

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
COMMERCIAL CASE NO. EOOI OF 2026

JOHN KIPRONO CHERUIYOT APPLICANT
VERSUS
ACCESS BANK LIMITED 1ST RESPONDENT
ANTIQUA AUCTIONS AGENCIES 2ND RESPONDENT

Coram: Before Hon. R. Nyakundi

M/s Kemboi Chambers Advocates

M/s Mbugwa, Atudo & Macharia Advocates

M/s KOMM Advocates

M/s Oyaro J & Associates Advocates

M/s Kibet Allan & Co Advocates

RULING

- 1.** Before this Court is an application dated 25th February 2026. The Applicant seeks the following orders;
 - a. *Spent*
 - b. *THAT pending the hearing and determination of the Application inter parties, this Honourable Court be pleased to issue a temporary order of injunction/stay restraining the respondents, its agents, servants and/or auctioneers from advertising for sale, selling, alienating, transferring or in any manner whatsoever dealing with property known as L.R NO. NGERIA KABONGO BLOCK 4/13, pending the hearing and determination of this Application.*
 - c. *THAT pending the hearing and determination of the Application main suit, this Honourable Court be pleased to issue a temporary order of injunction/ stay restraining the respondents, its agents, servants and/or auctioneers from advertising for sale, selling, alienating, transferring or in any manner whatsoever dealing with*

property known as L.R NO. NGERIA KABONGO BLOCK 4/13, pending the hearing and determination of this Application.

- d. *THAT pending the hearing and determination of the main suit, there be an order of stay of stay of execution of sale of the said property known as NO. NGERIA KABONGO BLOCK 4/13.*
- e. *THAT the Honourable Court be pleased to grant any such further orders as it may deem fit.*
- f. *THAT the costs of this application be provided for.*

2. The Application is made on the following grounds;

- i *THAT the Plaintiff/ Applicant is the registered owner of the property registration number L.R NO. NGERIA KABONGO BLOCK 4/13.*
- ii *THAT the suit property known as L.R NO. NGERIA KABONGO BLOCK 4/13 3. 4, 5 6. 7. 8. 9, 10. constitutes matrimonial property within the meaning of Section 6 of the Matrimonial Property Act, having been acquired and developed during subsistence of marriage.*
- iii *THAT the Plaintiff/Applicant resides on the said property together with the family and it constitutes their matrimonial home.*
- iv *THAT sometimes in 2003 the Plaintiff/ Applicant applied for a Bank overdraft facility of Kenya Shillings One Million Five Hundred Thousand Only (Kshs. 1, 500,000/=). The used his property being L.R NO. NGERIA KABONGO BLOCK 4/13 as security for the said overdraft.*
- v *THAT no spousal consent was obtained as required under section 12 of the Matrimonial Property Act, having been acquired and developed during the subsistence of marriage.*
- vi *THAT in 2004, the Plaintiff/ Applicant made an additional overdraft of Kenya Shillings Five Hundred Thousand Only (Kshs 500,000/=).*
- vii *THAT the facility has been renewed by the Plaintiff/Applicant since then. The 1st Respondent allows for the same to be renewed yearly in order to allow him to draw the same amount for one year*

which remain till recently when the 1st Respondent instructed the 2nd Respondent to auction his only property called home.

- viii *THAT the 1st Respondent has never declined and/or denied the Plaintiff/Applicant to renew the facility annually.*
- ix *THAT without any communication, notice, information and/or consent of the Plaintiff/ Applicant, the 1st Respondent converted the overdraft into a loan which started attracting interest at bank rate.*
- x *THAT the Plaintiff/ Applicant was therefore not aware that the overdraft facility had been converted into a loan, hence did not know of his obligation to repay the loan. The Plaintiff/ Applicant was further not aware of the terms of the loan and repayment conditions.*
- xi *THAT on 17th February', 2026 the Plaintiff/ Applicant was served with a notification of sale, together with 45 days redemption notice.*
- xii *THAT on 15th November, 2021 the 1st and 2nd Respondents herein advertised the Applicant's property for sale. The sale is slated for 19th March, 2026.*
- xiii *-THAT the 1st Respondent further inflated the amount owed by the Plaintiff/ Applicant from Kshs. 2,000,000/= to Kshs. 6, 061,825/= and revised it downwards again to Kshs 4,188,724.73 therefore ballooning and subtracting the figures with no justifications a clear indication of confusion on the site of the 1st respondent. How the 1st Respondent arrived at the said figures is strange to the Plaintiff/ Applicant and the same is exploitative and tantamount to a lottery expedition.*
- xiv *THAT the Plaintiff/ Applicant has sought the 1st Respondent's indulgence in negotiating a payment plan, to no avail.*
- xv *THAT prior to the aforesaid notification of sale and advertisement by the 2nd Respondent through the 1st Respondent, the 1st*

Respondent has never written any notices nor has the 2nd Respondent done so either.

- xvi *THAT the Plaintiff/ Applicant is willing to settle the outstanding amount as soon as possible in regards to overdraft borrowed.*
- xvii *THAT the said public auction to sell the Plaintiff/ Applicant's property is illegal since the Plaintiff/ applicant has not received or been served with the requisite notices from the 1st & 2nd Respondent or any document at all over the facility outstanding as an overdraft.*
- xviii *THAT the 1st and 2nd Respondents intend to illegally sell the suit property without an independent valuation to ascertain the current value as is required by law and if they are allowed to carry out the intended illegal sale, the property shall be sold at a throw away price way below its true value occasioning great injustice to the Plaintiff/Applicant.*
- xix *THAT forced value valuation relied upon by the 1st and 2nd Respondents was done in the year 2011. The forced value of Kshs. 8,250,000/ = is misleading and not true. The current value of the subject property stands at Kenya shillings Seventeen Million Five Hundred Thousand (Kshs. 17,500,000.00/ = and even more).*
- xx *THAT the Plaintiff/Applicant stands to lose property worth over Kenya Shillings 17,500,000.00/-) and the intended public auction by 2nd Respondent will do so at a throw away price should it be allowed to proceed.*
- xxi *THAT the Plaintiff/Applicant stands to suffer irreparable loss and damage should the illegal, unlawful and un-procedural sale of his property be allowed to proceed.*
- xxii *THAT the Plaintiff/ Applicant has a prima facie case with a high probability of success as the Respondents' actions are devoid of the following legal compliance:*

- a) *The 1st Respondent converted an overdraft facility to a loan without notifying, informing and/or seeking the Applicant's consent.*
 - b) *No demand or notification of default and the default amount has ever been served upon the Plaintiff/Applicant.*
 - c) *No true account of the overdraft and/or loan facility balance and amount repaid has ever been supplied to the Plaintiff/Applicant*
 - d) *No current valuation was conducted by the 1st and 2nd Respondents prior to the purported threatened sale by auction slated for 19th March, 2026 at 11.00am at Eldoret down near post office.*
 - e) *No spousal consent was obtained as required under Section 12 of the Matrimonial Property Act, having been acquired and developed during the subsistence of marriage.*
 - f) *The intended sale is a nullity, illegal and unlawful.*
- xix. *That the balancer of convenience tilts in favour of the Plaintiff/Applicant.*
- xx. *THAT this honourable court retains inherent powers to intervene and prevent injustice.*
- xxi. *THAT Section 3A of the Civil Procedure Act provides:*
- "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*
- xix. *THAT allowing the auction to proceed in the face of procedural and constitutional violation would amount to an abuse of the court process.*
- xx. *THAT the Plaintiff/ applicant has demonstrated sufficient cause to warrant the exercise of this honorable court's discretion in its favour.*

xxi. *THAT the Plaintiff/ applicant has established a prima facie case with a high probability of success.*

xxii. *THAT the Plaintiff/ applicant stands to suffer irreparable loss as his properties is at imminent risk of sale.*

xxiii. *THAT unless this Honourable Court intervenes urgently, the applicant's property will be sold in execution founded on procedurally defective and constitutionally infirm proceedings, thereby occasioning irreparable injustice.*

xxiv. *THAT the Plaintiff/Applicant has a triable defence raising serious issues including ownership, liability and procedural propriety.*

xxv. *THAT execution has commenced and the Applicant stands to suffer irreparable loss unless stay is granted.*

xxvi. *THAT this Plaintiff/ Application has been brought without undue delay.*

3. The Application is supported by an annexed affidavit dated 25th February 2026 sworn by John Kiprono Cheruiyot, the Applicant herein. The deponent echoes the grounds on the face of the Notice of Motion Application.

4. The application was opposed by way of a replying affidavit dated 6th March 2026 sworn by Elisha Nyikuli who deposed as follows:

1. *THAT I am the Head of Legal and Company Secretariat at Access Bank Ltd, who is the 1st Defendant/Respondent in this suit and who has authorized me to swear this affidavit on its behalf and therefore competent to swear this affidavit on behalf of the 1st Defendant/Respondent.*
2. *THAT I am also aware of the relationship between the 1st & 2nd Defendants, wherein the 2nd Defendant/Respondent has at all material times relevant hereto been acting on behalf and on the instructions of the 1st Defendant/Respondent and the 2nd Defendant/Respondent has also authorised me to swear this Affidavit on its behalf.*

3. *THAT I have read the application dated 25th February 2026, the Supporting Affidavit sworn by the Plaintiff/Applicant herein and the annexures thereto and having the same explained to me in detail by the Defendants' Advocates on record Ms Mbugwa, Atudo & Macharia Advocates and having understood all the contents thereof, I now wish to respond as follows: -*
4. *THAT from the onset the application is frivolous, vexatious and an abuse of court's process as such is only meant to waste court's precious time, mislead the court and deny the 1st Defendant/Respondent its Statutory right of sale as provided by the law and the subsisting agreement between the 1st Defendant/Respondent and the Plaintiff/Applicant.*
5. *THAT I have no reason to doubt the averments in paragraph 1 of the Supporting Affidavit and hereby confirm that given the documents like the title in the Banks possession a copy of which is also attached hereto and marked "EN 1", it is indeed true that the Plaintiff is the registered owner of the property more particularly known as NGERIA KABONGO/BLOCK 4/13 as alleged in paragraph 2 of the Supporting Affidavit*
6. *THAT the Property was used to secure banking facilities advanced to Tech Em Building and Civil Engineering Contractors Company Limited (hereinafter referred to as "the Borrower").*
7. *THAT as stated in paragraphs 4-6 of the Supporting Affidavit, it is indeed true that the Borrower was granted an Over Draft facility of Kshs 1,000.000/=.*
8. *THAT it is also true as stated in paragraph 4 of the Supporting Affidavit that upon the acceptance of the conditions in the said Letter of Offer and to secure the said overdraft facility the Plaintiff/Applicant executed a charge in favour of the 1st Defendant/Respondent dated 21st August 2006.*
9. *THAT by the time of drawing the charge, the law as regards spousal consent was not in-existent.*

10. *THAT alongside thereto the Borrower's directors executed personal guarantees for the amounts advanced to the Borrower and annexed hereto are copies of the Guarantees marked as "EN 3 (a) and (b)"*
11. *THAT thereafter and as stated in paragraph 5 of the Supporting Affidavit, the Plaintiff approached the 1st Defendant/Respondent for further accommodation whereupon he again executed a Further Charge to secure a further sum of Kshs. 500,000/= dated 12th October 2009 and the entries made against the charged property.*
12. *THAT by this time again, the law as regards the requirement for a spousal consent was not in place to warrant the requirement of a spousal consent hence no spousal consent was sought.*
13. *THAT following the facility alluded to in paragraph 10 hereinabove, the Borrower requested for a further financial accommodation of Kshs which was secured by a deed of variation of charge and second further charge dated 16th April 2015 thereby making the aggregate secured amount of Kshs 2,000.000/=.*
14. *THAT by the time of creating the Deed of Variation or Charge and Second Further Charge, the law as regards the requirement of spousal consent had been enacted in which case the 1st Defendant sought for the spousal consent which is found at page 8 of the Deed of Variation and Second Further Charge.*
15. *THAT it is therefore apparent that the Over Draft facilities have over time been secured by duly executed charges over the Plaintiff's/Applicant's property, Land Parcel NGERIA/KABONGO/BLOCK 4/13.*
16. *THAT it is therefore obvious that by the above said charges the Plaintiff/Applicant agreed that the 1st Defendant/Respondent may exercise its statutory power of sale and/or of appointment of receiver if the said Plaintiff/Applicant in case of default by the Borrower to service the financial facility granted by the 1st Defendant/Respondent.*

17. *THAT I have looked at the grounds on the face of the Application and more particularly the allegation that the overdraft facility were converted to a loan to which I vehemently deny as the facility has always been represented as an overdraft facility granted to the Borrower by the 1st Defendant/Respondent and property secured by the land parcel NGERIA/KABONGO/BLOCK 4/13 and this is evidence by all correspondences exchanged between the 1st Defendant and the Borrower and even the Plaintiff/Applicant hereto.*
18. *THAT in response to paragraph 7 of the Supporting Affidavit I am also aware that the Borrower was initially diligent in servicing the facility and that is why the 1st Defendant/Respondent never hesitated to enhance or even renew the overdraft facility from time to time, but the Borrower's diligence changed with time ending in default in the repayment of the debt.*
19. *THAT on or about the 17/7/2018, upon the application by the Borrower for a renewal of the Over Draft facility, the 1st Defendant/Respondent granted the Borrower a financial accommodation of Kshs. 3,500,000/= comprising of an existing Over Draft facility of Kshs 2,000,000/= and a Temporary Overdraft of Kshs 1,500,000/= valid for 30 days vide a letter of offer a copy of which is attached hereto and marked as "EN 6"*
20. *THAT the temporary facility of Kshs 1,500,000/= was then settled by the Borrower thus leaving the existing Over Draft facility of Kshs 2,000,000/= which was not properly serviced hence leading to further default by the Borrower*
21. *THAT I am aware that by a letter dated 14th May 2019 the 1st Defendant/Respondent (then known as Transnational Bank) issued a demand note to the Borrower for the then outstanding amount a copy of which is attached hereto and marked as "EN 7"*
22. *THAT following the said default and no response to the above said demand letter, the Respondent's above said Legal Officer*

issued instructions to the 1st Defendant's/Respondent's advocates on record then M/S Joe Ngigi & Company Advocates LLP, to issue a statutory notice to the Chargor in light of the default and instructing them to follow up on recovery of the outstanding balance.

23. *THAT the said firm issued the said notice dated 16th June 2020 a copy of which is annexed hereto and marked as "EN 8" which notice was served upon the Chargor by way of registered post and annexed hereto is a copy of the Certificate of postage marked as 'ZEN 9"*
24. *THAT following the said statutory notice, by a letter dated 16th October 2020 a copy of which is attached hereto and marked as "(EN 10)" the Defendant/Respondent's advocates on record that the Plaintiff/Applicant advise the 1st Respondent of the issuance of a 40-day Notice in accordance with the law and annexed hereto is a copy of the said notice marked as "EN 11" dated 9th October 2021"*
25. *THAT I am thus aware that the Plaintiff/Applicant was also duly served with a 45 day redemption notice and a notification for sale both dated 1st October 2021 copies of which are attached hereto and marked as "EN 12" and "EN 13" respectively.*
26. *THAT after the statutory notice, the 1st Defendant/Respondent issued instructions by a letter dated 8^h September 2021 a copy of which is annexed hereto and marked as "EN 14" to SEDCO VALUERS (K) LTD to carry out a valuation of the property prior to issuance of instructions for the realization of the security and annexed hereto is a copy of the valuation report marked as "EN 15"*
27. *THAT the said valuation is comprehensive and a true reflection of the then and forced market value of the property.*
28. *THAT on the 29th September 2021 upon receipt of the Valuation report the 1st Defeto instructed Antique Auctions Agencies to proceed with the realization of the security given the default by the Borrower who in turn issued the Plaintiff/Applicant with a 45 Days Redemption Notice dated 1st October 2021 a copy of which is*

annexed hereto and marked as "EN 12" alongside a Notification of sale dated 1st October 2021 a copy of which is attached hereto and marked as "EN 13" by the Plaintiff/Applicant to the 1st Defendant/Respondent

29. *THAT I am advised by ROBERT WAWERU MAINA of Antique Auctions Agencies, which advise I verily believe to be true that the Plaintiff/Applicant indeed received and acknowledged receipt of both the 45 days redemption notice together with the notification of sale.*
30. *THAT I am well aware that the said amount owing as at 1st October 2021 was Kshs 6,061,825/= as per the 45day Redemption Notice which amount was by then as a result of the principal and interest calculated over the entire default period and which amount has been justly arrived at contrary to the allegations on the grounds on the face of the Notice of Motion. (Attached hereto is a copy of the statement for the Borrower detailing the transactions in the Borrower's Account marked as "EN 16")*
31. *THAT I am also aware that much as the Plaintiff or even the Borrower have not made any effort to exercise his right of redemption much as he suggests that he has sought indulgence of the 1st Defendant/Respondent well aware that the Plaintiff/Respondent has not made any attempts to negotiate and/or settle the amounts due and owing thus resulting to recovery proceedings being instituted against the Plaintiff/Applicant.*
32. *THAT instead, the Plaintiff hereto only filed a suit before the subordinate court copies of which documents are attached hereto and marked as "EN 17" which suit was dismissed for want of jurisdiction. To date neither the Plaintiff nor the Borrower have made any effort to negotiate with the 1st Defendant/Respondent.*
33. *THAT I am further aware that the Statutory issued to the Plaintiff/Applicant has never been declared null and void and further even after the dismissal of the suit the Plaintiff/Applicant was served*

with fresh notices by Antique Auctioneers copies of which are marked as "EN 18" and EN 19" and the intended sale advertised in the Daily Nation dated 23rd February 2026 a copy of which is attached hereto and marked "EN 20".

34. *THAT the intended public auction is therefore legal as the 1st Defendant/Applicant's statutory power of sale has since matured and proper and requisite statutory notices have been issued.*
35. *THAT I have not seen paragraphs 7 to 18 of the Supporting Affidavit and I am advised by the Defendant's advocate Ms Mbugwa, Atudo & Macharia Advocates, which advise I verily believe to be true that the application served upon the 1st Defendant/Respondent and even the one filed in the CTS Portal do not bear the pages with the said paragraphs 7 to 18 of the Supporting Affidavit or even page 9 of the said Supporting Affidavit.*
36. *THAT I am informed by the said Advocates again which information I verily believe to be true that despite reminder to the firm of Kemboi Chambers Advocates the said firm has not served the full application given that the reserved application still has the same anomaly.*
37. *THAT annexed hereto is a copy of letter drawn by the 1st Defendant/Respondent to the said firm of Kemboi Chambers Advocates informing them of the failure and the same is copied to the Deputy Registrar marked as "EN 21"*
38. *THAT in response to the averments in paragraph 19, 20 and 21 I reiterate the averments in paragraph 25 hereinabove and highly dispute the valuation given but at the same time maintain that the 1st Defendant/Respondent has no intention whatsoever to sell the property at a throw away price and this is not a sufficient ground for an injunction given that such a loss can still be compensated by way of damages.*
39. *THAT in any event the allegation made in paragraph 22 is not supported by any evidence or factual assertion of the purported*

- irreparable loss as the Plaintiff has not shown any irreparable damage which cannot be compensated by way of damages.*
40. *THAT in further response thereto, the assertions by the Plaintiff/Applicant are fictitious and unsubstantiated as the Applicant has not provided any current valuation report to support his assertions.*
41. *THAT it is therefore clear that the application is frivolous, vexatious and an abuse of courts process as such is only meant to waste court's precious time mislead the court and deny the Defendant/Respondent their Statutory right of sale as provided by the law.*
42. *THAT I am informed by the Respondents' advocates on record and which information I verily believe to be true that if the said sale proceeds and the matter is decided in favour of the Plaintiff/Applicant, the said Plaintiff/Applicant would not suffer irreparable damage as same can be compensated in monetary terms.*
43. *THAT in response to paragraph 23 of the supporting Affidavit, I wish to reiterate that: -*
- a. That the Over Draft facility was never converted into a term loan,*
 - b. That statutory demands and notices clearly indicating the default amount and the requisite amounts required to regularize the account were issued*
 - c. That a valuation was conducted and a report prepared to that effect.*
 - d. That the intended sale of property is legal as all legal procedures have been complied with.*
 - e. That a spousal consent was obtained as and when the law stipulated so and annexed hereto is a copy of the consent marked as "EN 20"*
 - f. That the intended sale is well within the provisions of the law.*

44. *THAT the averments in paragraph 24 at page 10 of the Notice of motion are strange to me and seem to relate to an unknown issue given that the averments thereto relate to rights to information which the Plaintiff has not been denied.*

45. *THAT I have been advised by the Defendant/Respondent's Advocates on record which advise I verily believe to be true that the Plaintiff's right to information has not been infringed as he was duly informed at each stage of the matter and it is from such knowledge that the Plaintiff/Applicant instituted the current proceedings before this court.*

46. *THAT it is not in dispute that the 1st Defendant/Respondent has an enviable right of sale of the security property, as the Borrower has defaulted in repayment of the financial accommodation herein and the application is only meant to delay or interfere with the 1st Defendant/Respondent's right under the relevant law thus prejudicing them.*

47. *THAT it is also not in dispute that the Plaintiff has in deed defaulted in repayment and does not dispute this fact.*

48. *THAT I am further informed by the 1st Defendant/ Respondents' said advocates on record, which information I verily believe to be true, that even though the Plaintiff/Applicant admits to the indebtedness of the Borrower to the 1st Defendant/Respondent, the Borrower or even the Plaintiff/Applicant has not offered any security in Court to be granted the orders sought in his application, thus showing his unwillingness to settle the amount owing.*

49. *That I am aware that the above said delay is costly to the 1st Defendant/Respondent as the said financial accommodation is still accruing interest, while the Plaintiff/Applicant shows no intention to settle same and the said security may be rendered insufficient to settle the amount owing to the 1st Defendant/Respondent plus interest accrued.*

50. *That the averments in paragraph 25 of the supporting Affidavit as regards compensation of the 1st Defendant/Respondent by way of interest are therefore misplaced as interest charged on the property are a matter of right for facility granted to the borrowed but not compensation and cannot be let to accumulate unchecked as such interest may also surpass the value of the property charged.*
51. *That I therefore swear this affidavit in opposition of the Plaintiff/Applicant's application herein.*
52. *That what is deponed to herein above is true to the best of my knowledge save for the matters deponed to on information sources whereof have been disclosed and matters deponed to on belief whereupon the sources and grounds have been given.*
5. On the other hand, the Respondents also placed reliance in the grounds of opposition dated 6th March 2026.
- a) The Application is incompetent, misconceived, and an abuse of the court process, having been filed belatedly and purely as an afterthought intended to frustrate the Defendants/Respondents' lawful exercise of their rights.
 - b) The 1st Defendant/Respondent's statutory power of sale has properly arisen and is being exercised strictly in accordance with the law, the Land Act, and the terms of the charge instrument executed between the parties.
 - c) Proper and valid statutory notices were duly issued and served upon the Plaintiff/Applicant in compliance with the law, and the allegations of nonservice are false, misleading, and intended to misdirect the Court.
 - d) The Plaintiff deliberately and without good cause abandoned his right of redemption even after being served with requisite Statutory Notices hence the 1st Defendant is right and at liberty to proceed to exercise its statutory right to realise the security,

- e) The Plaintiff/Applicant is guilty of material non-disclosure and suppression of material facts, thereby disentitling him from the equitable relief sought.
- f) The Plaintiff's case is founded on illegalities and falsehoods, rendering the Application incompetent and incapable of invoking the Court's equitable discretion.
- g) The indebtedness of the Plaintiff is not disputed, and the orders sought would amount to shielding the Plaintiff from his lawful obligations and unjustly interfering with the Defendants' rights as secured creditors.
- h) The Plaintiff has approached the Court with unclean hands, and equity does not aid a party who seeks to perpetuate illegality, acts in bad faith, or suppresses material facts.
- i) No special circumstances have been demonstrated by the Plaintiff to warrant the grant of the injunctive orders sought.
- j) The Application fails to meet the settled principles for grant of injunction as laid down in *Giella v Cassman Brown & Co. Ltd* (1973) EA 358, in that:
 - The Plaintiff has not established a prima facie case with a probability of success.
 - The Plaintiff has not demonstrated irreparable loss incapable of compensation by damages.
 - The balance of convenience does not favour the Plaintiff but rests with the Defendants/Respondents as secured creditors.
 - The Plaintiff has not shown that a lower risk of injustice exists in his favour should the injunction be granted.
- k) The Plaintiff has failed to give an undertaking as to damages or costs, a mandatory requirement for the grant of injunctive relief.

- l) The application is prejudicial to the Defendant/ Respondent's rights of recovery and is calculated to delay, obstruct, and forestall the lawful realization of the charged property.
- m) The Application is contrary to principles of equity, as it:
- Seeks to perpetuate illegality;
 - Is made in bad faith;
 - Is founded on falsehoods;
 - Constitutes an abuse of the court process.
 - Amounts to approbating and reprobating at the same time given that the Applicant is on one hand denying indebtedness and on the other hand alleging willingness to negotiate the settlement of the matter.
- n) The Application is frivolous, vexatious, and intended solely to delay the expeditious disposal of this matter and deny the Defendants/Respondents the fruits of their contractual and statutory rights.
- 6.** This notice of motion is predicated in the plaint dated 25th February 2026 seeking the following orders:
- (a) *A temporary injunction restraining the defendants, its agents, directors, officers or otherwise from disposing off the suit property in any manner whatsoever pending the hearing and determination of this suit.*
- (b) *A permanent injunction restraining the Defendant, whether acting by itself, its agents, directors or officers from disposing off the suit property in any manner without following the due process of the law.*
- (c) *Costs of and incidental to this suit, and*
- (d) *Any other relief that this Honorable Court may deem fit.*
- 7.** The application itself was canvassed by way of written submissions.

Applicant's Written Submissions

- 8.** The Applicants Learned Counsel Mr. Kemboi arguments were to that effect and are dated 10th March 2026. In quest to answer the issues

in the notice of motion he framed three interlocutory questions. First, whether there is a serious triable issue. This he answered in the affirmative placing reliance in the landmark case of *Giella vs Cassman Brown & Company Ltd* [1973] EA. In buttressing this issue learned Counsel held the view that if an injunction is not granted the Applicant will suffer irreparable injury in which damages cannot be said to be an adequate remedy. The other argument put forth was that the property in question is a matrimonial home in which eviction and family displacement are classic example of irreparable harm. Learned Counsel further made reference to the following cases which lay down the principles on a prima facie case: *Mrao Ltd Vs First American Bank of Kenya Ltd* [2003] KLR.

- 9.** In the second limb of submissions, learned posed the question whether the overdraft facility was validly converted into a term loan. In answer to this question, Learned Counsel contended that the longstanding overdraft facility was converted into a term loan without the Applicant's informed consent or proper notification. That the conversion and any new repayment obligations was not communicated and that the quantum claimed by the Respondent is inconsistent and unexplained. Therefore, learned Counsel had the view that those are the triable issues which must be determined on the merits.
- 10.** In so far as the third limb is concerned, learned Counsel set out the question to be answered by this Court at this interlocutory stage to be whether statutory preconditions to exercise of the power of sale were complied with. According to Learned Counsel this was not done as conversion of overdraft to a loan and lack of notice coupled with a lack of procedural compliance before sale remains wanting on the part of the 1st Defendant/Respondent. It was learned Counsel's contention that there was no proper valid service of statutory notices, proof of personal service or postal delivery, adequate and

current valuation as well as a valid spousal consent over an illegal conversion of an overdraft into a loan.

11.The fourth round of arguments presented by the learned Counsel for the Applicant was whether the quantum claimed by the Defendant/Respondent was correctly calculated. With regard to this issue learned counsel urged the Court to go through a varying quantum and advertisements of sale from earlier figure of Ksh 6,061,825/= issued and recent amendment to Ksh 4,188,724.73/= which is evidence of him forcing out issues through the judicial process. In support of this learned Counsel placed reliance on the following authorities: Margaret Njeri Muiruri v Bank of Baroda (KEHC 7181) & Isha Mohamed Noor v KCB. Learned Counsel therefore persuaded this Court to give orders of a temporary injunction to have the matter heard on the merits.

Defendants/Respondents Written Submissions

12.In a brief rejoinder in terms of submissions, the learned Counsel for the Defendants Mr. Atudo placed reliance on the following cases under provisions of the Statute vehemently was of a different opinion that judicial discretion should be exercised in favour of the Applicant. (See *Land Act 2012 Sections 90 and 96 (Statutory power of sale)*, *Land Registration Act 2012, Section 93 (Spousal Consent)*, *Matrimonial Property Act 2013 – Definition and Rights in Matrimonial Property*. Case law: *Trust Bank Ltd v Eros Chemists Ltd [2000] eKLR*, *Giella v Cassman Brown & Co. Ltd (1973) EA 358*, *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR*, *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*, *Charles Kipchirichir Kogo v Frank Kemeli Tenai [2018] eKLR*, *Kenya Breweries Ltd v Washington Okeyo [2002] eKLR*, *Films rover International & Others v Cannon Films Sales Ltd [1986] 3 ALL E.R 772* and *Dorcas Muthoni & 2 Others v Michael Ileri Ngari [2015] eKLR*. In learned Counsel's submissions the Applicant has not satisfied the three-prong approach condition precedent set out in *Giella v Cassman Brown*

which provides inter alia; the test of a prima facie case, irreparable harm and a balance of convenience. It was also learned Counsel's contention that the Applicant has not offered an undertaking as to damages or cost which is a mandatory requirement for injunctive relief. The best assessment learned Counsel offered as against the Applicant was to the effect that all these processes are calculated to delay and obstruct the Respondent/Defendant's lawful recovery process of the loan amount due and owed which is not denied.

13.In the second line of submissions dated 23rd February 2026, Learned Counsel urged this Court to revisit the interim orders issued on 27th October 2025 with regard to the Notice of Motion dated 18th July 2025. According to learned Counsel this honorable Court considering the application ex parte granted interim stay orders on 21st July 2025 staying proceedings in Eldoret CMCC No. E615 of 2022 pending the hearing and determination of the application. This application was fully heard and the Court ordered by declining to grant prayers for calling of files and consolidation on the grounds of lack of jurisdiction over matters beyond Eldoret Station. As such. Learned Counsel reminded the Court to vacate the interim orders in view of the matter having being dismissed for want of jurisdiction for the subject matter being the suit land was way above what the statute has conferred as pecuniary jurisdiction before that very court.

Decision

14.I have read and understood all the processes filed and I have equally read and analyzed both the supporting and counter affidavits including the written addresses and the various annexures referred by the parties through their respective legal counsels. Having done all these, this court has the requisite jurisdiction to entertain this suit and I will therefore proceed to determine the motion concerning grant of temporary injunction.

15.I take cognizance that we are at the interlocutory stage but it does not lessen the fact that the standard and burden of proof does not

shift from the bearer of the burden being the Applicant in this case. The Law of Evidence Cap 80 of the Laws of Kenya aids a party who wants to be believed in what he or she alleges as an existing fact to a dispute as provided for under Section 107(1) of the Act. It is also a common law principle which we domesticated as a legal system that who ever asserts a fact must proof but he or she who denies did not prove anything on those facts. The concise *Law Dictionary Quotes Taylor* defines evidence to mean all the legal means, exclusive of mere augment which tend to proof or disapprove any matter of facts the truth of which is submitted to judicial investigation. (See *P.G Osborn Concise Law Dictionary, Sweet & Maxwell.*). The burden of proof was addressed vividly by the Court of Appeal in the case of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (2005)**: “ *As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.*”

16.The position is also that the evidence must carry a reasonable degree of probability, but not so high as is required in a criminal case. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR*, the Judges of Appeal held that:

"Denning J, in Miller v Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;- "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. This burden ona balance or preponderance of probabilities means a win however

narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

17. This is the hurdle which the Applicant must strive to jump over so that judicial discretion can be exercised in its favor. In the event he fails to discharge that burden the application will be denied.

18. The threshold of securing an injunction is now well settled having been rooted by the legislature in order 40 Rule 1 & 2 of the Civil Procedure Rules. To get an injunction the Applicant must show that there is no plain adequate and complete remedy at law and that an irreparable injury will result unless the relief is granted.

A person does not prima facie obtain an order of interlocutory injunction to restrain actionable wrongs for which damages are a proper remedy. So, once an applicant for interlocutory injunction shows that there is a serious issue to be tried relating to the violation of his right and that the damages he may suffer before the final determination of the suit will be such that it cannot be compensated for in damages, the court as a guardian of the rule of law will, on all the other relevant considerations, grant him the relief of interlocutory injunction. Admittedly, mere inconvenience without a proprietary right in the subject matter of the complaint is not enough to entitle an applicant to the order.

Where any doubt exists as to the plaintiff's right or if his right is not disputed but its violation is denied, the court, in determining, whether interlocutory injunction should be granted, will take into consideration the balance of convenience to both parties and the nature of the injury which defendant, on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and which the plaintiff, on the other hand, might sustain if the

injunction was refused and he should turn out to be right. Therefore, the burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than which the Defendant will suffer, if it is granted, lies on the plaintiff

An interlocutory injunction is directed to ensure that a particular act or acts do not take place or continue to take place pending the final determinate court of the rights of the parties. An interlocutory injunction is to regulate the position of the parties pending the trial and determination

of the issue between them, whilst avoiding a decision on such issues which could only be resolved at the trial.

*The purpose of interlocutory injunction is to protect a plaintiff against injury by violation of his right for which he could not be adequately compensated in the damages recoverable in the action if the case were resolved in his favour at the trial. The right of the plaintiff to be protected has to be weighed against the corresponding need of the defendant to be also protected against injury resulting to him having been prevented from exercising his own legal right if uncertainty were resolved in his favour at the trial (see the principles in the following authorities: *Trust Bank Ltd v Eros Chemists Ltd* (2000) eKLR, *Giella v Cassman Brown & Co. Ltd* (1973) EA 358, *Mrap Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR, *Nguruman Limited v Jan Bonde Nielsen & 2Others* (2014) eKLR, *Pius Kipchirhchir Kogo v Frank Kemeli Tenai* (2018) eKLR, *Kenya Breweries Ltd b Washington Okeyo* (2002) eKLR *Films Rover International & Others v Cannon Films Sales Ltd* (1986) 3 ALL E.R 772, *Dorcas Muthoni & 2Others v Michael Ireri Ngari* (2015) eKLR*

- 19.** The Applicant in this case pursuant to the above principles must be expected to answer the following questions in the affirmative. Fortunately, or unfortunately, it is an evidential burden to be discharged under Section 107 (1) 108 & 109 of the Evidence Act.

- (a) *The applicant must show that there is a serious question to be tried, that it that the applicant has a real possibility, not a probability of success at the trial, notwithstanding the defendants technical defence, if any*
- (b) *The applicant must show that the balance of convenience is on his side, that is that more justice will result in granting the application than in refusing it.*
- (c) *The applicant must show that damages cannot be an adequate compensation for his damage or injury, if he succeeds at the end of the day*
- (d) *The applicant must show that his conduct is not reprehensible for example that he is not guilty of any delay.*
- (e) *No order for an interlocutory injunction must be made unless the applicant gives a satisfactory undertaking as to damages save in recognized exceptions*

20. In my reading of the affidavits, the Applicant has moved this court because his property referenced as NGERIA/KABONGO/BLOCK 4 /13 is threatened to be sold by the 1st Defendant invoking the power of sale exercisable under the Land Act 2012 as read with Land Registration Act of 2012. The statutory provisions on the power of sale are very comprehensive in the spectrum of the law. Those specific legal procedures are expected to be complied to the letter by the Mortgagee before exercising the option of invoking this remedy as against the mortgagor. When can it be exercised within the letter, spirit and the ghost of the law. These are:-

- a) Notice requiring payment of mortgaged money has been served on the mortgagor and default has been made in payment of the money for three months after such service;
- b) Some interest is in arrears and remain unpaid for two months after becoming due notwithstanding that the principal sum to be advanced installment under the mortgage deed has not been advanced in full;

c) There has been a breach of some provision contained in the mortgage deed or in the statute and which imposes an obligation upon the mortgagor.

21. The affidavits by the Applicant as responded by the 1st Respondent by the respective counter affidavits, the borne of contention within the two disputants support the statutory power of sale, how it has been exercised by the mortgagee as against the mortgagor, the issue of spousal consent, the issue of valuation of the suit property prior to the Notice and advertisement to have the asset disposed of by way of public Auction, there is also the issue between the money due and owing and the one being stated in the various demand notices served by the mortgagee upon the mortgagor for settlement. The primary facts of the case as to the Applicant having obtained a facility from the 1st Respondent is not dispute. There is also no dispute as the security for the facility being NGERIA/KABONGO/BLOCK 4 /13.

22. This is what the comparative jurisprudence alluded to in the case of **Alliance Building Society Vs Share (1952) Ch. 581 ALL ER 1033** where the Court held thus: -

"the exercise of the power of sale under a mortgage deed is quite distinct and separate from the exercise of power by a judgment creditor to execute a judgment delivered in his favour. The two rights are in fact governed by separate and distinct relevant laws applicable to the exercise of each of the rights. A mortgagee can validly exercise his power of sale of the mortgaged properties under the deed of mortgage even if the judgment of court in his favour does not contain any order empowering him to sell mortgaged properties..."

23. The question is with rival submissions on the evidential material deducible by this court what is the quantum of the mortgage money due and payable to the 1st Respondent? That answer is not very precise from both the affidavits and documentary evidence. In my

view, that can be said to be a serious triable issue to be interrogated at the level of a full hearing on the merits. As if that is not enough how the statutory power of sale under the law was invoked and exercised by the mortgagee as against the mortgagor is also another predominant issue to be ventilated by the parties at an inter-parties forum. As observed also from the affidavit evidence and the submissions there is an allegation on spousal consent as to whether it was a condition precedent to the validity of the mortgage contract is not capable of being answered with completeness at this interlocutory stage. Given that status of affairs it appears in all the circumstances that damages and other legal remedies are not sufficient to put the Applicant in a favorable position if this court does not preserve the status quo so that the public Auction is halted temporarily for the parties to litigate under the provisions of Article 50 of the constitution by adducing and challenging evidence for or against this impugned mortgage contract.

24.It is now settled law in our jurisprudential development and progression duly domesticated to our own local circumstances that an application for interlocutory injunctive orders is a discretionary remedy which must be exercised judicially and judiciously by this court. The very reason being that the essence of an interlocutory injunction is for the preservation of the status quo ante bellum. Just as a reminder if the serious questions have arisen in dispute of this nature it is not the law that the Applicant must show a prospect of obtaining a permanent injunction at the end of the trial.

25.From the available evidence, there is both sufficient material accompanied with the documentary evidence that the Applicant has established both a prima facie case, the irreparable harm and the balance of inconvenience to tilt the scales of justice at this interlocutory stage in his favour because any other prejudice that will be suffered by the Respondent is capable of being remedied by way of costs and interest chargeable to the facility now in contestation.

Consequently, the prayer of temporary injunction is granted premised as follows: -

- (a) *That pending the hearing and determination of the main suit, there be an order of stay of execution of sale by Public Auction under instructions issued by the 1st Respondent to the 2nd Respondent to effect and realize the proceeds of the loan from the sale of LR NO. NGERIA/KABONGO BLOCK 4/13*
- (b) *That the Applicant be liable to meet any such costs or incidentals which may have accrued from the notices issued to exercise a statutory power of sale by the 1st Respondent.*
- (c) *The costs of this application to abide the outcome of the main suit*
- (d) *That this suit be fast-tracked by the parties complying with Order 11 of the Civil Procedure Rules in which a Status Conference shall be heard on the 19.5.2026 to fix a hearing date.*

**DATED, SIGNED AND DELIVERED VIA EMAIL AND CTS AT ELDORET
THIS 16TH DAY OF MARCH, 2026**

.....
R. NYAKUNDI
JUDGE