING
SERVICES.....2ND DEFENDANT

RULING

1.The background to this suit is well documented in **HCCC E362 of 2014 Naveen Prakash Sharma, Jitendra Chotabhai Patel, Rex Developers Limited and Avianspen Kenya Limited v Kenya Commercial Bank Limited and Spencon Kenya Limited**. The suit was triggered by the ruling of 17.10.2024 in which **Hon. Mulwa J.**, held in part that: -

“the fresh notices issued by the bank constituted a new cause of action and their propriety and that of any

subsequent auction or sale based on the same ought to be litigated in a fresh suit and not in the present suit. The plaintiffs' application is therefore misguided and fails to appreciate that the court is now functus officio and that the issues it raises constitute a new cause of action which ought to be litigated elsewhere."

2.The suit concerns a dispute relating to the intended auction of the plaintiff's properties known as **Title No. 7785/280** within Runda Estate, **Title No. 9042/155** and **9042/156** along North Airport Road, and **Title No. 17/198 and 17/201** within Thigiri Ridge charged to secure varied amounts which were loaned to the borrower, **Spenco Kenya Limited (Spenco)**.

Application

3.Contemporaneous with the plaint, the plaintiffs filed the notice of motion dated 23.4.2025 brought primarily under **Order 40 Rule 2(1) of the Civil Procedure Rules**.

4.The application is supported by affidavits sworn by **Ashutosh Sharma**, a director of the 1st and 2nd plaintiff and son to the 3rd plaintiff, on 23.4.2025 and 16.6.2025.

5.The plaintiffs seek a temporary injunction to restrain the defendants from selling three charged properties, contending that: -

(1)the statutory notices dated 22.6.2023 and the auctioneer's notices were served upon Spencon not upon them directly as the chargors;

(2)the notices did not specify the sums due under each charge as required by the court in the judgment of 29.9.2022 in HCCC E362 of 2014; and

(3)the 1st defendant failed to account for payments allegedly received from the Government of Kenya in favour of the Spencon, amounting to Kshs. 1,027,080,719.00/-.

6.The plaintiffs challenge the auctioneer's notices for seeking to recover the overall debt of Kshs. 1,348,368,947.27/- which is over and above the amounts secured by the charged properties.

7.The plaintiffs fault the 1st defendant for failing to calculate and supply them with individual accounts for sums secured by their respective charges. They contend that the failure to serve

them is meant to deprive them of their rights of redemption. They also contended that the notices offend **section 90 (2) of the Land Act** and the **in duplum rule** under **section 44A of the Banking Act**.

8.The 1st defendant opposed the application through grounds of opposition dated 6.5.2025 and a replying affidavit sworn by **Joseph Mutunga Muli** on the same date.

9.The 1st defendant asserted that the statutory notices of sale were served upon the plaintiffs through their postal addresses provided in the charges. It also asserted that the statutory notices only demanded the principal amount secured by each charge and the interest as ordered by the court in the judgment of 29.9.2022 in **HCCC E362 of 2014**. It confirmed that the notices indicated the total outstanding amount of KES. 1,348,368,947.27/-.

10.The 1st defendant denied receipt of Kshs. 1,027,080,719/- from the Government in favour of **Spenco**.

11.The 1st defendant denied that **section 44A of the Banking Act** applies, maintaining that the

dispute is not between a borrower and the bank, but between chargors and the chargee.

12.The 1st defendant deposed that it advanced a further sum of Kshs. 2,122,563,905 to **Spencon** and that the plaintiffs agreed that the charged properties would continue to be held as securities to secure the sums advanced.

13.The 1st defendant contended that this suit is an attempt by the plaintiffs to relitigate issues that were determined in **HCCC E362 of 2014**.

14.The 1st defendant conceded that it noted after the proceedings were instituted that the 2nd defendant demanded the entire debt outstanding from **Spencon** and not the amount secured by each charge. It indicated that since the sale slated for 29.4.2025 did not proceed, it would instruct the 2nd defendant to issue fresh 45 days' notices that comply with the Auctioneers' Rules before advertising the charged properties for sale.

Submissions

15.The plaintiffs filed primary and supplementary written submissions dated 23.6.2025 and 12.8.2025 respectively. The plaintiffs submitted that the legality of the sums claimed, the notices

and the resultant violations of their rights by the defendants raise triable issues warranting the injunction pending the determination of the suit. It is therefore in the interest of justice to grant an interlocutory injunction halting the sale of the suit property pending the hearing and determination of this suit, instead of allowing the 1st defendant to issue fresh notices.

16. The 1st defendant filed written submissions dated 28.7.2025.

17. The 1st defendant relied on **section 99 (4) of the Land Act** to argue that any loss that the plaintiffs could suffer because of the sale of the charged properties can be compensated by an award of damages. It highlighted that it is a tier 1 bank and there is no suggestion that it will be unable to compensate the plaintiff. It also added that the plaintiffs' remedy lies in seeking damages.

18. The 1st defendant submitted that the balance of convenience therefore tilts in favour of allowing it to proceed and exercise its statutory power of sale. It asserted that the debt advanced to **Spenco** remains outstanding and that an

outstanding debt should not be allowed to continue accruing interest when there are securities that can be sold to reduce the outstanding debt. It argued that it would substantially be prejudiced if it is stopped from recovering the outstanding debt and it holds valid securities.

19. The 1st defendant relied on **Muga Developers Limited v Equity Bank of Kenya Limited & 4 others [2020] KEHC 1065 (KLR)** to urge the court to restrain the exercise of the statutory power of sale until the notices were re-issued.

Analysis and Determination

20. The central issue is whether the plaintiffs have met the threshold for the grant of a temporary injunction.

Res judicata

21. However, the 1st defendant raised the preliminary issue of *res judicata*. It contended that this suit is an attempt by the plaintiffs to relitigate issues that were determined in **HCCC E362 of 2014**.

22. The plaintiffs contended that the issues raised in this suit are distinct from those raised in the

earlier suit and that they arise from a different set of facts as evidenced by the court's directive.

23. The doctrine of *res judicata* is underpinned in **section 7 of the Civil Procedure Act**. One of its elements is that the subject matter of the dispute is the same.

24. In the ruling of 17.10.2024 the court held that the issues arising from the issuance of fresh notices constituted a different cause of action. Therefore, I do not think that this suit is *res judicata* as it flows from a different set of facts.

The threshold

25. The applicant ought to establish 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. **Giella v Cassman Brown & Co. Ltd [1973] EA 358**

***Prima facie* case**

26. A *prima facie* case is one which on evidence presented, there exists a right which has apparently been infringed by the opposite party.

Mrao Ltd v First American Bank of Kenya Ltd

[2003] eKLR

27. In **Nguruman Limited v Jan Bonde Nielsen &**

2 others [2014] eKLR the Court of Appeal observed 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.”***

28. The plaintiff raised the issues of accounts and interest. Courts have held that the issues regarding accounts and interest are not per se grounds for stopping exercise of statutory power of sale.

29. The debt is owing. Nothing shows that the statutory notices, except the auctioneer's notice, were not properly issued or were defective. Thus, a *prima facie* case hinges on whether the auctioneer's notices were defective for demanding the entire outstanding balance instead of the sums secured by the charges. The 1st defendant acknowledged the defects in the auctioneer's notices and proposed to instruct the auctioneer to issue fresh notices thereto.

30. Therefore, I find that the plaintiffs have established a *prima facie* case that the auctioneer's notices were defective.

31. I shall, therefore, grant an injunction against the 1st defendant bank limited to the period necessary for the 2nd defendant to issue and serve fresh auctioneer's notices in compliance with the Auctioneer's Rules before it can exercise its statutory power of sale. See **National Bank Of Kenya Limited v Shimmers Plaza Limited [2009] KECA 250 (KLR)** and **Muga Developers Limited v Equity Bank of Kenya Limited & 4 others [supra]**,

32. Accordingly, I allow the plaintiff's application dated 23.4.2025 on the following specific terms: -

(1) The 1st defendant be and is hereby restrained from exercising its statutory power of sale in respect of the subject charged properties unless and until the 2nd defendant issues and serves fresh auctioneer's notices under the Auctioneer's rules. For the avoidance of doubt, once proper auctioneer's notices are issued and the debt is not settled, the

injunction shall lapse and the sale of the charged properties may continue as by law prescribed.

(2)The defendants shall bear half the costs of the application.

(3)Any prayer not specifically granted is deemed to be declined.

Dated, signed and delivered at Nairobi through Microsoft Teams online application this 26th day of February, 2026

F. Gikonyo M

Judge

In the presence of: -

Ondieki for 1st defendant

Ojiambo for Plaintiff

CA - Ivan/Aggrey