



Credit Automobile Limited v Diamond Trust Bank Kenya Limited (Commercial Case E155 of 2022) [2025] KEHC 5294 (KLR) (Commercial and Tax) (25 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E155 OF 2022**

RC RUTTO, J

APRIL 25, 2025

BETWEEN

CREDIT AUTOMOBILE LIMITED PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED DEFENDANT

RULING

1. Before this court for determination is a Notice of Motion Application filed under Certificate of Urgency dated 12th April, 2023 seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the entire suit, an order of injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, auctioning, taking possession of, leasing, transferring, or otherwise in any manner whatsoever interfering with all that property known as L.R No. 4894/127 (Original No. 4894/85) until this suit is heard and determined.
 - d. That the Honourable court be pleased to issue any such orders that may deem expedient and necessary in the circumstance of this case.
 - e. That the Defendant/Respondent be ordered to pay the costs of this application.



2. The application is premised on grounds on the face of the application and include that the Applicant obtained a financial facility from the Respondent, secured by L.R No. 4894/127 (Original No. 4894/85), a property belonging to Timothy Jowell Kamano. The Applicant asserts that the loan was fully repaid on or about 13th June 2014. However, the Respondent has refused to discharge the property, instead claiming that an outstanding balance of Kshs.5,100,000/= remains due. The Applicant contends that this amount arises from illegal charges, mismanagement of funds received, and failure to apply appropriate deductions. The Respondent now seeks to foreclose on the property, which is valued at over Kshs.50,000,000/=, despite it being matrimonial property belonging to the guarantor. The Applicant further argues that if the sale proceeds, the guarantor's family will be left homeless and destitute. Additionally, the Respondent has not conducted a recent valuation of the property and appears interested to sell it at an undervalued price.
3. In response, the Respondent filed a Replying Affidavit sworn on 10th October 2023 by Faith Ndonga, the Legal Manager of the Debt Recovery Unit. She stated that the Plaintiff had been granted financial facilities amounting to Kshs.7,003,176/=, which were secured by various properties. The Respondent avers that multiple statutory notices were issued to the Applicant and that the Applicant had acknowledged its indebtedness in a letter dated 14th March 2014, wherein it requested a report on the outstanding amount for settlement. The Respondent subsequently informed the Applicant that as of 21st March 2014, the amount owed stood at Kshs.7,393,945.91/=. On 11th June 2014, the Bank received a cheque for Kshs.6,368,939/= from the Applicant as part payment of the outstanding amount. This payment was applied towards settling Term Loan I and the Overdraft Facility, leaving Term Loan II still outstanding. The Bank issued a Notification of Sale to the Applicant on 31st August 2016. However, on 23rd September 2016, the Applicant denied the debt. In response, the Bank provided a detailed breakdown of the amount owed through a letter dated 26th October 2016. The Applicant's counsel acknowledged receipt of these documents in a letter dated 19th January 2017 and requested that the Bank refrain from further action until they received further instructions. Despite the Bank's requests for the Applicant to regularize the outstanding balance, no action was taken to remedy the default.
4. The Respondent further avers that all necessary statutory notices were issued and, as of 18th May 2023, the outstanding principal and interest on the Term Loan stood at Kshs.4,980,907.32/=:, while the borrower's account was overdrawn by Kshs.417,263.67/=:.
5. The Applicant subsequently filed a Further Affidavit sworn on 10th November 2023, asserting that the Respondent had failed to issue and serve a 90-day notice as required under Section 90(1) of the [Land Act](#). The Applicant contended that, in the absence of a valid 90-day notice, the Auctioneer's Notice is a nullity. Additionally, the Applicant argued that if the sale proceeds, it would suffer irreparable loss, given that the Respondent has imposed exorbitant and unlawful interest, penalties, and other charges.
6. During the hearing of the present application, both parties filed written submissions which I will consider along the oral highlights. The Applicant's submissions are dated 10th November 2023 while the Respondent's submissions are dated 5th December 2023. Parties highlighted their submissions on 4th November 2024.

Applicant's submissions

7. Mr. Odhiambo, counsel for the Applicant stated that the Respondent seeks to auction the subject property without providing any justification on how the debt accrued. He referred to the audit report, which, according to him, indicated that at the time the loan was being demanded, the Applicant had overpaid by approximately Kshs.300,000/=:, thereby establishing a prima facie case.



8. Counsel also cited the case of *Mrao Limited v First American Bank of Kenya* (2003) KLR 125 in support of his argument that the Applicant would suffer irreparable loss, as the subject property is matrimonial property that would be lost if the sale proceeds. He contended that since the Applicant had already repaid the loan, it should not be penalized twice. Additionally, he submitted that the subject property is valued at more than Kshs.50,000,000/= and that the Respondent has not demonstrated its ability to provide a refund.
9. Counsel submitted that the balance of convenience favors the Applicant, as the subject property is immovable and continues to appreciate in value. He further argued that there is an option for the Applicant to buy out the property or source a buyer and that, since the Respondent still holds the title, it can recover the outstanding amount. In support of this argument, the Applicant cited the case of *Stars & Garters Restaurant & Another v National Bank of Kenya Limited* [2019] eKLR. The Applicant also referenced the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, emphasizing that in determining whether a prima facie case has been established, the court should not conduct a mini-trial or closely examine the merits but only ascertain whether the Applicant has a right that has been or is likely to be violated.
10. Regarding the letter that the Respondent referenced as an admission of debt, counsel clarified that the letter merely sought clarification on the amount owed at the time and did not constitute an admission of liability. He further argued that the arrears in question relate to disputed charges, as the loan had been settled by 13th June 2024.
11. In its submissions, the Applicant also cited Rule 11 of the Auctioneers Rules, 1997, which prescribes the required contents of an instruction letter. The Applicant contended that there was no evidence of such a letter instructing the auctioneer and, therefore, the purported notice was in breach of the provisions, rendering it illegal. Thus, they urged the court to grant the prayers sought.

Respondent's submissions

12. The Respondent submitted on whether the Applicant is entitled to the injunctive reliefs sought.
13. On the first principle governing the grant of an injunction, Mr. Umba, counsel for the Respondent, submitted that the Applicant has not established a prima facie case. He relied on the case of *Mrao Limited v First American Bank & 2 Others* (2003) KLR 125 and further argued that the Plaintiff was duly served with all the requisite statutory notices as mandated by the *Land Act*, 2012.
14. He stated that the Applicant was served with a Statutory Notice dated 2nd September 2013, which was sent under a certificate of posting. Additionally, the Respondent issued a 40-day Notification of Sale under Section 96(2) of the *Land Act*, a 45-day Redemption Notice through Garam Investments, and a Statutory Notice under Section 90(3) of the *Land Act* dated 14th September 2020, also sent under a certificate of posting. A further 40-day Notification of Sale was issued on 4th February 2021.
15. The Respondent submitted that, given the foregoing, it cannot be said that its statutory power of sale has been improperly exercised. Therefore, the Applicant's attempt to challenge the sale lacks merit.
16. The Respondent submitted that a dispute over account balances cannot serve as a basis for granting an injunction to restrain a chargee from exercising its statutory power of sale. In support of this argument, the Respondent cited HCCC No. 3125 of 1995, *John P.O. Mutere & Another v Kenya Commercial Bank*, which was quoted with approval in *Housing Finance Company of Kenya v Ngege Kitson Mondo* [2006] eKLR. The Respondent argued that where there is a clear case of default, an injunction cannot be granted to prevent a mortgagee from exercising its statutory power of sale unless the outstanding amount is deposited in court.



17. Additionally, the Respondent, relying on the cases of Andrew Muriuki Wanjohi v Equity Building Society & Another [2006] eKLR, Andrew Ouko v Kenya Commercial Bank & 3 Others [2005] eKLR, and Section 99(4) of the *Land Act*, 2012, submitted that any loss suffered by the Applicant as a result of the Respondent's exercise of its statutory power of sale can be adequately compensated by damages, which the Bank, as a reputable financial institution, is capable of paying.
18. The Respondent submitted that the balance of convenience tilts in its favor, as the outstanding amount continues to accrue interest at contractual rates. Consequently, if the injunctive orders are issued pending the determination of the suit, the total outstanding amount will eventually surpass the value of the suit property, leading to further financial loss for the Applicant. The Respondent therefore urged the court to allow it to realize the security.
19. Furthermore, the Respondent argued that the Applicant has acted unconscionably and is undeserving of the court's relief, having failed to disclose that it had been duly served with all statutory notices and was fully aware of the Defendant's intention to exercise its statutory power of sale. The Respondent contended that the Applicant is not entitled to interlocutory injunctive orders, as it attempted to obtain them through misrepresentation, in direct contravention of the duty of good faith required of any party seeking ex parte relief. Accordingly, the Respondent urged the court to dismiss the Applicant's Application dated 12th April 2023 on this ground.
20. In conclusion, the Respondent submitted that the Applicant's Application dated 12th April 2023 lacks merit and should be dismissed with costs.

Analysis and Determination

21. I have considered averments and submissions by all parties; and the only one issue arising for determination is, whether the applicant has demonstrated that it is deserving of injunctive prayers sought and the attendant costs.
22. The granting of injunctive orders is a discretionary remedy by the Court and is based on the facts of each case. The burden of proving that the threshold for grant of injunction has been met is with the applicant.
23. The applicable law for the granting of injunctions is the provisions of Order 40 Rule 1 (a) of the Civil Procedure Rules and the principles for grant of injunction are set out in the case of *Giella –versus- Cassman Brown and Company Limited* (1973) E.A 385, at page 360 where the court held as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well-settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
24. In the case of *Mrao Limited –versus- First American Bank of Kenya and 2 Others* (2003) KLR 125, the Court of Appeal in determining what amounts to a prima facie case stated as follows: -

“A prima facie case in a Civil Case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an



arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

25. At this stage of trial, the Court is not expected to consider the merits of the case when determining whether or not a prima facie case has been established. This position was set out in *Nguruman Limited vs Jan Bonde Nielsen* [CA No. 77 of 2020](#) where the Court of Appeal stated as follows: -

"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 that has been or is threatened with a 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."

26. The Applicant instituted proceedings against the Respondent and sought injunctive orders, arguing that it had fully repaid the loan secured by L.R No. 4894/127 (Original No. 4894/85), a matrimonial property belonging to Timothy Jowell Kamano. The Applicant contended that the purported outstanding balance of Kshs 5,100,000/= arose from illegal charges, mismanagement of funds received, and failure to apply appropriate deductions. Additionally, the Applicant asserted that the property is valued at over Kshs. 50,000,000/= and that its sale would render the guarantor's family homeless and destitute.
27. From the facts presented in court, it is undisputed that the Applicant was granted various financial facilities by the Respondent, which were secured by multiple properties, including L.R No. 4894/127 (Original No. 4894/85). It is also uncontested that on 13th June 2014, the Applicant paid Kshs.6,368,939 towards the outstanding loan.
28. The Applicant's primary grievance are first that the Respondent had failed to issue and serve a 90-day notice as required under Section 90(1) of the [Land Act](#) and valuation was not done. The burden of proof is upon the respondent to prove that they issued the statutory notices. From the evidence presented, this court notes that the applicant was served with a statutory notice dated 2nd December 2013 which was sent through their address as disclosed in the mortgage (P.O Box 56776-00200 Nairobi). That the notice was also copied to the directors. Notably, save for stating that they were not served with the notices, they did not controvert the respondent evidence in any way. Thus, this court is left with one option that the applicants were served by way of posting, a recognized mode of service.
29. Secondly, while the applicant alleged that it had repaid the loan in full, it proceeded to raise concerns regarding the Respondent's alleged additional charges, which it categorizes as illegal fees, mismanagement of funds received, and failure to apply appropriate deductions. Courts have consistently held that a bank cannot be restrained from exercising its statutory power of sale solely on the grounds of disputed interest or calculations of the loan outstanding. In *Pelican Investments Ltd v National Bank of Kenya Ltd* [2000] 2 EA 488 (CCK) it was held that: -

"Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest...in any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction."

On this, the Respondent has demonstrated that it issued the computation of its figures to the applicant. The applicant has not specifically challenged or indicated the manner in which the fees charged are



illegal charges or mismanaged. At any rate, I believe those are issues that are substantive that can only be fully articulated at the trial.

30. The Applicant further submitted that, since the property is matrimonial property, the court should grant an injunction to prevent the family from becoming homeless and destitute. I am guided by the decision in Anita Chelegat v Fredrick Kumah Civil Appeal No. 300 of 2018 wherein it was held:

“The law has long been that once a property is offered as security for financial advances, it immediately becomes liable to be liquidated as a commodity in the property market the tender memories and deep emotions associated with it notwithstanding. We think the learned judge did well to follow and apply this court’s holding in Joseph Gitai Gachau- Vs- Pioneer Holdings [2009] e KLR:

However, we recognize the argument put forward by the applicants that the suit property is matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realize that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however, great, perse, would operate against the exercise of statutory power of sale by the mortgage”

It is patent that both under statute and the authorities, the sale of a charged property in exercise of a statutory power of sale is not an irreparable injury or an irredeemable loss. Should it be found upon the hearing of the case that there was irregularity or impropriety in the sale, such property is well- capable of valuation and the ensuing monetary compensation is sufficient to repair the harm or loss. On the aspect was well find the complaints against the learned judge to be misplaced. See Andrew Muriuki Wanjohi Vs Equity Building Society Ltd [2014] e KLR”

31. From the foregoing, the fact that the charged property was a matrimonial property would not, on that basis alone, preclude the Bank from exercising its statutory power of sale over such property once the power of sale arises and the court cannot stop it as well. In addition, spousal interest can be specifically pursued by the spouse in that capacity as the borrower in this instance was a corporate entity.
32. It is therefore my finding that the applicant has not established a prima facie case with a probability success. Having so found, as in Nguruman Limited v Jane Bonde Nielsen and 2 others Nrb Civil Appeal No 77 of 2012 [2014] eKLR since the applicant has not established a prima facie case with a probability of success, the issue whether the damages are sufficient to compensate the applicant in the event the suit succeeds does not arise. In view of my findings on the issue of prima facie case, I find that there is no reason to delve into determining if the rest of the limbs of principles of injunction were proved as the conditions for granting an interlocutory injunction are sequential so that the second and third hurdle of irreparable loss and balance of convenience can only be addressed if the first condition of prima facie case is satisfied.
33. From the foregoing findings, I find that the application dated 12th April 2023 is not merited and I therefore dismiss it with costs to the Respondent.

Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL, 2025.

RHODA RUTTO

JUDGE



In the presence of;

.....for appellant:

.....for Respondents:

.....Court Assistant:

