



REPUBLIC OF KENYA



**Munga v Africa Banking Corporation & 2 others (Civil Case E602 of 2024)
[2025] KEHC 544 (KLR) (Commercial and Tax) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E602 OF 2024
A MABEYA, J
JANUARY 29, 2025**

BETWEEN

DR PETR KAHARA MUNGA APPLICANT

AND

AFRICA BANKING CORPORATION 1ST DEFENDANT

ABC CAPITAL LIMITED 2ND DEFENDANT

EQUATORIAL NUTS PROCESS LIMITED 3RD DEFENDANT

RULING

1. The application before Court is dated 4/10/2024 and is brought under Article 40 of the [Constitution of Kenya](#) 2010 and Order 40, Rule 1 of the [Civil Procedure Rules](#) 2010.
2. The application sought a temporary injunction to restrain the defendants, their servants, or agents from advertising, selling, auctioning, transferring, disposing of, or interfering with the plaintiff's 75,000,000 shares held with Britam Kenya. The plaintiff further sought orders for a permanent injunction to prevent the defendants from realizing the securities issued by the 3rd defendant to the 1st defendant.
3. The application was supported by the affidavit of Dr. Peter Kahara Munga, sworn on 4/10/2024. The plaintiff's case was that he holds 75,000,000 shares with Britam Kenya, which were originally held with Genghis Capital Limited before being transferred to the 2nd defendant, ABC Capital. These shares were used as security for a loan facility advanced to the 3rd defendant by the 1st defendant to fund a World Food Programme contract, with a lien created on them.
4. According to the plaintiff, following the 3rd defendant's default on the loan repayment, he received a demand letter for payment of Kshs 433,767,398.33, threatening the sale of his shares if payment was



- not made. The plaintiff contended that he plans to use his shares to secure another loan and that the securities registered before his shares should be prioritized according to the doctrine of priority. He further contended that the demand letter violated the in duplum rule.
5. The 1st and 2nd defendants opposed the application. The 2nd defendant, acting as an agent of the 1st defendant, adopted the contents of the replying affidavit filed by Faith Nteere, the Senior Legal Manager at African Banking Corporation Limited (the 1st defendant).
 6. In her affidavit, filed on 29/10/2024, Nteere stated that the application sought to distort the terms of the loan facility. She stated that the 1st defendant provided multiple loan facilities to the 3rd defendant, with both the plaintiff and the 3rd defendant signing the offer letter. She further explained that the plaintiff, in his capacity as a director of the 3rd defendant, signed a personal guarantee and indemnity in favor of the 1st defendant, agreeing to repay the loan in the event of default. According to her, the demand notice dated 24/9/2024 sent to the plaintiff was valid due to the plaintiff's commitment to repay the loan.
 7. She further contended that the necessary approval from the Central Bank will be obtained at the time the shares are sold. That the plaintiff had not established a *prima facie* case, as the default was acknowledged. That the Plaintiff will not suffer irreparable harm, as the 1st defendant is a reputable financial institution capable of compensating the plaintiff with damages if needed.
 8. The application was argued through written submissions, which have been considered. Although the Court had initially indicated that they be hi-lighted, on carefully considering the same, there seemed to be no need for such hi-lighting. The primary issue for determination is whether the plaintiff has established a sufficient case to warrant the orders sought.
 9. On the first prayer, the plaintiff sought a temporary injunction to restrain the defendants from advertising, selling, auctioning, transferring, disposing of, or interfering with his 75,000,000 shares held with Britam Kenya.
 10. The principles for granting injunctive orders are well settled in *Giella v Cassman Brown & Co. (1973) EA*. To succeed, the plaintiff must demonstrate a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by an award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.
 11. The plaintiff acts as a guarantor for the indebtedness of the 3rd defendant arising from a loan facility provided by the 1st defendant. The plaintiff signed over his shares as collateral to secure the loan facility granted to the 3rd defendant. It is undisputed that the loan fell into arrears, leading the 1st defendant to issue a demand letter for payment of Kshs 433,767,398.33, to the plaintiff to rectify the default.
 12. The plaintiff contended that the 1st defendant should first utilize the securities registered before the plaintiff's shares to settle the loan facility. Additionally, he contended that if the 1st and 2nd defendant proceeded to sell the shares, it would violate his rights of ownership over the shares, contrary to Article 40 of the [Constitution](#), which protects the right to a fair hearing.
 13. The 1st defendant, on the other hand, contended that it was a conditional term of the contract that all securities, including the plaintiff's shares, were to be provided prior to the disbursement of the loan to the 3rd defendant. It further contended that there is no law or statute that expressly prohibits the sale of the plaintiff's shares, nor does any legal provision dictate that the 1st defendant must first realize the value of the other securities before proceeding with the sale of the plaintiff's shares.
 14. The plaintiff disputed the interest and contended that the amount demanded violated the in duplum rule.



15. The law is that a dispute on the loan amount and interest will not be a basis for granting an injunction as was held in the case of *Thatthy v Middle East Bank (K) Ltd & Anor* (2002) 1 KLR 595. In that case, it was held that: -
- “Since it is settled law that a dispute as to the amount owed would not of itself be a ground for injunctioning the mortgagee from exercising its statutory power of sale, whether the accounts were supplied (as sworn by the bank) or not supplied (as sworn by the plaintiff’s attorney) would not have a decisive bearing on whether or not to grant an injunction as prayed.”
16. The circumstances in which a mortgagee or chargee may be restrained from exercising his statutory power of sale are set out in *Halsbury’s Laws of England* Vol. 32 (4th Edition) paragraph 725 wherein it is stated thus: -
- “When mortgagees may be restrained from exercising power of sales—
- “The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”
17. The Court of Appeal emphasized on the above statement in the case of *Mrao Ltd v First American Bank of Kenya Ltd & Others* (2003) KLR 123 made it clear that when injunctions are sought to restrain mortgagees and chargees from realizing their security, additional care and consideration of the circumstances surrounding the transaction are highly relevant. The primary focus in such cases is whether the debt is being paid. Furthermore, the Court held that a dispute regarding the amounts due is not a sufficient ground to halt the realization process, even if the dispute arises from allegations of illegal or contested interest.
18. The plaintiff, being a guarantor and director of the 3rd defendant, committed to being liable for the repayment of the loan facility in the event that the borrower defaulted on its repayment obligations. By executing the deed of guarantee, the plaintiff assumed responsibility for the outstanding loan balance.
19. This meant that the plaintiff is legally bound to repay the entire loan amount, including any outstanding principal, accrued interest, fees, and penalties arising from the 3rd defendant’s default. The lender is entitled to initiate recovery actions directly against the plaintiff without first being required to pursue the borrower. When a party has willingly offered his property as collateral for a facility, such a party cannot turn around and claim that the realization of the collateral amounts to infringement of the right to property.
20. The Court finds that the issue of the plaintiff’s shares being used as security for another loan facility is irrelevant to the 3rd defendant’s indebtedness and his obligation to repay the loan. In this regard, the Court is not persuaded that the plaintiff has established any *prima facie* case with any probability of success.
21. The next issue is whether the plaintiff has established he will suffer irreparable loss and damage which would not be adequately compensated by way of damages. The plaintiff contended that if the injunction is not granted, he would lose his shares which are valued at Kshs 280,000,000/= which are inadequate to repay the amount demanded of Kshs.433,767,398.33.



22. From the pleadings, the Court finds that while it is crucial to preserve the plaintiff's right to property under Article 40 of the Constitution of Kenya, it is equally important to protect the interests and rights of the 1st defendant in the lien for which it lent out a huge loan to the 3rd defendant. The plaintiff's contention that he stands to lose his shares has an answer in the decision in Andrew M. Wanjohi v. Equity Building Society & 7 Others (2006) eKLR, wherein the court held, *inter alia*, that: -
- “...by offering the suit property as security, the chargor was equating it to a commodity which the chargee may dispose of in order to recover the loan, together with any interest thereon.”
23. This Court finds that, as the default has not been rectified, the plaintiff will suffer no irreparable harm if the injunctive orders are not granted.
24. On the balance of convenience, based on the materials presented, the Court finds that the balance tilts in favor of the 1st defendant being allowed to recoup its outlay and prevent the outstanding amount exceeding the securities held. The result is that the prayer for temporary injunction fails.
25. The second issue is that the plaintiff further sought orders for a permanent injunction to prevent the defendants from realizing the securities issued by the 3rd defendant to the 1st defendant. The Court has already that a chargee cannot be prohibited from realizing a security of a loan in the event of default unless the debt is paid into court. In the absence of such payment, the Court finds that the prayer for a permanent injunction preventing the 1st defendant from realizing the security is untenable and is disallowed.
26. Accordingly, the Court finds that the Notice of Motion dated 4/10/2024 lacks merit and is hereby dismissed with costs.

It is so ordered.

SIGNED AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.

A. MABEYA, FCI ARB

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE

