

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT MILIMANI**  
**ELCA NO. E042 OF 2025**

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**ANN WAHITO** - **APPELLANT /APPLICANT**  
**VS**  
**STEFFEN ROETTCHER** - **1<sup>ST</sup> RESPONDENT**  
**TALONS AUCTIONEERS** - **2<sup>ND</sup> RESPONDENT**  
**SARAH NGINA MBUTHIA** - **3<sup>RD</sup> RESPONDENT**

**RULING**

**[In respect of Applicant's application dated 8/11/25 and the  
Respondent's Preliminary Objection dated 25/11/2025]**

1. The Applicant filed a Notice of Motion dated 8/11/25 under Order 22 Rule 51, 52 Order 2 Rule 7 C, Order 51 Rule 1 & 3 Civil Procedure Rules and Sections 1A, 1B and 3A and Section 63 (e) of the Civil Procedure Act and Section 10 of the Arbitration Act No 4 of 1995 and all other enabling provisions of the Law and sought the following orders;
  - a. That a temporary injunction do issue forthwith restraining the Defendants/Respondents, their agents, Gallant Worldwide Auctioneers, its servants or employees from distressing, attaching or evicting the Appellant/Applicant from the suit premises pursuant to the proclamation dated 6/11/2025 pending the hearing and determination of the application dated 4/3/25.
  - b. That the Court do exercise its discretion and grant an extension of time within which the Appellant/Applicant should pay the 1st Respondent the sums indicated in the conditional stay order issued by Hon J G Kemei by a further 30 days.
  - c. That the Court be pleased to issue any order it deems to be fair and just in the circumstances.

- d. Costs of the application be provided for
2. The application is based on the grounds annexed thereto and the supporting affidavit of Ann Wahito, sworn on the same date.
  3. The deponent states that on 8/11/25, Gallant Worldwide Auctioneers slipped a proclamation notice under her door contrary to the provisions of the Auctioneers Act.
  4. That pursuant to the orders of the Court she paid the 1st and 3rd Respondents the sum of Kshs 500,000/-
  5. Reiterating the matters adverted in the notice of motion dated the 4/3/25, she urged the Court to grant the orders sought in the current application so as not to render the suit and the application nugatory.
  6. She stated that she has the intention of remitting the monies and sought a further 14 days to do so.
  7. That Gallant Worldwide Auctioneers have proclaimed her household goods for the sum of Kshs 1,130,000/-, a figure that remains contested. That the said Auctioneers failed to comply with Rule 12 of the Auctioneers Rules 1997 by failing to indicate the value of the purported proclaimed goods, noting that they did not access the suit premises to conduct the proclamation. That the list is imaginary, as many of the items listed therein are not in the suit premises.
  8. She stated that she is ready and willing to remit the monthly rents to Court or to a joint account of the lawyers on record to enable the Court to determine the issues. Unless the orders are issued, her goods will have been attached illegally.
  9. She stated that the 1st Respondent ought to have utilised the rent deposit to remedy any rent defaults as outlined in the lease agreement instead of levying distress against her. In any event, she argued, the lease required parties to refer any dispute to arbitration and not levy distress.
  10. The Respondent's Preliminary Objection on the other hand is premised on the grounds that;

- a. The Application is res judicata thus improperly before this Honourable Court and incurably defective as it is brought in contravention of Section 7 of the Civil Procedure Act.
  - b. The Application is incurably defective as it seeks to circumscribe the Orders of this Honourable Court issued on 22/10/2025.
  - c. The Application dated 8/11/2025 is bad in law, vexatious and a gross abuse of Court process.
11. Parties were directed to file and exchange written submissions with respect to the current application and the preliminary objection. The applicants' submissions are dated 9/12/25. The Respondents did not file any submissions.
  12. The Applicant stated that the preliminary objection is fact-dependent and therefore not a pure point of law. The question of whether the Court's orders issued on 22/10/25 are res judicata and require adduction of evidence, thus removing the objection from being a pure point of law. That the orders issued on 22/10/25 were conditional orders of status quo pending hearing and determination of the substantive motion dated 4/3/25, which application is still pending determination.
  13. The Applicant urged the Court to grant a temporary injunction [protection orders] for purposes of preserving the subject matter and to allow the parties to refer the dispute to arbitration.
  14. The issues for determination are;
    - a. Whether the preliminary objection is a pure point of law. In other words, whether the application is res judicata.
    - b. Whether the Court should issue a temporary injunction restraining the Respondents from distressing, attaching or evicting the Applicant from the suit premises in the presence of orders sought in the pending application dated the 4/3/25.
    - c. Whether an extension should be issued to the Applicant of 30 days to pay the Respondents

Whether the preliminary objection is a pure point of law. In other words, whether the application is res judicata

15. The test to be applied in determining a proper preliminary objection can be deduced

as follows; -

- i. A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.
- ii. A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.
- iii. A Preliminary Objection cannot be entertained where;
  - a. The facts are disputed/contested.
  - b. The facts are liable to be contested.
  - c. The facts are to be proved through process of evidence.
  - d. What is sought is an exercise of judicial discretion.

16. In this case, the gist of the objection is that the application is res judicata and that it has been brought to circumscribe the orders of the Court issued on 22/10/25. To determine whether the application is res judicata, the court is called upon to examine the orders issued on 22/10/25 and the basis for those orders. This process is fact-dependent.

17. I am guided by the decision in the case of Henry Wanyama Khaemba - vs- Standard

Chartered Bank Ltd & Another (2014) eKLR, the court stated as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are

incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

18. Equally in the case of George Kamau Kimani & 4 Others -vs- County Government of

Trans Nzoia & Another (2014) eKLR, the court stated: -

“.....The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata.”

19. In conclusion, I find that the preliminary objection is unmerited. It is dismissed.

Whether the Court should issue a temporary injunction restraining the Respondents should be issued.

20. In Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ...Vs...Trufoods (1972) EA 420.”

21. Further in the case of Edwin Kamau Muriu -vs- Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002, the court held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to

determine whether the Applicant is entitled to an Injunction sought on the usual criteria.”

22. First, the Applicant needs to establish that he has a prima-facie case with a probability of success. A prima-facie case was described in the case of Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003) KLR, to mean:-

“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”.

23. The Applicant has stated that the proclamation was not carried out in accordance with the provisions of Section 12 of the Auctioneers Rules, which state as follows;

“(1)Upon receipt of a Court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—(a)record the court warrant or letter of instruction in the register;(b)prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect; (c)in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;(d)on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;(e)ensure

safe storage of the goods pending their auction;(f)arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;(g)not remove any goods under the proclamation until the expiry of the grace period.

24. I have examined the said proclamation and find that it states the goods proclaimed to be in fair condition and specifies their values as well. It is not clear to the Court what defect is being complained about.

25. For that reason, the Court finds that the applicant has not established a prima facie case with a probability of success.

26. Regarding whether the Applicant might otherwise suffer irreparable injury that cannot be adequately compensated by damages, the Court observes that the dispute concerns the payment of outstanding rent that is due. However, the amount in question can be compensated through damages.

27. Thirdly, the Court finds that the balance of convenience favours not granting the same. It should be noted that the Applicant had sought an extension of time to make good the amount but failed to do so despite several accommodations being granted.

Whether an extension should be issued to the Applicant of 30 days to pay the Respondents

28. It is on record that when the Applicant filed the application dated 4/3/25, the Court issued an interim stay of execution of the orders issued by the trial court on 22/2/25, pending the inter partes hearing of the application on 19/3/25. On 19/3/25, the said orders were extended. On 27/3/25, the parties sought time to record a consent. By 29/4/25, the parties informed the Court that no consent had been reached as the Applicant had refused to pay rent, prompting the Respondents to file an application dated 16/4/25 [which is still pending] seeking to discharge the interim orders.

29. On 7/10/25, the Applicant requested time to deposit the rent in Court. A sum of Kshs 300,000/- was paid, and the Court directed the Applicant to deposit Kshs 1.1 million within 7 days as requested. At the Applicant's request, the Court granted an extension of time to comply with the orders of 13/10/25 within a period of 14 days; in default, the orders would lapse. Before the period lapsed, they moved the Court through the current application. From the record, the Applicant failed to comply with the orders and seemingly was provoked by the proclamation of the goods to file the current application.

30. Order 50, rule 6 of the Civil Procedure Rules provides that where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise.

31. In the interest of justice, the Court grants the Applicant a conditional stay of 30 days to pay the outstanding rent in default, the order shall lapse.

32. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF APRIL 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI  
JUDGE

Delivered Online in the Presence of:

1. Mr. Ogado for the Appellant
2. Mr. Kibera for the Respondents
3. CA- Mr Duncan Muusya

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