

# The High Court backs Chargee's right to appoint a receiver to collect rent after the Chargee's statutory power of Sale has been frustrated

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## A Commentary of the court's ruling in High Court Civil Case no. E007 of 2023 Kenya Women Micro Finance Bank Limited v Stellar Kavutha Muthoka & Kenny Muthoka Maluki and 8 other Interested Parties.

### Brief background of the case

Our client advanced facilities to a Chargor, who accepted the terms via Letters of Offer and executed a Charge and a Deed of Assignment of Rental Income as security. Following the Chargor's default in servicing the loan and failure to rectify it despite statutory notices, the Chargee's rights under **Section 90 of the Land Act, 2012** automatically accrued. The Chargor frustrated the exercise of the Chargee's statutory power of sale. Consequently, the Chargee appointed a receiver to collect rental income from the Chargor's property, which houses tenants, in accordance with the executed Deed of Assignment. The Chargee then sought to enforce this Deed and collect rent, but the Chargor opposed the application, arguing that the Chargee was seeking final orders at an interim stage.

The Chargee's application for the mandatory injunction to collect rent was premised on the following special circumstances and grounds:

- a. The **Financier's rights as a Chargee had accrued**. This is because the Chargors do not dispute that they are in default and that they have not been servicing the loan.
- b. **Section 90 (3) (b)**, Section 92 of the Land Act as read together with the provisions of the Charge and the Deed of Assignment of Rental Income executed by the parties gives the Chargee a clear and unfettered right to collect rent from the charged properties
- c. The provisions of the Deed of Assignment of Rental Income directed the Landlord to assign all rental income to the bank and place the Chargee at priority in receiving rental income from the charged properties. The Landlord/Chargor is bound not to fetter this right by any act or omission without a prior written consent of the bank.

### Findings of the Court

The Court took cognizance of the trite law that ***a mandatory injunction should can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.***

The Chargors having not presented any evidence to controvert the Financier's grounds, the Court held that the Chargee had shown special circumstance to warrant issuance of a mandatory injunction and subsequently enforced the Deed of Rental Assignment and ordered the Chargors to remit rent proceeds from the properties to the Chargee.

### Conclusion

The decision by Hon. Justice Robert K. Limo offers a reprieve to financiers and an alternative of appointing a receiver for rent as opposed to the usual statutory power of sale. As long as the Financier's rights as a Chargee have accrued, an existing Deed of Assignment of Rental Income can be enforced and Chargors ordered to remit rent to the Chargee **even at the interim stage pending hearing of the main suit.**

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