



**Diamond Trust Bank Kenya Limited v Kaminara Agencies Limited & 2 others  
(Civil Appeal E144 of 2023) [2025] KECA 48 (KLR) (20 January 2025) (Judgment)**

Neutral citation: [2025] KECA 48 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E144 OF 2023  
AK MURGOR, P NYAMWEYA & GV ODUNGA, JJA  
JANUARY 20, 2025**

**BETWEEN**

**DIAMOND TRUST BANK KENYA LIMITED ..... APPELLANT**

**AND**

**KAMINARA AGENCIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JONATHAN DANIEL MTURI ..... 2<sup>ND</sup> RESPONDENT**

**PATIENCE SIKUKU MTURI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the ruling and order of the High Court at Mombasa (F. Wangari, J) dated and delivered on 28th July 2023 in Civil Suit No. E030 of 2022)*

**JUDGMENT**

1. On 28<sup>th</sup> July 2023 the High Court, Mombasa delivered a ruling in Mombasa High Court Civil Case No. E030 of 2022 in which the learned Judge (Wangari, J) found the application dated 9<sup>th</sup> May 2022 merited and granted a temporary order of injunction pending the hearing and determination of the suit. The said suit was commenced by the 1<sup>st</sup> respondent against the 2<sup>nd</sup> respondent, the 3<sup>rd</sup> Mombasa Civil Appeal No E144 of 2023 Page 1 of 24 respondent and the appellant as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively.
2. The 1<sup>st</sup> respondent's case, as pleaded was that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were the owners of Plot No. Mainland North Section 1/1202 Old Nyali Estate, Mombasa (the suit property) which they leased to the 1<sup>st</sup> respondent for commercial purposes vide a lease executed on 14<sup>th</sup> November 2020; that the lease was for a period of 2 years effective from 14<sup>th</sup> November 2020 until 15<sup>th</sup> November 2022 with an option of a mutual renewal clause; that from the time of the execution of the lease the 1<sup>st</sup> respondent enjoyed peaceful occupation of the suit premises; that unknown to the 1<sup>st</sup> respondent, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had guaranteed a loan given by the appellant to a third party, namely Quantum



- Petroleum Limited (the borrower), on the security of the suit property; that the borrower having defaulted in its obligation towards repayment of the loan, the appellant sought to realise the security and, in compliance with the law issued the requisite notices to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; that it was at this juncture that the 1<sup>st</sup> respondent got to know of the subject property's encumbrance and moved the court to safeguard its interests; and that the intended sale was illegal and was meant to deny it its livelihood and/or residence.
3. Together with the plaint, the 1<sup>st</sup> respondent filed a Notice of Motion application dated 9<sup>th</sup> May 2022 in which it sought a temporary injunction restraining the defendants in the suit, their servants, agents and/or any other person acting on their behalf from alienating, selling, auctioning, transferring or disposing off the suit property pending the hearing and final determination of this suit.
  4. The 1<sup>st</sup> respondent's case as deposed to by Joseph Kayemba Ferunzi, its director, in the affidavit sworn on 9<sup>th</sup> May 2022 was: that being a lessee of the suit property, the 1<sup>st</sup> respondent had a major interest therein since it was carrying out its business operations "including meeting the desired needs of both my clients and employees at large" in the suit property; that it had no dealings whatsoever with the appellant; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents never disclosed to it that they had guaranteed a loan to the borrower; that it only became aware of the facility on 4<sup>th</sup> May 2022 when a notice of sale by public auction was brought to its attention by one of its clients; that had it had prior knowledge of the impending sale, it would have planned how to relocate and find an alternative business premises to conduct its business operations; that it had several business interests to meet including satisfying the needs of its clients and customers as well as employees and creditors which was threatened by the impending sale of the suit property hence it would suffer irreparable loss and damage; and that had the appellant done due diligence it would have known that there was tenant in the suit property.
  5. The application was opposed by the appellant by an affidavit sworn by Maryanne Mbugu, its legal manager, on 17<sup>th</sup> June 2022. The gist of the said affidavit was: that the appellant extended to the borrower various banking facilities which were secured, inter alia, by a charge over the suit property; that in breach of the terms of the facility, the borrower failed and/or neglected to make punctual payments as and when the same fell due causing the term loan facilities to be in arrears; that as a result the appellant commenced the recovery process by exercising its statutory power of sale in March 2014; that the borrower challenged the intended sale vide Mombasa HCCC No. 97 of 2015, a challenge which was dismissed and an application seeking stay of the said decision was similarly dismissed by this Court; that the suit itself was eventually dismissed for want of prosecution on 10<sup>th</sup> December 2019; that the appellant issued the statutory notices which were addressed to the borrower and to the chargors, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein; that upon the expiry of the period of the notices, the appellant instructed a firm of auctioneers to sell the suit property; that the lease agreement in question is null and void for contravention of section 88(1)(g) of the Land Act, 2012 which bars a charger from leasing a charged property for a period of more than a year without obtaining the consent of the charge; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents covenanted that they would not lease or sublease the charged property or any part thereof without the previous consent in writing of the charge, the appellant; that although the 1<sup>st</sup> respondent sought a permanent injunction the lease was due to lapse on 15<sup>th</sup> November 2020; that had the lease been entered into properly, the sale of the suit property would not have affected the 1<sup>st</sup> respondent since the sale would have been subject to the existing lease; and that the appellant was capable of meeting any award of damages.
  6. In the impugned ruling, the learned Judge found: that although the consent of the appellant was not sought and obtained before the lease between the respondents was entered into contrary to the provisions of section 88(1)(g) of the Land Act, the omission could not be visited against the 1<sup>st</sup> respondent who was unaware of the transaction; that since the purpose of an order of injunction is to



preserve the substratum of the suit and the party who stood to be prejudiced if the order sought was not granted was the 1<sup>st</sup> respondent, a prima facie case was established; that the 1<sup>st</sup> respondent stated that it was using the subject property for its business; that although the rent that the 1<sup>st</sup> respondent was paying could be determined, the gains on the use of the subject property by the 1<sup>st</sup> respondent could not be quantified; that although the appellant stated that damages could be computed, the benefits derived from the business could not be ascertained and as such, irreparable injury would occur if the order sought was not granted; that if the appellant was allowed to proceed with the realization of the subject property, the 1<sup>st</sup> respondent would lose that which it holds dear in its operations; and that on the contrary, the appellant still had the right to go ahead and realize the security in the event the suit was dismissed hence it was proper to maintain the status obtaining pending the hearing of the suit.

7. The appellant is aggrieved by the decision and appeals to this Court on the following grounds that the learned Judge erred in fact and in law: in failing to find that the 1<sup>st</sup> respondent had not demonstrated that it had a prima facie case with probability of success; by failing to find that the respondents failed and/or neglected to obtain the written consent of the appellant to enter into the lease agreement dated 14<sup>th</sup> November 2020 contrary to the provisions of section 88(1)(f) of the Land Act; by failing to find that the 1<sup>st</sup> respondent lacked the locus standi to challenge the appellant's exercise of its statutory power of sale as it was not the registered owner of the suit property; in failing to find that the lease agreement dated 14<sup>th</sup> November 2020 lapsed on or before the 15<sup>th</sup> November 2022 prior to the delivery of the ruling on 28<sup>th</sup> July 2023 hence the 1<sup>st</sup> respondent's rights, if any, had lapsed by effluxion of time rendering the application without legal basis and overtaken by events; by improperly exercising discretion in favour of the 1<sup>st</sup> respondent and taking into account irrelevant factors in arriving at the ruling; in finding that the 1<sup>st</sup> respondent would suffer irreparable injury and that damages would not be sufficient; in finding that the balance of convenience tilted in favour of the 1<sup>st</sup> respondent; in failing to find that the 1<sup>st</sup> respondent's claim that if the suit property was sold, it would be evicted had no basis in law as any purchaser by public auction would buy the suit property subject to the existing leases; by disregarding the averments and evidence adduced by the appellant thereby deciding the application against the weight of evidence adduced; and by failing to consider the appellant's submissions and authorities hence arriving at an erroneous conclusions.
8. We heard this appeal on 16<sup>th</sup> July 2024 on this Court's virtual platform when learned counsel, Mr Kisinga, appeared for the appellant, learned counsel, Mr Bunde, appeared on behalf of Ms Waguthi for the 1<sup>st</sup> respondent, and learned counsel, Mr Mkan, held brief for Mr Jonathan for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Although Mr Kisinga had filed his submissions and was ready to proceed, both Mr Bunde and Mr Mkan had not filed their submissions. We therefore directed Mr Bunde and Mr Mkan to make oral submissions.
9. The bulk of the submissions made by the appellant were directed at the merits of the suit rather than the ruling granting the injunction. However, the substance of the appellant's submissions was: that the 1<sup>st</sup> respondent failed to establish a prima facie case; that the 1<sup>st</sup> respondent not being the registered owner of the suit property had no locus standi to challenge the appellant's exercise of its statutory power of sale; that the lease having lapsed on 15<sup>th</sup> November 2022 prior to the delivery of the ruling on 28<sup>th</sup> July 2023, the 1<sup>st</sup> respondent's rights, if any had lapsed by effluxion of time rendering the application without legal basis; that the learned Judge erred in finding that the 1<sup>st</sup> respondent's loss would not be adequately compensated in damages yet the suit property was being used for commercial purposes whose value was ascertainable; that since the borrower had been in default since 2015, the appellant stood to be prejudiced by the grant of the injunction due to escalating interests with the risk that the debt would outstrip the value of the property; and that the 1<sup>st</sup> respondent, if he was properly in the suit



premises would not be prejudiced as the purchaser would take the title subject to the 1<sup>st</sup> respondent's interests.

10. Mr Bundi did not address us stating that he had no file.
11. Mr Mkan submitted that the lease created a contractual relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on one hand and the 1<sup>st</sup> respondent on the other hand; that in those circumstances, it was proper for the court to safeguard the interest of the 1<sup>st</sup> respondent; and that although the chargee has a right over the suit property, the interference with the interests of the 1<sup>st</sup> respondent ought to be sorted out first.
12. We have considered the submissions made before us. As we have stated the bulk of the submissions made on behalf of the appellant addressed the substantive issues in the suit as opposed to the application that was before the learned Judge. This being an interlocutory appeal, care must be taken to obviate expressing a conclusive view of the matter as the main suit is still pending before the trial court. The practice is and has always been that at an interlocutory stage the court may only express its views in the matters in controversy on a prima facie basis. Otherwise, a concluded view is likely to tie the hands of the Judge who would eventually hear the case, and is likely to cause embarrassment to the trial court. See *Mansur Said & Others v Najma Surur Rizik Surur* Civil Appeal No. 186 of 2005 and *Niazons (K) Limited v China Road & Bridge Corporation (Kenya)* Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502. A similar view was expressed by this Court in *Said Almed v Mannasseh Benga & Another* [2019] eKLR where it was appreciated that:

“...this is an interlocutory appeal, and so, like the trial court, this Court cannot make conclusive finding of fact as that would prejudice the proceedings in the main trial which is still pending.”

13. It is agreed by all the parties to the suit that the 1<sup>st</sup> respondent who filed the suit was not a registered owner of the suit property. It was in fact not a party to the transaction between the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Its claim or interest in the suit property was that of a lessee of the suit property. The learned Judge in arriving at the impugned decision did not address the issue whether or not the 1<sup>st</sup> respondent had locus standi to challenge the appellant's exercise of its statutory power of sale, an issue that was expressly raised by the appellant. The law as reiterated by this Court in the case of *Mohammed Eltaff & 3 others v Dream Camp Kenya Limited* [2005] eKLR is that the failure by a court to deal with the issues raised is a serious omission. In that case it was held that:

“We agree with Mr. Gautama that it is indeed a substantial objection to a judgment if it does not dispose of the questions that were presented by the parties for determination by the trial court or that the judgment has left certain issues unresolved.”

14. This Court in *Agnes Nzali Muthoka v Insurance Company of East Africa* [2001] 1 EA 143 held that:

“It is elementary that a judge has to hear parties, record down as fully as possible what they submit on, crystallise the issues, answer them as fully as possible and eventually hand down a decision.”

15. Kwach, JA in *Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others* [1993] eKLR added his voice by stating that:

“Nineteen issues were framed for decision by the judge. In his judgment, the judge only dealt with 9 issues leaving 10 undecided. It was the submission of Mrs Dias, for the respondents,



that the issues that the judge did not deal with explicitly he had covered by implication. With respect this is not borne out by a perusal of the judgment and in any event this would constitute a violation of the express provisions of order 20 rule 5 of the Civil Procedure Rules... Once issues were framed, the judge was obliged to decide each and every one of them and in failing to do so he committed a serious breach of procedure. This ground of appeal accordingly succeeds.”

16. The issue of locus standi was, as we shall show shortly, a serious issue in the application as it went to the determination as to whether or not a prima facie case was established. This Court in *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR defined locus standi thus:

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding

.... Lack of locus standi and lack of a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; literally it means a place of standing - see Jowitt’s Dictionary of English Law (2nd Edn). To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

17. We reiterate that the 1<sup>st</sup> respondent was allegedly a tenant of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, who was carrying out business on the suit property. It was aggrieved by the failure by the appellant to notify it of the intention to exercise its statutory power of sale of the suit property with the aim of realising its security under a charge by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In principle, the 1<sup>st</sup> respondent had no contractual or other legal right of claim under the charge on the basis of which the appellant moved to realise its security. Neither did it have any right or interest recognised under section 24 of the Land Registration Act, 2012. Indeed, it does not fall in the category of persons entitled to seek relief under section 103(1) and (2) of the *Land Act*, 2012.

18. In any event, once the appellant issued its statutory notice of sale to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, it was under no statutory or other legal obligation thereafter to issue such notice to any third party claiming under a tenancy or other contractual relationship with the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to which the charge was not subject.

19. In *Nairobi Mamba Village v National Bank of Kenya* [2002] 1 EA 197, Ringera, J. (as he then was) correctly held that it was only the chargor who could legitimately seek relief against the exercise by the chargee of its power of sale. As the learned Judge observed:

“In my judgment the only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively is the charger...Let me also say that the Plaintiff has an interest in the charged property for it is both the security for its indebtedness and the location of its business.

However such an interest does not suffice to give it locus standi to obtain an injunction against the chargee. The debtor’s interest it has in the property is not a proprietary interest therein and it does not in my view give it standing to question the exercise of the power of sale. The lessee or Licencee’s interest too does not suffice for the purpose of questioning the exercise of the power of sale.”



20. Similarly, in *Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd* [2004] 1 EA 357, this Court found that a debtor who had partly secured a loan by a charge against a third party's property could not seek to restrain or challenge the chargee's exercise of the statutory power of sale for want of proprietary interest in the charged property. In this regard, the Court observed:

“Lastly the Applicant has not shown that if the order of injunction is not granted, the appeal, if successful, will be rendered nugatory. The suit property does not belong to the Applicant. The owner of the suit property M/S Komarock View Estate Limited is not a party to the suit and has not challenged the intended exercise of statutory power of sale by the bank. So, even if the suit property is sold, the Applicant will not lose any proprietary right to the property. In the circumstances, if the appeal succeeds damages would be the only relief appropriate to the Applicant. It has not been said that the Respondent's bank has no means to pay compensation that may be ordered.”

21. It is noteworthy that this hitherto restricted locus was expanded vide section 103(1) of the [Land Act, 2012](#) to include other persons who may seek relief against a chargee. However, the Land Laws (Amendment) Act, 2016 [Act No. 28 of 2016](#) deleted section 103(1) (d), which had provided that lessees of the chargors were also entitled to seek relief. Accordingly, the current section 103(1) reads:

103. Application for relief by charger

1. An application for relief against the exercise by the chargee of any of the remedies referred to in section 90 (3) may be made by—
  - a. the chargor;
  - b. if two or more persons are joint chargors, by one or more of them on their own behalf;
  - c. a spouse of the chargor to the extent that the spouse was required to give consent to the creation of the charge but did not give consent;
  - d. deleted by [Act No. 28 of 2016](#), s. 75;
  - e. the trustee in bankruptcy of the chargor.

22. On the authority of *Executive Curtains & Furnishers Limited v Family Finance Building Society* [2007] eKLR), statutory notices are only issued once at the point of default, and the chargee is not required to repeat or reissue the notice once it is issued and served upon the chargor, the only party with locus standi to apply for injunction to restrain a chargee from exercising its statutory power of sale. See *Bank of Africa Kenya Limited & Another V TSS Investment Limited & 2 Others (Civil Appeal E055 Of 2022)* [2024] KECA 410 (KLR) (26 April 2024) (Judgment)

23. As was held in *The Siskina* [1979] A.C. 210, 256:

“a right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the plaintiff.

24. In an application for injunction the Judge should sequentially address the conditions for granting an application for injunction instead of proceeding straightaway to address the third condition because without establishing the existence of a prima facie case, a consideration of the other two conditions



becomes unnecessary. Where therefore an applicant has no registered interest in the land comprised in the title in dispute, it cannot be said that a prima facie case with a probability of success has been demonstrated, and as held in *Kenya Commercial Finance Company Limited v Afraha Education Society & 4 Others* Civil Appeal No. 142 of 1999 [2001] 1 EA 86:

“A party who has no registered interest in the suit parcel of land cannot be said to have a prima facie with probability of success case for the purposes of grant of injunction.”

25. It is clear that the 1<sup>st</sup> respondent had no locus to challenge the appellant’s exercise of its statutory power of sale. Without establishing its locus in the matter, the 1<sup>st</sup> respondent could not be said to have demonstrated a prima facie case with probability of success.
26. It is also clear from the 1<sup>st</sup> respondent’s own pleadings that the alleged lease was meant to lapse on 15<sup>th</sup> November 2022. The impugned ruling was delivered on 28<sup>th</sup> July 2023, long after the lease had expired. By granting the injunction, the learned Judge, in effect, extended the lease. It is trite law, as held in *National Bank of Kenya Ltd v Pipe Plastic Samkolit (Kenya) Ltd & Anor* [2002] E.A 503, that parties are bound by the terms of contract and a court of law cannot rewrite a contract between the parties. In granting the injunction post the expiry of the lease, the learned Judge in effect extended the alleged lease and bound the parties to a lease that no longer existed.
27. We are also not satisfied that damages could not have been an adequate remedy. The suit premises were being used for commercial purposes and it was not stated that there was anything unique about it and that the 1<sup>st</sup> respondent could not get similar premises where it could carry out the same business. The 1<sup>st</sup> respondent’s only complaint was the length of the notice as opposed to availability of alternative premises. Accordingly, there was no evidence that the 1<sup>st</sup> respondent stood to suffer irreparable loss if it was evicted as a result of the intended sale.
28. Considering the fact that the suit by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents challenging the sale had been dismissed, we find that the balance of convenience tilted in favour of the appellant since the interest continued to accrue. It was only prudent and in the interest of both the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the suit property be sold in order to arrest the escalation of interest.
29. Having considered the appeal, we find that the appeal meets the criteria for interfering with the exercise of discretion as set out by Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A where he held that:

“The Court of Appeal is only entitled to interfere [with the exercise of discretion] if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
30. We find that the learned Judge misdirected herself in law relating to the locus standi in challenging the exercise of a chargee’s statutory power of sale. We also find that the learned Judge failed to consider that by the time of the delivery of the ruling, the tenancy relationship between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, which was the basis upon which the injunction was sought no longer existed, this being a material consideration. By granting the injunction, the learned Judge, in effect, extended the alleged lease between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents contrary to the established law. That was plainly wrong.



- 31. Consequently, we find merit in this appeal which we hereby allow. We set aside the decision of the learned Judge made on 28<sup>th</sup> July 2023 in Mombasa High Court Civil Case No. E030 of 2022 allowing the application dated 9<sup>th</sup> May 2022 and granting the temporary order of injunction pending the hearing and determination of the suit and substitute therefor an order dismissing the said application with costs.
- 32. We award the costs of this appeal to the appellant to be borne by the 1<sup>st</sup> respondent.
- 33. Those shall be our orders.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2025.**

**A.K. MURGOR**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

