

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU,

JJA) CIVIL APPLICATION NO. E076 of 2025

BETWEEN

**JAMES MICHAEL MC TOUGH.....1ST
APPLICANT**

PATRICIA ANN MC TOUGH.....2ND APPLICANT

AND

NATIONAL BANK OF KENYA.....1ST

RESPONDENT GODFREY COLLINS OMONDI

**T/A COLINET AUCTIONEERS.....2ND
RESPONDENT**

(Being an application for injunction pending hearing and determination of the intended appeal from the Ruling of the High Court of Kenya at Kisumu (Mwanaisha S., J) dated 7th February, 2025

in

HC. COM. C. No. E003 of 2023)

**RULING OF THE
COURT**

1. The applicants are indefatigable litigants. They have filed several applications before the High Court and before this Court seeking interlocutory reliefs in their quest to prevent the 1st respondent bank from exercising its statutory power of sale of the properties that they had charged to it secure a

loan. This is yet another application which the applicants are seeking

interlocutory relief from this Court after yet another dismissal of their application by the High Court that sought to restrain the 1st respondent from exercising its statutory power of sale.

2. The notice of motion is predicated upon **“Order 42 Rule 6(1) & Order 40 Rule 1 of the Civil Procedure Rules 2010 and section 1A, 1B & 63 (e) of the Civil Procedure Act”**. No Rule of this Court has been cited in support of the motion. The applicants seek the following orders from this Court:

“ An injunction do issue restraining the 1st and 2nd respondents, their servants and/or agents jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing, and/or interfering whatsoever with the 1st applicant’s suit property Kisumu Municipality Block 11/219 pending the hearing and determination of the intended appeal from the ruling given by Hon. Lady Justice Mwanisha Shariff at Kisumu on the 7th day of February, 2025 in the High Court at Kisumu in Kisumu High Court Commercial Case No. E003 of 2023.”

3. The application is supported by the annexed affidavit of **James Michael MC Tough**, the 1st applicant and the

grounds stated on the face of the application. He filed a supplementary affidavit in further support of their application.

4. The application is opposed. **Paul K. Chelang'a** the 1st respondent's Recoveries Manager swore two affidavits, a replying affidavit and a further affidavit in opposition to the application.
5. The respondents filed their written submission prior to the plenary hearing of the application. This Court did not have sight of the applicants' written submission though it had the benefit of perusing the applicants' list and digest of authorities. This Court heard oral rival submissions made by **Mr. Otieno** learned counsel for the applicant and **Mr. Tugee** learned counsel for the respondent.
6. It is important for the Court to set out a bit of the applicant's litigation history to put in context the determination that the Court will make without delving into side issues that are not germane or core to the determination of the application.
7. The applicants charged their two properties being **Land Reference No. Kisumu Municipality/Block 11/53** (registered in the 2nd applicant's name) and **No. Kisumu /Block 11/219** (registered to the 1st Applicant) to the 1st respondent to secure a loan to operate a high-end hotel

facility by the name Sovereign

Hotel (the business). The applicants defaulted in repaying the loan plus the accrued interests. The 1st respondent sought to exercise its statutory power of sale over the suit properties to recover the outstanding amount. The properties were advertised for sale. The applicants filed a civil suit before the High Court at Kisumu (i.e Kisumu HC Commercial Case No. E003 of 2023) seeking *inter alia*, orders to restrain the 1st respondent from realizing the security. Contemporaneous with filing suit, the applicants filed an application seeking orders of temporary injunction to restrain the 1st respondent from selling the suit properties in exercise of its statutory power of sale. The application was dated 20th February, 2023. The application was considered by the High Court. In a ruling delivered on 31st July, 2023, the application was dismissed.

8. Dissatisfied, the applicants appealed to this Court. They file an application *vide* Civil Application No. E095 of 2023 seeking interim reliefs pending the hearing of the application and subsequently thereafter the appeal. The applicants' application seeking to stop the sale by Public auction of the

suit properties was allowed on an interim on condition that
the applicant

deposited a sum of Kshs. 375Million within thirty (30) days from 19th September, 2023. This was the date that the order was issued by this Court. The applicants did not comply with the condition. The application was eventually heard on merits and dismissed by this Court in a Ruling dated 25th October, 2023.

9. In the said Ruling, this Court held as follows:

“32.The bottom line is that what the applicants seek to injunctively interfere with is the 1st respondent’s exercise of its statutory power of sale in a situation where the loans advanced and the default are incontestable. As between a chargee and a charger, this Court is very slow to restrain the former. Indeed, our jurisprudence is that even an allegation of fraud (of the kind made here) on the part of the chargee is usually insufficient to provoke a restraint without requiring the chargor to pay into court the disputed amounts (See Mrao v. First American Bank of Kenya Limited & 2 others[2003] eKLR). There are, of course, exceptions to this general rule.

-for example where there are issues germane to the validity of the instrument creating the charge or when the integrity of the charge instrument is impugned.

33.In the instant case, there is not even a whisper that these exceptions apply. The applicants have not otherwise demonstrated to us why we should carve a

special exception in their case. The general legal logic -borne of law and Economics Sensibility- is that when a

chargor accepts to charge their property as security for a loan, they are, definitionally, agreeing that the charged property is a fungible commodity. Doing so means that such a chargor- applicant accepts that damages are an adequate remedy should a dispute or default arise and the chargee opts to exercise its statutory power of sale. Our jurisprudence has, consequently, consistently taken the position that charging a property commoditizes it; to offer a property as Security for a loan is to convert it into a commodity for sale in the land market in the event of a default. See, for example, Paul Muhoro Kihara v. Barclays Bank (K) Ltd, Milimani HCCC No. 33 OF 2002 (2001) 2EA 420 and John Nduati Kariuki t/a Jobester Merchants v. National Bank of Kenya Ltd [2006] eKLR.

34. The upshot is that, in the circumstances of this case, the applicants are simply unable to demonstrate, in the face of the valid charge instrument and uncontested evidence that the debt is still owing, that their appeal will be rendered nugatory because, definitionally, there are adequate monetary relief for their illegal cause of action. This is one of those cases where, adopting the words of Lord Hoffman in National Commercial Bank of Jamaica v. Olint Corp Limited [2009] 1 WLR 1405, the applicants should be “left to their remedy in damages” in the event they eventually succeed.”

10. After the delivery of this Ruling, the 1st respondent again advertised the suit properties for sale. The applicants

again challenged the intended sale, *inter alia*, on the grounds that

they had settled the debt, and secondly, that a valuation report had not been prepared by the 1st respondent before the suit properties were offered for sale by public auction. In essence the applicants were saying that they feared that the suit properties would be sold at an undervalue.

11. The applicants filed yet another application before the High Court seeking to restrain the 1st respondent from exercising its statutory power of sale for the above reasons. The application is dated 13th September, 2024. The High Court considered the application and dismissed it on 7th February, 2025. The applicants again filed another application before this Court with a view to stopping the intended sale of the suit properties by public auction.

12. It is clear from the above litigation history, that the applicants have had their day in Court. They have been heard and the grievances they had with the 1st respondent in relation to the intended sale of the suit properties by public auction have already been addressed by the Court and decisions rendered. It will not do for the applicants to split their claims into smaller but distinct claims so that they can

purport to bring them in

Court by instalments. Once this Court pronounced itself on the issues in dispute on 25th October, 2023, it was not open for the applicants to again to go before the High Court and seeks reliefs, that are on the face of it, issues that this Court had considered and determined.

13. It is evident that this application was filed in abuse of the due process of the Court especially in respect of matters that this Court has considered and rendered its opinion. By filing yet another application to challenge the same issues that this Court has already rendered its decision on, the applicants are in abuse of the due process of the law as was defined by this Court in **Muchanga Investment Ltd v. Safaris Unlimited (Africa) Ltd & 2 others [2009] KECA 453 (KLR)** thus:

“The employment of Judicial Processes is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and oppressive. The term abuse of process has an element of malice in it.”

14. We think we have said enough. The applicants should

know when they have reached the end of the road. Filing
a

multiplicity of applications either before this Court or before the High Court will not change the fact that the issues in dispute between the applicants and the 1st respondent that have been determined and decisions rendered are no longer live for determination by this Court.

15. The application lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Kisumu this 13th day of March, 2026.

ASIKE-MAKHANDIA

.....
**JUDGE OF
APPEAL**

H.A. OMONDI

.....
**... JUDGE OF
APPEAL**

L. KIMARU

.....
**. JUDGE OF
APPEAL**

**I certify that this is
a true copy of
original.**

Signed

DEPUTY REGISTRAR.