

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCOMM NO. 342 OF 2018**

TURITU SERVICE STATION LIMITED.....  
.....PLAINTIFF

-VERSUS-

HOUSING FINANCE COMPANY (KE) LTD.....1<sup>ST</sup>  
DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2<sup>ND</sup>  
DEFENDANT

-AND-

LAZINOS HOTEL & RESTAURANT LTD.....1<sup>ST</sup> INTERESTED  
PARTY

CYNTHIA WAMBUI T/A

LAIBON VILLA & GUEST HOUSE.....2<sup>ND</sup> INTERESTED  
PARTY

**RULING NO. 2**

1. This Ruling is in respect to two applications. The 1<sup>st</sup> application is the plaintiff/applicant's Notice of Motion dated 20<sup>th</sup> November 2023 filed pursuant to the provisions of Sections 1A, 1B, 3A, 59, 63(e) & 80 of the Civil Procedure Act, Order 40 Rules 1(a), 2, 4 & 10, Order 45 Rules 1(a) & (b), and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 82, 84, 90(2) & (3), 96, 97, 98, 103, 104(3), 105 & 106 of the Lands Act, and Sections 56, 68, 69, 70, 106

& 107 of the Land Registration Act. The plaintiff prays for *inter alia*, conservatory orders restraining the 1<sup>st</sup> defendant from advertising, selling, leasing, or interfering with the plaintiff's ownership of the property known as L.R. No. 209/178/29 along Limuru Road, pending the hearing and determination of this suit. The plaintiff also seeks an order under the doctrine of *lis pendens* and Section 106 of the Land Registration Act, to prohibit any changes in registration or ownership concerning L.R. No. 209/178/29 situated along Limuru Road and L.R. No. 37/254/31 in Nairobi West, pending the determination of this suit.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. David Njuguna Ngoi, the plaintiff's Director. Mr. Njuguna averred that the plaintiff is the registered owner of L.R. No. 209/178/29 (I.R. 85343) along Limuru Road, Nairobi, a prime commercial property valued at approximately Kshs.290 Million, which together with another property in Nairobi West was charged to the 1<sup>st</sup> defendant in 2013 to secure a loan facility of Kshs.250 Million. He claimed that the Nairobi West property was suspiciously sold by the 1<sup>st</sup> defendant in August 2019 for Kshs.225 Million, to itself as the highest bidder, with the legitimate expectation that the proceeds would fully settle the outstanding loan and lead to the discharge of the Limuru Road property.
3. Mr. Njuguna stated that the 1<sup>st</sup> defendant has failed to account for the sale proceeds, has not discharged the remaining charge and has continued to compound interest, penalties, and charges unlawfully, now demanding over Kshs.204 Million despite the plaintiff having paid in excess of Kshs.500 Million towards the loan, thereby triggering the *in duplum* rule.

4. Mr. Njuguna contended that the 1<sup>st</sup> defendant acted negligently, unlawfully and fraudulently by selling the Nairobi West property at an undervalue, imposing unauthorized charges, interest on interest, and penalties, and creating a state of perpetual indebtedness. He deposed that an independent forensic audit reveals massive irregularities, including illegal computation of interest, unauthorized debiting of valuation, legal and Auctioneer's fees, unexplained reversals, punitive insurance premiums, and a gross disparity between the plaintiff's and the bank's stated outstanding balances.
5. He maintained that the plaintiff's loan has been fully repaid and that in any event, the misappropriated and illegal charges exceed any amount allegedly outstanding. Mr. Njuguna averred that the 1<sup>st</sup> defendant has demonstrated an intention to dispose of the remaining suit property through a scheduled sale, despite the matter being pending, and without any subsisting conservatory orders, thereby risking the suit being rendered nugatory.
6. He asserted that prior receivership over the suit property was illegal and unaccounted for, thus exposing the plaintiff to financial loss, reputational harm, and multiple suits. He contended that due to the sentimental and unique nature of the property, and the irreversibility of a transfer to third parties, damages would be inadequate to compensate the plaintiff in the event that this suit succeeds. Mr. Njuguna stated that the balance of convenience and interests of justice favour the plaintiff being granted injunctive relief to preserve the substratum of the suit.
7. The 2<sup>nd</sup> application is the plaintiff's Notice of Motion dated 22<sup>nd</sup> April 2024 filed under the provisions of Sections 1A, 1B, 3A, 59, 63(e) of the Civil Procedure Act, Orders 40 Rules 1(a), 2, 4 & 10 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 82, 84, 90(2 & 3), 96, 97, 98, 103,

104(3), 105 & 106 of the Lands Act, and Sections 56, 68, 69, 70, 106 & 107 of the Land Registration Act. The plaintiff seeks orders for injunction restraining the 1<sup>st</sup> defendant from advertising, selling, leasing, or interfering with the plaintiff's ownership of the property known as L.R. No. 209/178/29 along Limuru Road pending the hearing and determination of this suit. The plaintiff also seeks an order under the doctrine of *lis pendens* and Section 106 of the Land Registration Act, to prohibit any changes in registration or ownership concerning L.R. No. 209/178/29 situated along Limuru Road and L.R. No. 37/254/31 in Nairobi West, pending the determination of this suit, and an order for taking of accounts of the loan account by the 1<sup>st</sup> defendant.

8. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. David Njuguna Ngoi, the plaintiff's Director. Mr. Njuguna deposed that the Nairobi West property was allegedly sold illegally and in defiance of a subsisting Court order in August 2019 for Kshs.225 Million, without accounting for fixtures and fittings valued at over Kshs.100 Million. He contended that the proceeds of that sale ought to have fully settled the loan and should have resulted in the discharge of the Limuru Road property, but the 1<sup>st</sup> defendant has failed to account for the sale proceeds, declined to discharge the remaining charge, and has instead continued to unlawfully compound interest, penalties, and charges in breach of the *in duplum* rule, now claiming in excess of Kshs.208 Million despite the plaintiff having paid over Kshs.500 Million towards the loan. He averred that the subject loan has been fully repaid, thus any sums demanded are fictitious and illegal.
9. In opposition to the applications herein, the 1<sup>st</sup> defendant filed replying affidavits sworn on 29<sup>th</sup> April 2024 & 26<sup>th</sup> February 2025 by Ms Belinda

Ng'ang'a, the 1<sup>st</sup> defendant's Head of Legal Department and Hedaya Malesi, the 1<sup>st</sup> defendant's Legal Officer, respectively.

10. Ms Ng'ang'a confirmed the existence of a loan facility advanced in 2013 in the sum of Kshs.250 Million, secured by charges over L.R. No. 37/254/31 (Nairobi West) and L.R. No. 209/178/29 (Limuru Road). She averred that the loan terms included monthly repayments, insurance premiums, agreed interest and default rates, the borrower's obligation to meet all incidental costs, and that upon persistent default by the plaintiff, the 1<sup>st</sup> defendant was at liberty to lawfully exercise its statutory power of sale. She maintained that the Nairobi West property was sold pursuant to a valid Consent Order and in compliance with the law and that the sale proceeds of Kshs.225 Million were duly credited to the plaintiff's mortgage account in tranches, but despite these credits, the plaintiff remained in default, with an outstanding balance of approximately Kshs.207 Million as at April 2024, prompting the resumption of recovery efforts over the Limuru Road property.
11. Ms Ng'ang'a deposed that the plaintiff was duly notified of the sale and the remaining outstanding balance. She averred that the 1<sup>st</sup> defendant lawfully levied interest, default interest, insurance premiums, and other charges strictly in accordance with the contractual documents and denied of the existence of hidden or unlawful charges. She asserted that the plaintiff's Forensic Audit Report is defective and an afterthought. She also stated that the loan was zero-rated as at July 2023, with no further interest accruing. Counsel disputed allegations of undervaluation and confirmed that an independent valuation of the Limuru Road property was conducted in September 2023, placing its market value at Kshs.155 Million and forced sale value at Kshs.116,250,000/=. She contended that disputes over accounts or interest do not constitute grounds

for injunctive relief, that the charged property is commercial in nature, and that any loss suffered by the plaintiff is compensable by damages.

12. The applications herein were canvassed by way of written submissions which were highlighted on 22<sup>nd</sup> September 2025. The plaintiff's submissions were filed by the law firm of Gichuki King'ara & Co. Advocates on 4<sup>th</sup> July 2025, while the 1<sup>st</sup> defendant's submissions were filed by the law firm of J. Louis Onguto Advocates on 4<sup>th</sup> July 2025.
13. Mr. King'ara, learned Counsel for the plaintiff cited the case of **Giella v Cassman Brown & Company Limited** [1973] EA 358 and the provisions of Order 40 Rule 1(a) & (b) of the Civil Procedure Rules, 2010, and submitted that the plaintiff has made out a case to warrant being granted the orders being sought herein. He argued that on a *prima facie* basis, the plaintiff challenges the sale of the Nairobi West property, contending that it was sold at a gross undervalue and in breach of the 1<sup>st</sup> defendant's statutory duty of care under Section 97 of the Land Act. He relied to the case of **Spero Holdings Limited v Co-operative Bank of Kenya Ltd & another** [2016] KEHC 8651 (KLR). He stated that the Nairobi West property was sold for Kshs.225 Million despite a forced sale valuation of Kshs.315 Million, and that valuable fixtures and fittings worth over Kshs. 100 Million, forming part of a fully furnished hotel, were neither valued nor accounted for in the sale.
14. Counsel asserted that had the property and fixtures been properly valued and sold, the proceeds would have been sufficient to clear the loan and arrears. Mr. King'ara cited the case of **Palmy Company Limited v Consolidated Bank of Kenya Limited** [2014] KEHC 4811 (KLR), and submitted that such a substantial disparity raises serious questions of bad faith, under sale, and breach of duty, which the 1<sup>st</sup> defendant has failed to adequately rebut.

15. On the issue of irreparable harm, Counsel submitted that the bank had already sold one charged property and continues to hold the Title to the remaining property at Ngara, placing it at imminent risk of disposal. He argued that the loss of the suit property, which is unique and of significant sentimental and commercial value, cannot be adequately compensated by damages, particularly where the sale is alleged to have been conducted unlawfully. Counsel maintained that the balance of convenience tilts in favour of the plaintiff.
16. Mr. Abuya, learned Counsel for the 1<sup>st</sup> defendant submitted that the allegations of unlawfulness in the sale of the 1<sup>st</sup> charged property and the intended sale of the 2<sup>nd</sup> charged property are false, unsubstantiated, and legally untenable. Relying on the case of **Giella v Cassman Brown & Company Ltd** (supra), the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] KLR 125, and Sections 107 and 108 of the Evidence Act. Counsel argued that the plaintiff has failed to establish a *prima facie* case, which is fatal to the application and obviates the need to consider irreparable harm or balance of convenience. He emphasized that the plaintiff admittedly borrowed monies, charged the two properties as security, defaulted in repayment, and voluntarily entered into a consent recorded in Court on 13<sup>th</sup> August 2019, permitting the sale of the 1<sup>st</sup> charged property, and it is therefore bound by its terms pursuant to the holding by the Court in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another** [2001] KLR.
17. Mr. Abuya submitted that the sale of the 1<sup>st</sup> charged property was conducted lawfully pursuant to the consent, after the plaintiff failed to procure a buyer by private treaty. He further stated that the auction of 30<sup>th</sup> August 2019 proceeded with the plaintiff's knowledge of the full payment of the purchase price, and proper notification of the sale proceeds and outstanding loan balance. Counsel

relied on the doctrine of privity of contract as restated by the Court of Appeal in the case of **Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi** [1985] KECA 58 (KLR), and asserted that the plaintiff cannot enforce rights of third parties.

18. It was stated by Counsel that a valid forced sale valuation was conducted for the 2<sup>nd</sup> charged property noting that the plaintiff had failed to produce any contrary valuation. He submitted that a chargee cannot be restrained from exercising its statutory power of sale merely because the amount due is disputed. He cited the Court of Appeal case of **Shimmers Plaza Limited v National Bank of Kenya Ltd** [2013] KECA 359 (KLR) and submitted that once a property is offered as security, it becomes a commodity for sale upon default, and sentimental attachment does not bar realization of the security.
19. He further submitted that the balance of convenience lies in favour of the plaintiff since continued restraint risks escalation of arrears and interest beyond the value of the security, exposing the bank to irrecoverable loss, whereas any loss to the plaintiff is compensable by damages.

#### **ANALYSIS AND DETERMINATION.**

20. I have perused the applications herein, the affidavits filed in support thereof, the replying affidavits by the 1<sup>st</sup> defendant and the written submissions by Counsel for the parties. The issues for determination are –
- i) Whether the plaintiff has made out a case to warrant being granted the conservatory orders sought;**
  - ii) Whether the Court should make an order under the doctrine of *lis pendens* and Section 106 of the Land Registration act; and**

**iii) Whether an order for taking of accounts should issue.**

**Whether the plaintiff has made out a case to warrant being granted the conservatory orders sought.**

21. Interlocutory injunctions are provided for under the provisions of Order 40 Rules 1(a) & (b) of the Civil Procedure Rules, 2010, which states 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 orders.*

22. The Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] KECA 606 (KLR), when dealing with an application for an interlocutory injunction held that as follows-

*In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

- a) establish his case only at a prima facie level,*
- b) demonstrate irreparable injury if a temporary injunction is not granted, and*
- c) ally(sic) any doubts as to (b) by showing that the balance of convenience is in his favour.*

23. The Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** (supra), considered what constitutes a *prima case* and stated as follows -

***“So what is a prima facie case, I would say that in civil cases 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. A prima facie case is more than an arguable case. 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. That is clearly a standard, which is higher than an arguable case.”***

24. It is not in contest that the plaintiff obtained a loan facility of Kshs.250 Million from the 1<sup>st</sup> defendant secured by charges over L.R. No. 37/254/31 (Nairobi West) and L.R. No. 209/178/29 (Limuru Road). It is also not disputed that the Nairobi West property was sold in August 2019 pursuant to a consent recorded in Court. From the averments made, the plaintiff raises serious and substantive questions regarding whether the sale of the Nairobi West property was conducted at an undervalue in breach of Section 97 of the Land Act, whether fixtures and fittings forming part of the charged property were excluded from valuation and sale, whether the proceeds of sale of the Nairobi West property were properly and fully accounted for, and whether the continued levying of interest, penalties and charges contravenes the *in duplum* rule and statutory protection afforded to chargors.

25. The aforesaid allegations by the plaintiff are supported by a Forensic Audit Report annexed to its affidavits in support of the instant applications, which *prima facie*, disclose significant discrepancies between the amounts paid, the sale proceeds, and the outstanding balances claimed by the 1<sup>st</sup> defendant. While

the 1<sup>st</sup> defendant disputes the accuracy and probative value of the audit, the competing positions disclose contested matters of fact that cannot be conclusively resolved at this interlocutory stage. This Court notes that disputes relating to accounts, interest computation, and statutory compliance are not, *per se*, grounds for injunction. However, where such disputes raise credible allegations of breach of statutory duty, unlawful enrichment, or bad faith, Courts have held that a *prima facie* case may be established.

26. In the premise, this Court is persuaded that the plaintiff has demonstrated an arguable and plausible claim that the subject loan may have been substantially or fully liquidated and that the continued exercise of the statutory power of sale may be tainted by illegality or want of proper accounting leading to contravention of the *in duplum* rule as per Section 44A of the Banking Act.
27. Accordingly, I am satisfied that the plaintiff has established a *prima facie* case with a probability of success.
28. As to whether the plaintiff stands to suffer substantial irreparable injury in the event that the orders being sought herein are not granted, this Court notes that the suit properties are charged land and are commercial in nature. It is now well settled that loss arising from the sale of charged property is compensable by damages. However, in the peculiar circumstances of this case and the plaintiff having demonstrated a *prima facie* case, this Court notes that the plaintiff has already lost one charged property and the remaining property is at the risk of sale before the substantive issues raised herein are heard and determined. Therefore, a transfer to third parties would complicate or render nugatory any eventual relief.

29. This Court notes that although the 1<sup>st</sup> defendant submitted that continued restraint risks escalation of arrears and interest beyond the value of the security, exposing the bank to irrecoverable loss, it also stated that as at July 2023, the subject loan was zero-rated, which means that there is no risk of escalation of arrears and interest beyond the value of the security
30. In the circumstances, this Court finds that the plaintiff has demonstrated that it stands to suffer irreparable injury, that cannot be adequately compensated by an award of damages.
31. The issue of balance of convenience does not arise since this Court is not in doubt. Nevertheless, based on the analysis I have made, the balance of convenience tilts in favour of the plaintiff.

**Whether the Court should make an order under the doctrine of *lis pendens* and Section 106 of the Land Registration act.**

32. The doctrine of *lis pendens* is anchored on public policy and it is intended to prevent the alienation of property in dispute during the pendency of litigation, so as to preserve the authority of the Court and to avoid multiplicity of suits. This doctrine has been applied consistently by Kenyan Courts. The Court of Appeal in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others** [2017] KECA 79 (KLR), while addressing the doctrine of *lis pendens* held as follows: -

*The Supreme Court of India in the case of KN Aswathnarayana Setty (D) Tr. LRs. & Others v. State of Karnataka & Others [2013] INSC 1069 stated that the doctrine is based on the legal maxim ‘ut lite pendente nihil innovetur’ (During a litigation nothing new should be introduced). The doctrine is couched equity, good conscience or justice because they rest upon an equitable and just*

*foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.*

*Our previous land legislation regime expressly embraced the doctrine under Section 52 of the repealed (Indian) Transfer of Property Act (ITPA) 1882 by stipulating that:-*

*“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.” Emphasis added.*

*Do courts still recognize the doctrine? The ITPA was repealed by the Land Registration Act (LRA) Number 3 of 2013; whose Section 107 (1) of the LRA provides for the saving and transitional provisions of the Act, and provides that:-*

*“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”*

*Presently, the LRA does not prohibit the application of the doctrine of lis pendens; nor does any law for that matter. For this reason and in view of Section 107 aforesaid, this Court has previously held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see. Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR).* (Emphasis added).

33. Section 106 of the Land Registration Act further empowers Courts to prohibit or restrict dealings in land, where a dispute is pending before it.
34. Given that ownership, valuation, accounting, and the propriety of the exercise of the statutory power of sale over L.R. No. 209/178/29 situated along Limuru Road and L.R. No. 37/254/31 in Nairobi West are directly in issue, this Court is satisfied that an order preserving their Register is necessary to prevent prejudice to the parties and to safeguard the integrity of these proceedings.
35. Accordingly, this Court finds that the plaintiff has met the threshold of being granted orders under the doctrine of *lis pendens* and Section 106 of the Land Registration Act.

**Whether an order of taking of accounts should issue.**

36. The plaintiff has sought an order to compel the 1<sup>st</sup> defendant to render a full and accurate account of the loan facility, including all payments made, interest charged, penalties levied, insurance premiums, and the application of sale proceeds.
37. The duty of a chargee to render accounts is well recognized in law and flows from both contractual and equitable principles. It is trite law that where a chargor credibly alleges overpayment, illegal charges, or lack of transparency, the Court is empowered to order accounts to be taken. In this case, the parties have placed before this Court significant divergent figures regarding the outstanding loan balance. I am therefore of the considered view that the resolution of the dispute of accounts is central to the determination of the rights of the parties herein and the legality of the continued enforcement measures by the 1<sup>st</sup> defendant.

38. In light of the above, this Court is satisfied that an order for taking of accounts in this case is necessary, appropriate, and in the interest of justice.

39. In the end, this Court finds that the applications herein are merited and they are allowed in the following terms: -

- i) Pending the hearing and determination of the suit herein, an order of temporary injunction is hereby issued restraining the 1<sup>st</sup> defendant from advertising, selling, leasing, or interfering with the plaintiff's ownership of property known as L.R. No. 209/178/29 along Limuru Road;**
- ii) Pending the hearing and determination of the suit herein, an order under the doctrine of *lis pendens* and Section 106 of the Land Registration Act, is hereby issued prohibiting any changes in registration or ownership concerning L.R. No. 209/178/29 situated along Limuru Road and L.R. No. 37/254/31 in Nairobi West;**
- iii) An order for taking of accounts of the loan account by the 1<sup>st</sup> defendant is hereby issued. The 1<sup>st</sup> defendant is given 60 days to render accounts, subject to extension on application; and**
- iv) Costs shall be in the cause.**

It is so ordered

**DATED, SIGNED and DELIVERED at NAIROBI on this 24<sup>TH</sup> day of April 2026. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI  
JUDGE**

**In the presence of:-**

Mr. Wachira h/b for Mr. King'ara for the plaintiff/applicant

Miss Kibe h/b for Prof. Edwin Abuya for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants/respondent

No Appearance for the Interested Parties

Mr. Muthomi – Court Assistant.

ORIGINAL