

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**COMMERCIAL CASE NO. E005 OF 2025**

**BENARD JAMES OKAYO ..... PLAINTIFF**

**- VERSUS -**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> DEFENDANT**

**LEGACY AUCTIONEERS SERVICES ..... 2<sup>ND</sup> DEFENDANT**

**WATTS AUCTIONS ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JOHNES AKELO OMBOTO ..... INTERESTED PARTY**

**R U L I N G**

1. The plaintiff moved this Court under a Certificate for injunctive orders vide an application dated **20/2/2025**.
2. Though the plaintiff failed to specify under what provisions of the law he moved the Court, he sought orders to restrain the defendants and their agents from carrying out any further actions relating to the purported sale and eviction on the property known as **LR No. 13432/77 (hereinafter ‘the suit property’)** within Kisumu County pending the hearing and determination of the suit.

3. The application was based on the grounds set out on the face of the Motion and the supporting affidavit of the plaintiff sworn on **20/2/2025**. These were that; the defendants unlawfully attempted to evict him from the suit property without any notice or without following any legal eviction procedure.
4. That he stood to suffer irreparable harm and damage to his property rights if the defendants' unlawful actions were permitted to continue and as such it was in the interests of justice for the orders sought to be granted.
5. The defendants opposed the application vide a replying affidavit sworn on the **23/5/2025** by one **George Onyango Athiambo**. It was deposed that the plaintiff was a former employee of the 1<sup>st</sup> defendant and that during his employment, he obtained various loan facilities but he resigned on the **15/9/2017**.
6. That on the **23/9/2015**, at the plaintiff's request, the 1<sup>st</sup> defendant advanced him a loan facility of **Kshs. 1,400,000/-** and a further sum of **Kshs. 1,400,000/-** on the **7/11/2016**, to enable him pay the existing balance on the previous loan which stood at **Kshs. 1,139,233.10/-** thus a top up of **Kshs. 266,766.90/-**. That both loans were subject to a mutually agreed repayment period of 60 months in installments of **Kshs. 27,722/-** and secured by a charge in favour of the 1<sup>st</sup> defendant over the suit property.

7. That during the plaintiff's employment, the interest rate charged on the loans was 7% but his employment terminated, the interest rates reverted back to the commercial rate chargeable by the 1<sup>st</sup> defendant.
8. That vide a letter of offer and acceptance dated **18/1/2017**, the 1<sup>st</sup> defendant advanced the plaintiff a construction loan of **Kshs. 8,640,000/-** secured by the suit property thus bringing the total loan advanced to the plaintiff to **Kshs. 10,040,000/-** that was to be repaid in 234 months in installments of **Kshs. 60,564/-** per month and at an interest rate of 5.5% per annum.
9. That after release of the loans to the plaintiff, he made some repayments but thereafter defaulted while in some cases making occasional irregular payments despite several reminders.
10. That as a result of the default, the 1<sup>st</sup> defendant exercised its statutory power of sale after following all due legal processes as required by law to recover the debt by issuing the appropriate statutory notices and ultimately instructed the 2<sup>nd</sup> defendant to have the suit property sold. That equally, the 2<sup>nd</sup> defendant complied and issued the appropriate Redemption Notice and Notification of Sale prior to having the suit property sold.
11. That on the **1/9/2022**, the suit property was sold by public auction by the 3<sup>rd</sup> defendant and transferred to the Interested Party and thus the plaintiff's equity

of redemption was extinguished. That in the premises the application should be dismissed.

12. I have considered the rival contestations and the submissions on record. This being an application for interlocutory injunction, the same is governed by the well-established principles laid down in the case of **Giella v Casman Brown & Co. Ltd [1973] 358**. These are that; an applicant must establish a prima facie case with a probability of success, that he/she stands to suffer irreparable loss that cannot be compensated by an award of damages if the injunction is denied and where the court is in doubt, it will determine the matter on a balance of the convenience.

13. In **Otieno vs. Premier Bank Kenya Ltd & 2 Others [2024] KEHC 6832 (KLR) (10 June, 2024) (Ruling)**, the court quoted with approval the holding in **Dr Simon Waiharo Chege v Paramount Bank of Kenya Ltd Nairobi (Milimani) HCCC No 360 of 2001**, wherein it was held as follows: -

*“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show*

*he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”*

14. The first issue is whether the plaintiff has established a prima facie case with a probability of success. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125**, the Court of Appeal defined prima facie case to be 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 to call for an explanation or rebuttal from the latter. It is not sufficient to raise issues, but the evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial.

15. In the present case, the plaintiff failed to disclose that the eviction he sought injunctive relief from was pursuant to the 1<sup>st</sup> defendant's exercise of its statutory power of sale which led to the sale of the suit property by Public Auction thereby extinguishing his equity of redemption.
16. The plaintiff did not deny obtaining loans from the 1<sup>st</sup> defendant or the fact that he was in default. The only reason he advanced for seeking injunctive relief was that the defendants had failed to follow the law in his eviction.
17. In rebuttal, the defendants described the plaintiff as a blatant defaulter. That the he had been duly served with all the requisite statutory notices. Evidence of the same was attached to the defendants' replying affidavit.
18. It is a common ground that the plaintiff obtained financing from the 1<sup>st</sup> defendant on the security of the suit property. That he eventually defaulted in payment of the instalments. There was evidence on record that he was duly served with all the Statutory Notices required by law.
19. ***Section 90(1) of the Land Act, 2012*** provides that: -

***“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.”*

20. *Section 96(1) of the same Act* on the other hand provides: -

*“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.”*

21. In the replying affidavit, the defendants annexed a **14 days’** demand letter to the plaintiff, the two **90 days Statutory Notice** dated **18/9/2019** and **26/3/2020** as well as the **45 days Redemption Notice** served on the plaintiff physically on the **2/1/2021** and by registered post on the **24/12/2020**. There was also the **Notification for Sale** similarly served on the same dates and in the same manner. In those notices, it demanded that the plaintiff do rectify the default with respect to the outstanding payments but the plaintiff failed to do so.

22. It is trite that parties are bound by their contracts and a Court cannot rewrite the contract for the parties. The Court of Appeal has firmly laid it that parties to contract are bound by the terms and conditions thereof, and that it is not the

business of courts to rewrite such contracts. See **National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR.**

23. Further, In **George Gikubu Mbuthia v Jimba Credit Corporation Ltd & another [2002] KECA 231 (KLR)** the court observed that;

*“A sale destroys the equity of redemption in mortgaged property and constitutes the mortgagee’s exercising the power of the sale as a trustee of the surplus proceeds of sale, if any, for the persons interested according to properties..... This means that the mortgagor’s right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On acceptance of a bid at an auction there is an immediate sale binding on the chargor.”.*

24. In the present case, the suit property was sold by public auction on the 1/9/2022 by the 3<sup>rd</sup> defendant and transferred to the Interested Party and thus the plaintiff’s equity of redemption was extinguished. There is clear evidence that he was served with all the requisite notices despite his allegation that he had not been served with the same. When the same were produced in the replying affidavit, there was no answer to the same. The 1<sup>st</sup> defendant’s statutory power of sale had arisen and it followed all the requisite provisions of the law in exercise of the same.

25. Consequently, it goes without say that, the suit property having been sold to the Interested Party, he is entitled to take possession thereof. The plaintiff has no right to continued possession thereof. There was no evidence that was presented to show that the defendants intended to take possession of the suit property contrary to the law.
26. In this regard, the Court is of the opinion and so holds, that the plaintiff has not established a *facie case* with a probability of success. He has failed on the first principle of the **Giella vs Cassman Brown** case.
27. The second principle is that a plaintiff must show that unless an injunction is granted, he may otherwise suffer loss that cannot be compensated by an award of damages. In the present case, the applicant alleges that he stands to suffer irreparable loss if the orders sought are not granted.
28. There is no doubt that once a property has been charged to secure financial accommodation, it *ipso facto* becomes a commodity for sale once there is default and there is no commodity for sale whose loss cannot be compensated by an award in damages. A Chargor who offers his property as security clearly anticipates the sale of the same in the event that he fails to service the loan.
29. In this regard, the claim that the plaintiff stands to suffer irreparable loss does not assist in advancing his case. The Court is not satisfied that there is any

evidence that the plaintiff would suffer irreparable loss and damage having in mind that he no longer has no known interest in the suit property.

30. On the third limb, the balance of convenience tilts in favor of letting the interested party enjoy the benefit of what he may have purchased at the public auction. It should be noted that the said auction has never been challenged or set aside.

31. In view of the foregoing, the Court finds the application dated **20/2/2025** to have been overtaken by events and without merit and is hereby dismissed with costs.

It is so ordered.

**DATED** and **DELIVERED** at Kisumu this **24<sup>th</sup>** day of **April, 2026**.

**A. MABEYA, FCI Arb**

**JUDGE**