



REPUBLIC OF KENYA



KENYA LAW
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**Mama Watoto Supermarket v Ncba Bank Kenya Plc (Civil Case
E006 of 2025) [2025] KEHC 9236 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE E006 OF 2025
S MBUNGI, J
JUNE 25, 2025**

BETWEEN

MAMA WATOTO SUPERMARKET PLAINTIFF

AND

NCBA BANK KENYA PLC DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated 20th June 2025, brought under Order 50 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the *Civil Procedure Act* and Article 159(2) (d) of *the Constitution*. The applicant seeks an injunction restraining the respondent from selling or otherwise dealing with properties known as Kakamega/Municipality/Block 1/84, Kakamega/Town/Block 11/120, Butso/so/Shikoli/1780, Butso/so/Shikoli/241 and Kakamega/Town Block/11/119. The applicant also seeks review of this Court's ruling dated 11th June 2025 and an order setting it aside.
2. The application is supported by the affidavit of Paul Kahiu Waweru, a director of the Plaintiff company. He avers that the Defendant, through Canonical Realty Ltd, undervalued the charged properties in a report dated 24th February 2025, significantly lowering the forced sale values compared to a prior valuation by Hectares and Associates dated 10th March 2022. The undervaluation, he claims, was not disclosed during the hearing of the earlier application and constitutes new and material evidence warranting review.
3. Mr. Waweru further deposes that the Plaintiff has received an offer of KShs. 90 million for one of the properties Kakamega/ Municipality/ Block 1/84, yet Canonical Realty had valued it at KShs. 75 million with a forced sale value of KShs. 56.25 million. He argues that this discrepancy demonstrates the extent of the undervaluation and the prejudice the Plaintiff will suffer if the auction proceeds. He contends that the properties include both residential and business premises and that their loss would render the Plaintiff and its directors homeless and without a livelihood.



4. The affidavit also states that the Defendant will suffer no prejudice if the orders are granted since the auction is scheduled for 26th June 2025, and interim relief would allow the Court to reconsider its earlier ruling with the benefit of the newly available evidence. Annexed to the affidavit are the relevant valuation reports and sale advertisements marked as “PKW 1,” “PKW 2,” and “PKW 3.”
5. The court on 23rd June 2025, ordered that the applicant serves the respondent with the application for a response; and that parties file submissions to dispose the application. No response was filed by the respondent. Neither has the respondent filed submissions at the time of writing this ruling. I note that there is no return of service in the court file, nor in the CTS. It is therefore uncertain if they were indeed served, or made aware of the application.

Applicant’s Case.

6. The Plaintiff/Applicant filed written submissions dated 20th June 2025 in support of the application. It was submitted that the application meets the threshold under Order 45 Rule 1 of the Civil Procedure Rules, having disclosed new and important evidence that was not available to the Applicant at the time of determination of the previous application. Specifically, the Applicant contended that after the Court rendered its Ruling on 11th June 2025, it emerged that the Defendant’s appointed auctioneers had undervalued the charged properties in a valuation conducted by Canonical Realty Ltd. The forced sale values reflected therein were significantly lower than those set in the 2022 valuation by Hectares and Associates. This discrepancy, the Applicant argued, demonstrates a deliberate attempt to dispose of the properties at throw-away prices.
7. It was submitted that one of the charged properties, Kakamega/Municipality/Block 1/84, had recently attracted a genuine buyer willing to pay KShs. 90,000,000/= while the Defendant’s valuation had pegged the property at KShs. 75,000,000/= with a forced sale value of KShs. 56,250,000/= thus confirming the extent of undervaluation. The Plaintiff maintained that this information was not disclosed by the Respondent during the earlier proceedings and constitutes a sufficient ground for review under Order 45.
8. On the question of irreparable harm, the Applicant submitted that the properties under threat of auction are not just investment assets, but the very premises from which the Plaintiff operates its supermarket business and where its directors reside. If the sale is allowed to proceed, it was argued, the Plaintiff and its directors would be rendered homeless and destitute, with no place to operate from or live. It was further contended that this is the kind of damage that cannot be adequately compensated by an award of damages.
9. The Plaintiff prayed for the Court to invoke the overriding objectives under Sections 1A and 1B of the Civil Procedure Act and Article 159(2)(d) of the Constitution to ensure that justice is done substantively and that the application is not defeated on procedural technicalities. The Court was therefore urged to review its earlier ruling, grant the injunctive orders sought, and safeguard the Applicant’s proprietary interests until the suit is fully heard and determined.

Analysis and Determination

10. The Court has considered the application, the supporting affidavit, submissions and the materials presented.
11. The issues arising for determination include whether the application satisfies the threshold for review under Order 45 of the Civil Procedure Rules and whether sufficient grounds exist for the grant of a temporary injunction pending review.



12. Under Order 45 Rule 1 of the Civil Procedure Rules, an applicant must establish that:
- a. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced at the time the decree or order was passed; or
 - b. There is a mistake or error apparent on the face of the record; or
 - c. There exists any other sufficient reason to warrant review.
13. The applicant seeks review of the Court’s Ruling delivered on 11th June 2025, primarily on the ground that it has discovered new and important evidence regarding the valuation of the charged properties. The applicant’s concern is that Canonical Realty Ltd, the respondent’s appointed valuer, undervalued the properties. The applicant also asserts that a potential buyer has offered a significantly higher price for one of the properties than the forced sale value indicated in the bank’s valuation.
14. This Court in its ruling of 11th June 2025 found that the statutory notices issued by the Respondent and the entire execution process leading to the advertisement of the suit properties were compliant with the Land Act, the Auctioneers Rules, and other applicable laws. The validity of the auction process, as a legal step following default, was upheld. The current application does not in any way discredit that finding. Instead, it raises concern with the valuation relied upon by the Respondent and whether the properties were properly priced for forced sale.
15. The Court notes that the issue of valuation, while important, does not directly go to the legality or regularity of the execution. It does not demonstrate an error on the face of the record nor does it raise a point that was unavailable at the time of hearing the earlier application. As such, the threshold under Order 45 Rule 1 has not been met.
16. On the claim of undervaluation, the Court finds that either party, including the Applicant, is at liberty to commission an independent valuation of the properties. Nothing stops the Plaintiff from presenting a counter-valuation to the auctioneers or negotiating with the bank. Moreover, in the event that any irregularity in the auction results in a forced sale below fair market value, the Applicant would still have legal recourse, including a claim for refund or damages against the bank, which is a solvent and regulated financial institution.
17. The claim that the applicant will suffer irreparable harm is also not persuasive in the context of a commercial property that has been used as security for a financial facility. The Applicant knowingly offered the properties as collateral, and loss arising from enforcement of a lawful charge can generally be compensated by damages. The Court aligns with the principle stated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where it was held:
- “A dispute as to the amount due or the fact that the chargor is likely to suffer loss is not sufficient to stop a chargee from exercising its statutory power of sale... especially where the charged property was given as security willingly.”
18. Lastly, this Court must observe that the absence of a response from the Respondent does not, in and of itself, entitle the Applicant to the orders sought. The burden lies with the Applicant to meet the legal threshold for review and injunctive relief. As stated in *Kenya Commercial Finance Co. Ltd v Ngeny & Another* [2002] 1 KLR 106, “Injunctions restraining mortgagees from exercising their statutory power of sale should only be granted where there is no doubt that the sale is improper.”



19. In the instant case, no material has been placed before the Court to demonstrate that the sale is unlawful or procedurally flawed. The Applicant merely disputes the quantum of the forced sale valuation, which in itself does not invalidate the auction process or warrant a review of the Court's earlier ruling.

Conclusion

20. In light of the foregoing, the Court finds that the Applicant has not met the threshold for review under Order 45, nor has it shown that the injunctive relief sought is merited.
21. The application dated 20th June 2025 is accordingly dismissed with no order as to costs, noting the uncertainty as to whether the Respondent was served.
22. Right of appeal within 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JUNE, 2025.

S.N MBUNGI

JUDGE

In the presence of:

Court Assistant – Elizabeth Angong'a

Mr. Udoto for the Applicant present online.

