



Transfleet Limited & another v Middle East Bank Kenya Limited & 5 others (Commercial Case E034 of 2024) [2025] KEHC 11444 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E034 OF 2024**

**PM MULWA, J
JULY 31, 2025**

BETWEEN

TRANSFLEET LIMITED 1ST APPLICANT

KINGORANI INVESTMENTS LTD 2ND APPLICANT

AND

MIDDLE EAST BANK KENYA LIMITED 1ST DEFENDANT

AKBER ABDULLAH KASSAM ESMAIL 2ND DEFENDANT

ELIZABETH ONGARE 3RD DEFENDANT

GARAM INVESTMENTS 4TH DEFENDANT

THE CHIEF LAND REGISTRAR 5TH DEFENDANT

JAMES GITAU SINGH 6TH DEFENDANT

RULING

1. The Applicants herein have moved the Court vide a Notice of Motion dated 14th October 2024, seeking leave to amend the plaint and a raft of interlocutory orders including stay, injunction, production of auction records, declarations on the legality of the auction, and cancellation of a Certificate of Sale and title documents in respect of Land Reference Numbers 214/293, 214/260 and 214/234 situate at Orchard Close, off Muthaiga Road, Nairobi County (hereinafter "the suit properties"). The application is supported by the affidavit sworn by the 1st Plaintiff and is premised on grounds that raise fundamental issues regarding the legality of the charge instrument, propriety of the auction process, and protection of proprietary interests.



2. The factual background is not in dispute. The 1st Plaintiff is the borrower, while the 2nd Plaintiff is the registered proprietor of the suit properties. The 1st Plaintiff executed a letter of offer dated 8th February 2021 for a term loan facility of Kshs. 196,145,837.06 and an overdraft facility of Kshs. 92,550,000.00. A charge over the suit properties was registered in favour of the 1st Defendant on 23rd June 2021. The Plaintiffs admit falling into arrears but assert that they made substantial payments, totaling Kshs. 141,113,557.83, which was acknowledged by the 1st Defendant vide letter dated 24th August 2023. They argue that this gave rise to a legitimate expectation that enforcement measures would be held in abeyance pending further negotiations.
3. Nonetheless, the 1st Defendant proceeded to auction LR No. 214/293 on 16th January 2024, resulting in its sale to the 6th Respondent, who claims to have paid the full purchase price and received a Certificate of Sale and title documents. The Plaintiffs assert that the auction was conducted without notice, at an undervalue in contravention of the law, and was therefore unlawful, irregular, and null and void.
4. The Applicants challenge the validity of the charge instrument on the ground that it was executed under coercion and that the individual who executed the same, one Tom Onyango, was not the duly designated Company Secretary of the 1st Plaintiff and lacked the requisite authority to execute the charge on its behalf. It is further alleged that the 1st Defendant has acted in contravention of the in duplum rule by unlawfully allowing the interest and charges to exceed the principal sum advanced.
5. The 4th Defendant filed Grounds of Opposition dated 25th November 2024 and affidavit sworn by Joseph Gikonyo on 5th March 2025. He contends therein that the 2nd Plaintiff, as well as the 4th, 5th, and 6th Defendants, have not been properly joined as parties to the suit, and as such, no effective orders can be granted against them in the absence of proper joinder. He avers that the auction was lawful as all notices were issued to the Plaintiffs, and that the property was sold to the 6th Defendant who was the highest bidder at Kshs. 152,200,000.00 The 4th Defendant further argues that the Plaintiffs have failed to demonstrate the existence of a prima facie case with a probability of success. It is asserted that the nature of the claim, being one that is capable of being remedied by an award of damages, does not meet the threshold for the grant of injunctive relief. The 4th Defendant maintains that the auction in question was conducted lawfully and in compliance with the applicable legal requirements. It is further submitted that upon the fall of the hammer, the equity of redemption was extinguished and the interest in the suit property lawfully passed to the highest bidder.
6. The 6th Defendant, for his part, filed a Preliminary Objection, Grounds of Opposition, and a Replying Affidavit, all dated 4th December 2024. He contends that the present application is an abuse of the court process and is incompetent on account of failure to seek leave to enjoin him and other parties to these proceedings. He argues that the application is res judicata, there being a previously filed matter in the Environment and Land Court being ELC No. E018 of 2024 between the same parties and concerning the same subject matter, which was struck out on 8th October 2024. It is his case that the Applicants have not demonstrated the existence of a subsisting suit or any substantive reliefs sought against him to justify the issuance of interim or injunctive relief.
7. The 6th Respondent avers that he is an innocent purchaser for value, having emerged as the highest bidder at the auction conducted on 16th January 2024, with a bid of Kshs. 152,200,000.00. He states that he paid the requisite 10% deposit on the same day and executed a Memorandum of Sale with Garam Auctioneers, following which he was issued with a Certificate of Sale dated 16th January 2024. He further deposes that following the dismissal of ELC No. E018 of 2024, he paid the balance of



Kshs. 136,800,000.00 and was thereafter issued with the title documents, which were released to his advocates. The property, he asserts, has since been lawfully transferred into his name.

8. The 1st Defendant filed the Notice of Motion dated 17th January 2025 seeking to have the suit dismissed, and challenging the amended plaint asserting that it introduces new parties without leave of the court and that the Plaintiff introduces a new cause of action.
9. The application was heard by way of written submissions with counsel highlighting their respective arguments on 20th March 2025.

Analysis and determination

10. The Court has distilled the following issues for determination:
 - i. Whether the suit and application are res judicata.
 - ii. Whether the Applicants have met the threshold for grant of injunctive relief;
 - iii. Whether the 4th, 5th and 6th Defendants are properly on record.

Whether the suit and the application is res judicata

11. The 6th Defendant has raised the preliminary issue that this application is res judicata, citing the dismissal of ELC No. E018 of 2024. The doctrine of res judicata is codified under Section 7 of the *Civil Procedure Act*. The same provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

12. The Court of Appeal in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR laid down the elements necessary for a successful plea of res judicata as follows:

“...firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally.”

13. The rationale behind the doctrine is to prevent re-litigation of issues that have already been conclusively determined. It is meant to safeguard judicial economy, ensure finality in litigation, and prevent the abuse of court process. (See also *E.T. v Attorney General & Another* [2012] eKLR).
14. In the present case, it is not disputed that ELC No. E018 of 2024 involved the same parties and concerned the same subject matter namely, the charged properties known as LR Nos. 214/293, 214/260 and 214/234 and the validity of the charge instrument. It is further admitted by both parties that the suit was dismissed on grounds of lack of jurisdiction.
15. It is trite law that a suit struck out or dismissed on jurisdictional grounds does not amount to a determination on the merits and cannot ground a plea of res judicata. In *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Court of Appeal emphasized



that for res judicata to apply, the prior decision must have been heard and finally determined by a court competent to adjudicate the matter.

16. Therefore, while there is commonality of parties and issues between the instant suit and ELC No. E018 of 2024, the fact that the latter was dismissed for want of jurisdiction renders the plea of res judicata inapplicable. I accordingly find that the application is not res judicata.

Whether the Applicants have met the threshold for grant of injunctive relief

17. The principles for granting interlocutory injunctions are settled. In the *Locus Classica* case of *Giella v Cassman Brown & Co. Ltd* [1973] E.A. 358 the court stated that “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:
 - a. Establish his case only at a prima facie level,
 - b. Demonstrate irreparable injury if a temporary injunction is not granted, and
 - c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.”
18. These principles were reaffirmed by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, which emphasized that the tests are sequential and not conjunctive.
19. In applying these principles, I first consider whether the Applicants have established a prima facie case. The definition of a prima facie case was elaborated by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as follows:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
20. The Applicants challenge the validity of the charge on the ground that the person who executed it lacked authority, that the in duplum rule was breached, and that the auction of 16th January 2024 was conducted irregularly and without notice or valuation. These are weighty issues, but at this interlocutory stage, they must be backed by credible prima facie evidence.
21. From the material on record, Plaintiffs were advanced a loan facility of Kshs. 196,145,837.06 and an overdraft facility of Kshs. 92,550,000.00 by the 1st Defendant as per the offer letter dated 8th February 2021, and a legal charge was created over the suit properties. The Plaintiffs do not deny the existence of the debt. They admit that they defaulted and that statutory notices were issued. They also admit that they attempted to negotiate a repayment plan and paid Kshs. 141,113,557.83, acknowledged by the 1st Defendant on 24th August 2023. However, the 1st Defendant proceeded to exercise its statutory power of sale and conducted a public auction, culminating in the sale of LR No. 214/293 to the 6th Defendant.
22. While the Plaintiffs argue that the auction was irregular and that they were in negotiations, it is not shown that the statutory process had been suspended or waived. The law is clear that negotiations do not automatically suspend or invalidate statutory notices issued under the *Land Act*, unless expressly



agreed by the parties. In *Labelle International Ltd v Fidelity Commercial Ltd & Another* (2003) Z.E.A. it was held that:

“It is now established law that when part of the amount claimed is admitted or proved to be due, a charge cannot be restrained by an injunction.”

23. On the question of undervaluation, Section 97(2) of the *Land Act* obligates a chargee to obtain the best price reasonably obtainable at the time of sale. However, the Plaintiffs have not produced an alternative valuation to challenge the price at which the property was sold. Bare allegations of underpricing, without evidence, are insufficient to impeach an otherwise lawful auction. (See *Palmy Company Limited v Consolidated Bank of Kenya Limited & Another* [2014] eKLR).
24. Furthermore, upon the fall of the hammer at the auction, the equity of redemption was extinguished. This position is supported by Section 98(1) of the *Land Act* and reiterated in *Nancy Kahoya Amadiva v Expert Credit Limited & Another* [2015] eKLR.
25. The 6th Defendant has exhibited the Certificate of Sale, Memorandum of Sale, and evidence of full payment. He is a bona fide purchaser for value, and no fraud or collusion has been alleged or proved against him. Under Section 26(1) of the *Land Registration Act*, a certificate of title is prima facie evidence of ownership unless obtained through fraud or misrepresentation to which the holder is a party. None has been demonstrated here.
26. As to the alleged breach of the in duplum rule, Section 44A of the *Banking Act* limits recoverable interest and charges on a non-performing loan to not more than the principal sum. The Applicants have not placed before the Court a detailed account or forensic report to show that the principal sum was exceeded. This remains a matter best addressed at trial.
27. The irreparable harm alleged by the Applicants is the loss of the charged properties. This court notes that the Applicant having offered properties Land Reference Numbers 214/293, 214/260 and 214/234 situate at Orchard Close, off Muthaiga Road, Nairobi County as security for the loan offered the same becomes commodity for sale. As held in *Kitur v Standard Chartered Bank & 2 Others* [2002] 1 KLR:

“It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits.”

28. An injunction will not be issued hereof when the Applicant’s claim is that of a dispute of the amount owed to the bank as this court has already established that indeed the Applicant owes the bank an amount which needs to be ascertained.
29. This Court is therefore not persuaded that the Applicants will suffer irreparable harm incapable of being remedied by an award of damages. Nor does the balance of convenience favour them in the face of admitted default, compliance with statutory procedures, and the rights of a third-party purchaser.
30. In conclusion, the Applicants have not satisfied the threshold for the grant of interlocutory injunctive relief. They have not demonstrated a prima facie case with a probability of success, nor established



irreparable harm. The statutory process was lawfully invoked, the property has been sold, and proprietary interests have passed to a third party.

Whether the 4th, 5th, and 6th Defendants are properly on record for failure by the Plaintiff to seek leave to enjoin them

31. The 4th, 5th, and 6th Defendants have raised objections to their inclusion in these proceedings, contending that they have been irregularly joined as parties without leave of the Court having first been sought and obtained.
32. The applicable legal framework is found under Order 1 Rule 10 and Order 8 Rules 3 and 5 of the Civil Procedure Rules, 2010. In particular, Order 8 Rule 3(1) provides that:

“A party may amend his pleadings with the leave of the court.”
33. Further, Order 1 Rule 10(2) empowers the Court to add parties where necessary, in the following terms:

“The court may at any stage of the proceedings, either upon or without the application of either party...order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
34. Upon a careful perusal of the record, this Court finds that no formal leave was sought or granted either to amend the Plaintiff or to join the 4th, 5th, and 6th Defendants to the proceedings. The inclusion of these Defendants in the instant suit without seeking and obtaining leave was therefore procedurally irregular. The law is clear that where leave is required, it must be expressly sought and granted; a party cannot proceed to unilaterally amend pleadings or join additional parties without the imprimatur of the Court.
35. That said, the Plaintiff has now, within the present application, sought leave to amend the plaintiff and to formally enjoin the 4th, 5th and 6th Defendants to these proceedings. The question before the Court is whether it should, in the circumstances, exercise its discretion to grant such leave retrospectively, thereby regularizing what is otherwise a clear procedural misstep.
36. The discretion to allow amendments or joinder, even belatedly, is a judicial discretion, guided by the overarching principle that litigation should be conducted with finality on the basis of the real issues in controversy and not defeated on the basis of mere technicalities.
37. In the present case, it is evident that the 4th, 5th, and 6th Defendants are directly affected by the reliefs sought, particularly in relation to the auction process, issuance of the certificate of sale, and transfer of the suit properties. Their presence is, in my view, necessary to enable the Court to effectually and completely adjudicate upon all questions involved in the suit. Moreover, no demonstrable prejudice has been shown to have been occasioned by the irregular joinder that cannot be cured by costs or appropriate directions.
38. In the interests of substantive justice, and to avoid multiplicity of suits, this Court is inclined to exercise its discretion in favour of the Plaintiff. Accordingly, I allow the request for leave to amend the plaintiff and formally join the 4th, 5th, and 6th Defendants as parties to these proceedings. The irregular joinder is hereby regularized, and the amended plaintiff to reflect this joinder shall be filed and served within seven (7) days from the date hereof.



39. Accordingly, I find that the Notice of Motion dated 14th October 2024 only succeeds to the extent of the prayer seeking leave to amend the Plaintiff. The rest of the prayers, including those seeking injunctive reliefs, cancellation of titles, and declarations of invalidity in respect of the auction and charge instruments, are not merited at this interlocutory stage and are hereby declined.
40. For clarity and avoidance of doubt, I make the following orders:
- a. The Plaintiff is hereby granted leave to amend the Plaintiff and to formally enjoin the 4th, 5th, and 6th Defendants to these proceedings.
 - b. The amended Plaintiff shall be filed and served within seven (7) days from the date of this Ruling.
 - c. The remainder of the prayers in the Notice of Motion dated 14th October 2024 are hereby dismissed.
 - d. Costs of the application shall be borne by the Plaintiff, save for the amendment which is allowed without costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Nyaga for Plaintiff

Mr. Esmail for 1st Defendant

Mr. Onyambu for 4th Defendant

Mr. Chemwoiwa for 6th Defendant

Court Assistant: Carlos

