

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**COMM CASE NO. 292 OF 2017**

**WARDPA** **HOLDINGS**  
**LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**CO-OPERATIVE** **BANK** **OF** **KENYA**  
**LTD.....DEFENDANT/RESPONDENT**

**AND**

**EDWARD NJUGUNA KANGETHE. ....1<sup>ST</sup>**  
**INTERESTED PARTY**

**GEORGE JAMES KIRERU KANGETHE .....2<sup>ND</sup>**  
**INTERESTED PARTY**

**RULING**

1. This Ruling is in respect of the Plaintiff/Applicants application by way of a Notice of Motion dated 13<sup>th</sup> November, 2025 and 14<sup>th</sup> January, 2026. They seek injunctive orders from this Court.

**Background Facts**

2. Before the Court are two Applications to be determined together. The 1<sup>st</sup> Application is a Notice of Motion dated 13<sup>th</sup> November, 2025. The Applicant seeks the following orders;

- a) *Pending the hearing and final determination of the instant application interparties (sic) or until further orders, the defendants' 45 days statutory notice dated 12<sup>th</sup> November 2025 and issued by the defendants Agent/auctioneer GARTH DAY YEAR AUCTIONEERS to the plaintiff relating to all that property known as Lr.No.209/2489/22 be suspended forthwith.*
- b) *Pending the hearing and final determination of this suit, the defendant's 45 days statutory notice dated 12<sup>th</sup> November 2025 and issued by the defendant's Agent/Auctioneer GARTH DAY YEAR AUCTIONEERS be and is hereby declared mala fides, irregular, unlawful, null and void, and further, the defendant, its agents, servants or anyone claiming through it be and is hereby prohibited from advertising for sale, offering for sale, or in any other manner alienating the suit property known as L.R NO 209/2489/22 pending the hearing and final determination of this suit.*
- c) *The costs of this application be provided for.*

3. The Application is supported by the Affidavit of **Michael Mwangi Wanjohi** who stated that the suit is substantially ready for hearing and is scheduled for pretrial conference. Yet the Defendant has issued a 45-day statutory notice through auctioneers threatening to sell the suit property. This is despite serious allegations of illegality, fraud, and collusion raised in the Further Amended Plaint. The Plaintiff contends that the threatened sale violates the doctrine of *lis pendens* under **Section 3 of the Judicature Act** and the protections under **Part VII of the Land Act**. Lastly it submits that the intended sale is contrary to the principles laid out in **Giella v Cassman Brown & Co. Ltd [1973] EA 358.**
4. It was further argued that the Defendant's actions are in bad faith, offend **Section 44A of the Banking Act** on the *in duplum* rule, and are unsupported by loan statements, rendering the demand unlawful. The Plaintiff maintains that the Court should not enforce or aid an allegedly illegal transaction. That the Defendant seeks to dispose of or alter

the subject matter of the suit to the Plaintiff's prejudice, before the imminent hearing.

5. In response, the Defendant filed the Replying Affidavit, sworn on 28<sup>th</sup> November 2025. The Respondent contended that the Application is *res judicata* because of the following prior decisions by different judges of the High Court as follows;

- (a) *Patrick Kangethe Edward v Co-operative Bank of Kenya Limited & another [2016] KEHC 2410 (KLR) (by Otieno J).*
- (b) *Patrick Kang'ethe Njuguna & 2 others v Co-operative Bank of Kenya Ltd, & 4 others [2018] KEHC 7966 (KLR) (by Otieno J);*
- (c) *Wardpa Holdings Limited v Cooperative Bank of Kenya Limited & 2 others [2017] KEHC 9998 (KLR) (by Sewe J);*
- (d) *Michael Mwangi Wanjohi v Patrick Kangethe Njuguna & 3 others [2018] KEELC 1770 (KLR) (by Okong'o J);*

(e) *Michael Mwangi Wanjohi v Patrick Kang'ethe Wanjohi & 3 others [2019] KEHC 9493 (KLR) (by Tuiyott J (as he then was).*

6. The Defendant further contended that the Plaintiff has abused the Court process by filing multiple applications aimed at frustrating the Defendant's statutory power of sale. It is argued that the doctrine of *lis pendens* does not apply to redemption suits. That the issue has effectively been settled by four prior rulings dismissing similar applications for injunction. The Defendant further maintains that any claim of breach of the *in duplum* rule ought to have been raised in the earlier applications and is now barred by *res judicata*. That in any event, the amounts claimed are consolidated from various accounts and do not breach the *in duplum* rule. Finally, the Defendant asserts that a dispute over the amount due is not a basis for granting an injunction. That this should only be considered as an issue if the Plaintiff pays a substantial part of the undisputed portion of the debt.

7. The 2<sup>nd</sup> Application is a Notice of Motion dated 14<sup>th</sup> January, 2026. The Applicant sought the following orders;

*a) Pending the hearing and final determination of the application dated 13<sup>th</sup> November 2025 the Public Auction scheduled for 10<sup>th</sup> February 2026 by the defendant's Agent/auctioneer, GARTH DAY YEAR AUCTIONEERS over LR. No. 209/2489/22 be suspended forthwith.*

*b) The costs of this application be provided for.*

8. The Application was supported by the Affidavit of **Michael Mwangi Wanjohi** who stated that the matter herein is substantially ready for full hearing save for the recent filing of a Further Amended Plaintiff. That the suit is set down for pre-trial conference on 20/1/2026. On 13<sup>th</sup> January 2026, the Defendant, through its Agents GARTH DAY YEAR AUCTIONEERS, advertised the suit property for public auction on 10<sup>th</sup> February, 2026.

9. In contrast, the Defendant filed the Replying Affidavit, sworn on 21<sup>st</sup> January 2026. He argued that for the reasons given in the earlier affidavit sworn on 28<sup>th</sup> November 2025, the

Plaintiff is not deserving of any sort of interim injunction. That no orders should issue, not even pending the hearing of the application dated 13<sup>th</sup> November 2025. However, if the Court is minded to give some interim relief while considering that earlier application, the Court to order that the Plaintiff deposits with the Defendant the principal amount (Kshs.166,000,000.00) by 9<sup>th</sup> February 2026. If it is not deposited, the auction should proceed on 10<sup>th</sup> February 2026.

### **Issues for determination**

10. The Court has considered the Applications and the responses therewith as well as the submissions and oral highlights by Counsel for the parties. The Court proceeds to frame the following issues for determination;

*a) Whether the Application is res judicata.*

*b) Whether an order of injunction should issue.*

### **Analysis**

11. It was the Applicant's case that the Defendant issued a 45-day redemption notice through GARTH DAY YEAR

AUCTIONEERS. The Notice was demanding Kshs. 453,593,617.24 as at 7th November 2025, failing which L.R No. 209/2489/22 in Ngara, Nairobi, would be sold on 10<sup>th</sup> February 2026 at their offices at Devan Plaza. The Plaintiff noted that this follows the filing and service of a Further Amended Plaint and the scheduling of a pre-trial on 20<sup>th</sup> January 2026. It contended that the intended sale is a tactic to pre-empt the Court's determination of the substantive issues at the full hearing. The Plaintiff further asserted that its interests are safeguarded by the doctrine of *lis pendens*, which preserves the Court's control over disputed property while litigation is pending.

12. In contrast, the Defendant argued that the Plaintiff's claim for an injunction, premised on the doctrine of *lis pendens* and the alleged breach of the *in duplum* rule under **Section 44A of the Banking Act**, cannot be entertained as it is barred by the doctrine of *res judicata*. The doctrine deprives the Court of jurisdiction to reconsider the issues. It is contended that all the requisite elements of *res judicata* are satisfied. This is given that there are five prior decisions

involving challenges by the Plaintiff or its privies to the Defendant's exercise of its statutory power of sale over L.R. No. 209/2489/22. That in any event, the Plaintiff's arguments would still lack merit even if considered.

**a) Whether the Application is *res judicata*.**

13. On the first issue of *res judicata*, **Section 7 of the Civil Procedure Act** provides:

***“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties...and has been heard and finally decided by such court.”***

14. **Section 7 of the Civil Procedure Act** bars Courts from trying matters that were directly and substantially in issue in a former suit between the same parties and were heard and finally determined. The Supreme Court decision in ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR*** outlined the key elements of *res judicata* as identity of parties, subject matter, and issues, together with a final determination on the merits.

15. According to the Respondent, the application is not only *res judicata* but that the Plaintiff is abusing the court process. The Court has perused the Ruling dated 22<sup>nd</sup> September 2017 by **Sewe J**, where the Applicant had an order of injunction against the sale and/or disposition of the suit property. The Court struck out the Application on grounds that the Application was *res judicata*.
16. It was the Applicant's position that the actions of the Defendant are meant to steal a march against the Plaintiff. That it is the Plaintiff who wants the real issues to be determined at the full hearing. This is before any recovery efforts are initiated by the Defendant or anyone claiming under them. The Applicant added that the legitimate expectation of the Plaintiff is that it is protected by the doctrine of *lis pendens*.
17. The **Black's Law Dictionary 9<sup>th</sup> edition**, defines *lis pendens* as the jurisdictional, power or control acquired by a Court over property while a legal action is pending.

18. Further, in the case of **Cieni Plains company Limited & 2 Others versus Ecobank Kenya Limited [2017]**

**eKLR**, the Court stated;

***“The doctrine of lis pendens often expressed in the maxim pendente lite nihilin novature (during litigation nothing should be changed). With regard to real property, section 52 of the now repealed Indian Transfer of Property Act 1882 provided that during the pendency in any court having authority in Kenya of any suit in which the right to immovable property was directly and specifically in question, the immovable property was not to be transferred or dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order that would be ultimately made , except with the authority of the court and on terms.”***

19. It is the Court’s considered view that the above previous Ruling bars the Applicant from seeking the same orders. The matter was between the same parties and over the same subject matter. While the Applicant might argue that its Application is premised on the doctrine of *lis pendens* and the alleged breach of the *in duplum* rule under

Section 44A of the Banking Act, the Applicant is essentially still seeking an order of injunction to stop the sale of the suit property.

- 20.** The doctrine cannot therefore be invoked to revive an application that is already foreclosed by prior rulings. The Court follows the decision of the Court of Appeal in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] KECA 102 (KLR)**.
21. It is the Court's finding that this Application is equally *res judicata* and is hereby struck out.

**b) Whether an order of injunction should issue.**

22. An injunction is a discretionary remedy. That is the holding by the Court of Appeal in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. In exercise of such discretion the Court cannot run contra statute. **Section 7 of Civil Procedure Act**, is a complete bar to this Court from exercising such discretion. The mandatory use of the words "No Court shall try..." in **Section 7** aforesaid removes or bars this Court from exercising such discretion. In any event

the previous outcomes by this Court have been to strike out the prior applications for injunctions. It cannot be said with certainty that a prima facie case has been proved.

23. As to irreparable loss, the same has not been adequately demonstrated. Lastly, as to the balance of convenience it does weigh heavily in favour of the Bank going by previous Court actions. The Court is not sufficiently persuaded to hold otherwise.

24. As to costs, the same ordinarily follow the event and lie at the discretion of this Court. There is no good reason advanced as to why the Court should deny the successful Respondent the costs of the Motions.

### **Determination**

25. The Plaintiff's Application by way of a Notice of Motion dated 13th November, 2025 is HEREBY struck out on the grounds of being *Res Judicata*.

26. The Plaintiff's Application by way of a Notice of Motion dated 14th January, 2026 is HEREBY dismissed for lack of merits.

27. The costs of the two applications are awarded to the Defendant/Respondent.

28. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS  
29TH DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN K.**

**JUDGE**

**In the presence of:**

Mr. Thuku for the Plaintiff/Applicant.

Mr. Odero for the Defendant/Respondent.

Miss Ithondeka for the Interested Parties.

Mr. John Paul- Court Assistant