

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELC APPEAL NUMBER E025 OF 2026

JAMES HENRY MURUNGIAPPELLANT /APPLICANT

VERSUS

KCB BANK KENYA LIMITED1ST RESPONDENT

UPSTATE KENYA AUCTIONEERS2ND RESPONDENT

RULING

1. Before me is the Notice of Motion Application dated the 02.03.2026 brought pursuant to the provisions of **Sections 3, 13 and 16 A of the Environment and Land Court Act, 2011; Sections 97 and 103 of the Land Act, 2012; Articles 48 and 162[2] [b] of the Constitution 2010.**

The reliefs sought *vide* the application are:

- i. That this Application be certified urgent and heard Ex parte in the first instance, and that service thereof be dispensed with in the first instance for purposes of prayer 2 herein.*
- ii. That pending the hearing and determination of this application inter partes, this honorable court be pleased to set aside, vary and or suspend the directions issued on 25th February 2026 by Hon. Albert Loosita in Meru CMELC No. E134 of 2023 – James Hernry Murungi v KCB Limited and another, to the extent necessary to preserve the suit property.*
- iii. That pending the hearing of this Application Inter-partes , this Honorable court be pleased to grant a temporary order of stay of the intended sale by public auction of the*

Appellant's/Applicant's property known as MWIMBI/KIRARO/899, 48 Area, Tharaka Nithi County, scheduled for Tuesday, 3rd March 2026, or on any other subsequent date, pending further orders of the court.

- iv. That pending the hearing and determination of the appeal herein, this Honourable Court be pleased issue an order of stay of execution and/or stay of the intended sale by public auction of the property known as MWIMBI/KIRARO/899, 48 Area, Tharaka Nithi County, and/or any transfer, registration, or other dealings therewith.*
- v. That any sale conducted in contravention of the orders of this Honourable Court be declared null and void.*
- vi. That cost of this Application be provided for.*

2. The Application is premised on various grounds which have been enumerated in the body thereof. The grounds include: The Applicant took a banking facility with the 1st Respondent; the facility in question is still pending; the 1st Respondent has commenced the process of exercising its statutory power of sale; the sale is intended to take place [sic] on the 03.03.2026; the intended sale is being undertaken without appropriate statutory valuation; the valuation report being relied upon was undertaken in May, 2023; the valuation report is outdated; the valuation report does not speak to the correct value of the suit property; the intended sale is vitiated by illegality; and the Applicant's right/equity of redemption is bound to be terminated.

3. Additionally, it has been contended that the Applicant herein filed civil proceedings *vide* Meru CMCECL No. E134 of 2023; the applicant also

filed an application to stop the intended sale; the application was heard and dismissed.

4. Moreover, the Applicant has posited that when the 1st Respondent resorted to exercising its statutory power of sale yet again; same filed an application *vide* Meru CMCELC No. 134 of 2023; the application was dated the 24.02.2026; the application was placed before Hon. Lesootia [SPM]; the designated magistrate reviewed the application and issued directions; the designated magistrate scheduled the application for interpartes hearing on the 18.03.2026; the designated magistrate failed to grant temporary orders; the failure to grant temporary orders has exposed the applicant; the applicant is now bound to suffer irreparable loss; and the suit property is on the verge of alienation.
5. Furthermore, the Applicant has also posited that following the failure by the designated magistrate to grant interim protection, the applicant felt aggrieved; the applicant has therefore filed the subject appeal; the applicant has equally filed the instant application; the appeal has overwhelming chances of success; the court is seized of jurisdiction to entertain the application; the applicant has established the requisite grounds/conditions for grant of an order of temporary injunction; and the applicant is ready and willing to abide by the conditions [if any] ordered by the court.
6. The instant application is supported by the affidavit of James Henry Murungi [the applicant] sworn on the 02.03.2026 and a further affidavit sworn on the 10.03.2026. The twin affidavit[s] have reiterated the

grounds which were elucidated in the body of the application. In addition, the deponent has also annexed various annexures including: a copy of the charge; copy of the application dated 15.11.2023 and a copy of the ruling previously issued on the 16.04.2025; and wherein a previous application for temporary injunction to avert the exercise of statutory power of sale was dismissed.

7. Based on the foregoing, the applicant has invited the court to find and hold that the subject appeal raises arguable points and thus the court ought to preserve the crux / substratum of the appeal. In particular, it has been submitted that the crux of the appeal can only be preserved by granting the orders sought. To this end, the applicant has implored the court to grant prayer 4 of the application.

8. The 1st Respondent filed an elaborate replying affidavit sworn on the 10.03.2026. The replying affidavit has provided a chronological background to the dispute beforehand. The deponent of the replying affidavit has highlighted various issues. The issues highlighted are: The applicant charged the suit property to the 1st Respondent; the charge was duly executed and registered; the applicant failed to meet his obligations; the 1st Respondent thereafter commenced the process of sale of charged property; the 1st Respondent undertook a statutory valuation; the 1st Respondent retained a nominated auctioneer; the 1st Respondent complied with the provisions of the law; and the 1st Respondent's statutory power of sale has since accrued.

9. In addition, the deponent of the replying affidavit has contended that confronted with the 1st Respondent's power of sale, the applicant herein

filed Meru CMCELC E134 of 2023; the applicant also filed an application dated the 15.11.2025; the application was heard and dismissed; the applicant again filed another application dated the 24.02.2026; the application was placed before the designated magistrate; the designated magistrate issued directions pertaining to the hearing of the application; the application is currently scheduled for hearing on the 18.03.2026; the application has not been disposed of; the filing of the current application constitute[s] an abuse of the due process of the court; and the applicant has not established the threshold for the grant of the orders sought.

10. The 1st Respondent has therefore invited the court to find and hold that the subject application amounts to forum shopping and in any event, does not suffice. The court has been implored to dismiss the application with costs.

11. The Application came up for hearing on the 11.03.2026, whereupon the court ordered that the application be canvassed and disposed of by way of oral submissions. The advocates for the parties obliged.

12. Learned counsel for the applicant adopted the grounds at the foot of the application; reiterated the averments *vide* the supporting affidavit and the supplementary affidavit; reiterated the contents of the annexures; and thereafter highlighted various/salient issues.

13. The issues highlighted by learned counsel for the applicant are: The Hon. Court is seized of the requisite jurisdiction to entertain the appeal and the

application; the decision of the court of appeal in **Cooperative Bank of Kenya Limited Versus Patrick Kangethe Njuguna and another [2017] EKLR** does not apply in respect of the instant matter; the subject appeal lies as of right; the directions of the designated magistrate issued on the 25.02.2026 are appealable; the applicant has established a basis to warrant the issuance of the orders sought; the intended sale of the charged property is contrary to the provisions of the law; the applicant's equity of redemption ought to be preserved; and the loss to be suffered is irreparable/not compensable in monetary terms.

14. Learned counsel for the 1st Respondent adopted the contents of the replying affidavit sworn on the 10.03.2026 and thereafter canvassed a plethora of issues. The issues canvassed are: The 1st Respondent has duly complied the provisions of the law; the 1st Respondent's power of sale has accrued; the honourable Court is divested of jurisdiction to entertain the appeal; the directions of the designated magistrate are not appealable; the appeal before the court does not lie; the applicant is guilty of abusing the due process of the court; and the applicant has failed to establish a basis for the grant of the orders sought.

15. Flowing from the foregoing, learned counsel for the 1st Respondent has invited the court to find and hold that the application is premature; misconceived; and legally untenable. The court has been invited to strike out the appeal and the application.

16. Having reviewed the application before the court; the supporting affidavit thereto; the supplementary affidavit; the replying affidavit in opposition

thereto; and the oral submissions made by/on behalf of the parties, various issues crystalize for determination.

17.The issues are: Whether the appeal before the court is competent or otherwise; whether the court is seized of the requisite jurisdiction to entertain the application or otherwise; whether the subject appeal and the application constitute[s] an abuse of the due process of the court; whether the application is defeated by the doctrine of *Res sub judice*; and whether the applicant has satisfied the threshold for the grant of the orders sought in any event.

18.Regarding the first issue, it is important to recall and reiterate that the applicant herein filed an application dated the 24.02.2026. The application was filed before the Chief Magistrate's court. The application was considered by the designated magistrate. The learned magistrate proceeded to and issued directions pertaining to the inter partes hearing of the application. For good measure, the application was scheduled for hearing on the 18.03.2026.

19.Other than the foregoing, the designated magistrate did not grant any interim orders. Notably, the designated magistrate was not persuaded to grant the interim orders. It is the failure to grant the interim orders which aggrieved the applicant and thus provoking the subject appeal. [see ground c of the application dated 02.03.2026]

20.The question that does arise is whether the directions of the designated magistrate; and which merely set down the application for interpartes

hearing are appealable; and if so, whether same are appealable as of right [if at all]. To start with, it is common ground that a right of appeal must be statutorily provided. The right must be prescribed or provided for under some law. Moreover, there is no gainsaying that a right of appeal cannot be inferred or be implied. Simply put, a right of appeal must be express and explicit. In addition, it suffices to posit that a right of appeal is not a birth right.

21. In the premises, it is incumbent upon every litigant seeking to appeal to demonstrate and show the provision of the law underpinning the appeal. Absent an express provision providing for an appeal, no appeal can lie. In this regard, it behooved the Appellant to demonstrate what provision of the law allowed the appeal against the directions of the Learned Trial Magistrate. It is not lost on me that the application which was mounted in the lower court has not been heard. Same is pending hearing on the 18.03.2026.

22. To my mind, no order has since been issued by the Learned Trial Magistrate which is capable of being appealed against. Instructively, the provisions of **Order 43 Rule 1 [o] of the Civil Procedure Rules, 2010**, only speaks to an order allowing or dismissing an application. Quite clearly, the directions of the Learned Trial Magistrate did not constitute or amount to an order [sic] capable of being appealed against.

23. Additionally, it is imperative to underscore that the provisions of **Order 43 of the Civil Procedure Rules, 2010**; as read together with the Provisions of **Section 75 of the Civil Procedure Act, Chapter 21 Laws of Kenya**, highlights the kind of orders, which are appealable as of right.

Where a particular cadre of order; or orders are not expressly provided for, an appeal [if any] can only lie with leave of the court. In this case, the directions of the lower court were/are not appealable as of right. Moreover, there is no gainsaying that no leave to appeal was ever sought or obtained. In any event, learned counsel for the Appellant did not advert to any such leave.

24. In my humble view, the appeal beforehand is not only premature, but misconceived. The appeal and the attendant application were dead before arrival at the gate of the Environment and Land Court. Simply put, the appeal was/is a nullity. It is irredeemable. No amount of legal arguments, including the slanted position taken by learned counsel for the Appellant, can salvage the appeal.

25. The legal position that a right of appeal must be statutorily prescribed has been the subject of a plethora of decisions by the Court of Appeal. In the case of **Attorney General v Bala [2023] KECA 117 (KLR)**, the Court of Appeal stated thus:

The right to appeal was a creature of statute and an appeal could be presented, only;

a. by a party in the suit if he was aggrieved by the judgment; or

b. by a person who was not a party but who was aggrieved by the judgment if he sought and got leave of the court to prefer an appeal against the judgment. Unless a right of appeal was clearly and expressly given by statute, it did not exist. Whereas a litigant had a right to institute any suit of a civil nature in some court or another, no right of appeal could be given except by express words. In other words, a right of appeal inferred in no one and therefore an appeal for its maintainability must have the clear authority of law. The right of appeal, which was a statutory right,

could be conditional or qualified. If the statute did not create any right of appeal, no appeal could be filed.

4. What was legislatively not permitted could not be read by implication, not in respect of right of appeal, as it was a creature of statute. An appeal was the right of entering a superior court invoking its aid and interposition to redress an error of the court below. The central idea behind filing of an appeal revolved around the right as contradistinguished from the procedure laid down therefor. A suit for its maintainability required no authority of law and it was enough that no statute barred the suit. But the position in regard to appeals was quite the opposite. The right of appeal inhered in no one and therefore an appeal for its maintainability must have the clear authority of law. That explained why the right of appeal was described as a creature of statute. 5. Under the Civil Procedure Act and the Civil Procedure Rules made thereunder, an appeal lay only as against a decree or as against an order passed under rules from which an appeal was expressly allowed by order 43, rule 1 of the Civil Procedure Rules. The first sentence in the two paragraphs the Appellant cited were mere findings by the High Court. The last sentences were his views.

No appeal could lie against a mere finding for the simple reason that the Civil Procedure Act and the Civil Procedure Rules did not provide for any such appeal.

26. The issue was equally underscored in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others NRB CA Civil Appeal No. 154 of 2013 [2013] eKLR.**

27. The Court of Appeal stated thus:

It is trite that no right of appeal exists absent an express donation by the Constitution, or by statute or by other law The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal.

It behoves an intending Appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie

28. *In a nutshell*, and bearing in mind the apt discussion [supra], I come to the conclusion that the appeal beforehand does not lie. The appeal is premature. Same is misconceived. In short, the appeal is incompetent and thus incapable of grounding the subject proceedings and the attendant application.

29. As pertains to the next issue, it is worthy to underscore that the dispute before the court touches on and concerns the exercise of statutory power of sale by the 1st Respondent. The Appellant posits that the 1st Respondent is exercising its statutory power of sale contrary to and in contravention of the provisions of the law. In particular, it is contended that the 1st Respondent is undertaking the intended sale on [sic] valuation report which was prepared in May, 2023. It is contended that the said valuation report does not reflect the correct value of the suit property. To this end, the Appellant invites the court to hold that the intended sale is therefore improper, irregular and invalid.

30. The subject which this court is being called upon to interrogate has been the basis of various pronouncements by the Court of Appeal. In particular, the court of appeal has held that the Environment and Land Court does not have jurisdiction to deal with issues/matters pertaining to the exercise of the statutory power of sale. For good measure, it has been held and reiterated that the power/jurisdiction belongs to the High Court in exercise of its unlimited original jurisdiction in civil matters. [**See Cooperative Bank of Kenya Limited versus Patrick Njuguna Kagethe and another [2017] eKLR; and Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR)** , respectively].

31. Learned counsel for the Appellant herein was/is enjoined to appreciate the obtaining case law. In addition, learned counsel was obligated to appreciate and internalize the doctrine of precedents/stare decisis. However, despite the significance of the doctrine, learned counsel for the Appellant sought to rely on the decision of the Environment and Land Court and which decision learned counsel posited bestowed this court with the requisite jurisdiction.

32. I beg to reiterate that where the Honourable Court of Appeal has clarified the jurisdiction of a court of law, the decision of the court is appeal holds sway. The decision holds sway until or unless same is superseded by the supreme court.

33. Before concluding on this issue, I wish to highlight the submission by learned counsel for the Appellant which touched on the gazette notice

number 5178 of 2014. Learned counsel for the Appellant submitted that the said gazette notice, which was published by Hon. Justice Mutunga – Chief Justice [now Chief Justice Emeritus] conferred jurisdiction to this court to entertain matters concerning exercise of statutory power of sale. I beg to state that learned counsel clearly misapprehended the import of the said gazette notice. In addition, counsel also failed to understand that the said gazette notice was superseded following the gazetting of the Environment and Land Court Practise directions 2025.

34. Learned counsel for the Appellant ought to re-check the status of the gazette notice number 5178 of 2014. Moreover, learned counsel also need to internalize whether the said gazette notice has any force, taking into account the promulgation of the **ELC Practise Directions – 2025**.

35. Turning to the third issue, it is my humble position that the Appellant herein cannot be filing a plethora of applications seeking the same; or nearly the same reliefs. Firstly, the Appellant herein filed the application dated 15.11.2023 and wherein same sought an order of temporary injunction to restrain the 1st Respondent from exercising its statutory power of sale. The said application was heard and disposed of *vide* ruling dated the 16.04.2025. For good measure, the application was dismissed for lack of merits.

36. First forward, the Appellant herein filed another application dated the 24.02.2026. The application sought orders to stay/restrain the sale of charged property. The application was placed before the designated/duty magistrate. The designated magistrate reviewed the application; issued

directions; and scheduled the application for interpartes hearing on the 18.03.2026.

37. Because the Learned Trial Magistrate was not persuaded to grant an interim orders, the Appellant abandoned that application and moved to this court. Instructively, the application dated the 24.02.2026 is still pending. The application is alive.

38. Despite the foregoing, the Appellant has now filed the current application. It is not lost on me that the current application has been filed during the pendency and lifetime of the application dated 24.02.2026. The two applications are seeking the same reliefs. Surely, the Appellant herein is playing lottery with the due process of the court.

39. Without belaboring the point, I wish to state that the conduct of the Appellant herein, namely; filing of a plethora of applications, constitutes and amounts to an abuse of the due process of the court. Such conduct must not be countenanced. Parties and their advocates ought to internalize the import of **sections 1 A and 1B of the civil Procedure Act, Chapter 21 Laws of Kenya**. The named provisions underpin the overriding objectives of the court.

40. The concept of abuse of the due process of the court was explained in the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR)**.

41. The court stated thus:

26. It's settled law that a litigant has no right to pursue paripasua two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

27. It is not open for the applicant herein to institute these Judicial Review proceedings after losing the Petition challenging the same criminal trial. The two processes are in law not available to the applicant. He ought to have appealed against the above mentioned decision if he was dissatisfied. The Applicant cannot lawfully file this Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as the Petition referred to above. The pursuit of the second process, that is this Judicial Review Application constitutes and amounts to abuse of court/legal process." [17]

28. Multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse. [18] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice. [19] I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.

29. This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must

always be mute and helpless victims of deception, fraud and blatant abuse of judicial processes.

30. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process. [20] The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in Court proceedings. These are, first, that the Court protect its ability to function as a Court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the Court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice. [21]

31. The concept of abuse of process overlaps with the obligation of a Court to provide a fair trial. The content of these obligations cannot, however, be stated exhaustively or analytically. These obligations rely on intuitive judgments formed by experience. [22] The obligation on a court is to provide a fair trial in accordance with law. The due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in the administration of justice is maintained. [23].

42. Concerning the aspect of *Res sub judice*, I wish to state that the applicant cannot be running and prosecuting two applications at the same time. Barring repetition, it is important to reckon that the application dated 24.02.2026 is still pending before the lower court. The application seeks same or near similar reliefs like the one before me.

43. To my mind, the current application is caught by the provisions of **Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya**. The application offends the doctrine of *Re sub judice*.

44. The elements/ingredients of the doctrine were highlighted in the case of **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR)**. The apex Court stated thus:

*The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the **filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.***

45. Finally, I wish to address the question as to whether the applicant has established a basis for the grant of the orders. It is crystal clear that the applicant sought and obtained a banking facility. The applicant executed the charge property. The applicant pledged the security. The security therefore became a commodity for sale in the event of default.

46. It is common ground that the applicant has since defaulted. The 1st Respondent has now sought to exercise its statutory power of sale. However, the applicant contends that the statutory power of sale is being exercised improperly and without due regard to the provisions **of Section 97 of the Land Act, 2012**. To this end, the Appellant now contends that the imminent sale of the suit property shall occasion irreparable loss.

47. My answer to the complaints by the Appellant are two-fold. Firstly, the improper exercise of the statutory power of sale [if at all] can only accrue indemnity on the basis of damages. [See the **Provisions of Section 99 [1] of the Land Act, 2012**].

48. Secondly, it is elementary learning that a property pledged as security becomes a commodity for sale in the event of default. Moreover, the property is subject to valuation. It then means that the property has a value. The loss, if any, arising from improper sale [if at all] is compensable in monetary terms.

49. Be that as it may, I did not hear the applicant to contend that the 1st Respondent is incapable of making good the loss [if any], subject to a finding by the court. I remind myself of the established principle that a chargee ought not be stopped from exercising its statutory power of sale, merely because the chargor is unhappy with the manner in which the sale is being carried out. In this case, the chargee undertook a statutory valuation. [See the holding in the case of **Elijah Kipngeno Arap Bii versus Kenya Commercial Bank Limited 2021 eKLR**].

Conclusion

50. The directions that were given by the Learned Trial Magistrate on the 25.02.2026 did not amount to any order. Simply put, an order denotes an order either allowing or dismissing the application. It is common ground that the application, which was the subject of the directions, remains pending. In this regard, no appeal can lie against the directions.

51. Additionally, the question of exercise of statutory power of sale does not fall for determination before the Environment and Land Court. At least, the obtaining jurisprudence states thus. Unless the Supreme Court shall have intervened on the issue, this court is bound by the doctrine of *precedents*. [See the holding of the Supreme Court in the case of **Asanyo & 3 others v Attorney-General [2020] KESC 62 (KLR)**]

Final Order:

52. Flowing from the foregoing analysis, the final orders that commend themselves to the court are:

- i. *The Appeal be and is hereby struck out.*
- ii. *The Application dated 02.03.2026 be and is hereby struck out.*
- iii. *Costs of the Appeal and the Application be and are hereby awarded to the 1st Respondent.*
- iv. *The Costs in terms of clause [iii] above shall be agreed upon and in default be taxed in the conventional manner.*

53.It is so ordered.

**DATED, SIGNED AND DELIVER AT MERU THIS 11Th DAY OF
MARCH, 2026.**

OGUTTU MBOYA, FCIArb; CPM [MTI-EA]

JUDGE

In the presence of

Naserian: Court Assistant

Mr. Mutisya holding brief for Mr. Kanjama SC for the
Appellant /Applicant

Mr. Mwaniki for the 1st Respondent

N/A for the 2nd Respondent