



**Shanghavi & another v M Oriental Bank Limited (Civil Suit E258 of 2024)
[2025] KEHC 1138 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E258 OF 2024
FG MUGAMBI, J
FEBRUARY 27, 2025**

BETWEEN

JAYESH UMEDLAL SHANGHAVI 1ST APPLICANT

NINA JAYESH SHANGHAVI 2ND APPLICANT

AND

M ORIENTAL BANK LIMITED RESPONDENT

RULING

1. Before court is the application dated 14/5/2024 brought under Order 40 rule 1 and Order 51 of the Civil Procedure Rules 2010 as well as Sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The application seeks conservatory orders restraining the respondent (the Bank) from selling or auctioning the property known as Unit Number 2 on the 5th floor of Fortis Tower (Title No. I.R. 150447, erected on LR No. 1870/IX/50) belonging to the applicants (the suit property). It further seeks orders directing the Bank to produce and file before the court accurate and verified statements of account to account for the sums claimed and owed under the charge over the suit property. It is supported by an affidavit sworn by Jayesh Umedlal Shanghavi on even date.
3. The applicants confirm being directors of The Good Earth Group Limited, a company which is currently under administration. They confirm that the company applied for and was extended financial facilities amounting to Kshs 70,000,000/= from the Bank. The facility was secured by amongst others, the suit property herein.
4. The applicants take issue with the Bank for attempting to recover the debt from their private property arguing that the company is a separate legal entity from them. It is their case that in the absence of any communication from the company's administrator, the Bank should be estopped from proceeding



with the alleged illegal sale since the administrator's report listed the Bank as a creditor. The applicants also question the amount claimed by the Bank, asserting that they had already made substantial payments toward settling the debt.

5. The application is opposed through a replying affidavit sworn by Wilfred Machini on 12/7/2024. The Bank equally acknowledges having extended several financial facilities to The Good Earth Group Limited, where the applicants were directors. The Bank adds that the company defaulted in its loan repayments, resulting in arrears amounting to Kshs 120,883,498.68. The Bank disputes the alleged variance in the amounts claimed. It is the Bank's case that as the company was insolvent, the applicants, as guarantors, were responsible for settling the outstanding debt.

Analysis and Determination

6. The application was canvassed by way of written submissions which I have carefully considered alongside the application, response, authorities cited and evidence produced by the parties.
7. The main issue for determination is whether the applicants have met the threshold for grant of conservatory orders. The principles guiding grant of conservatory orders in Kenya are well settled. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, discussed, the nature of conservatory orders as follows: -

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant's case for orders of stay.”

The court in *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & Others*; Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR summarized three main principles for consideration on whether to grant conservatory orders as follows:

- i. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
 - ii. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - iii. The public interest must be considered before grant of a conservatory order.
8. Considering the threshold established in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR I am not satisfied that the applicants have made out a prima facie case. I say so noting that the loan facility is acknowledged and it is undisputed that the applicants, in their capacity as directors of the Good Earth Group Ltd, guaranteed various facilities extended to the company.
 9. These facilities were secured by the suit property, which is the subject matter of these proceedings. The contention that the company, as the borrower, is under administration does not stop the Bank from pursuing its claim as a secured creditor. It is for this very reason that the property in question is not subject to administration proceedings, having been charged to the Bank.



10. It is a settled principle in law that once a property is offered as security, it becomes a realizable asset upon default. As held in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, a chargee's statutory right to sell crystallizes upon default, provided due process is followed. The applicants, by voluntarily offering the suit property as security, effectively discharged their absolute right of ownership under Article 40 of the *Constitution* in the event of default. They cannot therefore validly claim that they stand to suffer irreparable harm or prejudice, as their constitutional rights to property have already been waived to the loan obligations.
11. On the aspect of public interest, the Black's Law Dictionary 9th Edition defines public interest as:

“...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation”. In litigating on matters of “general public importance”, an understanding of what amounts to ‘public’ or ‘public interest’ is necessary. “Public” is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.”
12. Additionally, in the case of *Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamni and 4 others*, [2014] eKLR it was held that:

“...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large.”
13. The dispute before court does not qualify as a matter of public interest. The agreements entered into by the parties were purely private commercial transactions, intended to benefit only the contracting parties before the court. The mere fact that the respondent is a financial institution whose primary business involves dealings with the public does not, in itself, raise the matter to one affecting the broader society. For a matter to be deemed one of public interest, it must exceed the personal interests of the litigant and have a substantial impact on the general public or a significant segment of society. Consequently, I find no basis to categorize the matter as one of public importance.
14. In view of the foregoing, the applicants have failed to establish a case warranting the grant of a conservatory restraining the respondent from exercising its statutory power of sale. The applicant further sought an order directing the respondents to produce an accurate, true, and verified statement of accounts. The said statements of account are produced at pages 84 to 87 of the Bank's documents, thereby rendering this prayer moot. Suffice to say, the applicants do not question the validity of the said statements. By dint of section 176, the same are therefore proof that the amount due and owing to the Bank as at 30th June 2024 is Kshs. 120,883,498.63.
15. Having not convinced this court that there is an element of public interest and also having not made out a prima facie case with a probability of success, the inquiry on whether the applicants are entitled to a conservatory order ends at this point in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 Others*(supra).
16. In any event, I find that any loss that is to be suffered by them can ameliorated by an award of damages as per section 99(4) of the *Land Act*. I have not been shown or told that the Bank is not capable of paying these damages. The balance of convenience also tilts in favour of the Bank realizing their security as early as possible so that the value of the suit property is not outstripped by the ballooning debt.



Disposition

17. Accordingly, the application dated 14/5/2024 is devoid of merit. It is dismissed with costs to the respondents.

SIGNED IN NAIROBI

F. MUGAMBI

JUDGE

DATED AND DELIVERED IN NAIROBI THIS 27th DAY OF FEBRUARY 2025.

A. VISRAM

JUDGE

