



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiboro v Progressive Credit Limited & another (Commercial Suit E039 of 2023)  
[2025] KEHC 3614 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3614 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E039 OF 2023**

**H NAMISI, J**

**MARCH 24, 2025**

**BETWEEN**

**SHEILA KEMUNTO KIBORO ..... PLAINTIFF**

**AND**

**PROGRESSIVE CREDIT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. Before the Court is a Notice of Motion dated 2 February 2023 seeking the following orders:
  - i. (spent)
  - ii. An Order be issued pending the hearing and determination of this application inter partes prohibiting and/or restraining the Defendants/Respondents by themselves or through auctioneers, agents, servants, workers, employees, or any person acting on their behalf from auctioning, selling by private treaty, transferring, alienating, disposing of and/or altering the land records or changing ownership of that property known as Apartment No. 1A5 ON L.R 209/1256 (I.R 126571) Taj View Apartments, Riverside Drive within Nairobi County and/or interfering with the Plaintiff's possession thereof;
  - iii. An Order be issued pending the hearing and determination of the suit filed herewith prohibiting and/or restraining the Defendants/Respondents by themselves or through auctioneers, agents, servants, workers, employees, or any person acting on their behalf from auctioning, selling by private treaty, transferring, alienating, disposing of and/or altering the land records or changing ownership of that property known as Apartment No. 1A5 ON L.R



209/1256 (I.R. 126571) Taj View Apartments, Riverside Drive within Nairobi County and/or interfering with the Plaintiff's possession thereof

- iv. That costs of this application be provided for.
2. The Application is supported by the Affidavit sworn by the Plaintiff/Applicant and premised on the following grounds, inter alia:
- i. That the Plaintiff/Applicant is the proprietor of all that property known as Apartment number 1A5 on L.R NO. 209/1256 (I.R No. 126571/1) TAJ View Apartments Riverside Drive within Nairobi County (“the suit property”);
  - ii. That the Applicant has learnt of the 2nd Respondent intentions of auctioning the suit property on 07/02/2023 as communicated in one of the local dailies through publication of 30/01/2023 and actualization of the same will bridle and/or clog the Applicant's right of redemption over the suit property.
  - iii. That indeed, the Applicant who is a young lady and a first-time property owner is shocked about the Defendants' conduct and fears that she could be plunged into irreparable losses both financially and health-wise.
  - iv. That the said property was charged to secure loan of about Kshs. 4.5 million advanced by the 1<sup>st</sup> Defendant to one Walter Onchwari, the principal borrower and the Applicant was a mere guarantor.
  - v. That the 1<sup>st</sup> Defendant/Respondent has failed to inform the Applicant about the current liability of the principal borrower thus making it difficult for her to know the extent of default.
  - vi. That the Respondents have through calculated moves excluded and/or neglected the Applicant from participating in correspondence and/or activities relating to the loan in issue.
  - vii. That on 02/02/2023, the Applicant learnt through her friends and relatives that on 30/01/2023 the 2<sup>nd</sup> Respondent published an advertisement on one of the local dailies expressing its desire to auction the suit property on 07/02/2023 which act is calculated to rid the Applicant from exercising her right to equity of redemption. Consequently, the intended auction is illegal, unprocedural and meant to deprive the Applicant of her right to property by:
    - a. Failing to issue the statutory notice envisaged under section 90(2) of the [Land Act](#);
    - b. Failing to issue the notice of intention to sell pursuant to the provisions of section 96(3) of the [Land Act](#);
    - c. Failing to engage the Applicant on the issues regarding the impugned loan or default thereof at all;
    - d. Failing to communicate amount owing and due to the 1st Defendant to warrant the realization of the security;
    - e. Failing to grant the Applicant an opportunity to meet the accrued liability and/or offer alternative remedies/solutions.
    - f. The Defendants have not conducted valuation in the last 12 months as such the Applicant is apprehensive that the property is likely to be disposed of at throw-away consideration noting that the principal loan amount was less than half the value of the suit property.





restructuring of the loan facility, service of statutory notices upon the Applicant and condemning the Plaintiff/Applicant unheard.

10. On the issue of irreparable injury which would not be adequately compensated by an award of damages, the Plaintiff/Applicant submitted that she would suffer irreparably if the said orders are not granted as she stands to lose her property and only source of income. The Applicant relied on the case of Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 others [2008] eKLR , in which the court held:

“Damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

11. On a balance of convenience, the Plaintiff/Applicant relied on the case of Paul Gitonga Wanjau vs. Gathuthis Tea Factor y Company Ltd & 2 others (2016) eKLR.
12. On the issue of prima facie case with a probability of success, the Respondents relied on several authorities including the case of Mrao Ltd -vs- First American Bank of Kenya & 2 Others [2003] KLR 125. They submitted that just as the law protects borrowers, so does it promote a competitive, sustainable, efficient and effective credit industry. They argued that the Plaintiff/Applicant is bound by the charge instrument that she executed including, but not limited, to the clause providing for the exercise of the 1<sup>st</sup> Defendant/Respondent’s statutory power of sale.
13. It was the Respondents’ argument that the loan facility is not disputed and the Respondent’s statutory power of sale has risen legally. Further, in seeking to exercise its statutory power of sale, the 1<sup>st</sup> Respondent has complied with all the legal requirements as provided under Section 97 of the [Land Act](#).
14. As to whether damages are an adequate remedy, the Respondents argued the 1<sup>st</sup> Respondent is a financial institution with a wide pool of funds to pay the Plaintiff/Applicant any damages that she may suffer if an interlocutory injunction is not granted. The Resoondents relied on cases of Ngugi Mbugua & Anor vs Progressive Credit Limited [2021] eKLR, Muigai -vs- Housing Finance Co. Ltd & Another HCCC 1678 of 2001 and Vivo Energy Kenya Ltd -vs- Maloba Petrol Station Ltd & 3 Others [2015] eKLR.

### **Analysis & Determination**

15. I have considered the issues raised in this Application and keenly read the submissions by the parties. The first test is the issue of prima facie case. In the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal, indicated the following in regard to what constitutes a prima facie case:

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which



has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

16. In this instance, the Applicant has raised issues of service of the statutory or any other notices upon her, as well as disputing the amounts owed to the 1st Respondent. It is my considered view that the Applicant has established a prima facie case.
17. The second test is irreparable damage. On this issue, it is the Applicant's contention that she would suffer irreparably if the said orders are not granted as she stands to lose her property and only source of income. On the other hand, the 1<sup>st</sup> Respondent argued that it is a financial institution and is capable of compensating the Applicant if the Applicant's claim was to succeed.
18. In the face of the two competing arguments, I turn to the third test – balance of convenience. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, the Court held thus

“The meaning of balance of convenience in favor of the Applicant is that if an injunction is not granted and the suit is ultimately decided in favor of the Applicants, the inconvenience caused to the Applicant would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Applicants to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the Applicants who suffer. In other words, the Applicants have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

19. In the circumstances, the Application dated 2 February 2023 is allowed in terms of prayers (iii) and (iv) as follows:
  - a. An Order is hereby issued prohibiting and/or restraining the Defendants/Respondents by themselves or through auctioneers, agents, servants, workers, employees, or any person acting on their behalf from auctioning, selling by private treaty, transferring, alienating, disposing of and/or altering the land records or changing ownership of that property known as Apartment No. 1A5 ON L.R 209/1256 (I.R 126571) Taj View Apartments, Riverside Drive within Nairobi County and/or interfering with the Plaintiff's possession thereof pending the hearing and determination of the suit;
  - b. Costs in the cause

**DATED AND DELIVERED AT NAIROBI THIS 24 DAY OF MARCH 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

Ms. Mutua h/b Mr. Abidha .....for the Plaintiff/Applicant



Ms. Wamaitha for the Defendants/Respondents

Libertine Achieng ..... Court Assistant

