

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E668 OF 2025

BETWEEN

ABDALLAH HUSSEIN KHAMIS.....1ST

PLAINTIFF

BETH WANJIRU KINUTHIA.....2ND

PLAINTIFF

AND

HOUSING FINANCE COMPANY

LIMITED.....1ST DEFENDANT

KEYSIAN AUCTIONEERS.....2ND

DEFENDANT

RULING

Introduction and Background

1. By the Notice of Motion dated 8th October 2025, the Plaintiffs seek an injunction restraining the Respondents (“the Bank” and “the Auctioneer”) from dealing with the property House No. 20R erected on L.R No. 25732/7/IR No. 93892, Snowdrop Lane, Off Hillcrest Road, Karen, Nairobi County (“the suit property”) pending the hearing and determination of this suit. The application is supported

by the grounds on its face and the affidavit of the 1st Plaintiff sworn on 8th October 2025. The Bank opposes the application through the replying affidavit of its Legal Manager, Hedaya Malesi, 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

2. 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.

3. As to what constitutes a *prima facie* case, the parties are also spotted 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.”
4. The Plaintiffs’ case is that they are the joint registered owners of the suit property, which is their home and that the Bank advanced them a Home loan of Kshs. 18,000,000.00 in 2009, enhanced by further charges in 2013 for Kshs. 22,000,000.00 and in 2015 for Kshs. 13,000,000.00. The facility was secured by charges over the suit property and the 1st Plaintiff depones that he lost his job and has been unemployed since 2022 when the facility fell into arrears

which was also compounded by a medical emergency of his father and the suit property being vacant for a year.

5. The Plaintiffs state that they are willing and desirous of paying the arrears and are seeking to negotiate a payment plan with the Bank but that unless the court stops the sale, the Plaintiffs will suffer irreparable harm and lose their home. The Plaintiffs believe they have a prima facie case and the balance of convenience favors stopping the sale.
6. In response, the Bank depones that the Plaintiffs do not dispute the existence of the loan or their default and that the bank issued all required statutory notices and obtained a current, professional valuation as required by law. The Bank claims that the Plaintiffs have a history of making empty promises to pay and that they have come to equity with unclean hands by persistently breaching their contractual obligations while using illusory repayment promises to delay the Bank's lawful remedies. It submits that an injunction is an equitable remedy, and a defaulter cannot ask the court to shield them from the consequences of their own default and that the Plaintiffs voluntarily offered the suit property as collateral, knowing it was a "commodity for sale" in case of default. That any loss even of

sentimental value is quantifiable and can be adequately compensated by damages, especially since the bank is a stable financial institution capable of paying such damages.

7. The Bank avers that allowing the injunction would create a dangerous precedent, allowing defaulters to use courts as a haven to cripple financial institutions and the inconvenience to the Bank, that of being prevented from recovering a legitimate debt, outweighs the inconvenience to the Plaintiffs. As such, the Bank urges the court to dismiss the application with costs.
8. From the above summary of the positions of the parties and juxtaposing the same with the principles for the grant of an injunction, it is clear that the Plaintiffs have not made out a prima facie case with a probability of success. This court has always stated that a chargee's statutory power of sale arises upon default, regardless of the reason for the default, unless the borrower can show the lender acted illegally, oppressively, or fraudulently. The Plaintiffs admit default and their defence is based on hardship of loss of a job and a medical emergency. While sympathetic, these are not legal grounds to stop a lawful sale as the law does not require a bank to accept a borrower's personal hardship as a reason to delay realization. The fact that arrears are "only for the

year 2025" is not a legal shield. The default is current and real and the Plaintiffs' argument is essentially an appeal to restructure the debt, which is a commercial negotiation, not a legal right that a court can enforce by way of an injunction (see (see **Fatuna Osman Abdi v Kenya Industrial Estates Limited & another [2017] KEELC 2324 (KLR)**]

9. The Bank's processes were properly followed as the requisite statutory notices were issued and received by the Plaintiffs. The Plaintiffs' claim that they were not given a fair opportunity to negotiate or restructure is not a requirement before the statutory notices are issued. The Notice itself is the opportunity to remedy the default and the Plaintiffs' claim that the Bank should have negotiated more before advertising the sale is not an infringement of a right. It is an expectation of indulgence, which the Bank is actually not obligated to accept and it should not be lost that the primary task of the court is to construe the contract and any terms implied in it and as such, it cannot force parties into a bargain as it is not a matter of an entitlement bestowed upon the Plaintiffs, whether by statute or by contract (**Muiga Enterprises Limited v Kenya Commercial Bank Limited [2016] KEHC 8509 (KLR)**). It is for these reasons that the court cannot compel the Bank to

accept the Plaintiffs' payment proposal or accommodate them further.

10. I am in agreement with the Bank's submission that this court (the late Havelock J.) in **Mwangi & another v Housing Finance Co of Kenya Ltd [2013] KEHC 1903 (KLR)** held that a borrower cannot come to court seeking to stop a sale while merely expressing a willingness to pay and that the borrower must actually pay the admitted arrears into court or show a serious, demonstrable commitment. This is not the case herein as they only offer a payment plan and a desire to negotiate but they have not paid a single shilling of the admitted arrears to the Bank.

11. What is clear is that the Plaintiffs have failed to show an apparent infringement of a right by the Bank. The Bank has a legal right to recover its debt. The Plaintiffs have a legal obligation to pay, which they have not fulfilled. Their hardship, while unfortunate, does not transform the Bank's lawful process into an unlawful act. Without a dispute over the validity of the debt, the propriety of the notices, or an allegation of fraud, there is simply no prima facie case to answer.

12. Therefore, as the sequential test in **Nguruman(supra)** requires, the application

fails at the first hurdle and the court need not consider whether the Plaintiffs will suffer irreparable harm or where the balance of convenience lies.

Conclusion and Disposition

13. The Plaintiffs' application dated 8th October 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. N/A for the Plaintiff
2. Ms. Wangari holding brief Mr. Kabaiku for the Defendant
3. Amos- Court Assistant

ORIGINAL