

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E565 OF 2025

BETWEEN

FOUNDATION PILING LIMITED.....1ST

PLAINTIFF

RONALD NJOROGE KING'ANG'I.....2ND

PLAINTIFF

BELLA WAGATWE KING'ANG'I.....3RD

PLAINTIFF

AND

CREDIT BANK

PLC.....DEFEN

DANT

RULING

Introduction and Background

1. By the Notice of Motion dated 2nd September 2025 ,the Plaintiffs seek an injunction restraining the Respondent (“the Bank”) from selling, advertising, or interfering with the two properties; LR No.DAGORETTI/UTHIRU/987(NAIROBI/BLOCK 131/987) and LR No. 2951/189(NAIROBI/BLOCK 199/41) (“the suit properties”) pending

the hearing and determination of this suit. They further seek orders compelling the Bank to furnish them with full loan account statements and accounts be taken to ascertain the true amount owing before any further realization steps.

2. The application is supported by the grounds on its face and the affidavit of the 2nd Plaintiff sworn on 2nd September 2025. The Bank opposes the application through the replying affidavit of its Head of Legal Department Wainaina Francis Ngaruiya, sworn on 23rd October 2025. The application was canvassed by way of written submissions which are on record and which together with the pleadings I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and determination

3. As submitted by the parties, the main issue for determination is whether the court ought to grant the injunctive order sought by the Plaintiffs. They agree that for the Plaintiffs to obtain the injunction, they must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour (See **Giella v Cassman Brown &**

Co., Ltd. [1973] E.A. 358). It is also correct as per their submissions that in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2013] KECA 347 (KLR)**, the Court of Appeal reiterated these conditions and further clarified that they are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. This means that if the applicant does not establish a *prima facie* case, then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions.

4. As to what constitutes a *prima facie* case, the parties are also spot on to submit that the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)** explained that 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 to call for an explanation or rebuttal from the latter.”
5. The Plaintiffs’ case is that the 1st Plaintiff obtained loan facilities totaling approximately Kshs. 77.7 million in July 2017 for a coal

exploration project that later failed due to government cancellation. The loans were secured by, among other things, the suit properties but that due to the project's failure and the COVID-19 pandemic, the Plaintiffs struggled to repay. The Bank issued a 40-day Notice of Sale on 30th May 2025, followed by a Redemption Notice dated 14th July 2025 for Kshs. 80,743,405.08 and a Notification of Sale dated 9th July 2025 with the auction set for 24th September 2025.

6. The Plaintiffs claim that the Bank levied interest in excess of agreed rates without Cabinet Secretary approval, breaching the **Banking Act(Chapter 488 of the Laws of Kenya)**, that the demanded sum is outrageous and disputed and that the Bank has refused to provide proper statements or reconcile payments already made. The Plaintiffs further claim that they tried to sell one property by private treaty for Kshs. 45 million but the Bank frustrated the process by inflating the amount due and that they hired *Mabeya & Associates LLP*, who found a variance of Kshs. 37,174,634.55 being unsupported penal charges and loan adjustments that may violate the *in duplum* rule.
7. In response, the Bank depones that it issued multiple Letters of Offer from 2018 to 2022 for various facilities, restructures, and a moratorium, all accepted by the Plaintiffs and that indeed, the

facilities were properly secured by inter alia Charges over the suit properties. That as of 9th October 2025, the outstanding amount is Kshs. 79,360,149.20 and the Bank avers that proper statutory processes were followed as it issued the 90-day statutory notices under **section 90** of the **Land Act(Chapter 280 of the Laws of Kenya** in January 2025 for both properties, which notices were served by registered post. It then issued 40-day Notices to sell under **section 96(2)** of the **Land Act** on 30th April 2025, also served by registered post and a 45-day Redemption Notice was issued by *Phillips International Auctioneers* on 14th July 2025 and served by registered post and by electronic means. The Bank also states that a valuation of the suit properties was conducted on 30th April 2025.

8. The Bank contends that it has always been accommodating but the Plaintiffs have failed to act. The Bank states that it issued a "no objection letter" dated 13th March 2025 allowing the Plaintiffs to sell one of the suit properties by private treaty, however, the Plaintiffs never provided an executed sale agreement to the Bank.

That the Bank even met with the Plaintiffs' auditor to discuss reconciliation.

9. The Bank avers that the report by *Mabeya & Associates LLP* claiming Kshs. 37,174,634.55 in illegal charges is inaccurate and made in bad faith as the report failed to account for default interest which is contractually allowed in all Letters of offer, that the report incorrectly applied a flat 13% interest rate throughout, ignoring the actual rates in the Letters of offer and that the report relied on a repealed banking circular which was nullified by the ***Finance Act, 2019.***
10. The Bank asserts that it charged interest strictly per the signed Letters of offer and that default interest clauses are expressly provided for in each Letter of offer and the power to set interest rates was delegated to the Central Bank of Kenya (CBK) by way of ***Legal Notice No. 35 of 2006*** and risk-based pricing which the Bank avers is applicable here was approved by CBK. The Bank therefore states that it does not need Cabinet Secretary approval.
11. In sum the Bank states that it has taken all proper steps and complied with the law, that the Plaintiffs have not made out a prima facie case, that the auditor's report is deliberately misleading, that the Plaintiffs will not suffer irreparable loss because any loss can be compensated by damages, the balance of convenience favours the

Bank, which is entitled to recover its debt and it should be allowed to proceed with the auction.

12. I have gone through the submissions and positions of the parties highlighted

above. The Plaintiffs' primary claim is a dispute over the amount owed, based on an independent auditor's report and the charge of illegal interest. However, as correctly submitted by the Bank and established in numerous authorities including *Mrao(supra)* and **J. L. Lavuna And Others v Civil Servants Housing Co. Ltd. & Savings And Loan Kenya Ltd [1995] KECA 111 (KLR)**, a mortgagee/chargee will not be restrained from exercising its statutory power of sale merely because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner of sale. Further, a dispute in interest is not a basis for issuance of injunction against exercise of the chargee's power of sale unless it is easily discernible from the terms of the charge and law that usurious or illegal interest had been charged (see **Charles Alex Njoroge v National Bank of Kenya Ltd & another [2015] KEHC 8103 (KLR)**)

13. Even though the report relied on by the Plaintiffs will be interrogated further at trial, I find that the Bank has credibly poked

holes on the same at this point by stating that it failed to account for default interest which was contractually provided for in Clause 5 of every Letter of Offer annexed by the parties, that the report misapplied the interest rate, using a flat 13% rate from 2016 to 2025, while the Letters of Offer stipulate rates of 13.5%, 14%, 15%, plus penal rates for default and that it relied on a repealed circular which was nullified by the **Finance Act, 2019**.

14. In any event, even if the entire disputed amount of Kshs. 37,174,634.84 were to be deducted from the claimed debt of Kshs. 79,360,149.20, an undisputed amount of over Kshs. 42,185,514.36 remains. The Plaintiffs have not offered to pay this amount or provided any explanation for their default on this significant sum. I also find that the Bank has provided evidence of all requisite statutory notices being properly served and the Plaintiffs have not denied receiving them. Furthermore, contrary to the claim that the Bank frustrated a private sale, the Bank actually issued a "no objection letter" dated 13th March 2025 to facilitate it. The Plaintiffs' own correspondence of 10th May 2025 confirms the sale fell through because the buyer pulled out, not because of any action by the Bank. Because the Plaintiffs have failed to demonstrate a clear, infringed right that

would warrant the court's intervention, they have not surmounted the first hurdle and consequently, the court does not need to consider the other two conditions in line with the dicta in ***Nguruman(supra)***.

15. Even if a prima facie case existed, the Plaintiffs have not demonstrated irreparable loss as loss of property, by itself, is not automatically considered "irreparable" in the context of a charge. It is now trite that a property offered as security for a loan acquires a commercial character and the possibility of its loss upon default is a risk voluntarily accepted by the Chargor (see ***Maithya v Housing Finance co. of Kenya & Another [2003] 1 EA 133***). The Bank has stated and it has not been disputed that it is more than capable of paying damages for any loss to be suffered by the Plaintiffs from the sale of the suit properties. I agree that the suit properties have a finite value as evidenced by the valuation report annexed by the Bank and if the sale is ultimately found to have been unlawful, the Plaintiffs can be adequately compensated by an award of damages. An injury is irreparable only where no monetary standard can measure it which is not the case here (see ***Nguruman(supra)*** and ***Florence Khayanga Musanga v Transnational Bank Ltd & another [2020] KECA 36 (KLR)***]

16. I am in further agreement with the Bank that its right to recover its debt by realizing its security is being frustrated and the loan continues to accrue interest daily and there is a genuine risk that the debt will outstrip the value of the suit properties if the sale is delayed for the duration of a potentially lengthy trial, causing greater loss to the Bank and ultimately to the Plaintiffs, if the suit properties are sold for less than the debt. The balance of convenience, when weighed between a creditor lawfully seeking to recover a defaulted debt and a debtor who is in clear default, must favour the creditor.

Conclusion and Disposition

17. The Plaintiffs’ application dated 2nd September 2025 now stands dismissed with costs. The interim orders issued by the court are hereby discharged forthwith.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
8th DAY of MAY 2026**

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Gitonga holding brief for Mr. Mogeni for the Plaintiff
2. Ms. Maitai for the Defendant
3. Amos- Court Assistant

ORIGINAL