



**Chebet v I & M Bank Limited & another (Civil Suit E029 of 2024)
[2025] KEHC 14523 (KLR) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E029 OF 2024
E OMINDE, J
OCTOBER 16, 2025**

BETWEEN

IRENE CHEBET PLAINTIFF

AND

I & M BANK LIMITED 1ST DEFENDANT

ANTIQUA AUCTIONS AGENCIES 2ND DEFENDANT

RULING

1. By way of Notice of Motion dated 20th November 2024 the Applicant seeks the following orders;
 1. Spent
 2. Spent
 3. That an interlocutory injunction do issue restraining the defendants whether by themselves, their servants and/or agents from selling and/or transferring or evicting the plaintiff from occupation and user of the land parcel known as Title No. Eldoret Municipality/ Block 14/2464 pending the hearing and determination of this suit.
 4. That an order do issue directing the 1st Defendant/Respondent to supply to the Plaintiff the loan account statements in respect to the borrowing secured by the Charges created over Title No. Eldoret Municipality/ Block 14/2464.
 5. That the costs of this Application be provided for.
2. The Application is expressed to be brought under Order 40 rule 1, Order 51 Rule I of the *Civil Procedure Rules, 2010* together with all other provisions of the law. The Application is premised on the grounds on the face of it and the contents of the affidavit sworn in support of the Application.



3. In her affidavit, the Applicant deposed that she is the sole absolute registered proprietor of the land parcel known as Title No. Eldoret Municipality/ Block 14/2464. She annexed and marked as IC-1 a copy of the certificate of Lease. She stated that between the years 2020 and 2022, she offered her title over the property as collateral for three credit facilities offered by the 1st Defendant to her and an entity known as Robinmart Petroleum Limited and subsequent thereto, a Charge dated 9th January 2020 for Kshs. 5,000,000.00.
4. That a Further Charge dated 19th July 2021 for Kshs. 15,000,000.00 and a Second Further Charge dated 19th December 2022 for Kshs. 9,000,000.00 were registered against the property on 13th January 2020, 21st July 2021 and 21st December 2022 respectively. She urged that on 19th November, 2024, she was alerted by a friend that her name had appeared in an Auctioneers notice published on the Daily Nation newspaper of 18th November 2024 indicating that the property will be sold by way of Public Auction on 4th December 2024. She annexed and marked as IC-2 a copy of the newspaper advert.
5. She then tried to reach the 1st Defendant/Respondent to make disclosures of the particulars of the astronomical amounts claimed including supply of the loan account statement and discussion on the way forward. However, her efforts were not fruitful as the 1st Respondent was unresponsive and insisted on proceeding with an unlawful and irregular disposal of her property. Later in the day, she found a copy of the 2nd Respondent's Notice dated 30th September 2024 thrown into her compound. She annexed and marked as IC-3 a copy of the Auctioneers notice. On 20th November 2024, she got hold of partial account statements from the 1st Defendant and noted that the 1st Defendant had, without any justification, included a loan facility for Kshs. 16,000,000/ = granted to Robinmart Petroleum Limited. She denied agreeing to guarantee the said facility or create any charge. She Annexed and marked as IC-4(a) & (b) copies of the account statements.
6. She deponed that the loan facilities granted against the security of the suit property have substantially been repaid and as such the figure claimed is not justifiable. Further, that she has a prima - facie case with a probability of success as defendant's actions are intended at exercising an irregular statutory power of sale, are a clog on the right of redemption and unlawful in-respect of the land parcel known as Title No. Eldoret Municipality'/ Block 14/2464 for reasons inter alia that: -
 - a. The 1st Defendant has not complied comply' with Section 90 of the Land Act. 2012 as to service of a 90 days' notice.
 - b. The 1st Defendant has not complied with Section 96 (2) of the Land Act. 2012 as to service of a valid 40 days' notice.
 - c. No valid redemption and notification of sale notices have been issued and served as required by the Auctioneers Rules 1997.
 - d. No proper valuation as to the forced sale value of the charged property has been undertaken by a valuer as required by Section 97 (2) of the Land Act. 2012.
 - e. No reserve price has been set for purposes of public auction in breach of the provision of Section 98 (l) (e) of the Land Act. 2012.
 - f. The 1st Defendant claim on interest is in breach of the provisions of Section 44 of the Banking Act.
 - g. The 1st Defendant's claim includes strange amounts that were not borrowed or guaranteed by the Plaintiff and which amounts have clogged the Plaintiffs equity of redemption.



- h. The 1st Defendant is in breach of Section 66 (1) of the [Consumer Protection Act](#). Cap. 501.
 - i. The 1st Defendant is in breach of Section 66 (2) of the [Consumer Protection Act](#). Cap. 501.
 - j. The 1st Defendant is in breach of Section 44 and 44 A of the [Banking Act](#).
7. She deposed that damages shall not be an adequate remedy as the defendants have trampled upon her rights with impunity when a substantial part of the amounts advanced have been repaid. Further, that the balance of convenience tilts in favour of maintaining the status quo.

Respondents' Replying Affidavit

8. The 1st Respondent filed a replying affidavit dated 7th February 2025 in opposition to the Application. The same was sworn by Flaviah Wambui a Senior Associate, Debt Recovery Unit with the Defendant Bank.
9. She laid down a factual background by urging that the underlying suit relates to a credit facilities advanced to the Applicant and Robimart Petroleum Company Limited i.e. "the borrower" and "the Company"). At the time material to advancement of the said facilities by the Bank, the Applicant was the proprietor of the leasehold interest comprised in all that property known as Eldoret Municipality/Block 14/2464. She stated that Irene Chebet is the director of Robimart Petroleum Company Limited, the Company, and in her aforesaid capacity, together with Martin Robin Kinuthia, executed joint and personal guarantees and indemnities to secure the credit forming the subject of the present suit before this Court. Vide a letter of offer dated 19th September 2019, the Bank advanced to the Applicant a term loan facility of Kshs. 5,000,000/= for the purpose of financing the purchase of property known as Title No. Eldoret Municipality/Block/2464. She attached and marked as FW-1 a true copy of the Letter of Offer dated 19th September, 2019.
10. She reproduced the terms of the letter and urged that a legal charge was registered over the suit property vide a charge on 13th January 2020 vide an instrument dated 7th January 2020 executed by the Applicant as the legal and beneficial owner. She annexed and marked as FW-2 a true copy of the Legal Charge.
11. She reproduced the terms of the charge and stated that vide a letter of offer dated 22nd June 2021, the Bank further advanced Robimart Petroleum Company Limited an overdraft facility amounting to Kshs. 5,000,000/= and a Term Loan facility 2 of Kshs. 10,000,000/= for purposes of working capital in the ordinary course of business. The Applicant herein together with one Martin Robin Kinuthia as director and guarantor respectively in their joint capacities as director and guarantor executed the acceptance letter acknowledging receipt of the facility which she annexed and marked as FW-3. Additionally, the Applicant and Martin Robin Kinuthia, the directors of the company executed a joint letter of guarantee and indemnity dated 29th June, 2021 for an aggregate amount of Kshs. 24,600,000/= which she annexed and marked as FW-4.
12. The deponent averred that on 21st July 2021, a further legal charge was registered over the suit property vide a charge instrument dated 19th July 2021 executed by the Applicant as the legal and beneficial owner and the Applicant as the director of the Company. She annexed and marked as FW-5 a copy of the Legal Charge. Further, that vide a Letter of Offer dated 18th May 2022, the Applicant and Martin Robin Kinuthia later jointly executed a letter of guarantee and indemnity acknowledging that as at 17th May 2022, the principal debtor was indebted to the Bank to the tune of Kshs. 15, 681,910.76/=. The co-guarantors also agreed to be bound by the guarantee to the tune of Kshs. 22,000,000/=. She annexed and marked as FW~6 a) and (h) a copy of the Letter of Offer and letter of guarantee and indemnity dated 29th August, 2022.



13. Vide a letter of offer dated 17th November 2022, the Bank further advanced Robimart Petroleum Company Limited various facilities for purposes of working capital in the ordinary course of business. The Applicant herein together with one Martin Robin Kinuthia as director and guarantor respectively in their joint capacities as director and guarantor executed the acceptance letter acknowledging receipt of the facilities. She annexed and marked as FW-7 a copy of the Letter of Offer. Additionally, the Applicant and Martin Robin Kinuthia, the directors of the company executed a joint letter of guarantee and indemnity dated 23rd November 2022 for an aggregate amount of Kshs. 37,215,000/=. She annexed and marked as FW8 copies of the letter of guarantee and indemnity.
14. The deponent averred that on 21st December 2022, a second further legal charge was registered over the suit property vide a charge instrument dated 19th December 2022 executed by the Applicant as the legal and beneficial owner and the Applicant as the director of the Company. She annexed and marked a copy of the said charge. She urged that the facilities were disbursed to the borrowers pending execution of the letter of offer and creation of the legal charge. Additionally, the Bank advanced a loan facility of Kshs. 9,000,000/= to Robimart Petroleum Company Limited and Martin Robin Kinuthia as the registered owner of all that property known as L.R. No. Kiambaa/Thimbigua/5906 executed a legal charge dated 5th March 2023 in favour of the Bank. She annexed and marked as FW-10a copy of the legal charge.
15. The deponent averred that the borrowers defaulted on their repayment obligations almost immediately and in response, the Bank exercised its post-default rights by initiating the exercise of the statutory power of sale over the securities being; Eldoret Municipality/Block/2464 and L.R. No. Kiambaa/Thimbigua/5906 registered in the name of the Applicant herein and Martin Robin Kinuthia respectively.
16. The Bank issued a demand letter of an even date entreating the borrowers to pay the arrears together with interests thereon within fourteen (14) days failure to which the Bank would realize the security in question. The guarantors were equally made aware that the principal borrower was in default and at any time he would be required as a guarantor to make good the demand. However, neither the borrowers nor the guarantors heeded to this call. She annexed as FW-11 a copy of the Demand Letter dated 16th November 2023.
17. The bank then issued the Applicant as the borrower, Chargor and Guarantor with a ninety (90) days statutory notice cautioning her to rectify the default. She annexed and marked as FW-12(a) and (b) copies of the 90 days Statutory Notice and Certificate of Postage. Having failed to pay the outstanding debt, the Bank then issued the borrower a 40 days' statutory notice, annexing and marking as FW-13 (a) & (b) copies of the 40 Days Statutory Notice and Certificate of Postage.
18. The deponent averred that on 27th September, 2024, the Bank instructed Antique Auction Agencies to commence the sale of the suit property by way of public auction. At the time, the consolidated outstanding loan owed to the Bank by the borrowers was Kshs. 46,947,395.16/- as captured in the notification of sale. On 2nd October 2024, the auctioneer effected service of the 45 days' redemption notice and notification of sale to the Applicant herein, her co-guarantor and the principal debtor.
19. That the auctioneer returned an affidavit of service dated 11th October, 2024. She annexed and marked as FW-14 copies of the 45 Days Redemption Notice dated 30th September, 2024 and Affidavit of Service thereof. The deponent stated that it is evident from the notification of sale and the affidavit of service that the Applicant declined to receive the notice and it is untrue that the notices were thrown into her compound.



20. The deponent stated that the bank commissioned a valuation of the suit properties Eldoret Municipality/Block 14/2464 was valued, with the valuer placing the open market value at Kshs. 35,000,000/- and the forced sale value at Kshs. 26,250,000/=. She annexed and marked as FW-15 the Valuation Report. At the request of the Bank, a valuation of L.R. No. Kiambaa/Thimbugua/5906 was carried out by Highland Valuers Limited, who determined the market value to be Kshs. 12,000,000/= and the forced sale value to be Kshs. 9,000,000/=. She annexed as FW-16 a copy of the Valuation Report dated 4th October, 2024. She stated that on 18th November 2024, the auctioneer placed an advertisement of the two properties on the Daily Nation Newspaper inviting interested buyers. She annexed copies of the newspaper excerpt as annexure FW-17.
21. After the advertisement, the applicant approached the court to challenge the Bank's exercise of its statutory power of sale. Further, that as at 27th November 2024, the Applicant's personal account had an outstanding balance of Kshs. 530,850.03/= which has not been settled to date. Additionally, the accounts held by Robimart Petroleum Company Limited at the Bank were indebted to the tune of Kshs. 46,416,545.13/= and continue to attract interest and penalties at daily rates. She annexed and marked a FW-18 copies of the Loan Account Statements.
22. She deponed that the banks' exercise of statutory power of sale over the security in question is neither unjustified nor unlawful. Further, that the applicant has not met the requisite threshold to warrant the grant of the temporary injunction orders pending the hearing and determination of the instant Application and the underlying suit, to wit: The Applicant has not established a prima facie case with a probability of success at trial; The Applicant has not demonstrated that damages would not be an adequate remedy in case the suit succeeds on hearing and that the Applicant has not demonstrated that the balance of convenience tilts in her favour. She urged that it is in the interest of justice that this Application is dismissed.

Applicants' Supplementary Affidavit

23. The applicant filed a supplementary affidavit dated 26th February 2025 in response to the Replying Affidavit. She acknowledged having offered the title over the suit property as collateral for a personal loan of Kshs. 5,000,000/= which she has faithfully been servicing, and whose current balance is Kshs. 391,406/= an amount she intends to clear within the repayment period agreed with the 1st Defendant. She annexed and marked a copy of the Current Account Statement as IC-1. As for the other facilities offered to Robimart Petroleum Limited, she only agreed to guarantee the repayment of two loan facilities for Kshs. 15,000,000/= and Kshs. 9,000,000/= offered to the said Company using the suit property as can be seen from the Charge Instruments annexed and marked FW- 5 and FW-10 to the 1st Defendant's Replying Affidavit. Apart from the two loan facilities listed above, she did not offer the suit property as security for any other loan facilities granted to Robimart Petroleum Limited. Further, she stated that she was fully aware that the Company made other collateral arrangements and partially secured them through another property known as Title No. Kiambaa/Thimbugua/5906 referring to the annexure marked as FW-9 in the Replying Affidavit.
24. The deponent averred that the final charge registered against her property as collateral is Kshs 29,000,000/- and as such the 1st Defendant has no right to claim repayment of the additional facilities it granted Robimart Petroleum Limited on the strength of other securities. She denied having been served with the 90-day statutory notice, urging that it is a fact that has been proved by the 1st Defendant who has failed to provide a certificate of postage to annexure FW-12 (a) to its Replying affidavit as proof of Service of the said notice as the said Notice is dated 18th December 2023 yet the Certificate of postage annexed as Annexure FW-12 (b) is dated 21st November 2023 which is impossible as the Notice could



not be posted before it was issued. She also denied being served with the 40-day statutory notice, urging that it is a fact that has been proved by the 1st Defendant who has failed to provide any certificate of postage to annexure FW-13 (a) to its Replying affidavit as prove of Service of the said notice as the said Notice is dated 30th July 2024 yet the Certificate of Postage annexed as Annexure FW-13 (b) is dated 21st November 2023 which is impossible as the Notice could not be posted before it was issued.

25. She stated that this confirms that the intended sale of her property is irregular for want of service of Notices given and that the defendant is trying to rely on one Certificate of Postage to prove service of two Notices issued on different dates more than 6 months apart.
26. On the valuation notice, she urged that the Defendant has grossly undervalued the suit property as worth Kshs. 55,000,000/- on the open market yet according to Afrilan Valuers Valuers Ltd, the suit property has an Open Market Value of Kshs, 42,000,000, annexed and marked as IC-2. She urged that she has never been served with any notices through WhatsApp and prayed that the Application be allowed with costs to the Defendants.

1st Respondent's Further Affidavit

27. In response to the applicants' supplementary affidavit dated 26th February 2025, Flaviah Wambui swore a further affidavit dated 17th March 2025. She reiterated the averments in the Replying Affidavit dated 7th February 2025 and opposed the Plaintiffs depositions in the supplementary affidavit, particularly that:
 - a. The Plaintiff only guaranteed two loans for Robimart Petroleum Limited;
 - b. The Plaintiff was never served with the 90-day notice, 40-day notice and auctioneer's
 - c. Redemption notice;
 - d. There exist discrepancies in valuation of the suit property"; and
 - e. The intended sale of property is irregular due to lack of proper service of statutory notices.
28. She deponed that it is evident that the Plaintiff executed several letters of guarantee and indemnity to secure financial facilities advanced to Robimart Petroleum Limited. These letters include; Letters dated 30th March 2021 for Kshs. 3,000,000/-, 27th April 2021 for Kshs. 10,000/-, 29th June 2021 for Kshs. 24,600,000/-, 29th August, 2022 for Kshs. 22, 000,000/=and 23rd November, 2022 for Kshs. 37, 215,000/=. Further, that all the letters were duly executed by the Plaintiff by appending her signature on all the pages of the said documents and in the presence of Bernard K. Kiplagat. She annexed and marked as FW-1 (a), (b), (c), (d) and (e) copies of the Letters of Guarantee and Indemnity referred to above.
29. She stated the contents of Clause 25 in all the aforesaid letters of guarantee concerning joint and several liabilities, urging that the import and tenor of Clause 25 is that the Plaintiffs liability under the guarantee is joint and several, allowing the Creditor to pursue any guarantor individually or collectively for the entire debt A demand made to her co-guarantor, Martin Robin Kinuthia, is deemed valid and enforceable against her even if not addressed to her directly. Consequently, her assertion that she only guaranteed two loan facilities of Kshs. 15,000,000/- and Kshs. 9,000,000/- is inaccurate and misleading, as the letters of guarantee clearly demonstrate her liability extends to additional substantial facilities advanced to the Company, now in arrears.
30. The deponent averred that she was aware that the Plaintiff was served with the requisite notices via registered post sent to P.O. Box 3592-30100, Eldoret, as outlined below:



- a. Statutory Demand Notice: The Plaintiff was served with a statutory demand notice dated 16th November 2023, requiring payment of arrears amounting to Kshs. 3,620,867.66 within 14 days, failing which the security would be realized. Service was evidenced by the certificate of postage dated 21st November 2023. She annexed and marked as FW-2 copies of the Demand Notice and the Certificate of Postage dated 21st November 2023.
 - b. 90-Day Statutory Notice: The Plaintiff was also served with a 90-day statutory notice dated 18th December 2023 via her Ordinary Registered Mail (ORD), as evidenced by the certificate of postage dated 18th December, 2023. She annexed and marked as FW-3 a true copy of the 90-day Statutory Notice and the corresponding Certificate of Postage both dated 18th December, 2023.
 - c. 40-Day Statutory Notice: The Plaintiff was served with a 40-day statutory notice dated 30th July 2024, as evidenced by the certificate of postage dated 2nd August 2024. She annexed and marked as FW-4 copies of the 40-day Statutory Notice dated 30th July 2024 and the Certificate of Postage dated 2nd August 2024.
 - d. 45-Day Redemption Notice and Notification of Sale: The Plaintiff was duly served with the 45-day redemption notice and notification of sale dated 30th September 2024, inviting her to redeem the property known as Eldoret Municipality/Block 14/2464 by settling the outstanding debt of Kshs. 46,947,395.16 as at 27th September 2024. Service was effectively completed on 2nd October 2024. She annexed and marked as FW-5 (a), (b) & (c) copies of the Redemption Notice and Notification of Sale both dated 30th September 2024, along with the corresponding postage receipt dated 1st October 2024.
31. She urged that the valuation relied on by the Bank was conducted by qualified personnel who considered all the relevant factors in arriving at the current market value and forced sale value of the suit property. She stated that even if the Plaintiff were to establish that the suit property was undervalued, such a finding would not justify the issuance of an interlocutory injunction.
 32. She urged that the Plaintiff's objections are baseless and devoid of merit, as compliance with the statutory requirements has been conclusively demonstrated.

Applicants' Submissions

33. Learned counsel for the applicant submitted that the principles for the grant of injunctions were laid out concisely in the celebrated court of Appeal decision in *Giella -vs- Cassman Brown & Co. Ltd* (1973) EA. Counsel submitted that since equitable remedies are granted at the discretion of the court, for an Applicant to benefit from the equitable remedy he/she must comply with the principles of equity.
34. On whether there's a prima facie case with a probability of success, counsel cited the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR where the court defined a prima facie case, urging that the Plaintiff has presented adequate material, to establish that there exists a right that has been infringed by the Defendants who intend to exercise an irregular sale. He stated that the requisite three-month Statutory Notice was not issued prior to the property being advertised for sale and further, that the provisions of Section 90 (1) and 90 (2) (b) of the *Land Act* provide that where there is default for one month, a Chargee ought to have served the Chargor with a notice not less than three Months and which notice ought to have complied with the conditions provided therein. Furthermore, that Section 96 (2) of the *Land Act* obligates the 1st Defendant to serve a Forty (40) day Statutory Notice if the default in payment continued at the lapse of the three-month notice.



35. Counsel submitted that though the 1st Defendant has annexed Notices dated 18th December 2023 and 30th July 2024 as annexures FW-12 (a) and FW-13 (a) as Notices issued in compliance with the aforesaid sections, there is no proof that the notices were ever served upon the Plaintiff or the other persons contemplated under Section 96 (3) of the Land Act as the Certificate of Postage annexed as FW-12 (b) and FW-13(b) is dated 21st November 2023. That they cannot prove service of Notices that were yet to be issued when the alleged postage was made. In any event, one certificate of postage cannot prove service of two separate Letters issued on different dates.
36. Counsel urged that it is trite law that the burden of proof on service of Statutory Notices rests on the Chargor, placing reliance on the Court of Appeals decision in Nyagilo Ochieng and Another v Fanuel Ochieng and 2 others (1995-1998I 2 EA 260) in this regard. Additionally, he urged that the 2nd defendant as the 1st Defendant's agent on his part did not comply with the provisions of Rule 15 (d) of the Auctioneers Rules, 1997 which makes it mandatory for an auctioneer to locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the Auctioneer shall sign a certificate to that effect. He stated that Annexure FW- 14 is a Notification of sale issued to one Robin Kinuthia over a property known as Kiambaa/Thimbugua/5906 which is not the suit property and shows intended sale is irregular and that a prima facie case has been made.
37. Counsel urged that although they were in agreement that upon being pledged, a security capable of being sold in the event of default, the Defendant's actions in seeking to sell the suit property in recovery of a loan that the property was not pledged as security would expose the Plaintiff to the risk of suffering irreparable loss. He urged that the circumstances of this matter would warrant the Court holding in favour of the Plaintiff on this limb given the 1st Defendant is seeking to sell the property to recover unsecured amounts. That this matter is therefore distinguishable from the other authorities where courts have held that properties pledged as security become commodities capable of being sold in the event of default as the bank does not possess any statutory right to sell the suit property to recover the amount of Kshs. 16,000,000/= deposited to by the 1st Defendant as having been granted to the third party on 31st July 2023 allegedly advanced a sum of Kshs. 16,000,000/=. Further, that in any event, the 1st Defendant has not shown that the subsequent advances of the amount of Kshs. 16,000,000/= were covered by the principle of tacking under Section 82 of the Land Act to support its intention to recover the same through the Charges earlier created in its favour.
38. Counsel submitted that just because the 1st Defendant has money to pay the Plaintiff any damages that may be awarded to the Plaintiff at the final determination of the suit, the applicant urged the court not to allow the 1st Defendant to use its financial muscle with impunity, citing the case of Collogne Investments Limited v Bank of Africa.
39. On balance of convenience, counsel urged that based on the irregularities in the intended sale of the property and the violation of the Plaintiff right to property under Section 40 of the Constitution and its equitable right to redeem the same, the balance of convenience tilts in favour of the Applicant until the irregularities are remedied. He cited the case of Mathew Kiprono v Consolidated Bank of Kenya & another [2019] eKLR in this regard. Counsel urged that the applicant has met the threshold for grant of orders sought and prayed that the court allow the Application.

1st Respondents' Submissions

40. Counsel for the 1st Defendant/Respondent submitted that they would rely on the Replying Affidavit and the further Affidavit dated 17th March 2025. He submitted that he noted that this dispute epitomizes the well-settled principle that courts can neither rewrite contracts, nor shield a defaulting



party from the consequences of his/her own breach. The Applicant, having voluntarily entered into binding loan agreements with the 1st Respondent, now seeks the intervention of this Honourable Court to evade her repayment obligations and restrain the 1st Defendant from exercising its statutory power of sale over the suit property.

41. Counsel invited the court to apply the well-established principles set out in *Giella v Cassman Brown* (1973) where the court stated that for the injunctive reliefs to be granted, the Applicant must demonstrate a strong prima facie case with a high probability of success, prove that they stand to suffer irreparable harm that cannot be compensated by damages, and establish that the balance of convenience tilts in their favour. Regarding Prayer Number 4 of the Application, counsel submitted that the request for an order directing the 1st Respondent to supply the loan account statements is moot, overtaken by events, and a waste of this Honourable Court's time. The loan account statements have already been produced before this Court and therefore, there is no further need for an order on this issue. He cited the decision of the Court of Appeal in *Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 others* [2020] in this regard.
42. Counsel reproduced the contents of the replying affidavit on the factual background and proceeded to submit on the issues for determination. On whether the Applicant has established a prima facie case counsel cited the definitions of the same in the cases of *Mrao v First American Bank of Kenya Limited & 2 Others* {2003} and *Nguruman Limited v Jan Bonde Nielsen & 2 others*. Counsel submitted that the 1st Respondent has not infringed on any rights of the Applicant and further, it issued the Applicant with all the necessary legal demands and notices before commencing its statutory power of sale. Further, he urged that he would demonstrate that the Applicant entered in all the loan agreements willingly and in full knowledge of the consequences of default.
43. Counsel reproduced the averments in the replying affidavit on the offer letters, charges and statutory notices issued to the applicant and therefore there is no reason to regurgitate them here as they have already been produced above. Counsel urged that the applicant cannot now seek to fault the 1st Respondent for exercising its statutory power of sale, as the evidence clearly shows she was in default of her loan repayment obligations. Further, that the Applicants allegation that she only guaranteed the facilities advanced to the Company up to Kshs. 29,000,000/= is inaccurate.
44. That as demonstrated by annexures FW-1 (a), (b), (c), (d), and (e) to the 1st Respondent's Further Affidavit dated 17th March 2025, the Applicant personally guaranteed and assumed liability for facilities amounting to Kshs. 37,215,000/=. The Applicant signed all the respective letters of guarantee, clearly signifying her intention to indemnify the Bank for any losses arising from the Company's obligations, up to the stated amount, exclusive of interest and penalties.
45. That the correct position, therefore, is that both the Applicant's personal loan facility and the facilities extended to the principal debtor remain in arrears. Pursuant to Clause 22 of the respective Letters of Offer, which provide for the Bank's right of set-off and lien, the Bank is entitled to consolidate the outstanding balances and retain a lien over the Suit Property until the full satisfaction of the obligations and liabilities of the principal debtor. Additionally, the charge registered over the Suit Property empowers the Bank to exercise its statutory power of sale through public auction, provided the requisite notices are issued and a valuation is duly conducted.
46. Counsel submitted that the Applicant has not adduced any evidence to demonstrate repayment or provided any supporting dispositions nor annexed any receipts or documentation to that effect. Notably, the Applicant does not dispute the fact of non-payment of these loan facilities by the principal debtor.



47. Counsel laid out the sequence of events of the exercise of statutory power of sale and referred the court to the case of *Cedarwood Hotels & Resorts Investment Company v Kenya Commercial Bank Limited & another* (Civil Case E008 of 2022) [2022] KEHC 15000 (KLR) on the issue of competing valuation reports. Further, he urged that the applicant has not offered evidence to show that the valuation done was a complete undervaluation of the suit property or demonstrated that the Valuer Acumen were unqualified. Furthermore, the applicant did not outline any irrelevant factors considered by the valuers in undertaking their valuation.
48. In any event, the applicant's main focus is that there has been a drastic drop in the market price of the suit property. He stated that this discrepancy was explained by the 1st respondent through its letter dated September 21, 2021 by Centenary Valuers Limited who attributed the drop in market price to the covid 19 pandemic. The valuation that the Applicant now challenges as having grossly undervalued the suit property was conducted on 30th September 2024, well within the twelve-month period preceding the intended sale, in line with the requirements under the *Land Act*.
49. In contrast, the valuation report relied upon by the Applicant was conducted on 20th February 2025, a mere five months later. It is implausible, without any extraordinary justification, that the property could have appreciated by Kshs. 7,000,000/= within such a short period. Moreover, an allegation of undervaluation, standing alone, is not sufficient to restrain the realization of a charged property where the loan facility is undeniably in arrears. The appropriate remedy, if any, lies in a claim for damages. Should the valuation report commissioned by the Applicant ultimately withstand scrutiny, it may be considered as a relevant factor in assessing any potential damages to be awarded not as a ground to halt the exercise of the Bank's statutory power of sale. He invited the court to be guided by the decision of Justice J. Ngaah in *Brade Gate Holdings Ltd & another v Jamii Bora Bank Limited* [2018] KEHC 4289 (KLR). Counsel prayed the court find that the Applicant therefore has no prima facie case with a chance of success.
50. On irreparable loss, counsel urged that the Applicant does not stand to suffer any harm that cannot be compensated by way of damages, citing the finding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (Supra) and *Paul Gitonga Wanjau v Gatbuti Tea Factory Company Ltd & 2 Others* (2016) eKLR.
51. Counsel urged the court to consider the equitable maxim that "he who comes to equity must come with clean hands." That the Applicant has approached this Court on the assertion that the Bank is seeking to irregularly auction her property based on securities she allegedly did not offer. Contrarily, the Bank has demonstrated that the Applicant executed guarantees securing loan facilities amounting to Kshs. 37,215,000/ =, which remain in arrears. Further, that given that the 1st Respondent is a reputable financial institution with the capacity to satisfy any potential award, should the Court ultimately rule in favour of the Applicant, it is evident that no irreparable loss will be suffered that cannot be compensated by an award of damages. He cited the case of *Stek Cosmetics v Family Bank of Kenya Limited* (2020) in this regard.
52. On whether the balance of convenience tilts in favour of the 1st Respondent counsel urged in the affirmative. Eh stated that as at 30th September 2024, the date in which the 45 days' redemption notice was issued by the auctioneers, the outstanding debt amount was Kshs. 46,947,395.16. The Suit Property on the other hand was valued at a market value of Kshs. 35,000,000 and a forced sale value of Kshs. 26, 250,000. Further, that this outstanding loan amount has already exceeded the market value of the property and continues to attract interests and penalties for default. It is therefore more probable than not that the 1st Respondent will never be able to recover its full and outstanding arrears if it does not move with speed to realize this Suit Property to recover its debt. Counsel cited the case of *Susan*



Wangari Mburu v Eldoret Water & Sanitation Company Limited (2020) and prayed that the Court finds that the balance of convenience tilts in favour of the 1st Respondent who is likely not to recover the outstanding loan arrears. He prayed the court dismiss the Application with costs.

Analysis & Determination

53. The main issue that arises for determination is; Whether the court should grant an interim injunction to the applicant.

54. In order to determine whether to grant an interim injunction, the court is guided by the provisions of Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

“Where in any suit it is proved by affidavit or otherwise —

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

55. Additionally, the principles that guide a Court in dealing with Applications for injunctions were well settled in the celebrated case of *Giella –vs-Cassman Brown and Company Limited*, Civil Appeal No. 51 of 1972 where it was held as follows:

- i. The Applicant must establish a prima facie case with a probability of success.
- ii. Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.
- iii. Applicant has to demonstrate that balance of convenience tilts in its favour.

56. Further, in *Nguruman Limited v Jane Bonde Nielsen and 2 Others*, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.



The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

57. It follows that in order for the court to issue an injunction in favour of the applicant, she must satisfy the requirements as set out in *Giella vs Cassman Brown* (supra) and further, all the three requirements must be fulfilled sequentially.
58. What constitutes a “prima facie” case was discussed in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, where the Court of Appeal held as follows:
- “It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two ... In civil cases a prima facie case 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 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.”
59. The Application is premised on the grounds that the applicant was not served with the requisite statutory notices of sale and as such, the exercise of the statutory power of sale by the respondents was irregular. She additionally denied having defaulted on the payments and urged that the amounts claimed by the respondent bank were false.
60. It is not in dispute that the applicant is the registered proprietor of the parcel of land known as Eldoret Municipality/Block 14/2464. It is also evident from the annexures on record that the applicant was advanced a facility of Kshs. 5,000,000/- vide an offer letter dated 19th September 2019, which letter was annexed to the respondents’ affidavit as annexure FW-1. A legal charge was accordingly registered on 13th January and the same was produced as annexure FW-2. Vide another letter of offer dated 22nd June 2021, the bank granted the applicant a term loan facility of Kshs. 10,000,000/- and the applicant executed the acceptance offer letter as well as a joint letter of guarantee and indemnity dated 29th June 2021 for an aggregate amount of the same.
61. The applicant additionally registered a further charge on 21st July 2021 and later on signed a letter acknowledging indebtedness to the tune of Kshs. 15, 681,910.76/=. The applicant executed a joint letter of guarantee and indemnity dated 23rd November 2022 for an aggregate amount of Kshs. 37,215,000/= and registered a second further legal charge on 21st December 2022. This brief history reveals that the applicant was heavily indebted to the bank with several charges registered over the suit properties.
62. As the applicant defaulted on the loans, the next step for the respondent was to exercise statutory power of sale. Before a Chargee can exercise its statutory power of sale, the law requires it to issue notices to the Chargor as follows:



- a. 90 days' statutory notice of default, pursuant to Section 90(1) and (2) of the [Land Act, 2012](#).
 - b. 40 days' notice of intention to sell, pursuant to Section 96(2) of the [Land Act, 2012](#).
 - c. 45 days' redemption notice pursuant to Rule 15(d) of the [Auctioneers' Rules, 1997](#).
 - d. 14 days' notification of sale, pursuant to Rule 25(e) of the [Auctioneers' Rules, 1997](#).
63. In regard to (a) above, Section 90 aforesaid provides as follows:
1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
 2.
 3. If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may —
 - (a) sue the chargor for any money due and owing under the charge;
 - (b) appoint a receiver of the income of the charged land;
 - (c) lease the charged land, or if the charge is of a lease, sublease the land;
 - (d) enter into possession of the charged land; or
 - (e) sell the charged land;
64. From the evidence on record, it is evident that the applicant was served with the requisite notices as follows;
- a. Statutory Demand Notice: The Plaintiff was served with a statutory demand notice dated 16th November 2023, requiring payment of arrears amounting to Kshs. 3,620,867.66 within 14 days, failing which the security would be realized. Service was evidenced by the certificate of postage dated 21st November 2023. She annexed and marked as FW-2 copies of the Demand Notice and the Certificate of Postage dated 21st November 2023.
 - b. 90-Day Statutory Notice: The Plaintiff was also served with a 90-day statutory notice dated 18th December 2023 via her Ordinary Registered Mail (ORD), as evidenced by the certificate of postage dated 18th December, 2023. She annexed and marked as FW-3 a true copy of the 90-day Statutory Notice and the corresponding Certificate of Postage both dated 18th December, 2023.
 - c. 40-Day Statutory Notice: The Plaintiff was served with a 40-day statutory notice dated 30th July 2024, as evidenced by the certificate of postage dated 2nd August 2024. She annexed and marked as FW-4 copies of the 40-day Statutory Notice dated 30th July 2024 and the Certificate of Postage dated 2nd August 2024.
 - d. 45-Day Redemption Notice and Notification of Sale: The Plaintiff was duly served with the 45-day redemption notice and notification of sale dated 30th September 2024, inviting her to redeem the property known as Eldoret Municipality/Block 14/2464 by settling the outstanding debt of Kshs. 46,947,395.16 as at 27th September 2024. Service was effectively



completed on 2nd October 2024. She annexed and marked as FW-5 (a), (b) & (c) copies of the Redemption Notice and Notification of Sale both dated 30th September 2024, along with the corresponding postage receipt dated 1st October 2024.

65. The annexures as referred to above were contained in the supplementary further affidavit by the 1st respondent and also in the replying affidavit to the application. On the issue of service of the notices, the Court of Appeal pronounced itself on the issue of proof of service in the case of *Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited* [1996] eKLR, where the court made the following observation:

“..... Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya.”

66. On valuation of the properties, Section 97(1) and (2) of the *Land Act* provide as follows:

- “(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale”.
- (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

67. The 1st Respondent commissioned a valuation of the suit property in accordance with the provisions above which was evidenced by annexures FW-15 and FW-16 to the replying affidavit, which were valuation reports of the properties that were charged for the amounts advanced to the applicants.

68. The above said, from the evidence tendered in court, and the averments made in the in the affidavits, the court is very well satisfied that contrary to her assertions, the applicant was duly served with all the requisite statutory notices by the respondent. In this regard, I find that the Applicant has failed to establish a prima facie case with a high probability of success. This being the case then, as was held in the case of *Nguruman Limited v Jan Bonde Nielsen*(Supra) the court need not delve into the other requirements for the issuance of an injunction to wit irreparable loss and balance of convenience.

69. The upshot then is that the application lacks merit and the same is now hereby dismissed in its entirety and the applicants’ prayer for an interim injunction is denied. Accordingly, having found that the 1st respondent correctly exercised its statutory power of sale, the prayer for the supply of the loan account statements is equally dismissed as the burden of proof of any payments made towards the settlement of the borrowed sums fell squarely on the shoulders of the applicant. Having failed to discharge this burden, the same cannot be transferred to the applicant.

70. The conclusion from the foregoing is that the application is dismissed in its entirety with costs to the Respondents.

READ DATED AND SIGNED AT ELDORET ON 16TH OCTOBER 2025.

E. OMINDE

JUDGE

