

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT NO. E010 OF 2024

JAMES MAINA GITHINJI

.....**PLAINTIFF**

VERSUS

FAULU MICROFINANCE BANK LTD 1ST

DEFENDANT

MISTAN AUCTIONEERS.....2ND

DEFENDANT

JUDGMENT

1. While delivering a ruling in this matter, which is reported as *Githinji v Faulu Microfinance Bank Limited & another [2025] KEHC 216 (KLR)*, I lamented as follows:

19. Conversely, when valid notices are issued, the court cannot, out of goodwill, fiat, conjecture, or surmise, gratuitously issue an injunction. The loan is unpaid over 2 years later. The loan may soon outstrip the value of the property. The balance of convenience tilts in favour of the 1st Respondent. As the court of appeal held in *Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others [2018] eKLR*, banks don't have their own money. They must safeguard those. The court of appeal stated as doth: A bank has no

money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.

20. I am inclined to agree with the Hon. Kwach, JA (as he then was) in the case of *Mrao Limited -versus- First American Bank of Kenya and 2 Others* (2003) KLR 125, when he had this to say:

I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.”

21. I have said enough to state that I have not seen a case capable of succeeding. I dismiss the application dated 5.10.2024. It lacks merit and is accordingly dismissed with costs of Ksh 20,000/- to the 1st Respondent.

2. The plaintiff filed suit vide a plaint dated 5.10.2024 against the bank and the auctioneer over matters related to an auction. The Plaintiff posited that there is a matrimonial property in land parcel number Thengenge/Karia/1851 and that there is a commercial property in land parcel number Thengenge/Karia/1385.
3. It was stated that in August 2023, the plaintiff was advanced a sum of Ksh.25,000,000/=. The spouse consented as required under section 12(1) of the Matrimonial Properties Act for land parcel number Thengenge/Karia/1385. The plaintiff endeavoured to offset amounts when due. He was served with a 7-day notice on 29.1.2024 claiming Ksh. 606,740.22/= on 1.02.2024.
4. The first Defendant served a statutory notice on 14.02.2024 and it expired on 14.05.2024. The said notice was not served on the spouse, contravening section 96(3) (e) of Land Act. Another statutory notice was served on 25.03.2024, expiring on 25.06.2024. It was equally not served on the spouse. On 18.06.2024, the plaintiff was served with a 45-day statutory notice under section 96(2)(3) of the Land Act. He averred that he ought to have been served after expiry of 90- day statutory notice and not before and that the spouse was also not served. He stated that the second Defendant on 30.07.2024 served a 45-day redemption notice under rule 15(d) of the auctioneers' rules 1997.

5. The said auctioneers are said to have set the auction date for 9.10.2024. He stated that he was again, in a bizarre manner, or so he thought, was served with a 40-day statutory notice, which was not served on the spouse. The said notice ought to have expired on 30.09.2024. He stated that the date of 09.10.2024 as auction date was illegal. The said auction was advertised on 24.09.2024, which was both illegal, null void, and premature. The defendants were said to subject the plaintiff to public odium, ridicule and unnecessary and illegal costs. This is said to have been illegal acts and omissions leading to untold misery and public embarrassment. He stated the court has jurisdiction by dint of the decision in **Bank of Africa Limited v TSS Investment LTD CACA E055 of 2022.**

6. The plaintiff claimed the following orders:

- a. A permanent injunction restraining the 1st and 2nd Defendants by themselves, agents and/or servants howsoever from selling by public auction or otherwise, the Plaintiff's properties situate in the County of Nyeri and known as Thengenge/Karia/1851 and Thengenge/Karia/1385.
- b. A declaration that the 1st and 2nd Defendants are not entitled to recover any costs and charges

from the Plaintiff arising from the impugned notices referenced in this matter.

c. General damages.

7. First defendant entered appearance and filed defence dated 17.02.2024. They averred that they held security for a sum of Ksh. 25,000,000/=. Such a property that was offered for security is a commodity for sale. The said security was approved by the plaintiff and spouse. They posited that Ksh. 26,575,035.62 was due and owing.
8. They averred that for each security they issued separate notices that is on 14.2.2024, 18.6.2024 and 30.07.2024 for notice under section 90, 96 and redemption notice respectively. For an amount of 15,000,000/= they issued notices on 25.03.2024, 20.08.2024 for notices under section 90 and 96 respectively. Different notices were issued as there were different loans.
9. They posited that the issue of spouse not being served is preposterous since the duo share the same address. The account was said to be in arrears since the plaintiff defaulted. The court was urged to uphold sanctity of commercial transactions.
10. The matter came to court under certificate of urgency where I found that there was nothing urgent in the matter. Later I dismissed *in limine* the application for injunction. I

proceeded and gave directions and proceeded to hearing. One witness testified for the plaintiff and one for the defendant. Parties filed humongous submissions. Since the matter raised only one issue, that is whether the suit is merited, I will subsume evidence and submissions to analysis. This is because there are no factual dispute.

Analysis

11. The only issue in this matter is whether the plaintiff's suit is merited. The court takes a broader view of the issue since the questions raised did not crystalize to prayers in the plaint. For example, the plaintiff seeks for general damages, but there is no background set for the said damages. The next issue is whether to issue a permanent injunction.
12. There is also prayer 2 in the plaint. It is plucked out of the blues. The first defendant registered charges over land parcel number Thengenge/Karia/1851 and Thengenge/Karia/1385. Given that spousal consents were given, it is irrelevant whether the properties were matrimonial property or not.
13. The second sub-issue is whether the spouse ought to be served and whether she was served. The notices sent were sent to the plaintiff and Nancy Nyambura Maina. The spouse was sent notices in the same address as the plaintiff.

There are additional notices to 201 Othaya and 215 Nyeri. Who is best placed to confirm that there was no service? The first defendant showed there was notices issued to the plaintiff and his spouse.

14. The non-receipt of notice is within the special knowledge of Nancy Nyambura Maina, who did not testify. Section 112 of the Evidence Act provides as follows:

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

15. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR**, the court stated as follows:

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.

16. Further in the case of **Kimotho -vs- KCB (2003) 1 EA 108**, the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession. By failing to have Nancy Nyambura Maina testify the question of whether she was served, became moot.

17. The second sub issue is the service of notices. The plaintiff admits that notices were issued. His issue was that the first defendant issued multiple notices. The first defendant on the other hand noted that the notices were issued upon default for each loan.

18. The notices issued were as follows:

- a. The notices under section 90 of the Land Act
- b. The notices under section 96 of the Land Act
- c. The notices under section 90 of the Land Act
- d. Rule 15 of the Auctioneers Rules

19. Rule 15 of the Auctioneers Rules provide as follows:

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property-

- a. Record the court warrant or letter of instruction in the register.
- b. Prepare a notification of sale in the form prescribed in sale form 4 set out in the second schedule indicating the value of each property to be sold;
- c. Locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

- d. Give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
- e. On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

20. Section 90 of the Land Act provides as follows:

90.(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) The notice required by subsection (1) shall adequately inform the recipient of the following matters

- (a) the nature and extent of the default by the chargor;
- (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from

doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within two months 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;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may-

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to (i) lease the charged land or if the charge is of a lease, sublease

the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

(5) -

21. Section 96 of the Land Act provides as doth:

96.(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.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on-

- (a) the Commission, if the charged land is public land;
- (b) the holder of the land out which the lease has been granted, if the charged land is a lease;
- (c) a spouse of the chargor who had given the consent;
- (e) any lessee and sublessee of the charged land or of any buildings on the charged land;
- (f) any person who is a co-owner with the chargor;

(g) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;

(h) any guarantor of the money advanced under the charge;

(i) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

(j) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

22. The advertisement is issued after expiry of the redemption notice. Notice issued in August 2024 had effectively been issued and the last notices were issued on 30.07.2024. They averred that for each security they issued separate notices, that is on 14.2.2024, 18.6.2024 and 30.07.2024 for notice under section 90, 96 and 20.08.2024. For notices issued on 30.07.2024, the matter was ripe for sale. There was nothing stopping the auction from proceedings.

23. The question of debt is central to exercise of statutory power of sale. There is absolutely no dispute on that end. The plaintiff confirmed that he was in default. He had not paid the loan since 2024. In the case of **Raghibir Singh Chatte v National Bank of Kenya Limited**

[1996] KECA 99 (KLR), the Court of Appeal, Akiwumi, J. A, stated thus:

The words of Jessel M.R. on this issue are the following:

When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”

24. The court in the above case continued as follows:

In the subsequent appeal to this court, it was held that a mere denial is not a sufficient defence in the type of action that had been brought against the defendant. In the judgment of this court delivered by Platt, J. A. as he then was, it is clearly stated as follows:

“First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

Thus is Maguga General Stores this court authoritatively enunciated the principle that in an action for a debt or liquidated demand a mere denial or general traverse will not do for all purposes. Applying the same principle a defence in an action of that type that is a mere general traverse cannot be and is not a sufficient defence and also discloses no reasonable defence for the purposes of 06 r 13(1)(a).

25. Notification of sale was also issued on 29.7.2024. The same date the redemption date was given. This was outside 90 days given in both notices. There was sufficient time to rectify the default. The period of rectification ought to be not less than 2 months. In this case a 90-days' notice was given. There was no rectification of default. The auctioneer was under duty to issue a redemption notice. The notices were issued to the plaintiff and were served and admitted so. The question of loss of his property is not a ground since this was a chose in action. Once the plaintiff and his wife offered two properties, they became a chose in action.

26. It must be remembered that the issuance of these notices are legal requirements. Once issued to the charger then the same triggers other legal processes. As held in **East Africa Venter Co. Ltd v Agricultural Finance Co-op Ltd & another [2017] eKLR**, without the notices the entire process cannot be undertaken. The court posited;

45. The statutory notices stipulated under the Land Act are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance

with the legal framework on statutory notices. The Statutory notice in the present case in my humble view was not in accordance with section 90(2) of the Land Act and therefore the acts of the defendant in seeking to exercise its chargee's statutory power of sale are unlawful.

46. Secondly, section 96 of the land Act is explicit to the effect that after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96(2) of the Land Act, before the chargee can sell the charged property. The notice under section 96(2) of the Land Act is mandatory, and is quite different from the Redemption Notice issued under rule 15 of the Auctioneers Act as herein explained.

Section 96(2) of the Land Act which provides as follows:-

“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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

27. Having found that the valid notices are issued, the court cannot out of goodwill, fiat, conjecture surmise of gratuitousness issue an injunction. The loan is unpaid over 3 years later. The court of appeal held in **Bank of Africa Limited v Juja Coffe Exporters Limited & 4 others**

[2018] eKLR, that banks don't have their own money. They must safeguard those. The court of appeal stated as doth: -

A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it;

28. I am inclined to agree with the Hon. Kwach, JA (as he then was) in the case of **Mrao Limited -versus- First American Bank of Kenya and 2 Others (2003) KLR 125**, when he had this to say:

“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.”

29. The suit has no basis. The loan was due and all notices were properly issued. The court cannot issue a permanent injunction to bar a banker from recovering its security once default has occurred. Even where there is no default, an injunction can only relate to particular notice. A permanent injunction basically amounts to lifting the charge and freeing the property. There is no illegality pointed out in the charge itself. The prayer for permanent injunction was lost long before any witness testified.

30. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be

added to the costs and shall be recoverable as such.

31. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

32. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by

ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

33. In the circumstances the suit is dismissed with costs.

Determination

34. The upshot of the foregoing is that I make the following orders: -

- a) The suit lacks merit and is accordingly dismissed with costs.
- b) 14 days right of appeal.
- c) The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 20th day of April, 2026.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Plaintiff present

Mr. Aduda for the plaintiff absent

Ms. Onsare for the defendant

Court Assistant – Michael/Martin