



REPUBLIC OF KENYA



KENYA LAW
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**Rotich v Equity Bank Limited & another (Commercial Civil Suit
E006 of 2025) [2025] KEHC 11968 (KLR) (11 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
COMMERCIAL CIVIL SUIT E006 OF 2025
RN NYAKUNDI, J
AUGUST 11, 2025**

BETWEEN

WESLEY KIPYEGON ROTICH PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

RAZORSHARP AUCTIONEERS 2ND DEFENDANT

RULING

1. Before this Court is an Application brought under Order 40 Rule 1, 2, 9 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#) read with Section 1A, 1B and 3A, 63[e] of the [Civil Procedure Act](#) and all other enabling provisions of the law.
2. The Applicant sought for the following prayers;
 - i. Spent
 - ii. That pending inter-parties hearing of this Application, this Honourable Court be pleased to grant an order of temporary injunction restraining the 1st and 2nd Defendant/Respondent jointly and severally whether by itself, its authorized agents, employees and/or servants and/or otherwise from marketing and/ or advertising and/or offering for sale or selling either by public auction as per notice dated 05/06/2025 and/or any future date or by private treaty, taking possession and/or exercising statutory power of sale of all that parcel of land known as Eldoret Municipality Block14/1131.
 - iii. That pending hearing and determination of this Application; this Honourable court be pleased to grant an order of temporary injunction restraining the 1st Defendant/ Respondent jointly and severally whether by itself, its authorized agents, employees and/or servants and/or otherwise from marketing and/or advertising and/or offering for sale or selling either by



public auction as per notice dated 05/06/2025 and/or any future date or by private treaty, taking possession and/or exercising statutory power of sale of all that parcel of land known as Eldoret Municipality Block14/1131.

- iv. That pending hearing and determination of the suit, this Honourable Court be pleased to grant an order of temporary injunction restraining the 1st Defendant/Respondent jointly and severally whether by itself, its authorized agents, employees and/or servants and/or otherwise from marketing and/or advertising and/or offering for sale or selling either by public auction as per notice dated 05/06/2025 and/or any future date or by private treaty, taking possession and/or exercising statutory power of sale of all that parcel of land known as Eldoret Municipality Block14/1131.
 - v. Costs of this Application be borne by the Defendants/Respondents; and;
 - vi. Such further and/or other orders be made as the Court may deem fit and expedient.
3. The Application is made on the following grounds;
- a. That the Plaintiff/Applicant is the absolute registered owner of suit properties known as LR No. Eldoret Municipality/Block 14/1131 and in occupation of the same which were charged to the 1st Defendant/Respondent as collateral to secure the principal loan amounts.
 - b. That the 1st Defendant/ Respondent did not issue a Statutory Notice over the non-payment of any monies due under the charge to give the Plaintiff an opportunity to redeem and/or rectify the same within three months as required under Section 90[1] [2] [b] of the Land Act, 2012 Laws of Kenya.
 - c. That the 1st Defendant/Respondent did not issue a Statutory Notice of at least 40 days as required under Section 96[2] [3] [of the] Land Act, 2012 Laws of Kenya.
 - d. Unknown to the Plaintiff/Applicant, the Defendant/Respondent engaged 2nd Defendant/ Respondent, to auction the above-mentioned properties on Thursday 05/06/2025 for Kshs 17,679,990/= to market value of over Kshs 40,500,000/= which act is wrongful, unlawful, in bad faith and in breach of the Land Act, 2012.
 - e. The Plaintiff is dutifully performing his contractual obligations and/or repayment duties with the 1st Defendant/Respondent. That the Land has not been valued since 2011 despite the advertisement for sale.
 - f. That the fair current market value of the Land is over Kshs 40,500,000/= and the failure to value the Land is in breach of Section 97 of the Land Act and exposes the Applicant to great loss;
 - g. That a Chargor cannot rely on a valuation that is more than twelve [12] months old pursuant to Rule 11[b][x] of the Auctioneers Rules;
 - h. That a sale by a Chargee is required under Section 97 of the Land Act to obtain the best price reasonably obtainable at the time of sale.
 - i. That Section 98 [1] [d] of the Land Act is intended to ensure that a Chargee should not effect a statutory sale of property below the market price;
 - j. That Rule 16 [d] of the Auctioneers Rules was flouted in that it requires an accurate description of the property;



- k. That contrary to the mandatory provisions of Section 21 [3] of the [Auctioneers Act](#) the conditions of sale of the Land did not state whether the sale shall be subject to a reserve price of not;
 - l. Unless otherwise restrained by this Court the 1st Defendant/ Respondent will unfairly reap from its own illegal/unprocedural acts/ omissions and proceed to prematurely and unlawfully auction the charged property to the detriment of the Plaintiff/Applicant.
 - m. It is only fair, just and in the interest of justice that the orders herein be granted in order to preserve the suit property pending the determination of the suit herein.
4. The Respondent filed a Replying Affidavit vehemently opposing the Application stating as follows;
- a. That I am the Credit Manager of the 1st Defendant/Respondent, Eldoret Branch. I am duly authorized by the Defendants/ Respondents and therefore competent to swear this affidavit.
 - b. That I have read and understood the Plaintiff/ Applicant's Application dated 3rd June 2025 and I wish to respond to it as follows:
 - c. That by a Letter of Offer dated 1st November, 2022 the Plaintiff/ Applicant obtained a loan facility for the sum of Kshs 17,000,000/= from the 1st Defendant/ Respondent.
 - d. That the loan was secured by a legal charge registered in favour of the 1st Defendant/ Respondent over the property known as Eldoret Municipality Block14/1131.
 - e. That the loan was repayable in 48 monthly installments of Kshs. 456,068/= and it to attract interest at the rate of 13% per annum. The loan also attracted penalty interest at the rate of 3% per annum in the event of default above the applicable interest rate.
 - f. That it was a term under clause 10 of the Letter of Offer that failure by the Plaintiff/ Applicant to meet his obligations under the Letter of Offer constituted default and entitled the Defendant/Respondent to demand payment of the outstanding amount.
 - g. That the Plaintiff/ Applicant defaulted in meeting his obligations under the letter of offer and this prompted the Defendant/Respondent to initiate recovery procedures in compliance with the law.
 - h. That the Defendant/Respondent issued the Plaintiff/Applicant with a 90 days' notice dated 26th January 2024 asking him to settle the amount in arrears which stood at Kshs. 1,477,667.70/= at the time while the total outstanding debt stood at Kshs 15,913,036.05/=.
 - i. That the Plaintiff/Applicant did not comply with the 90-day notice and the 1st Defendant/ Respondent issued him with a 40 days notice to sell dated 27th May 2024 asking him to rectify his default by paying the sum of Kshs. 2,917,177.50 which was outstanding amount in arrears at the time while the total outstanding debt stood at Kshs 16,210,484.15/=.
 - j. That upon expiry of the 40 days period, the 1st Defendant/ Respondent instructed auctioneers, being the 2nd Defenciant/Respondent who issued the Plaintiff/Applicant with a 45 days redemption notice dated 26th July 2024 giving the Plaintiff/ Applicant the prescribed 45-day notice prior to sale by public auction.
 - k. That the Defendants further advertised the property for auction in the Standard Newspaper of 14th May, 2025 which scheduled the property for sale on 5th June, 2025.



- l. That the 1st Defendant/ Respondent also conducted a valuation of the suit property and a valuation report dated 9th September 2024 was prepared by a qualified and re valuer, which valued the suit properly at a market value of Kshs. 15,000,000/=. This valuation was within the statutory requirement that a valuation be no older than 12 months prior to the sale.
- m. That the Plaintiff/Applicant's claim that the suit property is worth Kshs 40,000,000/= is unsubstantiated and exaggerated. The property was properly and professionally valued and was neither undervalued nor irregularly listed for auction. The 1st Defendant/ Respondent listed the property based on the said current market valuation, contrary to the baseless assertions by the Plaintiff/Applicant.
- n. That the 1st Defendant/Respondent issued all the requisite notices to the Plaintiff/Applicant and in fact, following the Plaintiff/Applicant's continued inaction, the 2nd Defendant/ Respondent issued a courtesy notice dated 13th May 2025 as a follow-up to the 45-day notice which was served on the Plaintiff/Applicant through registered post and via WhatsApp. Despite this, the Plaintiff/ Applicant still failed to make any arrangements to regularize his loan account.
- o. That all the notices were served upon the Plaintiff/Applicant via registered post through the postal address P.O. Box 220-30700 Iten which he provided in the loan documents in line with paragraph 12 of the Letter of Offer, which was freely and duly executed by the Plaintiff/ Applicant and which expressly provided that all notices would be deemed duly served if sent by registered post to the postal address provided by the Chargor, the Plaintiff/Applicant herein.
- p. That despite being given ample opportunity to remedy the default, the Plaintiff/Applicant failed to take any substantive steps to regularize his account and as at 26th May, 2025 the outstanding loan amount stood at Kshs. 17,868,900.40/=.
- q. That the 1st Defendant/Respondent acted lawfully and in strict compliance with the law which explicitly empowers it to recover the debt through the statutory power of sale in the event of default.
- r. That the Plaintiff/Applicant's allegations of unlawful attachment are unfounded and devoid of merit, as the Defendants/Respondents fully complied with all legal requirements before initiating the auction process.
- s. That the instant application seeks to restrain the 1st Defendant/ Respondent from recovering monies legally advanced to the Plaintiff/ Applicant under the loan agreement which the Plaintiff/Applicant has defaulted causing undue prejudice to the 1st Defendant/Respondent.
- t. That I know of my own knowledge and I am also advised by my Advocate on record whose advise I verily believe to be true that he who seeks equity must come with clean hands. The Plaintiff/Applicant herein has come to court with unclean hands and he undeserving of the orders sought.
- u. That I am also advised by our advocate on record which I believe to be true that it is settled law that a borrower who puts up his property as security in a commercial transaction such as to obtain a facility from a bank, ought to know that in the event of default, the property can be sold to recover the amount due.
- v. That it is clear that the Plaintiff/Applicant's application is intended to prejudice and prevent the Defendant/Respondent from exercising its statutory power of sale for purposes of



recovering the outstanding debt owed to it by him which continues to attract interest until payment in full.

- w. That the Plaintiff/Applicant does not stand to suffer irreparable loss if the property is sold and the balance of convenience tilts in allowing the sale of the property as he has been in persistent default since the loan was disbursed.
- x. That I respectfully urge this Honorable Court to dismiss the Plaintiff/ Applicant's Application with costs to the Defendants/ Respondents.
- y. That what is deposed to herein is true to the best of my knowledge, save where based on information and belief sources whereof having been disclosed hereinabove.

Decision

5. In addition to the Affidavits, the Court is privy with the Written Submissions by the respective Legal counsels for and against the Grant of temporary injunction under Order 40 Rule 1 and 2 of the [Civil Procedure Rules](#).
6. In strengthening its Submissions to oppose the Grant of injunctive orders Learned Counsel M/s Koros invited the Court to rely on the provisions Section 90, 91, 92, 96 and 97 of the [Land Registration Act](#) of 2012. Essentially Learned Counsel submitted that the Applicant/Plaintiff has failed to demonstrate any irregularity in the exercise of the statutory power of sale by the Defendant/Respondent to this Claim. It was the contention of Learned Counsel that the critical elements now settled in law for any injunctive relief to be granted by this Court is far from being proven by the Plaintiff/Applicant. In this respect, Learned Counsel in buttressing the facts with the legal perspective placed reliance on the following authorities; [Ngugi v Kenya Commercial Bank Ltd](#) [2006] eKLR, [Mrao Ltd v First American Bank of Kenya Ltd & 2 Others](#) [2003] eKLR, [Nguruman Limited v Ian Bonde Nielsen & 2 Others](#) [2014] eKLR, [Kenya Breweries Ltd-v-Okeyo](#) [2002] IEA, [National Bank Of Kenya Ltd-v Pipeplastic Samkolit \[K\] Ltd & Another](#) [2001] KLR, [Zadrack Oyaroo Achoki v Consolidated Bank](#) [2013] eKLR, [Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited and 2 ORS](#) [2016] eKLR, [Mary Wanjiku Mwaniki & Another v Dream Credit Limited](#) [2017] eKLR, [Bryan Chebii Kipkoeh v Barnabas Tuitok Bargoria & Another](#) [2019] eKLR, [Andrew Muriuki Wanjohi v Equity Building Society Limited & 2 Others](#) [2006] eKLR, [Fredrick Nzoika Musilu v Kennedy Ochieng Kimata And 2 ORS](#) [2020] eKLR, [Patrick Waweru Mwangi And Anor v Housing Finance Co. Of Kenya Ltd](#) [2013] eKLR and [Michael Gitere & Another v Kenya Commercial Bank Limited](#) [2018] eKLR.”
7. Is there material evidence this Court to be persuaded to maintain the Plaintiff/Applicant motion that there are serious questions to be tried. As the Applicant are real prospect of being granted a permanent injunction against the Respondent/Defendant to this mortgage and mortgagor contract. These are questions which the Plaintiff/Applicant must discharge within the spectrum of Section 107 [1], 108 and 109 of the [Evidence Act](#). The statutory framework on the power of sale of any Suit property charged to a bank to secure loan facilities is now well settled. It is about the legal instruments key of which is, the letter of offer and acceptance on the part of the Plaintiff/Applicant. The terms in the letter of offer are usually very comprehensive detailing the intention of the Parties to enter into a legally binding contract. The Superior Courts both at common law and domestic have settled the legal issues around this question now before this Court to also render its decision on the matter. Interestingly, as I continue researching on questions of law across the various branches touching on the disputes placed before me for determination I find very insignificant differential minimum on the predominant principles between the comparative and domestic jurisprudence. In my writings, both jurisdictions form a just dessert in the decision-making process of my judgement. Obviously, the local jurisprudence



as domesticated by our very own apex courts carries the day at the end of it all for reasons of the stare decisis doctrine.

8. In so far as this motion is concerned, I am guided by the decision of the *Privy Council in Eng Mee Yong and Others v Letuchasan*, 1979 UKPC 13 [4th April 79], in a Judgement delivered by Lord Diplock, stated that in the grant of an interlocutory junction;

“The guiding principle in granting an interlocutory injunction is the balance of convenience, there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a ‘probability,’ a ‘prima facie case’ or ‘a strong prima facie case’ that if the action goes to trial, he will succeed; but before any question of a balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous or vexatious; in other words that the evidence before the court discloses there is a serious question to be tried, *American Cyanamid v Ethicon Ltd.* [1975] AC396.”

9. Lord Diplock in the Land Mark Case of *American Cyanamid Co -v- Ethicon Limited* when he stated;

“the Court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the Court’s function at this stage of litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.... So, unless the material available to the Court at the hearing of the Application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospect of succeeding his claim for a permanent injunction at the trial, the Curt should go on to consider whether the balance of convenience lies in the favor of granting or refusing the interlocutory relief that is sought.”

10. In brief, the key aspects of granting injunctions in Kenya drawing inspiration from the principles in *Giella -v- Casman* 1973 EA which include;

- a. That the Applicant/Applicants must demonstrate a prima facie case meaning that they have a reasonable chance of success in the underlying legal dispute.
- b. That if the court declines to grant the Applicant/Applicants an order they will suffer irreparable harm that could not be adequately be compensated by monetary damages.
- c. That where the Court is in doubt it will consider which party would suffer greater prejudice or hardship if the injunction is granted or denied.”

11. As said earlier, the Commercial Claim here is under a Mortgage Contract which generally is defined as follows;

“A mortgage is a form of security created by contract, conferring an interest in real or personal property defeasible upon performing the condition of paying a given sum of money, with or without interest, or of performing some other condition. Such security depends upon a grant by the debtor or someone on the debtor’s behalf, not upon a reservation. A mortgage may be either legal or equitable. A charge by way of legal mortgage of land has the same effect as a mortgage without any legal estate being conferred on the mortgage.”



12. The statutory power of sale is exercisable when the mortgaged suit property transferred to a financial institution like the Respondent/Defendant in this case and the mortgage money has become due and payable or there has been a default in the terms of the contract. These are some of the issues which surround this mortgage contract the affidavits by the Plaintiff/Applicant has counter demanded by the credit manager of the 1st Defendant/Respondent, Bank when examined in details there are variances which go to the root of the contract in question. I have had the advantage of taking a panoramic view of the annexed loan facility letter dated 1/11/2022 which sets the tone, condition precedents and warranties upon which each party is bound unless varied or set aside. In Banking Law, the term used is restructuring the mortgage agreement.
13. In exercising discretion one of the much talked about ground, is that of irreparable loss. The Court in *Paul Gitonga Wanjau -v- Gatbiti Tea Factory Co. Ltd & 2 Others* [2016] eKLR. The Court held that;
- “Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the respondent will suffering it is granted lies on the Applicant.
- Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favor of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.”
14. In the Plaintiff file on 3rd June, 2025 the Plaintiff/Applicant prays for Judgement against the Defendant in the following terms;
- i. An Order of permanent injunction restraining the 1st and 2nd Defendant jointly and severally whether by themselves, their agents, employees, any other persons claiming through them or otherwise howsoever, from in any way whatsoever entering, occupying, marketing and/ advertising for sale or selling by public auction and/or private treaty, leasing out, sub-dividing, receiving sale proceeds or taking possession and/or exercising Statutory Power of Sale over the charged suit property being Eldoret Municipality Block14/1131.
 - ii. Cost of this suit and any other and/or further relief the Honorable court deems fit to grant.
15. In the main Plaintiff the Plaintiff/Applicant has pleaded inter-alia as follows;
6. That the 1st Defendant did not issue a Statutory Notice of at least 40 days as required under Section 96[2] [3] [of the] *Land Act*, 2012 Laws of Kenya.
 7. Unknown to the Plaintiff, the 1st Defendant/Respondent engaged 2nd Defendant, Razor Sharp Auctioneers to auction the above-mentioned properties on Tuesday 25/04/2023 for Kshs 17,679,990.90 contrary to market value of over Kshs 40,500,000/= which act is wrongful, unlawful, in bad faith and in breach of the *Land Act*, 2012.



8. Unless otherwise restrained by this Court the 1st Defendant will unfairly reap from its own illegal/unprocedural acts/omissions and proceed to prematurely and unlawfully auction the charged property to the detriment of the Plaintiff.
9. despite demand made and notice of intention to sue issued, the Defendant has failed, refused and/or neglected to cease and desist from trespassing on the suit property.
16. I have reviewed the entire evidential material and the claim for a permanent injunction against the assets be Eldoret Municipality Block14/1131 whose rights have got to be interpreted and construed within the four corners of the mortgage agreement. The rival conflicting affidavits by the parties do not answer some of the critical questions to place this dispute on the scale of a prima facie case. Yes, on irreparable harm the Plaintiff/Applicant maybe apprehensive that the property is likely to be auctioned at a value less than the current market value, necessitating for him to look for the balance to liquidate the loan. That means that the auctioneer who has been instructed by the 1st Defendant may call for auction bids that may not be advantageous to the Plaintiff/Applicant. The fears, anxiety and apprehension are matters for another day in so far as this dispute is concerned.
17. For those reasons, the case at bar is determinative on a balance of convenience so as the Court has the ability to do justice as to whether the 1st Defendant/Respondent was in breach of exercising the statutory power of sale prematurely as pleaded by the Plaintiff/Applicant. The test on the balance of convenience is that the Court should take whichever course that seems likely to cause the least irreparable prejudice to one party or the other before the Judgement on the merits. It is also necessary to mention that in granting this injunction in favor of the Plaintiff/Applicant for avoidance of doubt, the mortgage contract on repayment of any such instalments has not been suspended. I say so because if at the end of it all the question begs for a refund when the matter is determined on the merits, the 1st Defendant/Respondent with its financial muscle would be in a position to compensate the Plaintiff/Applicant appropriately.
18. It is with this respect I grant temporary injunction under Order 40 Rule 1 and 2 of the Civil Procedure Rules and the governing dicta in the above cited formulated principles as put sufficiently by the session Judges who were faced with a similar cause of action to the instant case. As to the costs of this Application the same shall abide the outcome of the suit. In my considered view the Parties to this Suit shall file the necessary evidential disclosures, including any Defense if any from the Defendant/Respondent within 21 days from today's date. Thereafter, a final pre-trial conference be held on 16/9/2025 to fix the hearing date not more than 30 days from the status conference.
19. It is so ordered.

DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 11TH AUGUST 2025.

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R. NYAKUNDI
JUDGE

