



Gilgil Treatment Industries Limited v Bank of India & another (Civil Case E001 of 2025) [2026] KEHC 3763 (KLR) (19 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E001 OF 2025
E OMINDE, J
MARCH 19, 2026**

BETWEEN

GILGIL TREATMENT INDUSTRIES LIMITED PLAINTIFF

AND

BANK OF INDIA 1ST DEFENDANT

KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS 2ND DEFENDANT

RULING

1. By way of a Notice of Motion Application dated 17th March 2025, the Applicant seeks the following orders;
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of the suit, the honourable court be pleased to issue/ grant an interim order of injunction to restrain, prohibit and or bar the Defendants either by themselves, agents, servants and or any one acting under their instructions from selling, alienating, disposing of and/or otherwise dealing with the properties namely L.R No's Eldoret Municipality Block 9/2501; Eldoret Municipality Block 9/2502 and Eldoret Municipality Block 9/2522 in any manner whatsoever and howsoever.
 4. Spent.
 5. Further and in the alternative and without prejudice to the foregoing, the honourable court be pleased to order and or direct the maintenance of status quo currently obtaining over and in respect of the suit properties pending the inter-parties herein of the instant suit and/or further orders of the court.



6. Costs of the application be provided for.
2. The Application is expressed to be brought under Order 40 rules 1, 2 & 3; and Order 51 Rules 1, 2 3 & 4 of the Civil Procedure Rules 2010; Sections 3A & 63(e) of the Civil Procedure Act; Section 90(2); 96(2) & Section 97 of the Land Act, 2012 (2016) and Articles 27(1) & (2); 40(3) & 64 of the Constitution 2010 and the inherent jurisdiction of the court.
3. The Application is premised on the grounds on the face of it and the averments of the Manager of the Applicant, Divyesh Indhubai Patel, in the affidavit sworn in support of the application. In his affidavit, the deposed that he was competent to swear the affidavit and annexed and marked as “DIP1 (a), (b) and (c) copies of authority to plead, act and a resolution, to that effect. He deposed that the Plaintiff made a request for a banking facility and financial accommodation to the 1st Defendant herein on or about February/March 2022. Pursuant to the Application, the 1st Defendant issued a letter of offer dated 11th March 2022 wherein the 1st Defendant agreed to offer the banking facility in the sum of Kshs. 200,000,000/= only. He annexed and marked as DIP-2 a copy of letter of offer.
4. The deponent averred that he was aware that the Plaintiff/Applicant through its directors accepted the letter of offer which acceptance was communicated to the 1st Defendant. Further, that the Plaintiff also perfected the security in favour of the 1st Defendant. It executed the charges in respect of the various properties which were thereafter registered in favour of the 1st Defendant. He annexed and marked as DIP -3 (a), (b) and (c) copies of the charged documents. The bank then disbursed the monies in favour of the Plaintiff herein.
5. The deponent averred that arising from the covid-19 effect and the down-turn that followed, the Plaintiff/'s business failed to pick up thus the applicant was deprived of the economic capacity to make repayments in accordance with the terms of the contract. From the failure to comply with the terms of the charged documents, the 1st Defendant issued a demand notice dated 1st July 2024 demanding repayment of the sum of Kshs. 192,029,191.80/= within a duration of 30 days.
6. The Applicant was unable to remedy the default and the 1st Defendant issued a statutory notice dated 26th August 2024. He annexed and marked a copy of the statutory notice as DIP-4 and urged that it was irregular, illegal, unlawful and thus invalid for non-compliance with the provisions of Section 90(2) of the Land Act 2012 (2016). Further, that the impugned statutory notice has adverted to 90 days, which is contrary to the prescription of the law which highlights three calendar months.
7. The deponent averred that the 1st Respondent issued a notice dated 19th November 2024 and the 1st Defendant purported to issue 40 days' notice to the Applicant to remedy the default by paying the entire outstanding amount. He annexed and marked as DIP-5 a copy of the secondary notice under reference. He urged that the dated 19th November 2024 was irregular, illegal and invalid insofar as same was issued contrary to Section 90(2) of the Land Act 2016. Further, that the impugned notice was issued before the lapse of the statutory duration stipulated under Section 90(2) of the Land Act 2012.
8. The deponent averred that the 2nd Respondent issued the redemption notice and the notification of sale dated 17th January 2025 wherein it has intimated that it shall offer for sale the charged properties on the 19th March 2025. He annexed and marked as DIP -6 a copy of the redemption notice and notification for sale. He stated that the impugned redemption notice and by extension notification of sale are equally premature, irregular, illegal and invalid.
9. Further, that the intended exercise of statutory power of sale is also illegal and unlawful in the absence of the statutory valuation. The deponent stated that prior to scheduling the sale of the charged properties, it was incumbent upon the 2nd Defendant/Respondent to undertake an advertisement in



- accordance with the provisions of Rule 15[f] of the Auctioneers Rules 1997. That the 2nd Respondent has since indicated that the impugned sale shall proceed on the said date albeit prior to undertaking the statutory advisement either in accordance with the law
10. The deponent averred that taking into account the various breaches of the law, the applicant has demonstrated a prima facie case with probability of success. Moreover, the Applicant herein shall be disposed to suffer irreparable loss, unless the orders sought are issued and/or granted. He prayed that the court allows the Application with costs.
 11. The 1st Respondent filed a Replying Affidavit dated 4th April 2025 sworn by Sanjay Kumar, the 1st Respondents' Chief manager. He deponed that the Application should be dismissed with costs and proceeded to summarise the facts leading up to the Application. He urged that The Bank of India, vide its Letter of Offer dated 11th March 2022, granted Banking Facilities to the Borrower, Annexing and marking as SK1 a copy of the Offer letter.
 12. That the banking facilities of Kshs. 200,000,000.00/- were secured by a charge over the properties title Nos. Eldoret Municipality Block 9/2501, Eldoret Municipality Block 9/2502, and Eldoret Municipality Block 9/2522, all registered in the name of the Applicant, with the charge indicated in the encumbrance section of the titles. He annexed and marked as SK 2 a copy of the charge dated 23rd June 2022 registered over the properties and as SK 3 (a, b and c) copies of the titles charged to the Bank. He urged that the Applicant breached the terms of the facilities granted by the Bank by defaulting repayment with arrears amounting to Kshs. 192,637,461.80, together with accrued interest from the date the account was classified as a non-performing account on 29th June 2024. He annexed and marked as SK 4(a and b) copies of the Applicant's Bank account statements.
 13. The deponent averred that despite several reminders to the Applicant to make repayments, the Applicant continued to be in default after which the bank issued a thirty (30) day notice dated 1st July 2024 notifying the Applicant that its account had been classified as non-performing which notice was ignored. He annexed and marked as SK 5 the said notice.
 14. Further, that the Applicant's breach of the terms compelled the Bank to institute and exercise the remedies available to it by law in Sections 90 and 96 of the *Land Act*, No.6 of 2012 by issuance of the Statutory Demand Notice dated 31st July 2024 and Statutory Notice of Intention to Sell dated 19th November 2024. He annexed and marked as SK G (a and b) the Statutory Demand Notice dated 31st July 2024 and Statutory Notice of Intention to Sell dated 19th November 2024.
 15. The deponent stated that the Statutory Demand Notice and Statutory Notice of Intention to Sell were served upon the Applicant through the registered post to the Chargor's last known postal address in Kenya as per clause 41 of the Charge dated 23rd June 2022, annexing and marking as SK 7(a and b) the corresponding payment receipt for postage of the Statutory Demand Notice and Affidavit of service sworn on 4th September 2024 by a certified process server and as SK 8 (a and b) the corresponding payment receipt for postage of the Statutory Demand Notice and Affidavit of service sworn on 7th December 2024 by a certified process server. He deposed that despite issuance of the two statutory notices the Applicant failed to regularize the accounts.
 16. The deponent stated that the statutory notice to exercise the power of sale was sent via registered post on 8th August 2024 and stipulated that service shall be deemed to have occurred 10 days after the date of posting. Accordingly, the notice of intention to sell, sent via registered post on 20th November 2024, which similarly provides a 10-day period from the date of posting, was served within the prescribed three-month period.



17. The deponent averred that the 1st Respondent instructed the 2nd Respondent, to proceed and advertise and sell the suit property through public auction. The 2nd Respondent issued the forty-five (43) days redemption notices dated 17th January 2025 to the Applicant which were duly served on 22nd January 2023. Despite the issuance of the redemption notices, the Applicant failed to regularize the accounts with the 1st Respondent and the default of the banking facilities continued and subsisted to the 1st Respondent's detriment.
18. The 1st Respondent instructed the 2nd Respondent to proceed to issue the 15-day notification of sale upon the Applicant and thereafter advertise and sell the suit properties through public auction. The 2nd Respondent issued the notification of sale dated 14th March 2025 that were received by representatives of the Applicant which stated that the advertisement for public auction of the properties would appear in the Daily Nation Newspaper on 2nd April 2025. The notification of sale further stated that the public auction was scheduled to take place on 17th April 2025.
19. The deponent averred that it is clear that the Applicant was given sufficient notice and an adequate opportunity to rectify the default but failed to do so, necessitating the 1st Respondent to exercise its power of sale as the chargee. The 1st Respondent's remedies now stand fully crystallized and the Applicant has no other remedy available to them outside regularizing his accounts with the Bank. The Applicant has brought the instant application with a view to unjustifiably impede the 1st Respondent from exercising its remedies as rightfully accrued by law.
20. Counsel urged that the Applicant has not annexed records of any substantial repayment of the banking facilities and therefore continues to be in arrears. Further, that the allegation that the 1st Respondent did not issue them with the redemption notices and notifications of sale is false, and does not warrant any consideration by this Court. He invited the Court to as well examine the conduct of the Applicant who now seeks equitable relief while coming to this Court with unclean hands. He urged that the balance of convenience in the instant matter should shift to the Respondents and prays that this Honourable Court affirms this position by dismissing the Application.

Applicant's Submissions

21. Learned counsel for the applicant submitted that it is trite that a Chargor's right to property secured by a charge is constitutionally protected under Article 40 of *the Constitution*. As such, any interference with that right, including the exercise of a Chargee's statutory power of sale, must be strictly in conformity with the law. He reproduced the provisions of Section 90(2) of the Act and urged that the five limbs are mandatory, not directory. Non-compliance renders the notice void ab initio.
22. That the statutory language requires the default be remedied "within three months." He stated that the notice dated 31st July 2024 gives the Applicant "90 days" to cure the default. Though often interchanged in commercial language, ninety days and three months are not legally synonymous. Conversely, this was clarified in the decision of *Albert Mario Cordeiro & Another v Vishram Shamji [2015] eKLR and Trust Bank Ltd v Eros Chemists Ltd [2000] 2 EA 550 (CAK)*. Counsel additionally cited *Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR* and urged that the substitution of "three months" with "ninety days" renders the notice legally insufficient and cannot found a lawful exercise of the statutory power of sale. In view of the foregoing and looking at the meaning and tenor of the statutory notice dated 31st July 2024 does not inform the chargor of its right under Section 103 to seek relief from the Court. This is a cardinal omission and fatal defect.
23. Counsel urged that the provisions of Section 90(2)(e) mandates that the notice must notify the chargor of: "the right of the chargor in respect of certain remedies to apply to the court for relief against



- those remedies." That the omission of this information denies the chargor a fair opportunity to invoke the safeguards accorded under the law and undermines the due process guarantees entrenched under Articles 47 and 50 of *the Constitution*. Counsel cited the case of James Ndonyo & Another v Mombasa Women Prison Sacco Ltd [2022] eKLR in this regard.
24. Furthermore, counsel urged that the notice is ambiguous as to when the notice period begins. It says service will be deemed effective 10 days from the date of posting or the day of hand delivery, whichever is earlier. Such ambiguity in computation of time leaves the chargor uncertain as to when the default remedy period ends. Counsel urged that the courts have been categorical that clarity of timelines is imperative and cited Elizabeth Wambui Njuguna v Housing Finance Co. of Kenya Ltd [2006] eKLR. In view of the foregoing, a defective statutory notice is not a technical or procedural defect curable under Article 159 of *the Constitution* or the oxygen principles.
 25. Counsel placed reliance on Ngugi v Kenya Commercial Bank Ltd [2006] 1 EA 118, National Bank of Kenya Ltd v Shimmers Plaza Ltd [2009] eKLR, on the failure to serve a notice and urged that the purported statutory notice cannot be salvaged, and any action undertaken pursuant to it, including the Notice of Intention to Sell dated 19th November 2024 and the auction scheduled for 17th April 2025, is illegal, null and void ab initio. The entire process must be halted to prevent an illegal deprivation of the Applicant's property.
 26. Counsel submitted that it is imperative to understand the meaning of Section 96 of the *Land Act*, 2012 which sets out the mandatory requirements a chargee must fulfil after the expiry of the three-month notice issued under Section 90, and before exercising the statutory power of sale. He cited the provisions of Section 96(2) of the *Land Act*, 2012 and urged that the context of Section 96(1) also requires that the statutory power of sale can only be exercised once the three-month period under Section 90(2) has lapsed and the chargor has not remedied the default.
 27. The law therefore contemplates a sequential compliance framework to inter-alia: First, a valid Section 90 Notice (3 months); Then, upon lapse of that period and default, issuance of a valid Section 96 Notice (at least 40 days); Only thereafter can the sale process legally commence. From the foregoing, the Notice of Intention to Sell dated 19th November 2024 is rendered invalid ab initio by operation of law due to the foundational defect in the preceding Section 90 notice as already demonstrated in issue. He cited Palmy Company Limited v Consolidated Bank of Kenya Ltd & Another [2014] eKLR and National Bank of Kenya v Shimmers Plaza Ltd [2009] eKLR, in this regard.
 28. Counsel submitted that the provisions of Section 96 notice dated 19th November 2024 collapses for being legally predicated on an invalid Section 90 notice. That other than the foregoing, Regulation 15 of the Land Regulations, 2017 (Legal Notice No. 219 of 2017) prescribes the form and content for the notice under Section 96.
 29. Counsel urged that the burden of proving service of the Section 96 notice lies with the chargee. He cited the decision in Nyagilo Ochieng & Another v Fanuel B. Ochieng & 2 Others [1996] eKLR in this regard. He urged that the Respondents allege they served the notice by registered post but fail to show: Proper certificate of posting for the Section 96 notice; Date of receipt or actual service; Compliance with Regulation 15(3)(b), which requires personal service where possible. In the premises, any ambiguity in date of service impairs computation of the 40-day window and raises a constitutional concern under Article 47 of the Fair Administrative Action and Article 50 of *the Constitution* 2010.
 30. Counsel urged that it is worth noting that the notice does not adopt Form 5 prescribed under the Land Regulations, 2017, and urged that this is contrary to holdings in Biwott Kipkorir Kitur v Equity Bank Ltd [2019] eKLR. Further, that it is crystal clear that Section 96(1) makes it clear that the power of sale does not crystallize until the lapse of a valid three-month notice under Section 90. Furthermore,



if the statutory power of sale has not matured due to a defective Section 90 notice, then any notice of intention to sell under Section 96 issued before such crystallization is premature and invalid.

31. Counsel placed reliance on the decision in *Mbuthia v Jimba Credit Finance Corporation & Another* [1988] KLR 1 in this regard. He maintained that the entire statutory process leading to the public auction is void ab initio, and any attempted auction of the charged properties on the basis of the impugned notice would amount to an unlawful deprivation of property under Article 40 of *the Constitution*.
32. As pertains to the third issue, Counsel urged that the *Land Act*, 2012 and the Auctioneers Rules, 1997 impose a comprehensive legal framework governing the exercise of the statutory power of sale. To this end, the key obligations include; Proper service and content of notices under Sections 90 and 96 of the *Land Act*; Undertaking a forced sale valuation under Section 97(2); Compliance with Auctioneers Rules (particularly Rules 15 and 16); and Adhering to the principles of equity and fairness. For clarity, a failure in any of these elements vitiates the intended sale. Counsel urged that there is no evidence in the Respondents' Replying Affidavit that any valuation report was ever undertaken prior to the issuance of the 45-day redemption notice dated 17th January 2025 or the auction scheduled for 17th April 2025. He cited the case of *J. N. Njogu v National Bank of Kenya Ltd* [2006] eKLR in this regard and Nairobi HCCC No. 235 of 2005 - *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd*.
33. Counsel reproduced the provisions of Section 97(1) of the *Land Act* and urged that this provision codifies common law principles that were previously applied in *Cuckmere Brick Co. Ltd v Mutual Finance Ltd* [1971] Ch. 949. Further, that without a valuation, the Respondents cannot demonstrate that any care was taken to obtain the best price, thus breaching this obligation. He stated that it is trite, that under Rule 15(d) of the Auctioneers Rules, an auctioneer must, before sale: Issue a 15-day notice; Include the reserve price, which must be informed by a valuation; Serve the notice personally or by affixing it on the property; File a notification of sale with the registrar.
34. He submitted that there is no evidence that the 15-day notification of sale complied with these requirements. He cited *Patrick Kinyanjui Njuguna v Co-operative Bank of Kenya Ltd* [2015] eKLR, and *Mwalimu Cooperative Savings & Credit Society Ltd v Nairobi County* [2018] eKLR, urging that from the preceding jurisprudence, the cumulative non-compliance with valuation, proper service, and transparent notices offends the provisions of Article 47(1) of *the Constitution*. Consequently, where the Respondents; Failed to issue compliant notices; Did not obtain a valuation; and did not show service or proof of proper auctioneer compliance. Then they effectively denied the Applicant the right to be heard, prepare, or redeem the property prior to sale.
35. He additionally cited *Republic v Commissioner for Cooperatives Ex parte Kirinyaga Tea Growers Co-operative Savings & Credit Society Ltd* [1999] eKLR, *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 and urged that the Applicant, faced with imminent loss of substantial real estate, is entitled to the Court's protection where the lender acted recklessly, oppressively, or without following statutory safeguards. He urged that the cumulative failures render the intended sale unlawful, invalid, and susceptible to injunctive relief.
36. Counsel submitted that it is also imperative to underscore that the applicable test for the grant of an interlocutory injunction is well settled and was authoritatively stated in the case of: *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and further, that the test has been affirmed in numerous decisions including: *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125. He stated that the Applicant has demonstrated a serious question to be tried and urged that the respondents' violations suggest that their exercise of the statutory power of sale is not only procedurally flawed but substantively unlawful,



warranting judicial intervention. Hence, the Applicant has established a prima facie case worthy of the court's protection.

37. On whether loss that will be sustained is compensable by damages, he cited the case of Paul Muhia Nduati & Another v National Bank of Kenya Ltd [2015] eKLR, and Olympic Escort International Co. Ltd & 2 others v Parminder Singh Sandhu & Another [2009] eKLR. He urged that the Applicant risks losing its secured real estate in Eldoret, valued at hundreds of millions of shillings, due to defective notices and a flawed auction process. This loss is neither remote nor speculative. It is imminent, real, and would fundamentally affect the Applicant's commercial viability. Accordingly, the threshold of irreparable harm is satisfied.
38. Counsel urged that the balance of convenience requires the court to tilt the scales in favour of the party who stands to suffer greater harm. In this case: If the injunction is granted, the Respondents suffer temporary delay, but they retain their statutory rights and remedies; and if the injunction is denied, the Applicant may lose valuable commercial property, whose sale would be difficult if not impossible to reverse. He placed reliance on the decision of the Court in Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] E.A. 86 in this regard. Counsel submitted that if default is admitted, the lender must exercise power of sale in accordance with the law.
39. Counsel urged that there exists a maxim of "he who seeks equity must do equity" which directly applies. That the Applicant has not abdicated responsibility for the loan, but has instead continued to service the debt. This conduct demonstrates willingness to honour the contractual bargain, thereby disentitling the Respondent from branding the Applicant as a defaulter undeserving of the Court's protection.
40. He cited the decision in Andrew Muriuki Wanjohi v Equity Building Society & 2 Others [2006] eKLR. He urged that the continued repayment demonstrates that the Applicant's challenge is not meant to frustrate the Respondent's commercial interests, but to ensure the exercise of power of sale is compliant with the law. He cited Samwel Karanja Njihia v Equity Bank Ltd & Another [2014] eKLR, where the Court emphasised that while a chargee has the right to realise security, the exercise of that right must strictly conform to statutory requirements.
41. Counsel stated that if the injunction is denied, despite ongoing repayments, the Respondent stands to unjustly enrich itself by exercising an unlawful statutory sale while still receiving instalments. That equity abhors unjust enrichment and will not allow a party to profit from its own wrong. Counsel cited Giro Commercial Bank Ltd v Ali Swalleh Mangi & 2 Others [2019] eKLR, and urged that the Applicant's proactive steps both in Court and in servicing the loan, distinguish this case from scenarios where borrowers run to court only after prolonged default. By paying instalments despite filing suit, the Applicant has come to Court with clean hands and should not be subjected to the harsh penalty of losing property through a procedurally unlawful auction. He prayed the court to allow the application as prayed.

1st and 2nd Respondents' Written Submissions

42. On whether the Statutory Notices issued under Section 90 and 96 of the [Land Act](#), 2012 are valid Counsel urged that the Statutory Demand Notice dated 31st July 2024 was served and the same is regular, lawful and meets the requirement set out in law. The Notice was posted on 8th August 2024. and was deemed served 10 days after posting, which would be on 18th August 2024. Pursuant to Section 90, the Applicant was entitled to a minimum of three months from 18th August 2024 to rectify the default, which would have lapsed on 18th November 2024.



43. The second notice, being the statutory notice of intention to sell, dated 19th November 2024, posted on 20th November 2024, and was deemed served four days later, on 24th November 2024. Therefore, from the date of deemed service of the first notice to the date of deemed service of the second notice is a total period of three months and six (6) days. This demonstrates that the Respondent substantially and procedurally complied with the requirements of Section 90 of the *Land Act*, and the Applicant cannot rely on semantics regarding the expression of time to invalidate an otherwise lawful notice. Counsel cited the decision in *Deni Plains Company Ltd & 2 Others v Ecobank Kenya Ltd* [2017] eKLR and the case of *Milimani Motors (K) Limited vs Kenya Commercial Bank Limited* [2014] eKLR in this regard.
44. Counsel urged that it is clear that the statutory demand notice was issued in the manner set out in law and consequently, every other notice issued thereafter, should be deemed as lawful. The Applicant has not shown that they suffered any prejudice as a result of the Respondent's choice of words. In fact, the Applicant enjoyed a longer period than the statutory minimum and yet took no steps to remedy the default. In light of the foregoing, the Statutory Notice was valid, lawful and meets the requirement set out in law.
45. Counsel urged that the Applicant has not established a prima facie case with a probability of success or at all. He cited the decision of the Court of Appeal in *Nairobi - COACA No. 77 of 2012 -Nguruman Limited v Jan Bonde Nielsen and 2 Others* [2014] eKLR and urged that the Applicant must go beyond merely having an arguable case. Merely raising issues does not suffice. It is incumbent upon this Honourable Court to examine the material evidence presented before it and ask itself if it is possible to discern a right accruing to the Applicant and an imminent infringement.
46. Counsel submitted that the issues raised by the Applicant in the Application revolves around the validity of the statutory notices as prescribed by law. Further, that the Applicant ought to have placed before this court, material that at the very least shall be relevant to buttress its allegations. There is no evidence on the record in the instant Application speaking to the alleged invalidity of the statutory notices and any prejudiced suffered by the Applicant as a result. Further, the Applicant has not made any attempt to exercise its equity of redemption nor has it made any substantive offer to repay the entire amount arising from the charge. The material placed before this court solely constitutes allegations and does not disclose a right accruing to the Applicant which is under imminent threat of adverse action and as such does not meet the threshold of a prima facie case.
47. Counsel urged that the Applicant appears to be inviting this Court to take cognizance of its ownership of the property offered as security for the facility extended by the 1st Respondent as a right worth protecting and the auctioneering process as imminent threat of infringement. However, in the context of securities and facilities, where breach has been alleged or established, the properties provided as securities must first be applied for the recovery of the default amount.
48. It is not the 1st Respondent who interferes with that right of ownership, it is the law, in the form of remedies to the chargee which interferes with the charger's right of ownership. It is only redemption of the default or proof of payment that would again firmly bring the properties under the uninterrupted ownership of the mortgagor. This position was maintained in *Kajiado - HCCC No. 13 of 2018 - Empeut Resort Limited & another v Tourism Finance Corporation & another* [2018] eKLR.
49. Counsel urged that during the cross-examination of Divyesh Indubhai Patel, the deponent of the Applicant's supporting affidavit, he admitted that the amount owed to the 1st Respondent remains outstanding. Further, that the Applicant had not made any effort to clear the arrears, alleging that they disputed the outstanding amount. However, despite making that claim, the Applicant has not tendered any evidence to support such a dispute. It is therefore evident that the alleged dispute is merely



an excuse to avoid meeting contractual obligations and to frustrate the 1st Respondent in the lawful exercise of its statutory remedies under the Charge. He cited Albert Mario Cordeiro and Another vs Vishram Shamji [2015] eKLR 9 and urged that failure to at the very least produce evidence showing some effort to make substantial payment cripples the establishment of a prima facie case in the instant case and the Application, on this limb must fail.

50. Counsel cited Kajiado - HCCC No. 13 of 2018 - Empeut Resort Limited & another v Tourism Finance Corporation & another [2018] eKLR and Court of Appeal in Nairobi - COACA No. 77 of 2012 - Nguruman Limited v Jan Bonde Nielsen and 2 Others [2014] eKLR on the principles for an injunction. He stated that it is established that all the conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. That if a prima facie case is not established then irreparable injury and balance of convenience need no consideration.
51. The existence of a prima facie case does not permit leap-frogging by the applicant to injunction directly without crossing the other hurdles in between. In the instant Application, the Applicant has failed to establish a prima facie case as comprehensively presented. He submitted that should this Court be inclined to investigate the second pillar required for granting an injunction, the Respondents invited the court to consider the pronouncements in Nairobi - COACA No. 77 of 2012 - Nguruman Limited -vs- Jan Bonde Nielsen and 2 Others [2014] eKLR.
52. Counsel urged that any injury, if at all, to be suffered by the Applicant is accurately quantifiable and can be remedied by way of monetary damages. Additionally, the 1st Respondent is capable of compensating the Applicant for any injury or loss sustained by way of monetary damages. He placed reliance on the decision of the Court of Appeal in Muga Developers Limited v Equity Bank of Kenya Ltd & 4 others (Civil Application E082 of 2021) [2022] KECA 453 (KLR).
53. Counsel urged the court to first investigate the nature and extent of injury likely to be suffered if this Application is dismissed. That the Applicant has not demonstrated any genuine or irreparable harm that cannot be adequately compensated by damages. Having willingly subjected the property to the terms of the charge, the Applicant cannot now seek to shield it from realization under the pretext of alleged injury.
54. Further, that it is vital for this Court to investigate and determine whether the envisaged loss or damage is reparable and irreparable by way of damages. In lieu of any evidence as to distinct character or unique nature of the suit property such as to render it irreplaceable even by way of monetary damages, the Respondent urged the Court to hold that the suit property is replaceable and monetary damages would suffice to ensure such conclusive compensation.
55. Counsel posited that the 1st Respondent is a banking institution in the commerce of taking deposits and issuance of banking facilities and various financial accommodation. It is well-known that banking institutions are high net worth institutions. The 1st Respondent is not threatened with any winding down or insolvency proceedings. It therefore stands in a position fit and capable of compensating the Applicant at the estimated value of the suit property should this or any other Court issue such order.
56. Counsel urged that the Application must fail due to the Applicant's failure to establish the second pillar. Nonetheless, the Respondents present that the Application has failed on both the first and second pillar and prays that the same be dismissed in its entirety. Further, on balance of convenience, Counsel cited the decision in Kajiado - HCCC No. 13 of 2018 - Empeut Resort Limited & another v Tourism Finance Corporation & another [2018] eKLR and Nairobi - COACA No. 77 of 2012 and urged that the balance of convenience tilts in favour of the applicant. He urged the court to dismiss the application with costs.



Determination

57. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”

58. Order 42 Rule 6(6) of the Civil Procedure Rules provides as follows;

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

59. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358, where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

60. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely: -

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.

61. What amounts to a prima facie case, was determined by the Court of Appeal, in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 as follows:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing



itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

62. The burden of proof of proving that there exists a prima facie case was laid out by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen and 2 others* (2014) eKLR, stated that;

“the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

63. The court went further to state that: -

“we reiterate that in considering whether or not a prima facie case has been established, the court does not hold a minitrial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.

Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.”

64. The conditions for the grant of an order of temporary injunction are to be surmounted sequentially. In this regard, where an applicant does not prove prima facie case then the court has no business progressing the matter further. (See *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR); and *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86.]

65. Before a Chargee can exercise its statutory power of sale, the law requires it to issue notices to the Chargor as follows:

- a. 90 days’ statutory notice of default, pursuant to Section 90(1) and (2) of the [Land Act](#), 2012.
- b. 40 days’ notice of intention to sell, pursuant to Section 96(2) of the [Land Act](#), 2012.
- c. 45 days’ redemption notice pursuant to Rule 15(d) of the Auctioneers’ Rules, 1997.
- d. 14 days’ notification of sale, pursuant to Rule 25(e) of the Auctioneers’ Rules, 1997.

66. Section 90 of the [Land Act](#), 2012 provides that:

1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
2.
3. If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may —
 - (a) sue the chargor for any money due and owing under the charge;
 - (b) appoint a receiver of the income of the charged land;



- (c) lease the charged land, or if the charge is of a lease, sublease the land;
- (d) enter into possession of the charged land; or
- (e) sell the charged land;

67. Upon issuing a notice under Section 90(1) of the [Land Act](#) and upon the expiry of the statutory period, the chargee can exercise power of sale under Section 96(1) of the [Land Act](#) which provides;

- (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.
- (2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

68. I have considered the pleadings as well as the submissions filed and without going into much ado on all the issues therein raised instead but concentrating on the salient requirements on compliance with the law in a situation where a charge seeks to exercise their statutory power of sale, in noting that the Applicants' application is premised on the assertion that the charge did not meet the statutory requirement in its bid to exercise of its statutory power of sale, the court notes that the documents annexed to the Respondent's pleadings show that the 1st Respondent issued two notices to the Applicant on 31st July 2024 and 19th November 2024 under Sections 90 and 96 of the [Land Act](#) which are also within the timelines required of them by law. In this regard, the court is satisfied that this legal requirement was complied with by the Respondent

69. Further the court also notes the Applicant disputes having been served with the notices. However, the 1st Respondent provided, as proof of service of the Statutory Demand Notice and Statutory Notice of Intention to Sell by way of annexure SK 7(a) and (b) the corresponding payment receipt for postage of the Statutory Demand Notice and Affidavit of service sworn on 4th September 2024 by a certified process server and annexure SK 8(a) and (b) being the corresponding payment receipt for postage of the Statutory Demand Notice and Affidavit of service sworn on 7th December 2024 by a certified process server.

70. The Court of Appeal pronounced itself on the issue of proof of service in the case of Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR, where the court made the following observation:

“..... Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the [Interpretation and General Provisions Act](#), Cap 2, Laws of Kenya.”

71. In considering the evidence of service as provided by the Respondents and guided by the case law herein cited, I am satisfied that service of the notices was duly effected as is required by law. In light of my findings as above, it is my finding that the Applicant has not at all established a prima facie case with a high probability of success.



72. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others*, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, where the Court of Appeal reiterated as follows:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86). If prima facie case is not established, then irreparable injury and balance of convenience need no consideration

73. In light of my finding that the Applicant has failed to establish a prima facie case with a high probability of success and guided by the above holding of the Court of Appeal in the *Nguruman Case (Supra)*, the court will then not belabor itself with the twin issues of irreparable loss and balance of convenience. Accordingly, it is my finding that the Applicant’s Application lacks merit and the same is accordingly dismissed in its entirety with costs to the Respondent.

READ DATED AND SIGNED AT ELDORET ON 19TH MARCH 2026

E. OMINDE

JUDGE

