



REPUBLIC OF KENYA



KENYA LAW
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**Salim v Eco Bank Limited & 2 others (Commercial Case
E010 of 2025) [2025] KEHC 11846 (KLR) (8 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
COMMERCIAL CASE E010 OF 2025
M THANDE, J
AUGUST 8, 2025**

BETWEEN

ASHA KAMENE SALIM PLAINTIFF

AND

ECO BANK LIMITED 1ST DEFENDANT

WATTS AUCTIONS 2ND DEFENDANT

PETRO SOKO LIMITED 3RD DEFENDANT

RULING

1. The Plaintiff filed a plaint dated 8.6.25 seeking a permanent injunction restraining the 1st and 2nd Defendants, their representatives, assigns and any other persons acting under them or any other party whatsoever, from taking any action towards sale, disposal and or anyway doing any act that would undermine the Plaintiff's proprietary interest in the suit property. She also seeks an order requiring that the 3rd Defendant (Petro Soko) do give an account of the monies received from the loan from the 1st Defendant (the Bank) and account for monies that were to be paid to the Plaintiff. She further seeks general and exemplary damages against Petro Soko.
2. The Plaintiff also filed an Application of even date seeking the following orders:
 1. Spent.
 2. Pending the hearing and determination of this application, an order of temporary injunction be and is hereby issued against the Defendants/Respondents their representatives, assigns and any other persons acting under them from taking any action towards sale, transferring, disposal, parting with and or anyway dealing in any way the property known as L.R No 9122/401 and L.R No 9122/402 that may change or tamper ownership thereof.



3. Pending the hearing and determination of this suit, an order of injunction be and is hereby issued against the Defendants/Respondents their representatives, assigns and any other persons acting under them from taking any action towards sale, transferring, disposal, parting with and or anyway dealing in any way the property known as L.R No 9122/401 and L.R No 9122/402 that may change or tamper ownership thereof.
4. Costs of this application be provided for.
3. The grounds upon which the Application is premised are that sometime in January 2023, she encountered serious financial constraints and was unable to secure credit on account of being listed in the credit reference bureau. In August 2023, she entered into an agreement with Petro Soko to obtain a loan of Kshs. 55,000,000/= on her behalf. In consideration thereof, she was to pay Petro Soko Kshs. 9,000,000/= as commission. She stated that under the arrangement, she was coerced to transfer her properties known as L.R. No. 9122/401 and L.R. No. 9122/402 (the suit property) to Petro Soko for the limited purpose of securing the loan facility. She further stated that there exists a substantive and unresolved ownership dispute between her and Petro Soko over the suit property, which is central to the validity of the intended sale. The Plaintiff asserts ownership of the suit property and has filed Malindi ELC No. E085 of 2024, currently under appeal, challenging the transfer of title which was procured under economic duress and misrepresentation.
4. It is the Plaintiff's case that the transfer of the suit property was not a sale but merely a facilitative arrangement for loan acquisition, and was induced by misrepresentation and exploitation of the Plaintiff's financial vulnerability. She averred that she resides on the suit property which is now valued at nearly Kshs. 100,000,000/=:, having invested heavily in the same. As such, if the sale proceeds, she will suffer irreparable loss that cannot be adequately compensated by damages, including the loss of her home, livelihood, and life's investment. The Plaintiff further stated that the issue of ownership of the suit property is sub judice as there is a pending appeal before the Court of Appeal. She contends that proceeding with the sale while ownership of the suit property is in contention risks rendering the ongoing litigation nugatory and would defeat the ends of justice.
5. The Plaintiff further asserted that the impugned sale of the suit property is based on a flawed and contested loan arrangement, executed in the name of Petro Soko under circumstances tainted with fraud, non-disclosure, and breach of contract, making the statutory power of sale premature, procedurally irregular, and legally untenable. She added that the balance of convenience tilts in favor of preserving the status quo pending full determination of the dispute. Further that the Bank, being a financial institution, is capable of being compensated should the Plaintiff be found liable, whereas the Plaintiff cannot recover her home and business premises if the property is sold. Additionally, that allowing the sale to proceed under contested and possibly fraudulent circumstances would sanction unjust enrichment and defeat the Plaintiff's equitable rights in the suit property. She concluded that equity demands that status quo be maintained until the real issues are resolved.
6. The Bank filed an application dated 19.6.25, seeking that the suit herein be struck out. The Bank's grounds are that the Plaintiff is not the registered owner of the suit properties which are registered to the Petro Soko. Consequently, the suit is void ab initio for want of locus standi on the part of the plaintiff to file the suit. Further that the suit is sub judice by virtue of Environmental and Land Court ruling of 20.5.25 in Malindi ELC No. E085 of transferring the suit to the High Court (the transferred suit). The Bank contends that this suit will prejudice the hearing of the transferred suit and embarrass the Court. Additionally, that no complaint or wrong doing has been raised against the Bank and the 2nd Defendant. The Bank asserts that the suit is frivolous, vexatious and an abuse of the court process.



7. The Plaintiff opposed the Application vide her replying affidavit sworn on 17.7.25 in which she restated her averments in her affidavit in support of her Application. Petro Soko did not file a response to this Application.
8. In opposition to the Plaintiff's Application, the Bank and the 2nd Defendant filed a replying affidavit sworn on 19.6.25, by John Mwonga, the Bank's Head of Remedial Department in which he reiterated the averments in the application to strike out the suit. He contended that the Application is intended to derail the realization of the Bank's securities in exercise of its statutory power of sale for default in repayment of a loan advanced to the 3rd Defendant. Further that the Plaintiff's application for injunction was dismissed in the ruling in the ELC case. Additionally, that the agreement dated 30.8.23 between the Plaintiff and the 3rd Defendant is in issue in both suits and that the matter is therefore sub judice.
9. Petro Soko opposed the Application vide a replying affidavit sworn by Haitham Ali Shebe its director in charge of sales. He stated that there is no evidence that the value of the suit property is Kshs. 100,000,000/- as alleged by the Plaintiff. Further, that the issues raised in the Application relate to the arrangement between the Plaintiff and Petro Soko, and have no bearing on the Bank and its right to exercise its power of sale as lender. Further, that the Bank was involved only as lender upon a security held by Petro Soko following a transfer by the Plaintiff who at all times represented herself and was understood by the Bank to be a seller of the suit properties.
10. In her supplementary affidavit, the Plaintiff denied the allegations by the Bank and 2nd Defendant and reiterated her earlier averments. She contends that the Bank was jumping the gun and that there must be a determination of the owner of the suit properties and that is her. She insisted that she remains the owner of the suit properties and she had an understanding and arrangement that the transfer thereof to Petro Soko was to facilitate a credit facility from the bank as she could not secure the same having been listed in credit reference bureau.
11. I have given due consideration to the Applications, the rival affidavits and the written submissions filed by the parties.
12. The principles governing the grant of interlocutory injunction were set out in the case of *Giella v Cassman Brown* [1973] EA 358, where the Court of Appeal stated:

The conditions for a 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 must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.
13. On whether the Plaintiff has demonstrated a prima facie case to justify the grant of the orders sought, the Court will be guided by the decision in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, in which the Court of Appeal had this to say on what constitutes a prima facie case:

So what is a prima facie case? I would say that in civil cases it is a case in 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.



14. As I consider this issue, it is necessary to first determine whether the Plaintiff has locus standi to bring this suit. The Plaintiff seeks that the bank be restrained from realising its security.
15. The material before the Court shows, and it is not disputed, that the Plaintiff is not the registered owner of the suit properties. The suit properties are registered to Petro Soko.
16. Section 26(1) of the *Land Registration Act* provides:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
17. Upon the registration of the suit properties to Petro Soko, notwithstanding that it was for the purpose of obtaining a loan on behalf of the Plaintiff, Petro Soko became the absolute and indefeasible owner of the same, subject only to the encumbrances contained in the certificate of title. In light of this, can the Plaintiff establish a prima facie case?
 18. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal had this to say about the onus placed on a party to establish a prima facie case:

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.

19. As indicated, the Plaintiff is not the registered owner of the suit properties which form the Bank's securities. As such, she does not have a clear and unmistakable right to show, that is directly threatened by the intended sale of the suit properties. Similarly, she has not demonstrated a right that needs to be protected.
20. In *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, the Court of Appeal had this to say on the issue:

In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”



21. The Court went on to say:

Thus in *Agricultural Finance Corporation V Lengetia Ltd* (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

22. Flowing from the cited authority, it is clear and indeed trite, that a contract cannot confer rights or impose obligations on any person other than the parties to the contract.

23. In the instant case, the Plaintiff is not a party to the loan agreement and charge in which the Bank advanced the loan in question, to Petro Soko. It would have been different had the Plaintiff been a party in the charge as the borrower and Petro Soko, being the registered owner of the suit properties, as the chargor. This is not the case. Accordingly, the Plaintiff does not have locus standi to seek injunctive orders against the Bank in respect of properties of which she is not the registered owner and pursuant to a charge to which she is not a party.

24. The circumstances herein are that Petro Soko charged the suit properties as security for the loan advanced to it. Pursuant to the charge, the Bank acquired rights over the suit properties as security in exchange for the money advanced to Petro Soko. The rights so acquired by the Bank are limited to the realization of the said security where default has occurred. In this regard, I am guided by the holding in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR, where the Court of Appeal stated:

36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.

25. The fact of loan default is undisputed herein. As such, the Bank is entitled to exercise its statutory power of sale which was clearly a term of the loan agreement between it and Petro Soko. The Bank cannot be denied its right to realise its security on account of a dispute between the Plaintiff and Petro Soko arising from an agreement between them, which agreement, the Bank was not party or privy to.

26. In the end, the Court finds that the Plaintiff lacks locus standi to seek the orders herein. It follows that the Plaintiff has not met the test for the grant of the injunctive orders sought.

27. The Defendants have stated that the matter herein is sub judice. The Plaintiff filed the ELC case against Petro Soko, seeking declaratory and injunctive orders against Petro Soko, arising from the agreement between her and Petro Soko. The ELC case was transferred to this Court by the ruling of 20.5.25. That agreement is also the subject of the suit herein. From the documents on record, the Plaintiff also filed Mombasa CMCE 1161 of 2024 against Petro Soko and the Bank, which was withdrawn.



28. The Plaintiff cannot have the present suit that arises from the impugned agreement, which is directly and substantially in issue in the transferred suit. Public interest requires that a party should not be harassed by a multiplicity of proceedings involving determination of the same issue. This is the doctrine of sub judice which is captured in Section 6 of the *Civil Procedure Act* which provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

29. The doctrine of sub judice deprives the court of jurisdiction to entertain a suit in which the subject matter is also directly and substantially in issue in a previously instituted suit between the same parties. The rationale of this bar is to avoid issuance by courts of concurrent jurisdiction, of conflicting decisions over the same matter. The sub judice rule further seeks to protect the court from abuse of its process. This necessitates that where more than one suit is filed in courts with jurisdiction between the same parties on the same subject matter, then the latter suit ought to be stayed pending the determination of the earlier suit.

30. In its advisory opinion in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, the Supreme Court considered the subject of sub judice and aptly stated:

67. The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

31. Similarly, in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, Mativo, J. (as he then was) stated that the basic purpose of the sub judice rule was to pin down parties to one litigation to avoid conflicting decisions. The learned Judge stated:

24. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

32. Any orders granted herein would most certainly impact the transferred suit. As such, sustaining the instant suit cannot be defended as it is not possible to interrogate and determine the matter herein without delving into the issues pending in the transferred suit.



33. Flowing from the cited cases, it is evident that the filing of multiplicity of suits on the same subject matter, against the same opponent, in the same or different courts constitutes abuse of the court process. A party pursuing the same matter in different court processes is in effect engaging in a gamble, a game of chance seeking to get the best in the judicial process.
34. The Court has inherent jurisdiction to protect itself from this kind of abuse and to see that its process is not abused by the parties that come before it. Accordingly, the filing of this suit during the pendency of the transferred suit is an abuse of the court process and the Court must protect itself from such abuse.
35. In the end and in view of the foregoing, the Court finds that the Application dated 8.6.25 is unmerited and the same is hereby dismissed with costs to the Defendants. The Court further finds that the Application dated 19.6.25 is merited and the same is allowed with the result the suit herein is struck out. The 1st Defendant shall have costs.

DATED SIGNED AND DELIVERED IN MALINDI THIS 8TH DAY OF AUGUST 2025

M. THANDE

JUDGE

