DL Koisagat Tea Estate Limited & 5 others v Stanbic Bank Kenya Limited & another (Commercial Case E011 of 2024) [2025] KEHC 178 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEHC 178 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

COMMERCIAL CASE E011 OF 2024

RN NYAKUNDI, J

JANUARY 20, 2025

BETWEEN

DL KOISAGAT TEA ESTATE LIMITED ..... 1ST PLAINTIFF

KOISAGAT TEA ESTATE LIMITED ..... 2ND PLAINTIFF

KOIFAN DEVELOPERS LIMITED ..... 3RD PLAINTIFF

FIREFOX KENYA LIMITED ..... 4TH PLAINTIFF

DAVID BETT LANGAT ..... 5TH PLAINTIFF

HELLEN JEROBON LANGAT ..... 6TH PLAINTIFF

AND

STANBIC BANK KENYA LIMITED ..... 1ST DEFENDANT

GARAM INVESTMENT AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. Before me for determination are two applications from both parties. First, is a notice of motion dated August 29, 2024 by the Plaintiffs expressed to be brought under the provisions of section 1A, 1B and 3B of the *Civil Procedure Act*, Order 40 Rule 1, 2 and 5 of the Civil Procedure Rules 2010 and Order 51 of the Civil Procedure Rules. The Plaintiff sought orders as follows:

    a. Spent

    b. That pending the inter-parties hearing and determination of this application, a temporary injunction be granted restraining the defendants either by themselves, their servants, workers, agents and/or employees from interfering, entering into, trespassing, auctioning, wasting, damaging, alienating, selling by public auction or private treaty or in any manner, removing or

disposing of the property known as L.R. No. 10105 (I.R NO. 18136) situate in Nandi County or any part thereof (hereinafter referred to as 'the Nandi Property').

c. That pending the inter-parties hearing and determination of this application, a temporary injunction be granted restraining the defendants either by themselves, their servants, workers, agents and/or employees from interfering, entering into, trespassing, auctioning wasting, damaging, alienating, selling by public auction or private treaty or in any manner, removing or disposing of all plant and machinery on the property known as L.R. No. 10105 (I.R NO. 18136) situate in Nandi County or any part thereof.

d. That pending the inter-parties hearing and determination of this application, a temporary injunction be granted restraining the defendant either by themselves, their servants, workers, agents and/or employees from interfering, trespassing, auctioning, wasting, damaging, alienating, selling by public auction or private treaty or in any manner, removing or disposing of the property known as title number Mombasa/Block 1/355 situate in Mombasa County or any part thereof (hereinafter referred to as 'the Mombasa Property').

e. That pending the hearing and determination of the main suit, a temporary injunction be granted restraining the defendants either by themselves, their servants, workers, agents and/or employees from interfering, trespassing, auctioning, wasting, damaging, alienating, selling by public auction or private treaty or in any manner, removing or disposing of the property known as L.R. No. 10105 (I.R No. 18136) situate in Nandi County or any part thereof.

f. That pending the hearing and determination of the main suit, a temporary injunction be granted restraining the defendants either by themselves, their servants, workers, agents and/or employees from interfering, trespassing, auctioning, wasting, damaging, alienating, selling by public auction or private treaty or in any manner, removing or disposing of all plant and machinery on the property known as L.R. No. 10105 (I.R No. 18136) situate in Nandi County or any part thereof.

g. That pending the hearing and determination of the main suit, a temporary injunction be granted restraining the defendant either by themselves, their servants, workers, agents and/or employees from interfering, trespassing, auctioning, wasting, damaging, alienating, selling by public auction or private treaty or in any manner, removing or disposing of the property known as Title Number Mombasa/Block 1/355 situate in Mombasa County or any part thereof.

h. That pending the hearing and determination of the main suit, a temporary injunction be granted directing the Respondents to withdraw and/or cancel the advertisement for public auction of the Mombasa Property, the Nandi Property and all the plant and machinery on the Nandi Property published in the Daily Nation newspaper on 26th August 2024 and the standard newspaper on 27th August, 2024.

i. That pending the hearing and determination of the main suit, an order be granted for an impartial and independent valuation to be done in respect to the Nandi property, the Mombasa Property and all the plant and machinery on the Nandi Property.

j. That pending the hearing and determination of the main suit, an order be granted for the 1st defendant to supply the Plaintiffs with a full, comprehensive and audited statement of accounts for all the accounts held by the 1st defendant on behalf of the 1st Plaintiff specifically details relating to the principal sum interest accrued and charges incurred.

k. That the Plaintiff be granted costs of this application.

2. The application is based on the grounds on its face and its supported by the affidavit sworn by David Bett Langat. By way of summary, chief of the grounds relied on are:

a. On 24th April, 2020, the 1st Plaintiff applied and the 1st defendant offered the 1st Plaintiff a loan facility ("the facility"). The facility was for USD 16,129,497 and was to attract an interest rate of 9.25% per annum. The facility was to be repaid within 120 months.

b. The facility was aimed at restructuring and consolidating the 1st Plaintiff's existing facilities with the 1st defendant, term out hardcore overdraft facilities, take over the 4th Plaintiff's facilities with the 1st defendant and capitalize arrears in the sum of USD 1,303,922.

c. However, in operating its business, the 1st Plaintiff was faced by numerous challenges including:

i. A bleak economic climate caused by fluctuations in the dollar rate.

ii. Overproduction of tea and government interference with tea pricing leading to the collapse of the tea industry.

iii. Adverse effects arising from the covid-19 pandemic.

iv. The Russia-Ukraine war noting that Russia is a key importer of Kenyan tea.

v. The war in the Republic of Sudan.

vi. The war in the Middle East which obstructed shipping routes.

d. Cognizant of the challenges faced by the 1st Plaintiff, the 1st defendant restructured the facility multiple times. After the restructuring proved unsuccessful, the 1st defendant commenced enforcement action over the charged properties, to recover the sums owed to it.

e. The 1st defendant instructed the 2nd defendant to place an advertisement for auction of the charged properties. The intended auction was scheduled to take place in early August 2023.

f. However, the Plaintiffs and the Defendants commenced talks aimed at averting the intended auction. These negotiations led to the Plaintiffs and the 1st defendant mutually agreeing to enter into a Standstill Arrangement ("the Agreement") dated 12th September, 2023

g. That the agreement provided for various obligations to be met by all the parties in this suit. Some of the critical undertakings of the agreement are as follows:

i. The 1st Plaintiff was to make monthly payments of the USD amount equivalent of KES 12,500,000/=

ii. The 1st Plaintiff was to put up for sale various assets it owned in the Republic of Tanzania (Tanzania).

iii. The Agreement was to be implemented in two phases with each phase having milestones to be met.

iv. The milestones in Phase 1 included the coming up of a sale strategy and transaction approach, identifying and shortlisting potential buyers and facilitating potential buyers' due diligence. The milestones in phase 2 included receiving of bids, entering

into sale agreements, obtaining regulatory approvals and completion of the proposed transaction.

v. The proceeds from the sale of the assets in Tanzania was to be utilized in settling the debt the 1st Plaintiff owed to the CRDB Bank PLC in Tanzania ("CRBD") and repayment of the loan it owed the 1st defendant.

vi. An independent Transaction Advisor was to be appointed as a transaction advisor to assist in the sale of the 1st Plaintiff's assets in Tanzania. To this end, KPMG East Africa was appointed as the ITA.

vii. A sale and purchase agreement (SPA) for the purchase of the Tanzania assets was to be concluded by the 1st Plaintiff, with the assistance of the ITA, within three months from commencement date of the second standstill period. The second standstill period refers to a new date agreed upon if various milestones to be attained were not met to external dependency outside the control of the 1st Plaintiff.

viii. The sale of the Tanzania assets was dependent on the obtaining of requisite regulatory approvals required.

ix. As the 1st Plaintiff pursued the sale of the Tanzanian Assets, the 1st defendant undertook not to take or continue any action to enforce the payment of monies under any existing facility; enforce, or take any step with a view to enforcing, any security or guarantee given by any person in respect of the obligations under any facility of the 1st Plaintiff; or repossess or take possession of any assets which is the subject of a charge; among other covenants.

h. In fulfillment of their obligations, the Plaintiffs facilitated the performance of phase 1 of the Agreement in conjunction with the ITA. The ITA duly obtained shortlist of potential buyers for the Tanzanian Assets. However, at the stage of the review of phase 1, the ITA was yet to facilitate the due diligence by the potential buyers for the proposed transaction.

i. That in the absence of credible and likely potential buyers for the Tanzania assets, the attainment of phase 2 of the milestones was massively and negatively impacted.

j. Apprehensive of the looming deadlines in the Agreement, the 1st Plaintiff was compelled to explore alternative buyers for the Tanzania assets. The 1st Plaintiff sought the 1st defendant's approval to progress an initiative running parallel to the ITA's remit. This parallel endeavor would see the Tanzania assets acquired by the Government of Tanzania and their ownership transferred to smallholder farmers in Tanzania. The 1st defendant acknowledged the 1st Plaintiff's initiative and did not object to the proposal.

k. The 1st Plaintiff, in good faith and placing reliance on the 1st defendant's conduct, entered into a sale transaction engagement with the Government of Tanzania. The engagement incorporated the Kenya Tea Development Agency (KTDA) who were to assist in the management of the tea business in Tanzania upon the completion of the transaction.

l. The 1st Plaintiff apprised the 1st defendant and the ITA f any and all developments with regards to the sale of the Tanzania assets.

m. However, noting that the pursuit of the transaction between the 1st Plaintiff and the Government of Tanzania was a parallel process to that envisaged in the agreement, various foreseeable challenges arose.

n. Firstly, the proposed sale is subject to certain regulatory processes in Tanzania, budget formulation and policy alignment. All these processes are outside the control of the 1st Plaintiff.

o. Secondly, this parallel process commenced after the execution of the agreement. the timelines envisaged in the Agreement are thus not sustainable in light of new developments.

p. That nevertheless, and notwithstanding the challenges that they have been experiencing, the Plaintiffs have endeavored to fulfil their obligations in the Agreement. These endeavors have included raising finances from alternative business and pursuing alternative resources to offset the debt including entering into negotiations with a local financier to take over their loan obligations with the 1st defendant. The Plaintiffs have thus not been indolent in the performance of their obligations under the agreement.

q. Owing to the difficulties faced by the 1st Plaintiff faced by the 1st Plaintiff, he was constrained to delay some of the monthly installments required under the Agreement. This triggered the 1st Defendant to issue the 1st Plaintiff with a notice of breach dated 26th January, 2024.

r. The 1st Plaintiff and the 1st defendant thereafter entered into a series of good faith negotiations to enable the 1st Plaintiff too meet its obligations under the agreement.

s. By way of a letter dated 28th June, 2024, the 1st defendant accepted the 1st Plaintiff's request to pay KES 37,500,000, as payment for the installment arrears and submit a letter of sale with regards to the Tanzanian assets, as conditions precedent to an extension of the agreement.

t. The 1st Plaintiff and the 1st defendant have continuously engaged each other in a transparent and honest manner.

u. In this spirit, the 1st and 5th Plaintiff and the 1st defendant held a meeting on Thursday, the 22nd of August, 2024 during which good faith negotiations were undertaken regarding the Plaintiffs' debt. It was agreed that the 5th Plaintiff would supply the 1st defendant with updates on the sale of the Tanzania assets.

v. The 1st Plaintiff complied with the 1st defendant's request, repaying the sought updates to the 1st defendant on the 23rd of August, 2024. The 1st Plaintiff reiterated its commitment to settling the debt amount and requested for 30 days to furnish the 1st defendant with further information on the status of the sale of the Tanzanian assets and/or a term sheet from the perspective Lender on the refinancing under discussion.

w. Further, the 1st defendant requested that the 1st Plaintiff provides a duly signed power of attorney. This power of attorney was designed to enable the 1st defendant to freely transact in relation to the Plaintiffs' properties. Notably, this was not a term of the agreement. In addition, the issuance of power of attorney would have massively exposed the Plaintiffs as they would have totally surrendered their rights in respect to their assets. The Plaintiffs would lose their right to obtain fair value for assets as the 1st defendant would have been empowered to enter into treaties in a manner they exclusively deemed fit.

x. Based on the 1st Plaintiff misgivings relating too the request to provide a power of attorney, the 1st Plaintiff in its letter of 23rd August, 2024 requested the 1st defendant that the advocates of parties engage with a view of adopting a trust deed to continue to hold the signed power of attorney for the 90-day subordination period.

y. Based on the frustration experienced in performing the agreement, the financial challenges faced by the Plaintiffs and the series of engagements between the Plaintiffs and the 1st defendant, the plaintiffs were confident that the 1st defendant was appreciative of its circumstances and was being accommodative. The conduct of the 1st defendant and the positive engagements between the parties gave an impression that there were positive signs that an amicable resolution of the issue would be arrived at.

z. The Plaintiffs were therefore shocked to find out that on 26th August, 2024, the defendants re-advertised in the Daily Nation Newspaper for auction, parcel the Mombasa property registered in the name of Koifan Developers Limited, the 3rd Plaintiff herein and which auction was scheduled for the 9th September, 2024.

3. In a counter application dated 4th September, 2024, the defendants sought orders as follows:

a. Spent

b. Spent

c. Pending the hearing and determination of this application, Paragraph (4) of the order of 30th August 2024 directing the Plaintiffs to give an understanding as to damages be substituted with an order directing the Plaintiffs to pay a sum of KES 12,500,000/= per month with effect from 30th August, 2024 as a condition for the grant of the order of 30th August, 2024, and in default of payment of any one installment, the order of 30th August, 2024 stand vacated.

d. The order of 30th August 2024 be set aside and/or discharged.

e. The Plaint dated 29th August, 2024 be struck out.

f. The costs of this application and the suit be awarded to the defendants.

4. On 18th September, 2024, the parties were directed to canvass the two applications by way of written submissions, to which both parties have complied.

5. The Plaintiff through learned counsel Mr. Ochieng filed written submissions dated 22nd October, 2024 in support of the Plaintiffs' application dated 29th August, 2024 and in opposition of the Defendants' application dated 4th September, 2024. Learned Counsel identified the following issues for determination:

a. Whether the Plaintiffs are entitled to the orders sought in the Plaintiffs' Application;

b. Whether the Orders of 30th August 2024 ought to be varied, discharged or set aside by this Honorable Court;

c. Whether the Plaint dated 29th August 2024 ought to be struck out; and

d. Whether the Defendants' application ought to be heard in priority to the Plaintiffs' application.

6. Counsel started by submitting that the Plaintiffs are entitled to the orders sought in the application.

7. On the first issue, learned counsel for the Plaintiffs constructed his argument around the classic principles for granting temporary injunctions, as established in the locus classicus case of Giella v Cassman Brown & Co Ltd [1973] 1 EA 358 (CAK). On the first limb of establishing a prima facie case, counsel drew the court's attention to the definition provided in Mrao v First American Bank of Kenya Limited & 2 others (2003) eKLR, where the Court of Appeal defined it as a case which, on the

material presented, would lead a properly directed tribunal to conclude that a right has been infringed. Counsel drew the court's attention to Glascott v Lang 3 MY. & CR. 455, which established that for a prima facie case, it is sufficient if the Court finds upon the pleadings and evidence 'a case which makes the transaction a proper subject of investigation.' This principle, counsel submitted, squarely applied to the present circumstances where serious questions of law and fact required judicial scrutiny.

8. On the substantive elements of their case, counsel acknowledged the underlying indebtedness but presented a nuanced argument centered on the quantum of debt, which they contended arose from interest rate variations implemented without the requisite Cabinet Secretary approval under Section 44 of the *Banking Act*. This position found resonance in the Supreme Court's determination in Stanbic Bank Kenya Limited v Santowels Limited Supreme Court Petition No. E005 of 2023. Counsel further developed this thread by reference to Njogu & Company Advocates v National Bank of Kenya Limited [2016] eKLR, addressing the legal implications of statutory non-compliance on contractual arrangements.

9. Counsel further advanced their submissions on force majeure, arguing that the Standstill Agreement had been frustrated by a confluence of extraordinary circumstances. Reference was made to Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited (Civil Appeal 64 of 2022) [2023] KECA 700 (KLR), where the court recognized COVID-19 as a force majeure event. Counsel elaborated that this principle extended to the cascading effects of international conflicts and disrupted shipping routes that had materially affected the Plaintiffs' business operations.

10. Counsel further relied on Development Finance Company of Kenya & 2 others vs Wino Industries Limited (1995) eKLR, particularly highlighting Justice Gachuhi JA's comprehensive discussion on estoppel and waiver. The submission emphasized that the Defendants, having engaged in good faith negotiations and being fully aware of the Plaintiffs' difficulties, should not be permitted to renege on these negotiations, especially given the Plaintiffs' demonstrable commitment through their engagement with the Government of Tanzania.

11. The submissions drew attention to Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd (1982) ALL ER 577, emphasizing that where parties proceed on an underlying assumption, neither should be allowed to go back on that assumption when it would be unfair or unjust to do so.

12. Addressing the second limb of irreparable injury, counsel detailed the far-reaching implications of the intended sale, noting its impact on over 359 staff members and 5,423 farmers, alongside essential community services including schools and hospitals. In response to the Defendant's assertion about their capacity to compensate in damages, counsel referenced Givan Okallo Ingari & Millicent Nyanya Ingari V Housing Finance Company of Kenya Limited (Civil Case 79 Of 2007) [2007] KEHC 2411 (KLR), where the court rejected the notion that a defendant's financial capacity to pay damages could justify actions that would fundamentally alter the parties' relationship.

13. Counsel underscored that the contemplated sale of properties at an undervaluation would prejudice not only the current parties but also impact the 5th and 6th Plaintiffs as guarantors. The submissions highlighted that this potential liability could be extinguished through the proposed sale of Tanzania assets, presenting a more equitable resolution for all parties involved.

14. On the question of varying or setting aside the orders of 30th August 2024, counsel anchored their opposition in the principle of judicial discretion, referencing Harrish Chandra Bhovanbhai Jobanputra and Anor v Paramount Universal Bank Ltd & 3 others HCCC No. 828 of 2010. Through this lens, counsel argued that no material facts had been concealed from the court, nor had there been any radical change in circumstances that would warrant disturbing the orders.

15. Counsel extensively addressed the principles governing variation of court orders, citing Filista Chamaiyo Sosten v Samson Mutai [2012] eKLR, where Hon. Munyao Sila J emphasized that the discretion under Order 40 Rule 7 should be sparingly exercised to avoid its use as a backdoor appeal mechanism.

16. Counsel particularly objected to the Defendants' proposal for a monthly payment of Kshs. 12,500,000, arguing that this would amount to the court prematurely adjudicating a central issue in the main suit. The submission emphasized that the disputed amounts arose from allegedly unlawful interest variations and required proper judicial scrutiny in the main suit.

17. Regarding the striking out of the plaint, counsel invoked the cautionary approach outlined in Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR. The submissions emphasized the gravity of such a remedy, drawing support from Yaya Towers Limited v Trade Bank Limited (Civil Appeal No. 35 of 2000), which underscored that striking out should be reserved for the clearest of cases. Counsel maintained that the plaint raised substantive issues meriting full judicial consideration.

18. Drawing from Lawrence v Lord Norreys (1890) 15 App Cas 210, counsel emphasized that the court's inherent jurisdiction to dismiss an action should be exercised only in exceptional cases. The submissions referenced Article 50 of the *Constitution* of Kenya 2010, buttressed by the rule of natural justice audi alterum partem, arguing that every person has the right to have disputes resolved through fair hearing.

19. Counsel cited Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164, elaborating that a pleading becomes frivolous only when it lacks substance or is groundless, and vexatious when it lacks bona fides or tends to cause unnecessary anxiety, trouble, or expense to the opposite party.

20. On the question of hearing priority, counsel grounded their submissions in constitutional principles of judicial authority, citing Khan v International Commercial Company (K) Ltd (Civil Appeal 124 of 2018) [2023] KECA 181 (KLR). The submissions emphasized that the court's discretion in managing its proceedings cannot be fettered by litigants' preferences. Counsel noted that their application, being first in time and already certified urgent, naturally preceded the Defendants' uncertified application.

21. The defendant through Learned Senior Counsel Mr. Kimani filed two sets of submissions in opposition to the Plaintiff's injunction application dated 29th August, 2024 and in support of the defendants' application dated 4th September, 2024 to set aside the order of 30th August, 2024 and to strike out the suit.

22. In the first set of submissions dated 22nd October, 2024, the defendant relied on the facts as set out in the replying affidavit of Robert Githua sworn on the 4th September, 2024. The affidavit was filed in response to the injunction application and in support of the striking out application. The defendant equally relied on the grounds of opposition dated 4th September, 2024 filed in response to the injunction application and the digest of authorities.

23. Starting with the Plaintiff's injunction application which seeks to restrain the 1st defendant from exercising its statutory of sale in respect of Land Reference Number 10105 and title number: Mombasa/Block 1/355 (hereinafter collectively referred to as the "charged properties") pending the hearing determination of the suit, learned counsel submitted that the Plaintiff is required to prove it has a prima facie case with a probability of success, that it will suffer irreparable harm that cannot be compensated by an award of damages if it is successful and finally, that the interlocutory injunction should be issued based on a balance of convenience. On this, he relied on the case of Nguruman Limited

v. Jan Bonde Nielson and 2 others (2014) eKLR. It was submitted for the defendant that the Plaintiff has not established the three requisite conditions for an injunction to be granted.

24. Learned counsel pointed out that a prima facie case is one where, on the material presented to the court, a court 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. In support of this, counsel relied on the case of Mrao Ltd. V. First American Bank of Kenya Limited & 2 others (2003) eKLR.

25. It is submitted for the Defendant that the Plaintiffs have failed to demonstrate that the 1st defendant has infringed any of their rights, necessitating the defendants to apply to have the suit struck out. Counsel further pointed out that in the injunction application and the affidavit of David Bett Langat sworn on 29th August, 2024 in support of that application, the Plaintiffs expressly admitted that:

    a. The 1st defendant offered credit facilities to the 1st Plaintiff and these facilities were secured by, inter alia, the charged properties.

    b. The 1st Plaintiff in default of the credit facilities advanced to it by the 1st defendant.

    c. The 1st defendant has accommodated the 1st Plaintiff multiple times by restructuring the facilities and after the restructuring proved unsuccessful the 1st defendant moved to exercise its power of sale.

    d. The 1st defendant has issued the statutory notices required under section 90 and 96 of the *Land Act*, 2012.

    e. The 1st defendant gave the 1st Plaintiff further accommodation by entering into the standstill agreement dated 12th September 2023 and the 1st Plaintiff defaulted on terms of this agreement leading to notices of breach being issued by the 1st defendant.

26. In light of the stated admissions, he submitted that it is manifestly clear that the 1st Plaintiff is in default and the 1st defendant has issued the statutory notices required to exercise its statutory power of sale. That there is no legal basis to stop the 1st defendant from exercising its rights as charge.

27. It was submitted that there can be no prima facie in the face of clear admissions of indebtedness and of issuance of the requisite statutory notices.

28. Learned Senior Counsel Mr. Kimani summarized the Plaintiff's grounds in support of the injunction application as follows:

    a. The 1st defendant is acting in bad faith and not in the interest of justice by advertising the charged properties for sale despite the ongoing discussions between the parties

    b. Proceeding with the auction of the charged properties shall defeat the "intent and purpose" of the Standstill Agreement.

    c. The interest of justice is best served by allowing the Plaintiffs to conclude the ongoing transaction involving the sale of the Tanzania assets and therefore any auction that would affect this should be shelved.

    d. The 1st defendant has not provided up to date valuation reports for the charged properties.

    e. There is need to ascertain the actual debt owed before proceeding with the auction.

29. From the summarized grounds, learned counsel submitted that in paragraph (a) to (c), there is nothing disclosing any alleged infringement of the Plaintiff's rights and should fail. The assertions that the 1st defendant is acting in bad faith and that the interest of justice warrant the grant of an injunction are unsubstantiated and without any legal foundation. The Plaintiffs are essentially arguing that the 1st defendant should be compelled to give the Plaintiffs more time to sell their Tanzanian assets despite the admission that the 1st Plaintiff is in default and the 1st defendant has issued all the statutory notices.

30. Learned counsel further argued that the Plaintiffs should not be allowed to walk away from the bargain of the terms of the agreements they entered into with the 1st defendant based on general claims that this would be in the interest of justice. That the Plaintiffs are bound by the terms set out in the facility letters and in the Standstill Agreement and this court cannot rewrite the terms of those agreements. On this he relied on the case of National Bank of Kenya Limited v. Pipeplastic Samkolit (K) Limited and another (2002) E.A 503 (CAK).

31. It is also submitted for the defendant that the equity follows the law. Learned counsel placed reliance on the case of Habib Bank A.G. Zurich v. Rajnikant Khetshi Shah (2018) eKLR. He submitted that the interest of justice in the present case is that the 1st defendant, having complied with the provisions of the *Land Act*, should be allowed to exercise its power of sale to recover the credit facilities that the 1st Plaintiff has failed to pay.

32. Learned counsel submitted that the 1st defendant has acted in good faith by extending accommodation to the Plaintiffs even after the 1st defendant was in default. That this is evident from the following:

    a. The 1st and 4th Plaintiffs restructured the credit facilities advanced to them in February 2019 vide 4 facility letters all dated 25th February, 2019. Despite the principal debt moratorium of 12 months given to the 1st and 4th Plaintiffs by the 1st defendant, the 1st and 4th Plaintiffs were unable to honor their obligations under these facility letters.

    b. The 1st and 4th Plaintiffs' default notwithstanding, the 1st defendant again agreed to restructure the credit facilities advanced to the 1st and 4th Plaintiffs by a facility letter dated 24th April, 2020 to give the Plaintiffs another opportunity to settle the outstanding credit facilities.

    c. The Plaintiffs and the 1st defendant entered into the standstill agreements dated 12th September 2023 to give the 1st Plaintiff yet another opportunity to settle the outstanding credit facilities. The 1st Plaintiff failed to honor its obligations under this agreement.

33. It was further the submission of the Defendant that the Standstill Agreement expired on 30th June, 2024 due to the 1st Plaintiff's repeated failures to honor its obligations under that agreement. That the allegations of bad faith by the 1st defendant are not supported by the evidence adduced in court and this should not be a ground for issuing an interlocutory injunction.

34. On the question of valuation of charged properties, counsel submitted that the Plaintiffs' allegations that the 1st defendant is likely to proceed with the auction without providing a valuation report of the charged properties is patently untrue. He stated that the 1st defendant ensured a valuation of the charged properties is done before advertising the auction as can be seen from the following:

    a. Ascendas Kenya Limited thereafter prepared a valuation reported dated 23rd July, 2024 in respect of title number: Mombasa/Block 1/355. That the market value of this property is KES 238,000,000/= and the forced sale value is KES 178,500,000/=.

b. Ascendas Kenya Limited thereafter prepared a valuation report dated 31st July, 2024 in respect of Land Reference Number 10105 (Original Number 6085/2 & 4). That the marked value of this property is KES 2,428,385,000/= and the forced sale value is KES 1,821,288,750/=.

35. It is submitted for the defendant that an allegation that a charged property has been undervalued alone is not sufficient to warrant the grant of an interlocutory injunction. On this he relied on the Court of Appeal's decision in Nyeri Civil Appeal E008 of 2023 Cedarwood Hotels & Resorts Investment Company v. Kenya Commercial Bank Limited & Another where the court set out the following principles to be considered where an allegation of undervaluation is made:

a. It is not enough to merely claim that the selling price is not the best price obtainable by producing a counter valuation report.

b. The applicant must show through evidence that the valuation report that the bank is relying on to exercise its power of sale does not give the best price obtainable at the time.

c. A prima facie burden rests with the applicant to prove that its right to obtain the best reasonable obtainable price at the time is being infringed by an undervaluation of the charged property.

36. He argued that the Plaintiffs have not challenged the qualifications or the competence of Ascendas Kenya Limited who prepared the valuation reports of the charged properties. That the Plaintiff has not alleged that irrelevant factors were considered as part of those valuations. There is therefore no basis for alleging that the 1st defendant has undervalued the Charged properties.

37. On the actual debt owed, learned counsel argued that the Plaintiff's allegations that there is a risk that the auction could proceed without ascertaining the actual debt owed to the 1st defendant is not a sufficient ground to issue an interlocutory injunction. On this counsel cited the decision in Mrao Ltd. V. First American Bank. That in any event, the 1st defendant set out the outstanding debt owed by the 1st Plaintiff in its letters dated 14th March, 2024, 11th June, 2024, 21st June, 2024, 28th June, 2024, 11th July, 2024 and 14th August, 2024. It is therefore not correct that the actual debt owed is not known. The Plaintiffs did not challenge the outstanding amounts set out in these letters and it is submitted that the actual debt owed is well known to the Plaintiffs and that this allegation is an afterthought designed to obtain an interlocutory injunction. To this end, Mr. Kimani, Senior Counsel submitted that the defendants have demonstrated that the Plaintiffs do not have a prima facie case and the injunction application should fail on this ground alone.

38. On the question of the irreparable loss, it is submitted for the defendant that there is no dispute that the charged properties were offered to secure the facilities advanced to the 1st Plaintiff by the 1st defendant. The charged properties became commodities of sale that can be sold to recover the debts owed. Learned counsel cited the decision in John Kingori Kioni v. Sidian Bank & another (2020) eKLR, where Wendoh J followed the decision in Isaac O. Litali v. Ambrose Lusumbai & Beatrice Subali & AFC. Learned counsel maintained that the Plaintiffs confirmed that they could not suffer irreparable loss when they offered the charged properties as securities for the credit facilities advanced to the 1st Plaintiff, making them commodities of sale. That in line with section 99(4) of the *Land Act*, any loss that the Plaintiffs could suffer as a result of the sale of the charged properties can be compensated by an award of damages.

39. It is submitted for the 1st defendant that it is a stable bank and there is not suggestion that it would be unable to compensate the Plaintiffs in the event they are successful at trial. The 1st defendant therefore should not be stopped from exercising its power of sale to recover the outstanding debt. That the

Plaintiffs have failed to surmount this hurdle as well and this is another ground for the dismissal of the injunction application.

40. Finally, on the balance of convenience, it is submitted for the Defendant that this court need not consider the balance of convenience. That if the court considers the said element, the balance of convenience tilts in favor of dismissing the injunction application. According to the Defendant, in the letter dated 14th August, 2024, the total amount outstanding from the 1st Plaintiff to the 1st defendant is USD 19,555,845.16 which sum continues to accrue interest. That the outstanding amount is equivalent to KES 2,522,704,025.64 at an exchange rate of KES 129 to the dollar. This is a colossal sum of money. Counsel submitted that the longer the debt remains outstanding the harder it will be for the 1st defendant to recover the sums advanced and the 1st defendant will be at risk of suffering substantial irreparable loss.

41. The next application for consideration was that made by the defendant seeking to strike out the suit. The application sought orders as follows:

    a. Paragraph (4) of the order of 30th August 2024 directing the Plaintiffs to give an understanding as to damages be substituted with an order directing the Plaintiffs to pay a sum of KES 12,500,000/= per month with effect from 30th August, 2024 as a condition for the grant of the order of 30th August, 2024.

    b. The Plaint dated 29th August, 2024 be struck out.

42. It is submitted for defendant that Order 40 Rule 7 of the Civil Procedure Rules provides that an injunction may be discharged, varied or set aside by the court on application by any party dissatisfied with the order. He submitted that the 1st defendant is dissatisfied with the order granting the Plaintiffs an interim injunction on condition that the Plaintiffs give an undertaking as to damages.

43. Learned Senior Counsel Mr. Kimani submitted that the evidence shows that the Plaintiffs have repeatedly defaulted even after being given accommodation by the 1st defendant by way of a restructuring of the loans moratorium periods and the standstill agreement. As a result of the repeated default, the total outstanding amount outstanding as at 14th August 2024 is equivalent to KES 2,522,704,025.64. That an undertaking as to damages would only serve to increase the already colossal amount owed by the 1st Plaintiff to the 1st defendant. This is not an equitable condition for the grant of an interim injunction.

44. Counsel cited the provisions of Order 40 Rule 2(2) of the Civil Procedure Rules, 2010 which provide that the court may grant an interim injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit. In support of his argument, counsel cited the case of Chania Shuttle Limited v. kenol Kobil Limited (Civil Suit 79 of 2012) KEHC 3042 (KLR) where Odunga J held that the court is empowered, in appropriate cases, to grant a conditional injunction with respect to the duration and even impose such terms as appropriate including an order that the applicant secures a bank guarantee.

45. That as the Plaintiffs are already in default and the sum owed to the 1st defendant is huge. The appropriate condition for the grant of an injunction in the present case would be for the Plaintiffs to be ordered to pay KES 12,500,000/= per month as a condition for the grant of an interim injunction and in default of payment of any one instalment then the interim injunction should stand vacated.

46. Learned Counsel further submitted that there has been no reasonable cause of action on the part of the Plaintiffs. That the 1st defendant has demonstrated that the Plaintiffs' claims that the 1st defendant is acting in bad faith and that the 1st defendant is frustrating the negotiations lack merit and are not

a reasonable cause of action in the part of these submissions that shows the Plaintiffs do not have a prima facie case.

47. That the Plaintiffs' claims as set out in paragraphs 48 to 51 of the plaint are untenable for the following reasons:

    a. The Plaintiffs have admitted that the 1st Plaintiff is indebted to the 1st defendant and is in default of its obligations under the credit facilities advanced to the 1st Plaintiff by the 1st defendant.

    b. The Plaintiffs have admitted that the 1st defendant has issued the statutory notices required under the *Land Act* for the 1st defendant too proceed to exercise its statutory power of sale.

    c. The Plaintiffs allegation that the 1st defendant has acted in bad faith by advertising the charged properties for sale lacks any legal or factual basis. There is no law or agreement in place that stopped the 1st defendant from advertising the charged properties for sale.

    d. The 1st Plaintiff has at all times had access to their statements of accounts through the online banking platform and has always been made aware of the outstanding amounts vide the letters dated 14th March, 2024, 11th June 2024, 21st June, 2024, 28th June, 2024 and 14th August, 2024. The claim that the statements have not been furnished is false and intended to mislead.

    e. The 1st Plaintiff has never challenged the rate of interest applied to the facility and has not given any particulars of the alleged instances when the 1st defendant varied the rate of interest applied contrary to the law.

48. Learned Counsel stated that a reasonable cause of action is based on the facts of the case, the existence of which entitles one person to obtain a remedy against another person as was stated in the case Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance v. Mara Conservancy & 5 others (2014) eKLR. That the claims made against the defendants in the Plaint dated 29th August, 2024 are groundless and fanciful. They do not disclose a reasonable cause of action against the defendants. The Plaint therefore should be struck out.

49. Finally, learned counsel submitted that the Plaintiff flagrantly misused the court process by filing the instant suit for the sole purpose of delaying the exercise of the 1st defendant's power of sale where the Plaintiffs have admitted indebtedness to the defendant and have admitted service of the statutory notices. That this is a suit solely meant to vex and annoy the defendants and it should be struck out.

50. In conclusion, the defendant submitted that the they have demonstrated that not only have the Plaintiff failed to show that they have a prima facie case, the Plaintiffs failed to show that they have a prima facie case, the Plaintiffs' complaints do not disclose a reasonable cause of action and the entire suit should be struck out. Further that on the examination of the Plaintiffs' claims, it is clear that the sole purpose of this suit is for the Plaintiffs to delay the 1st defendant's exercise of its statutory power of sale until the Plaintiff's conclude the sale of their assets in Tanzania. This is an abuse of the court process. That where the debt, default and service of statutory notices have been admitted, the court should not restrain the 1st defendant from exercising its power of sale. For those reasons, learned counsel urged the court to dismiss the injunction application and to allow the application to strike out the suit.

51. In the next set of submissions dated November 11, 2024 Mr. Kimani, Learned Senior Counsel addressed new arguments raised by the Plaintiffs in their submissions. The said arguments are:

    a. The Plaintiffs argue for the first time at paragraph 17 of their submissions that an interlocutory injunction should be issued because the 1st defendant has altered the rate of interest charged on the 1st Plaintiff's facilities in contravention of section 44 of the *Banking Act*.

b. At grounds 5 and 6 of the injunction application, the Plaintiffs indicate that the effects of Covid-19, the loss of key markets resulting from the Russia-Ukraine war, the conflict in Sudan, and Middle East tensions disrupting shipping routes to Pakistan led to the 1st Plaintiff defaulting on its obligations under the credit facilities. That at paragraph 22 of their submissions, the plaintiffs for the first time urge the court to investigate whether the credit facilities advanced to the 1st plaintiff and the standstill agreement dated 12th September 2023 have been frustrated through force majeure due to the challenges the 1st plaintiff faced as outlines in ground 5 of the injunction application.

52. Learned counsel argued that it is improper for the Plaintiffs to introduce new grounds in support of the injunction application at the submission stage. The defendants have not had an opportunity to respond to these allegations and to tender evidence in court to refute these allegations. on this, he relied on the case of Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others (2014) eKLR and the case of Idris Abdi Abdullahi v. Ahmed Bashane & 2 others (2018)

53. It is submitted for the Defendant that there is no evidence adduced by the Plaintiffs to support the allegation that the defendant has altered the interest rate charged on the credit facilities advanced to the 1st Plaintiff contrary to section 44 of the *Banking Act*. on this, counsel relied on MC Sakar, SC Sarkar and Prabhas C Sarkar law of Evidence 18th Edition Volume 2 and the cases of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) KECA 319 and Njogu & Company advocates v National Bank of Kenya Limited (2016) eKLR.

54. Learned counsel also submitted that the allegations of frustration through force majeure are an afterthought which are only meant to hinder the 1st defendant's exercise of its statutory power of sale. On this, he cited the case of Coast Raha Limited v. Consolidated Bank Limited (2024) KEHC 7063 (KLR). He argued that an agreement that expires due to non-performance by one party cannot be argued to have been frustrated by force majeure and a party that fails to honor its obligations within the time set out in an agreement should not be allowed to rely on general arguments on good faith to prolong the terms of the expired agreement.

Analysis and determination

55. This matter brings to the fore fundamental questions at the intersection of banking law, contract, and equity. Before the court are two applications that, though procedurally distinct, emanate from a complex commercial relationship spanning several years and territories.

56. The dispute centers on certain properties, namely L.R. No. 10105 (I.R NO. 18136) situated in Nandi County and Title Number Mombasa/Block 1/355 in Mombasa County, along with plant and machinery thereon. These properties were charged to secure credit facilities advanced by the 1st Defendant to the 1st Plaintiff. The core facility, granted on 24th April 2020, amounted to USD 16,129,497 at an interest rate of 9.25% per annum, repayable within 120 months. This facility was meant to restructure and consolidate existing facilities, term out hardcore overdraft facilities, take over the 4th Plaintiff's facilities, and capitalize arrears amounting to USD 1,303,922.

57. The commercial context of this dispute is particularly significant. The tea industry, forming the backbone of the 1st Plaintiff's operations, has faced unprecedented challenges. These range from domestic concerns such as fluctuating dollar rates and regulatory interventions in tea pricing, to global disruptions including the COVID-19 pandemic, the Russia-Ukraine conflict (affecting a key tea export market), the Sudan crisis, and Middle Eastern tensions impacting crucial shipping routes to Pakistan.

58. In recognition of these challenges, the parties entered into a Standstill Arrangement dated 12th September 2023, demonstrating an initial willingness to find a lasting solution towards the performance of the contract by the Plaintiff. This arrangement was structured in two phases, incorporating both immediate relief measures and longer-term strategic solutions. Key among these was the proposed sale of the 1st Plaintiff's Tanzanian assets, with proceeds earmarked for settling obligations to both CRDB Bank PLC in Tanzania and the 1st Defendant.

59. In finer detail as captured under clause 2.2 and 2.3 these are some of the conditions precedent on the part of the Plaintiffs:

    a. Receipt by the lender of a copy of this agreement fully executed by the company, the obligors and the shareholder guarantors.

    b. Receipt by the lender of Board resolutions from the company and the obligors approving the terms of this agreement and the entry into this agreement by the company and the obligors, in form and substance satisfactory to the lender.

    c. Receipt of written undertaking by the shareholder guarantors that they shall use their voting powers to give effect to the terms of this agreement including facilitating the proposed transaction.

    d. Receipt by the lender of a signed contract between the company and the ITA confirming the appointment of, and scope of work for, the ITA as the company's advisor for the proposed transaction, in form and substance satisfactory to the lender.

    e. Receipt by the lender of the letter sent by the company to CRDB to request for its written consent for the sale of the Tanzania assets and a dated acknowledgement of receipt of such letter by CRDB.

    f. Receipt by the lender of audited financial statements (including signed auditors' opinions) for the 2021 financial year for each of the Tanzania companies impacted by the proposed transaction.

    g. Receipt by the lender of recent official company searches from the Tanzanian companies' registry confirming the shareholders of all the Tanzanian businesses;

    h. Receipt by the lender of the liabilities Matrix (Kenya) and full disclosure of any actual or threatened recovery action by creditors in Kenya;

    i. Receipt by the lender of currently valid Tax Clearance/Compliance certificates from the TRA for the companies shown in Schedule 3 (Tanzania assets) or if such certificates are unavailable, official current tax ledger reports or statements from the TRA indicating the taxes due from the companies in schedule 3; and

    j. Receipt by the lender of a currently valid tax compliance certificate from the KRA for the company.

60. The totality of the covenants and certain obligations to be undertaken under the standstill agreement between the Plaintiff and the Defendant are clearly outlined in order to meet the terms of the loan repayment as initially agreed in the primary contractual instruments. Is there any particular reason why this court should not give effect to this standstill agreement? in analyzing the various affidavits by either parties and annexed documentary evidence, one cannot ignore to delve into the interpretation and construction of the contractual documents which forms the basic structure for grant or denial of

temporary injunction as stipulated under Order 40 Rule 1 and 2 of the Civil Procedure Rules. The key guiding principles on this branch of law on interpretation of contract documents is clearly stipulated in the persuasive case of Investors Compensation Scheme Ltd. V West Bromwich B.S.W (1998) 1 WLR 896 HL in which Lord Hoffman remarked as follows:

> " Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. The law excludes from admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are some respects unclear. But this is not the occasion on which to explore them. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life to conclude that the parties must, for whatever reason, have used the wrong words or syntax. The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in forms of documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

61. Applying the principles applied in the above comparative jurisprudence, on the face of it, one sees no reason to depart from the plain language of the standstill agreement save for this court to answer the question whether the submissions and arguments advanced by the Plaintiff with regard to the exceptional circumstances which when considered within the rubric of the *evidence Act* in matters which the court has to take judicial notice carry any weight in so far as the performance of the contract which was binding between the borrower and the lender.

62. I reiterate that whilst conduct and intention of the parties is deducible from the construction of the agreement which shows the terms of the contract set out to be performed within a specific period on the repayments to be made by the Plaintiff and the sum advanced and owed to the defendant. In this application, some of the issues canvassed by the Plaintiff hinge on remarkable frustrations arising out of the volatility of the European Tea market including the Russian-Ukraine war. In addition, the Plaintiff argued and submitted that the initial contract set to be performed between the period under review with effect from the 1st drawdown of the loans advanced as per the letters of offer dated 17th November, 2016 spread out to be repaid between 60 and 84 months concurrently. My reading of the contract did not incorporate the force majeure clause. So the question which falls to be determined whether the contract was frustrated by some supervening event under the common law doctrine of frustration.

This doctrine concerns the treatment of contractual obligations in the event unforeseen circumstances occurring. The Plaintiff delved into avalanche of events, highlighting the Covid-19 pandemic, the international tea market recession which was also precipitated Russian and Ukraine war. The concept stipulates that the horror of an unexpected turn of events, once they occur evidence shows a potential or actual adverse on the Plaintiff to perform his/her obligations of the contract as agreed with the defendant in the loan agreement. For the Plaintiff to qualify, material evidence must be pre-sentence to demonstrate that it was absolutely impossible for him/her to comply with the terms of the agreement due to the events which ere external, unpredictable and unavoidable.

63. In the case of Davis Contractors Ltd v. Fareham UDC (1956) 2 ALL ER 145 the court stated as follows:

> " Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni it was not this that I promise to do."

64. It is important to bear in mind that the COVID-19 pandemic ravaged the globe with far reaching economic and social rights consequences until the lifting of the restrictions on or about October, 2021 and yet each state was to keep vigilant on any emerging threats from the pandemic. It is therefore a general consensus that the nature and spread of Covid-19 in so far as the Plaintiff's investment which involved the sale of tea to other Regional and international markets may have been negatively impacted by the restrictions imposed to contain the outbreak of the virus. It follows from these observations that neither the Plaintiff or the defendant bank can be said of having reasonable control of the circumstances arising out of the covid-19, the international markets more so the leading route of Russia and Ukraine in which both countries have been at war for sometimes now. It might not be farfetched in my considered view that the alleged circumstances by the Plaintiff constitute frustrating events. The import of it in my view was the conduct and intention of the parties to revisit the performance of the four contracts dated 17th November, 2016 to compromise them within the scheme of the Standstill agreement whose rationale was to underpin justice and fairness to the parties. The theme of Standstill agreement is better understood in reference to the guidelines in the persuasive case of the Super Two (1990)1 Lloyd's Rep at page 8 where the court emphasized that the object of the doctrine was to give effect to the demands of justice to achieve a just and reasonable result, to do what is a reasonable and fair as an expedient to escape from injustice where such would result from enforcement of a contract in its's literal terms after a significant change in circumstances."

65. The arguments for and against grant of injunction was vehemently agitated by learned legal counsels seized of the matter during the highlighting of submissions. Turning to the concept of frustration, it would be appropriate to state that the arguments being mooted by the Plaintiff which were not absolutely rebutted by the defendant tends to show that the unforeseen supervening events. Occasioned or contributed to situations which made it impossible for the Plaintiff to fulfil his obligation to all contracting parties to the contract.

66. That is the basis upon which the Plaintiffs relies on the doctrine of frustration, citing a concatenation of events from the COVID-19 pandemic to geopolitical conflicts affecting their markets. The Court of Appeal in Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited (Civil Appeal 64 of 2022) [2023] KECA 700 has recognized COVID-19 as a force majeure event capable of frustrating contractual obligations.

67. This discussion on this matter will be incomplete without delving into the operation of the doctrine of force majeure. The court in the case of Nisho-Iwai Co. Ltd v Occidental Crude Sales Inc (1984) 729 F2d 1530 set out the elements of the doctrine as follows:

> " Force majeure' has traditionally meat an event which is beyond the control of the contractor .... And contractual force majeure clauses typically incorporate this requirement .... The term 'reasonable control' has come to include two related notions. First, a party may not affirmatively cause the event that prevents his performance .... The second aspect of reasonable control is more subtle. Some courts will not allow a party to rely on an excusing event if he could have taken reasonable steps to prevent it ..... The rationale behind this requirement is that the force majeure did not actually prevent performance if a party could reasonably have prevented the event from happening. The party has prevented performance and, again, breached his good faith obligation to perform by failing to exercise reasonable diligence."
>
> (See also the principles in Pankaj Transport PVT Limited v SDV Transami Kenya Limited [2017] eKLR)

68. So what is the Plaintiff trying to persuade the court to do under the auspices of this doctrine? That the events enumerated above occasioned his inability to supply the tea and services to the local, Regional and international markets where he had targeted to sell his produce which inevitably curtailed a large number of customers resulting in the short fall of the income which cumulatively was form part of the quantum for the loan repayment to the defendant. Apart from these considerations being pleaded and submitted by the Plaintiff, my reading of the agreements ultimately to the extent they were endeavored to regulate the relationship between the borrower and the lender, there is no crystal clear clause on force majeure. However, being a common law doctrine, it can be imported to the contract by a party who wishes to demonstrate that the events in question generally were beyond his/her reasonable control and not capable of being overcome by the exercise of reasonable means or due diligence hence the failure of partial or total performance of the contract. As noted above, liabilities had accrued prior to the occurrence of frustrating and force majeure events.

69. These necessitated various negotiations between the purchase culminating into the Standstill agreement. By this agreement, every effort was made to re-structure the loans agreements for the defendant to recover the amount due and owing from the Plaintiff. The general approach of the agreement appears to have taken into account any unforeseen events which incapacitated the Plaintiff from honoring his obligations. It is also true to observe. The specifics of the Standstill Agreement as at the time of this litigation had not been fulfilled as framed by the parties to the contract. The differences arising out non-performance of the necessitated the filing of the instant suit. The documentation and the exact terms of the contract are not actually disputed save for the conditions agreed for the Plaintiff to covenant to sale certain key assets like the Tanzania, immovable property and all incidentals or improvements that accrue from it in order to offset the outstanding loan amount due to the defendant whose registered charge was L.R. No. 10105 (I.R NO. 18136) in Nandi County and Title Number Mombasa/Block 1/355 in Mombasa County.

70. The current impasse arose when, despite ongoing discussions and initiatives including potential engagement with the Government of Tanzania for asset acquisition, the Defendants published auction notices in the Daily Nation and Standard newspapers on 26th and 27th August 2024 respectively. This precipitated the present applications, which raise profound questions about the intersection of statutory banking powers and equitable principles of redemption.

71. The matter transcends mere contractual interpretation, encompassing crucial questions about the scope of Section 44 of the *Banking Act* regarding interest rate variations, the contemporary application of force majeure principles in commercial contracts, and the delicate balance between a lender's statutory remedies and a borrower's right to equity of redemption. Additionally, the case presents significant public interest considerations, given its potential impact on over 359 staff members, 5,423 farmers, and essential community services including schools and hospitals.

72. This court is thus called upon to navigate these competing interests while upholding both the commercial certainty necessary for banking operations and the equitable principles that have long governed property rights in our jurisprudence.

73. The starting point in appraising these applications must be the classic principles governing interlocutory injunctions as established in Giella v Cassman Brown & Co Ltd [1973] 1 EA 358. The principles have been consistently upheld, requiring an applicant to demonstrate a prima facie case with a probability of success, show threat of irreparable injury, and if in doubt, the matter is resolved on the balance of convenience.

74. The courts have evolved beyond strictly adhering to the three principles established in the Giella Case when considering applications for interlocutory injunctions. Instead, courts now take a more holistic approach, examining the broader circumstances of each case while keeping in mind the law's overarching objectives. This more flexible interpretation was notably articulated by Justice Ojwang (as he then was) in Suleiman v. Amboseli Resort Ltd (2004) KLR 589 where he stated:

> "…….counsel for the defendant urged that the shape of the law governing the grant of injunction relief was long ago in Giella –v- Cassman Brown in 1973 cast in stone and that no new element may be added to that position. I am not, with respect in agreement with counsel in that point for the law always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 770 -781. A fundamental principle of… that the court should take whichever counsel appears to carry the lower risk of injustice if it should turn out to have been "wrong"……
>
> Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown the court has had to consider the following questions before granting relief:
>
> iv) is there a prima facie case….
>
> v) does the applicant stand to suffer irreparable harm…..
>
> vi) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory relief, should always opt for the lower rather than the higher risk of injustice……."

75. The Court of Appeal has in the case of George Orango Orago – Vs – George Liewa Jagalo & 3 Others, [2010] eKLR stated that the purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property.

76. Similarly, in Mrao Ltd v First American Bank of Kenya Ltd & 2 other 2003 Eklr the court reiterated the essence of a prima facie case where it observed:

> "I would say that in civil cases it is a case which on the moment presented to the court or 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. Therefore, the first hurdle an applicant must satisfy in order to be granted an injunction is to show existence of a prima facie case grounded on a legal right deserving of protection."

77. The case at bar is based on interwoven knots of commercial transactions between the lender and the borrower herein referred to as the Plaintiff and the defendant bank. In the factual matrix, it is not disputed that the Plaintiff's properties have been offered for sale by the defendant bank to liquidate the debt which has been due and owing by the Plaintiff. The charged properties offered as securities were advertised for sale in a public auction to be conducted by Garam Investment Auctioneers. In determining this matter, the law is settled as observed from the various case law duly decided by the superior courts of Kenya. The injunction means an equitable remedy which is limited upon the applicant satisfying the criteria set out in Giella v. Cassman Brown and Mrao (supra). It is a limited jurisdiction donated to the court for purposes of evaluating whether the mortgagee has complied with the provisions of the *Land Act*, 2012 namely: Section 89, 90, 96, 97 and 98.

78. The Plaintiffs' case rests on several interwoven grounds that warrant careful consideration. First, they challenge the quantum of the debt, arguing that the 1st Defendant unilaterally varied interest rates without obtaining requisite approval from the Cabinet Secretary under Section 44 of the *Banking Act*. This position finds support in the recent Supreme Court decision in Stanbic Bank Kenya Limited v Santowels Limited Supreme Court Petition No. E005 of 2023, which emphasized the mandatory nature of regulatory approval for interest rate variations.

79. The force of this argument is particularly compelling when viewed against the background of Njogu & Company Advocates v National Bank of Kenya Limited [2016] eKLR, which established that contracts contravening statutory provisions are void ab initio. While the Defendants contend that the Plaintiffs never challenged these variations earlier, this argument overlooks the fundamental principle that an illegality cannot be cured by acquiescence.

80. A particularly significant aspect emerges from the ongoing negotiations for the sale of Tanzanian assets. The evidence suggests that the 1st Plaintiff, in reliance on the Defendants' conduct, pursued negotiations with the Government of Tanzania. This engagement raises substantial questions under the principle of equitable estoppel.

81. The valuation issue presents another substantive concern. While the Defendants have produced valuation reports from Ascendas Kenya Limited, the Plaintiffs' request for independent valuation aligns with the principle that a chargee's power of sale must be exercised in good faith with due regard to the chargor's interests. The Court of Appeal in Nyeri Civil Appeal E008 of 2023 Cedarwood Hotels & Resorts Investment Company v Kenya Commercial Bank Limited & Another has established that while mere allegations of undervaluation are insufficient, a prima facie case of prejudicial valuation warrants judicial intervention.

82. The question of irreparable injury requires careful consideration of both immediate and consequential damages. While the Defendants argue that any loss can be compensated through damages, citing their financial capacity as a banking institution, this position requires deeper scrutiny in light of established jurisprudence.

83. In Givan Okallo Ingari & Millicent Nyanya Ingari V Housing Finance Company of Kenya Limited [2007] KEHC 2411, the court established that a defendant's financial capacity to pay damages cannot, by itself, justify actions that would fundamentally alter the parties' relationship. Here, the potential injury extends beyond mere monetary quantification. The Plaintiffs have demonstrated that the proposed sale would affect not only their commercial interests but also the livelihood of 359 staff members and 5,423 farmers, alongside essential community services including educational and healthcare facilities.

84. It is settled law in Kenya from the many decisions by the various courts in our legal system that the purpose of an interlocutory injunction is to protect the Claimant, all the Plaintiffs against injury by a violation of his/her rights which could not be adequately be compensated in damages recoverable in the action of the charge exercising its statutory power of sale on the strength of the legal framework that a default has occurred. At a glance this doesn't appear to me to be an ordinary commercial transaction given its magnitude of the colossal amount advanced to the Plaintiff as capitation for the various investments to be carried out within the period of 60 to 84 months capped as the repayment period being a measure of full settlement of the debt in favor of the defendant. Yes, I am in concurrence with the defendant that the letters of offer dated 17th November, 2016 are not disputed by the Plaintiff and therefore the court should not resolve or make an attempt to exercise discretion. In any other manner safe to protect the rights of the defendant to give way for the power of statutory sale which has ripened in accordance with the provisions of the *Land Act*. In contrast, the Plaintiff has pleaded contested facts as against the Claim by the defendant bank. This includes: the uncertainty as to whether the public auction as adverted to by the defendant bank is the only recourse to secure and compensate itself of the liabilities held by the plaintiff and the various loan agreements. In this context, during the hearing of this application, various arguments were alluded to by both counsels to the existence of a right of redemption in the standstill agreement to undertake due diligence as against the Tanzanian assets to have them disposed of by private treaty. It is therefore the strong view of the court that this right of redemption of having the aforementioned property provides the essentials for the preservation of the rights of the Plaintiff by way of an enlargement of time to source for other purchasers in the event the Tanzanian government fails to make a successful bid in favor of the offer contemplated by the Plaintiff.

85. Furthermore, the peculiar nature of the Tanzanian assets transaction merits special consideration. The Plaintiffs have entered into advanced negotiations with the Government of Tanzania, a process that could potentially settle the entire debt. The premature sale of the charged properties could irreversibly prejudice these negotiations, creating a form of injury that transcends pure financial computation. According to general principles of law recognized in our legal system and as well as established jurisprudence both locally and internationally justification of impatience by a trial court to summarily decline to grant interlocutory injunction before it has reached a final decision on the merits, there is a likelihood of prejudice or threats to injustice of such a nature that it would not be possible fully to restore those rights at a future date. In t

86. The Defendants' reliance on John Kingori Kioni v. Sidian Bank & another (2020) eKLR, suggesting that charged properties become mere commodities of sale upon default, must be balanced against the broader equitable principles governing mortgages. The fact that properties were offered as security does not extinguish the mortgagor's fundamental right to equity of redemption, particularly where viable settlement proposals are actively being pursued.

87. In weighing the balance of convenience, this court must consider the relative hardship that would be suffered by either party depending on whether the injunction is granted or refused. The principles established in American Cyanamid v Ethicon Ltd [1975] UKHL 1 guide this assessment.

88. Several factors tilt the scales in favor of maintaining the status quo through injunctive relief:

89. First, the ongoing negotiations with the Government of Tanzania present a potentially comprehensive solution that would serve both parties' interests. The sale of Tanzanian assets could potentially satisfy not only the 1st Defendant's debt but also obligations to CRDB Bank PLC, achieving a more efficient resolution than piecemeal property sales.

90. Second, the valuation concerns raised by the Plaintiffs require proper investigation. The gap between market value and forced sale value in the existing valuations raises legitimate questions about potential asset undervaluation.

91. Third, while the Defendants legitimately seek to recover their facility, their position is secured by the charged properties. Conversely, an immediate sale could cause irreversible damage to the Plaintiffs' business operations and the broader community interests.

92. The Defendants' contention regarding the quantum of debt (USD 19,555,845.16 as of August 14, 2024) underscores the significant financial stakes involved. However, this must be weighed against the potentially greater prejudice of foreclosing viable settlement options and causing widespread socio-economic disruption.

93. Having carefully weighed the submissions of both parties and the applicable legal principles, this court must strike a balance between protecting the legitimate interests of a lender and preserving the equitable rights of a borrower, particularly where substantial questions of law and fact arise.

94. The dispute raises significant issues regarding compliance with Section 44 of the *Banking Act*, the application of force majeure principles, and the equitable doctrine of redemption. These are not merely technical points but go to the heart of banking law and practice in Kenya. The recent Supreme Court pronouncement in Stanbic Bank Kenya Limited v Santowels Limited Supreme Court Petition No. E005 of 2023 emphasizes the significance of regulatory compliance in interest rate variations, making it incumbent upon this court to ensure full investigation of these issues.

95. Furthermore, the ongoing negotiations with the Government of Tanzania represent a potentially viable solution that could satisfy all parties' interests. The court notes that these negotiations were undertaken with the knowledge and tacit approval of the 1st Defendant. The principle of equity, that equity regards as done that which ought to be done, supports preserving the status quo to allow these negotiations a reasonable chance of success. The case for the Plaintiff when considered with that of the defendant in detail there is evidence of good faith on the part of the Plaintiff as covenanted in the various loan agreements, to repay the loan by way of redemption or disposal of other high valued assets some of which are within the knowledge of the defendant bank.

96. The socio-economic implications of an immediate sale cannot be ignored. While the court acknowledges that a chargee's statutory power of sale should not be lightly interfered with, the circumstances here present exceptional factors warranting judicial intervention. The potential impact on over 5,000 individuals directly dependent on these operations, coupled with the community services at stake, elevates this matter beyond a simple creditor-debtor dispute.

97. On the question of varying the orders of 30th August 2024, this court finds no compelling reason to interfere with the learned judge's exercise of discretion. The principles established in Mbogo v Shah (1968) 1 EA 93 require clear demonstration of error or injustice before disturbing such orders. No such showing has been made here.

98. Regarding the application to strike out the plaint, the court is guided by the principle articulated in Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR that this remedy

should be reserved for the clearest of cases. The substantive issues raised in the plaint merit full hearing and determination. A reasonable cause of action was given a fair meaning in the case of Thomas v. Olufosoye (1986) 1NWLR that:

> " A reasonable cause of action is as meaning a cause of action with a chance of success only when the allegations in the pleadings are considered."

99. The provisions of Order 2 Rule 15 of the Civil Procedure Rules provides as follows:

> " At any stage of the proceedings, the court may order to be struck out or amended any pleadings on the ground that:
>
> a. It discloses no reasonable cause of action or defence in law
>
> b. It is scandalous, frivolous or vexatious.
>
> c. Or it may pre-judice, embarrass or delay the fair trial of the action
>
> d. It is otherwise an abuse of the process of the court.
>
> In interpreting this rule, the Court of Appeal asserted itself in the case of Blue Shield Company Limited v. Joseph Mboya Oguttu 2009) eKLR where it stated:
>
> > The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A (as he then was) in his Judgment in the case of D.T. Dobie & Company (Kenya) Limited v Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1)(a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:
> >
> > " The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."...The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

100. On the alleged question of the Plaint being a sham or vexatious, the defendant's legal counsel contends that the Plaintiff has not disputed the debt without necessarily delving into the critical features of the contract which was entered into in 2016 as restructured by the Standstill Agreement. The defendant refrained from exposing the entire factual background of the dispute including the concession of the Plaintiff being allowed to sell other assets including the one located in the Republic of Tanzania and the cash receivables be used to offset the indebtedness with the defendant bank. I am therefore of the considered view given the other issues highlighted above within the rubric of the doctrines of frustration and force majeure, the Plaint cannot be described as being scandalous or a sham not capable of raising a triable issue. The protocols of a public auction are well documented in our jurisprudence

and the legislative enabling statute. The likelihood of the advertised properties: L.R. No. 10105 (I.R NO. 18136) and Title Number Mombasa/Block 1/355 in Mombasa County being sold for a song or at an undervalue than what they were initially valued by the defendant bank for purposes of securing the loan cannot be said to be farfetched.

101. In determining whether or not it is in the interest of justice, to determine this dispute at the interlocutory stage, this court has to take into account whether the Plaintiff in his quest has persuaded the court that there are disputed facts on the entire spectrum of the contract which demands of this forum to exercise jurisdiction on the merits.

102. I have no hesitation from the affidavits submitted before this court that they are departure points as between the parties to warrant a trial on the merits. The interlocutory jurisdiction is sometimes referred to as a sifting mechanism to protect the court from unwarranted matters finding their way to the courts' corridors. This High court is a forum of first instance on all civil matters with a pecuniary jurisdiction above twenty million. When civil matters are brought directly to it as a matter of procedural law, it is called upon to deal with disputed facts on which evidence might be necessary to decide civil issues and decisively render a decision on the merits and not purely to engage in academic interest. If the Plaintiff's right to access the court under Art. 48 by being given an opportunity to ventilate his case under fair trial rights as stipulated in Art. 50 of the *Constitution*, one cannot rule out a violation of this constitutional imperatives. The present application as therefore been assessed in light of the above considerations on the aforementioned factors cumulatively ascertained from the material evidence filed by each of the parties to this litigation.

103. I bear in mind that the weight placed on different factors in the process of decision making to decline or grant temporary orders of injunction always depends on the circumstances of each case and the broader interest of the Plaintiff, the interest of society if any and the applicable law.

104. It is my take in appreciating the tenets of the application and the opposition raised by the defendant bank that this is essentially a mixed factum case involving invocation of the common law doctrines of frustration, Force majeure, the right of redemption acceded to the plaintiff to dispose off by way of sale other independent immovable assets from which he was to settle the outstanding debts with defendant bank. In those circumstances, the question of the balance of convenience arises and the same will vary from case to case as I find it applicable to the instant application. Admittedly its my view that the Plaintiff will suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. As at the time the plaintiff approached this court there was existence of the legal right involving the on going negotiations towards the sale of properties like the one located in the Republic of Tanzania in which the government had shown positive interest to make offers to secure the rights therein registered in the name of the plaintiff's company. This interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff in the event successful bidders come through to purchase the identified property long after the public auction for the Kenya assets has taken place and the same could not be adequately satisfied the decretal sum being demanded by the defendant bank.

105. In the exercise of a wide discretion therefore on the disputed issues at this interlocutory stage, the applicant has satisfied the criteria that special circumstances exist to obtain temporary orders of injunction premised as follows:

    a. The Plaintiffs' Notice of Motion dated 29th August 2024 is allowed in the following terms: An injunction is granted restraining the Defendants from selling, disposing of, or in any way dealing with the properties known as L.R. No. 10105 (I.R NO. 18136) in Nandi County and Title Number Mombasa/

Block 1/355 in Mombasa County, including all plant and machinery thereon, pending the hearing and determination of the main suit.

b. That the cross application by the defendant bank to set aside the interim orders of injunction be and to strike out the plaint are hereby denied.

c. That in adherence to clause (a), the condition precedent of the temporary injunction is ordained with a lifespan of four months, time which the parties shall comply with Order 11 of the Civil Procedure Rules to canvass the disputed issues on the merits.

d. That the Plaintiff and the defendant in the interim take positive steps in revisit the Standstill Agreement and subsequent correspondences initiated after the expiry of the initial structured terms of engagement with a view to crystallize and unlock the right of redemption for the sale of the existing assets capable of sourcing the necessary finances to settle the loan due owing and outstanding to meet the ends of justice of both parties.

e. That a declaration is hereby made for a fresh valuation of the charged properties by a professional valuer given the differentia minimum noticeable in the reports shared with the court. This be complied with within 45 days from today's ruling.

f. That the defendant during the subsisting period has a right of being repaid the loan advanced to the Plaintiff conditioned on the encumbered properties. Nothing during this period shall restrain the Plaintiff from meeting his obligations on agreed terms pending the hearing and determination of the contested issues as highlighted.

g. That in the event the Plaintiff fails to prosecute the suit within the stipulated period in clause (a), this court shall be at liberty to lapse.

h. That the undertaking on damages and costs shall abide this litigation or in such orders of this court.

i. The status Conference to monitor compliance be held on February 27, 2025

106. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT ELDORET THIS 20TH JANUARY, 2025.

In the presence of:

Mr. Ondieki Advocate for the Defendant Bank

M/s Matu for the Plaintiffs

.....

R. NYAKUNDI

JUDGE