Master Macadamia (EPZ)Limited & 2 others v I & M Bank Limited & 2 others (Commercial Case E001 of 2025) [2025] KEHC 4062 (KLR) (24 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4062 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

COMMERCIAL CASE E001 OF 2025

HM NYAGA, J

MARCH 24, 2025

BETWEEN

MASTER MACADAMIA (EPZ)LIMITED .... 1ST APPLICANT

HENRY PAUL IRERI NJERU .... 2ND APPLICANT

CHRISTINA WARUE AND HENRY PAUL NJERU (SUING AS THE LEGAL EXECUTORS OF THE ESTATE OF PROTASIO NJERU-DECEASED) .... 3RD APPLICANT

AND

I & M BANK LIMITED .... 1ST RESPONDENT

BHAVESH JAYANTIBHAI PATEL .... 2ND RESPONDENT

JAYANTIBHAI CHATURBHAI PATEL .... 3RD RESPONDENT

RULING

1. The matter before me is the application dated 10th January 2025 and it seeks the following orders.

    a. Spent.

    b. That the Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent by itself, servants, agents or otherwise howsoever from repossessing, advertising, selling, disposing of, offering for sale and or alienating in any manner whatsoever any of the Applicants' properties, including but not limited to Land Parcel No. Nyaki/Giaki/60, assets, machinery, stock, land and or equipment's or any part thereof pending the hearing and determination of the application interpartes.

    c. That the Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent by itself, servants, agents or otherwise howsoever from repossessing, advertising,

selling, disposing of, offering for sale and or alienating in any manner whatsoever any of the Applicants' properties, including but not limited to Land Parcel No. Nyaki/Giaki/60, assets, machinery, stock, land and or equipment's or any part thereof pending the hearing and determination of the main suit.

d. That the Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent from appointing a receiver or manager over the Applicants' charged properties including but not limited to Land Parcel No. Nyaki/Giaki/60, assets, machinery, stock, land, equipment or any part thereof and or interfering with the Applicants' peaceful and quiet possession and enjoyment of its charged properties pending the hearing of the application inter partes.

e. That the Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent from appointing a receiver or manager over the Applicants' charged properties including but not limited to Land Parcel No. Nyaki/Giaki/60, assets, machinery, stock, land, equipment or any part thereof and or interfering with the Applicants' peaceful and quiet possession and enjoyment of its charged properties pending the hearing and determination of the main suit.

f. That the Honourable Court be pleased to issue an order prohibiting the 1st Respondent from publishing or advertising any information related to this dispute or the 1st Plaintiff's/ Applicant's financial status on its own website, through its business partners, or through 3rd-party platforms pending the hearing and determination of the application inter partes.

g. That the Honourable Court be pleased to issue an order prohibiting the 1st Respondent from publishing or advertising any information related to this dispute or the 1st Plaintiff's/ Applicant's financial status on its own website, through its business partners, or through 3rd-party platforms pending the hearing and determination of the main suit

h. That the Honourable Court do issue an order restraining the 1st Respondent from listing the Applicants with any Credit Reference Bureau pending the hearing and determination of the application inter partes.

i. That the Honourable Court do issue an order restraining the 1st Respondent from listing the Applicants with any Credit Reference Bureau pending the hearing and determination of the main suit.

j. That costs of this application be awarded to the Applicants.

2. The application is supported by the grounds set out on the face of it and the affidavit sworn by Henry Paul Njeru, the 2nd applicant.

3. In a nutshell the 2nd applicant states that the 1st applicant was registered and incorporated in the year 2020 wherein he and the 3rd applicant were the directors and shareholders at the of ratio of 50:50. That shortly after its incorporation the 2nd applicant and 3rd applicant were introduced to the 2nd and 3rd respondent by one Eric Odhiambo who was the Assistant General Manager of I&M Bank the 1st respondent herein. That the 2nd and 3rd applicants agreed with the 2nd and 3rd respondents to run a business of manufacturing macadamia products and they agreed to have equal contribution at the commencement of the business. That consequently, it was agreed that the contribution of the 2nd and 3rd applicant would be parcel LR Number Nyaki/Giaki/60, the suit property herein, valued at around Kenya shillings 100 million while the 2nd and 3rd respondents would contribute cash of Kenya shillings 45 million. That in keeping their end of the bargain the 2nd and 3rd applicants transferred the

suit property to the 1st applicant but the 2nd and 3rd respondents did not deposit the money as agreed. That the 2nd and 3rd respondents irregularly and unlawfully obtained a credit facility from the 1st respondent on the 6th of April 2021 without the knowledge of the registered directors or shareholders. That as at that date of 6th April 2021 the 2nd and 3rd respondents did not have the capacity to act on behalf of the company and therefore the company is not liable for the loan facility.

4. It is further averred that the 1st respondent failed to conduct due diligence and establish that the 2nd and 3rd respondents were not directors or shareholders of the company. That therefore the respondents colluded to have the loan advanced to the 2nd and 3rd respondents.

5. It is further averred that on 15 March 2022, the company's directors and shareholders held a general meeting and a resolution was passed that the 2nd applicant would transfer 20% of his shares to the 2nd respondent while the 3rd applicant would transfer 20% of his shares to the 3rd respondent. That this left the 2nd and 3rd applicants with 60% of the shares. That the 2nd and 3rd respondents then accepted their appointment through a letter dated 15th of March 2022 and the changes were affected at the Company's Registry on the same date.

6. The applicants aver that the 1st charge in question was registered on the 23rd April 2021 and this was 11 months and 23 days before the 2nd and 3rd respondents were appointed as directors or shareholders of the company and that on that ground the said charge is regular, null and void.

7. The applicants further state that despite requests to supply the applicants with the charge documents the 1st respondent has consistently refused to do so. That on the 8th of June 2022 the 1st respondent issued a further credit facility to the 1st applicant without any minutes or resolution of the shareholders or directors as required. That the said facility was solely taken out by the 2nd respondent who signed the offer letter without the knowledge of the 2nd applicant or the deceased.

8. It is further averred that on 29th September 2023, the 1st respondent again irregularly issued another credit facility without any minutes or resolution passed by the board of directors as required by the law and the 1st respondent's letter of offer, which was a condition precedent to articulate 3 of the said letter. That the said letter was signed by the 2nd and 3rd respondents as guarantors. That it is the legal procedure as stipulated in the Offer Letter dated 6th April 2021, 8th June 2022 and 29th September 2023 under the Conditions Precedent at Schedule 3, that the borrower supplies a copy of the minutes of the board of directors of the borrower approving and authorizing the execution of the letter of offer and each of the security documents to which it is party and authorizing a person or persons to sign all notices and communications in respect of the facilities certified true by the chairman as part of his conditions precedent. That despite all these provisions the said credit facilities were provided without this requirement which clearly shows the lack of due diligence and care on the part of the 1st respondent.

9. It is further averred that the Articles of Association of the 1st applicant require an unanimous decision of all directors in the form of a resolution in writing signed by all eligible directors or an agreement in writing by all directors as set out in Schedule 3 condition precedent paragraph *2*. That at no point did the 1st respondent inform or notify the other two directors and majority shareholders of the credit facilities advanced to the company or the letters of offer which were only addressed to the 2nd and 3rd respondents and who are not majority shareholders. That the 2nd respondent sidelined the 2nd and 3rd applicants in the day-to-day running of the company by denying them access to the daily sales, purchases, payments and so on, despite numerous follow up and that after some time the 2nd and 3rd applicants completely failed to find the 2nd and 3rd respondents and so they started to suspect that there were malicious actions by the said respondents.

10. It is further averred that the 2nd and 3rd applicants being the majority shareholders, were utterly surprised to receive a statutory demand notice issued under section 90 of the *Land Act* dated 15th of October 2024 demanding payment of arrears of a loan facility amounting to Kenya shillings 58,360,534. That the applicants who are the majority shareholders and directors of the company have never been made aware of any loan advanced by the 1st respondent to the 1st applicant. That more importantly, the applicants have never known to what use the loan advanced was put to and that the 2nd and 3rd respondents used the entire loan for their own benefit without the knowledge of the applicants. That it was then discovered that the 2nd And 3rd respondents had acted fraudulently and maliciously defrauded the company. That consequently proceedings were commenced against the 2nd and 3rd respondents to bring them to book. That a report was also made to the Directorate of Criminal Investigations (DCI) and subsequently warrants of arrest were issued against the 2nd and 3rd respondents for failing to attend court and complying with the court orders.

11. The applicants further aver that in a derivative claim they filed in Meru Commercial Case number is E009 of 2024, the court ordered that the 2nd and 3rd respondents to provide a detailed account statement of all the relevant documents pertaining to the company, but the 2nd and 3rd respondents have declined or refused to comply with the said order and subsequently an application for contempt of court was commenced.

12. The applicants further aver that had the 1st respondent conducted due diligence before advancing the loan facilities to the 2nd and 3rd respondent, including the search at the companies registry, it would have informed them who the true shareholders and directors were at the time it was approached for a loan facility.

13. It is further averred that the statutory notice issued on 15th October 2024 was also served on the 2nd and 3rd applicants, which clearly shows that the 1st respondent was aware of the existence of the other directors. That the lack of due diligence on the part of the 1st respondent clearly shows an intention to defraud the 2nd and 3rd applicants herein. That it is also suspicious that the 2nd and 3rd respondents were introduced to the 2nd and 3rd applicants by an agent of the 1st respondent, one Eric Odhiambo and the credit facilities were advanced to them in total disregard of the two other directors.

14. The applicants aver that the above transactions and the turn of events point to a collision between the 1st respondent and the 2nd and 3rd respondents with a hidden motive to defraud them and the company. That therefore, the 1st respondent's statutory notice is unlawful and null and void.

15. The applicants aver that unless the 1st respondent is stopped by this court from exercising the demands on the security, there is the likelihood that the applicants will suffer irreparable harm, loss of clientele and business goodwill that it has established over the years, which cannot be compensated by an order of damages.

16. The applicants further aver that the respondents do not stand to suffer any prejudice if the orders sought are granted. That the 2nd and 3rd respondents gave personal guarantees when obtaining the loan facility so the 1st respondent ought to pursue them to recover the debt owed to it.

17. In response to the application, the 1st respondent filed a replying affidavit, sworn by on by one Samuel Irungu, it's Senior Manager, Credit Department.

18. The 1st respondent avers that the 1st applicant's relationship with the bank commenced in the year 2021 when the1st plaintiff opened an account with it. That at the time the 1st plaintiff introduced the 2nd Plaintiff And the 2nd defendant as the signatories to the account. That therefore, it is not true that the 2nd and 3rd defendants were introduced to the applicants by its officers.

19. It is further stated that by a letter of offer dated 6th April 2021 the bank at the request of the 1st plaintiff agreed to advance the 1st plaintiff credit facilities in the form of an ,overdraft facility a term loan and a revolving short term loan, whose purpose was working capital and to finance the purchase of machinery and macadamia nuts. That the said letter of offer dated the 6th April 2021 was attached to the plaintiffs' own documents. That said loan facilities were to be secured by;

    i. Fixed and floating debenture over the entire assets of the 1st plaintiff securing a sum of Kenya shillings 65,000,000/- and United States dollars 2,160,000/-.

    ii. A supplemental 1st legal Charge over the suit property securing the sum of Kenyan shillings 30,400,000.

    iii. Joint And several personal guarantees and Indemnities securing the sum of Kenya shillings 65,000,000/- and USD2,160,000/-.

    iv. A letter of set-off to be executed by the 2nd defendant.

20. That as covenanted, the charge in favor of the bank dated 13th April 2021 was created. That all the documents were executed on behalf of the 1st plaintiff by the 2nd defendant who was a sole director of the 1st plaintiff at the time of execution of the charge.

21. It is further stated that by an offer letter dated 8th June 2022 the bank made the 2nd facility available to the 1st plaintiff in the form of an asset finance for the sum of USD 145,925.50, whose purpose was to finance the purchase of machinery for use in the 1st plaintiff's business. That by a further letter of offer dated 29th September 2023, the bank, at the request of the 1st plaintiff reviewed and extended the limit of their overdraft facility of Kenya shillings 20,000,00/- and cancelled the short term loan facility of USD 2,160,000/- previously sanctioned to the 1st plaintiff.

22. The 1st respondent further avers that, however, in default of her obligations under the letters of offer, the debenture and the charge to the 1st plaintiff failed to make the scheduled monthly repayments to the bank as convenanted and the 1st plaintiff's loan account has been in default and remains in default to date. That arising from this default the Bank by a letter dated the 16th September 2024, demanded from the 1st plaintiff the outstanding amount of Kenyan shillings 55, 684,378.14 within 14 days from the date thereof. That however the 1st plaintiff failed to make good the default and consequently the bank served the 1st plaintiff with the three months' statutory notice dated 15th of October 2024 requiring it to remedy the default. That the letter was served upon the 1st plaintiff as well as the 2nd and 3rd defendants by registered post. That the 1st plaintiff has expressly admitted that they were duly served with the demand letter and the statutory notice. That despite the service of the demand letter and the statutory notice the 1st plaintiff did not remedy the default.

23. The 1st respondent further states that it is a complete stranger to paragraphs 2,4,5,6,9,10, 11 and 12 of the supporting affidavit as they relate to the 1st plaintiff's internal business operations which the bank is not privy to.

24. In response to paragraphs 3 and 33 of the supporting affidavit, the bank states that besides making bare allegations the plaintiffs have not adduced evidence to demonstrate that the bank or its representative introduced the plaintiffs to the 2nd and 3rd defendants.

25. In a specific reply to paragraphs 7, 8,13, 30,31,32 and 34 of the supporting affidavit on the allegation that the bank failed to conduct any due diligence to confirm the directorship of the 1st plaintiff, the bank states that it always carried out proper due diligence on the plaintiff and the security that was

offered. That the bank requested the plaintiff to submit the know your customer (KYC)documents and the bank verified the same form the relevant government registries.

26. It is further stated that as at March 2021, when the 1st plaintiff opened an account with the bank the 2nd and 3rd plaintiffs were the directors and shareholders of the 1st plaintiff. That following internal arrangements and restructuring the 2nd defendant was appointed as the sole director of the plaintiff. That prior to the creation and registration of the charge dated 13th April 2021 in favor of the bank, the bank conducted the proper and necessary due diligence on the status of the 1st plaintiff, including a search at the Company Registry And ascertained that the 2nd defendant was the sole director and a shareholder or the 1st plaintiff, while the 3rd defendant was a shareholder or the 1st plaintiff. That consequently as at 6th April 2021 when the 2nd defendant executed the letter of offer, he was duly authorized to execute any documents relating to the letter of offer, the debenture and the charge instrument on behalf of the 1st plaintiff in respect of the facilities. That the allegations that the bank colluded with the 2nd and 3rd defendants to defraud the 1st plaintiff and the 2nd and 3rd applicants are made in bad faith and have no basis.

27. In response to paragraph *14* and *35* or the supporting affidavit, it is averred that the Bank has always made full disclosure to the 1st plaintiff in relation to the loan account whenever requested to do so.

28. In response to Paragraphs 15, 16, 17, 18,20 and 36 of the supporting affidavit, the bank states that at the time of its execution of the letters of offer dated 6th April 2021, 8th June 2022 and 29th September 2023, the bank was supplied with the resolutions passed by the board of directors and minutes, in line with express terms of the said letters of offer. That by the said minutes and resolutions the 1st plaintiff approved and confirmed the borrowed facilities, approved and confirmed the terms and conditions of the letters of offer, debenture and the charge document, and ratified and approved the execution of the letter of offer, debenture and the charge instrument, and that they authorized the director of the 1st plaintiff to execute the documents relating to the letters of offer, debenture and charge instrument. That it is therefore not true that the bank failed to conduct due diligence as alleged.

29. It is averred that in view of the above and in respect to the interim and final relief sought, a litigant who seeks an injunction has to satisfy the court that has a prima facie case with a high probability of success and that it will suffer irreparable harm or injury which cannot be compensated by way of damages in the event that they reliefs sought are not granted and that if the court is in doubt as to the two prerequisites, the court shall determine the matter on a balance of probabilities. That the plaintiffs have not established an arguable case at all because the bank conducted proper and necessary due diligence on the status of the directorship of the company and it ascertained that the 2nd defendant was a sole director of the 1st plaintiff and therefore was duly authorized by the 1st plaintiff to execute the letters of offer, the debenture and the charge instrument. That the bank was equally supplied with his resolutions passed by the board of directors authorizing the borrowing and ratifying the execution of the letters of offer, the debenture and the charge instrument.

30. It is further averred that in any event, the execution of company documents by an officer of the company without being authorized does not invalidate the document, pursuant to the rule in the Turquand case and a 3rd party may enforce a contract against a company provided the obligations arising thereunder were assumed by an officer with ostensible authority. That therefore the 1st plaintiff cannot rely on execution technicalities to avoid its contractual duties.

31. It is further averred that the bank derives her right to exercise its statutory power of sale from the letter of offer, the charge instruments and the applicable provisions of the law. That there’s no factual or legal basis for the court to postpone or impede the exercise of the bank’s statutory power of sale. That the money borrowed by the plaintiff was credited to its account for its benefit and therefore it cannot

allege anomalies to the borrowing after having the benefit of the borrowed amounts. That there is no irregularity or impropriety that can be visited upon the bank and none has been demonstrated. That consequently, the bank has a right to exercise its power of sale without any impediment by the court.

32. The 1st respondent thus had the court to dismiss The application.

33. The 2nd respondent filed a replying affidavit sworn on 25th February 2025. It is averred that this application is devoid of merit. That the supporting affidavit contains false and fraudulent assertions and fails to make full disclosure of all material facts.

34. It is averred that contrary to the assertions by the applicants, he is a sole director of the 1st plaintiff and he holds 50 ordinary shares of the company while the remaining 50 ordinary shares held by his father, the 3rd respondent. That as a sole director and shareholder he has not approved the filing of this suit by the company and neither has the 3rd respondent.

35. It is further stated that this 1st plaintiff was incorporated on 12th October 2020 by the late Protasio Njeru and Henry Paul Ireri Njeru, each holding 50 ordinary shares of the 100 total ordinary shares. That on 9th March 2020 the company opened a business bank account with the 1st respondent. That the signatories to the bank account were himself as the operations manager and Henry Paul and Protasio Njeru, the other directors of the company. That the bank account mandate required joint signatures by both himself and Henry Paul Ireri. That soon thereafter in March 2021 the entire 100 shares of the company were transferred to him and the 3rd respondent and that he was also appointed as a sole director of the company. That he executed the company documents in his capacity as a sole director and all the signatures were duly witnessed. That on 6th April 2021 the company passed a resolution to apply for and obtain a loan facility from the 1st respondent for the purpose of working capital to finance the construction of a factory for the business, finance the purchase of machinery and finance the purchase of macadamia nut- in -shell. That pursuant to the company's resolution the company executed a facility agreement dated the 6th April 2021 with the bank for the following facilities;

i. An overdraft of Kenya shillings 20,000,000/-

ii. A term loan of Kenya shillings 45,000,000/-

iii. A revolving short term loan of US dollars 2,160,000/-

iv. That the facilities were secured with;

v. A joint and several personal guarantee and indemnity by himself and the 3rd respondent securing the sum of Kenyan shillings 65,000,000/- and US dollars 2,160,000/-

vi. A fixed deposit by himself of Kenya shillings 45,000,000/- to be held under lien,

vii. A letter of set off executed by himself as a sole director,

viii. A floating and fixed debenture over all the company's assets securing the sum of Kenya shillings 65,000,000/- and US dollars 2,160,000/-

ix. A legal charge over the suit property.

36. It is further averred that in line with the facilities agreement the company executed all the assets debenture dated 13th April 2021. The debenture was duly registered after due execution by himself as a sole director. That on 13th April 2021 the company also executed a legal charge over the suit property securing a sum of Kenya shillings 30,400,000/-. The charge was fully registered upon assessment and payment of stump duty. That by a 2nd letter of offer dated 8th June 2022, the company executed another facility agreement with the bank in the form of an asset finance facility for US dollars

145,925.50 to finance the purchase of machinery. That by a 3rd letter of offer dated the 29th September 2023, the company requested and was issued with a review and extension of limit on the initial overdraft facility of Kenya Shillings 20,000,000/- and cancelling the revolving short term loan of US dollars 2,160,000/-.That the cancelation of the revolving short term loan was cancelled as the company had fully repaid it inclusive of the interest and charges.

37. It is further averred that all the loans obtained from the bank were used for the internal purposes, that is to purchase machinery, develop the factory, buy raw materials and to run the company. That all the loan facilities were duly serviced in a timely manner until the 2nd applicant obtained High Court order on 3rd June 2024 which froze all the company's bank accounts with a further order that barred him and the 3rd respondent from dealing with the company. That the default in loan repayment is as a result of the orders issue by the High Court freezing the 1st applicant's bank accounts, which orders were issued pursuant to an application filed by the 2nd applicant in Meru High Court Case number E009 of 2024. That as a result of the court orders the company could not continue being in operation and had to be closed down and consequently it defaulted on its facilities repayment obligations.

38. The 2nd respondent acknowledges that through a letter dated the 16th September 2024, the 1st respondent issued a demand notice for repayment of an outstanding loan of ksh. 55,684 378.14. that as a sole director of the company and as a shareholder together with the 3rd respondent their hands are tied by the orders issued in the said case. That the bank then issued a three month statutory notice of sale dated15th October 2024 requiring the company to regularize its facilities. That they still could not meet the banks demand as the orders were still in place. That he is well aware that the 2nd and 3rd applicants did not put in any funds towards the development of the company, its factory and any claims to the company or its shares is fraudulent. That the 2nd and 3rd applicants are not shareholders or directors of the company. That since the transfer of shares in March 2021 to date the shareholding of the company has not changed and both he and the 3rd respondent have never transferred any shares back to the 2nd applicant or the late Protasio Njeru as asserted by the applicants.

39. It is further averred that neither he nor the 3rd respondent signed the transfer of shares forms purportedly signed on 15th March 2022 transferring 20 ordinary shares to himself and 20 ordinary shares to the 3rd respondent. That neither he nor the 3rd respondent attended the purported meeting on 15th March 2022. That they did not sign the minutes of that purported meeting which indicates that he and the 3rd respondent attended the meeting at the company's registered office on 15th March 2022 where it was resolved that the 2nd and 3rd respondent would be appointed as directors and shareholders of the company. That neither he nor the 3rd respondent signed the letters dated the 15th March 2022 addressed to the Registrar of Companies purportedly consenting to be appointed as directors effective from that date. That on 15th of March 2022 which is a date of the alleged meeting they were not in the country as they arrived in Nairobi on 16th March 2022 as shown by the endorsement on their passports, which were exhibited in his affidavit.

40. The 2nd and 3rd respondents deny having stolen from or defrauded the company. He admits to have been charged in criminal case number E1763 of 2024 but avers that no prima facie case has been found against him.

41. The 2nd respondent denies having colluded with the 3rd respondent or the 1st respondent to defraud the company or at all. It is averred that the facilities were obtained by the company lawfully and regularly as at all material times he was acting in his capacity as a sole director of the company.

42. The parties were directed to file submissions. At the time of writing this ruling, only the applicants and the 1st respondent had complied with the said directions.

Applicants' submissions

43. The applicant submitted that the main issue for determination was whether the Applicants had met the threshold for an interlocutory injunction as set out in Giella vs Cassman Brown (1973) EA 358.

44. On the test of a prima facie case, it is submitted that the applicants have met the threshold in that they have demonstrated that the process of taking out the alleged loan that forms the basis of the 1st Respondent's threshold action that of sale of the suit property was illegal, unlawful and un-procedural. That the applicants having given a history of how the 1st applicant came into being have shown how the 2nd and 3rd Respondents irregularly obtained a credit facility from the 1st Respondent on 6th April 2021 without the knowledge of the registered shareholder and directors. That as that date, the 2nd and 3rd Respondents were irregularly obtained a credit facility from the 1st Respondent and 6th April 2021, without the knowledge of the registered shareholders and directors. That as that date, the 2nd and 3rd Respondents were neither shareholders nor directors of the company and therefore locked any capacity to act on behalf of the company. That the 2nd and 3rd Respondent only became shareholders and directors with effect from 15th March 2022, with a total of 40% shareholding while the 2nd applicant and Protasio Njeru retained 60% shareholdings. That the credit offered on 8th June 2022 and 29th September 2023 were without the knowledge of the other two shareholders/directors.

45. It is further submitted that the form CRC-12 exhibited by the 1st Respondent lack any evidential backing and cannot be a standalone document and nothing would have easier than to show how the 10% shares were transferred vide a Board Resolution, minutes and share transfer documents.

46. It is further submitted that while the 2nd and 3rd Respondents lodged a complaint with the Registrar of companies, when the parties were invited to a meeting, thy failed to turn up and the Registrar did confirm that the first charges of shareholding/directorship were made on 15th March 2022.

47. It is further submitted that in its Ruling in HCCC E009 of 2024 this court (Justice Kassan) noted that the 2nd and 3rd Respondents allegations of illegal acquisition of shares by the applicants to be mere allegations that could not hold water. That the 2nd and 3rd Respondents were ordered to provide specific documents which they have failed to do. That the 2nd Respondent and 3rd Respondents were ordered to provide specific documents which they have failed to do. That the 2nd Respondent faces criminal charges of stealing by Directors.

48. The Applicants urged the court to find that the loan to the 2nd and 3rd Respondents to be irregular and unlawful and that that the subsequent charge was null and void. To buttress this point, the Applicants relied on the decision in Arthi Highway Developers Limited vs West-End Butchery Limited and 6 others [2015] KECA 816 (KLR).

49. It is submitted that the material before the court clearly indicates that the 1st Respondent failed to conduct due diligence as set out in Central Bank of Kenya Prudential Guidelines 2013 especially Clause 5.6 which obligate the institutions to establish to its satisfaction that it is dealing with a person that actively exists, identify those persons who are empowered to undertake the transactions. The Applicants used the court to find that the 1st Respondent failed in its duty, cited in support of this submission was the case Gulf African Bank Ltd vs Attican Ltd and 4 others (2023) KEHC 18241 KLR.

50. It is further submitted that the 1st Applicant's reliance on the Turquand Principle (Rule is untenable and that there are exceptions to the Rule, as set out in Arthi Highway Developers case (Supra).

51. The Applicant further referred to this court's decision in Xianghui International (K) Ltd vs African Banking Corporation Ltd [2024] KEHC 15326 (KLR) and the case of St. Patrick's Hill School Ltd vs Bank of Africa Ltd: Civil case No. 7 of 2017.

52. On the above, the applicants submitted that they have established a prima facie case.

53. On the question of whether damages are inadequate to compensate the applicants, they submitted in the affirmative. It was submitted that once applicant has established a prima facie case that a Respondent has breached its right, an injunction ought to issue. That when the act complained of is an illegal act that blatantly flouts the law, a court of equity cannot fold its hands and condone the offending act on the basis that damages are on adequate remedy. To buttress this point, the Applicants cited Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Ltd (2005) eKLR.

54. It is further submitted that the company is located on the charged property and its sale will render the livelihood of the employees jobless and destitute and shut down the company. That this cannot be compensated by damages. To buttress this point, the applicants cited Xianghui International (k) Ltd Case (Supra).

55. The Applicants further submit that even if the court is to consider the matter on a balance of convenience then the same tilts in their favour. Cited to buttress this point was Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR.

1st Respondent's Submissions

56. In its substantive submissions, the 1st Respondent submit that prior to the execution of the Letter of offer dated 6th April 2021, it conducted the proper and necessary due diligence on the actual status of the 1st plaintiff, including a search at the Company Registry and had ascertained that the 2nd Respondent was the sole director and was a shareholder of the 1st Plaintiff, alongside the 3rd Respondent.

57. It is submitted that under section 37 of the *Companies Act*, a document is validly executed by a company if its is signed on behalf of the company by the two authorized signatories or by a director of the company in the presence of a witness who attests the signature. That it is on this section that the 2nd Respondent, who was a director, signed the documents, dated 6/4/2021, 8/6/2022 and 29/9/2023. That in addition, the Bank was furnished with the resolutions passed by the Board of Directors, approving the borrowing facilities and authorizing the director (2nd Respondent) to execute documents relating to the Letters of offer, the debenture and the charge instrument.

58. On the allegation that the 2nd Respondent lacked the capacity to act on behalf of the company, the 1st respondent the doctrine of under management that a third party may enforce a contract against a company provided that the obligations arising under the contract were assumed by an officer with ostensible authority. To buttress this submission, the 1st respondent cited the decision in Florence Wangu Mwangi and Another vs British American Insurance Co Ltd and Another (2010) eKLR, which relied on the case of Royal British Bank Ltd vs Turnquard (1856) 6 E&B 327.

59. It is this submitted that on the basis of the Turguard Rule, the 1st Respondent was not obligated to inquire into the regularity of the 1st Plaintiff's internal proceedings and it could assume that all the requirements had been complied with. That in any case it is not inconsistent with the 1st Plaintiff's Articles of Association for a sole director to make unilateral decisions on its behalf.

60. It is further submitted that at the time of execution of the letter of offer and the securities which secured the credit facility, the 2nd respondent was the sole director of the Plaintiff while he and the 3rd Respondents were the two shareholders. That notably, the 2nd Applicant and the late Protasio Njeru were neither shareholders nor directors of the company. That in the premises, the contention that the 2nd respondent lacked ostensibly authority to execute any contract on behalf of the 1st Plaintiff is not tenable.

61. It is further submitted that the loan facilities were credited to the Plaintiff's account for its benefit. That the loan facilities' purpose was to finance the purchase of machinery and provide working capital for the company.

62. It is further submitted that the 1st Plaintiff has failed to make the scheduled monthly payments as covenanted and that the 1st Respondent reserved its right to exercise its statutory power of sale from the documents executed and the applicable laws and there is no factual basis to impede it from exercising that right.

63. It is thus submitted that the applicants have failed to surmount the first test that of establishing a prima facie case with a probability of success.

64. On the question of whether the plaintiff will suffer irreparable injury or less which would not be adequately compensated by an award of damages, the 1st Respondent submitted in the negative. The 1st Respondent cited the decision in Nguruman Ltd vs Jan Bonde Nielson and others [2014] eKLR on what amounts to irreparable harm.

65. Citing Kitur vs Standard Chartered Bank and 2 others [2002] eKLR, the 1st Respondent posits that once the suit property was offered as security for the said loan, the same became a commodity for sale. That the value of the suit properly is determinable and quantifiable and in the unlikely event that the plaintiff suit succeeds, the 1st Respondent can reinstate the monetary loss suffered by them and result of the sale of the suit, property.

66. It is thus submitted that the Plaintiffs/Applicants have also failed to establish that they stand to suffer irreparable loss or injury if the orders sought are not granted.

67. It is further submitted that should the court be called upon to decide the matter on a balance of convenience, the same tilts in favour of the 1st Respondent, to allow it to recover its monies advance to the 1st Plaintiff. That it is axiomatic that the 1st Respondent does not have money of its own as the money advanced to the 1st Plaintiff is indeed depositors' money and as such it ought to be recovered at the earliest.

68. With these submissions the 1st Respondent urged the court to find that the Applicants are not entitled to the injunctive relief sought and that the application should be dismissed with cost.

Analysis and determination

69. As has been submitted by the parties, the test of the application is whether the applicants have met the threshold for the grant of an injunction as set out in Giella vs Cassman brown [supra]. Thus, the Applicant must establish the following:

    a. A prima facie case with a probability of success.

    b. That the applicant might suffer irreparable loss at injury unless the orders sought are granted.

    c. The balance of convenience tilts in their favour, in case of doubt on (b).

70. As to what constitutes a prima facie case, the same was well elaborated in Mrao Ltd vs First American Bank of Kenya Ltd and 2 others (supra) where it was held:-

> " A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

71. If I get the Applicant's correctly, their case is based on alleged fraudulent acts on the part of the 2nd and 3rd Respondents. It is also alleged that the 1st Respondent colluded with the 2nd and 3rd Respondents to create the debt.

72. The Applicants aver that at the time that the first loan facility was registered, the 2nd respondents had not become a shareholder or director of the company an allegation disputed by the defendants.

73. According to the Applicants, the 2nd and 3rd defendants/respondents only became directors/shareholders from 15th March 2022 after the original shareholders passed a resolution to transfer 20% of the shares to each of the 2nd and 3rd respondents. Thus, it is argued the 2nd Respondent could not have lawfully executed any documents on 6th April 2021.

74. The 2nd Respondent's case is that he was the sole director at the time that the first loan facility was offered by the 1st Respondent. The 1st Respondent avers that it did the necessary queries/diligence and established that to be the case.

75. The applicants and the 2nd and 3rd respondents have mentioned Civil Suit No. E009 of 2024 in which they are parties.

76. Interestingly, in that case, when the applicants sought to have them punished for contempt of court the 2nd and 3rd respondents were categorical that:-

    a. The 2nd Applicant was a shareholder and director with equal rights in the company, hence could access the documents ordered to be provided, and the accounts of the company.

    b. They became shareholders after a resolution of 15th March 2022.

    c. That they received 20% shares each, leaving the 2nd and 3rd Applicants with 30% shares each.

77. Now, parties are bound by their own pleadings. It follows that the 2nd Respondent cannot allege one thing in one suit and another in another suit over the same issue.

78. Clearly, there is a dispute as to whether the 2nd Respondent and 3rd Respondent were shareholders/directors at the time the first loan facility was issued on 6th April 2021. The Applicants have exhibited minutes, a resolution form CR-12 to buttress their case. On their part, the 1st Respondent has exhibited a CR-12, minutes and resolution purporting to have authorized the 2nd respondent to execute the requisite documents. One document is correct and the other has to be false.

79. It is thus the view of the court that there is an issue that requires detailed examination. If the court was to find that the 2nd and 3rd Respondents were not shareholders or directors at that material time, then their purported execution of the documents on behalf of the 1st Applicant will be rendered null and void and would affect the charge in question which was registered on 23rd April 2021. It goes without saying that any further charges based upon a fraudulent charge would be examined for their validity.

80. I am thus of the view that the applicants have established a prima facie case with a probability of success.

81. As stated, prima facie need not be one that will have to succeed but one that raises questions that warrant further interrogation.

82. It has been argued that by application of the Turquand Rule, also known as the indoor management rule, the 1st Respondent, having conducted due diligence and having acted with good faith, could assume that the company's internal management and procedures had been followed correctly even if they hadn't.

83. The said rule was set out in Royal British Bank vs Targuard (supra) where the court (Jervis CJ) stated as follows:-

> 'I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I incline to think that the question which has been principally argued both here and in that Court does not necessarily arise, and need not be determined. My impression is (though I will not state it as a fixed opinion) that the resolution set forth in the replication [332] goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the Company, be authorized to be borrowed: and the replication shews a resolution, passed at a general meeting, authorizing the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me enough. If that be so, the other question does not arise. But whether it be so or not we need not decide; for it seems to us that the plea, whether we consider it as a confession and avoidance or a special Non est factum, does not raise any objection to this advance as against the Company. We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.'

84. In Mahony v East Holyford Mining Co 1875) LR 7 HL 869 the said rule was affirmed by the House of Lords as follows:

> " When there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, those so dealing with them externally are not to be affected by irregularities which may take place in the internal management of the company."

85. The said rule was applied by the court in Florence Wangu Mwangi and Another vs British American Insurance Co. Ltd (supra) cited by the 1st Respondent. It was held as follows;

> 'The other issue which is connected to this, is the fact that the loan was given to the 2nd plaintiff and the directors were the 1st plaintiff and the 3rd defendant. Under the Contract Law, when a third party is dealing with a company, he is entitled to assume that any transactions or obligations entered into by the company through persons who are held out to be its officers will be enforced against the company and the third party is not entitled

to look behind the company dealings to confirm the regularity of the companies internal proceedings and they are not entitled to assume that all is being done irregularly.

In this case the 2nd defendant was represented by the 3rd and the 4th defendants as the bona fide officials. (See the text book Palmer's Company Law twenty second Edition volume One) where the learned authors were dealing with the doctrine of constructive notice and expressed themselves as thus on page 286 . . . the rule in Royal British Bank v Turquand (supra) which provided

> "...That the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with." The rule in Turquand's case was again subject to exceptions. Even this solution would have been principle that a director or other officer could bind the company if he had ostensible or apparent authority, even though the board of directors had not endowed him with actual authority. By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily."

86. As was correctly submitted by the Applicants, there are exceptions to the said Rule and this so held in Arthi Highway Developers Ltd vs West End Butchery and 6 others (supra) where it was held that:

> " The case is a clear exception to the Rule in Turquand's case, derived from the case of Royal British Bank v Turquand(1856) 6 E & B 327)which prevents outsiders from being affected by internal irregularities of which they have no means of discovering. But the Rule does not apply, amongst other exceptions, where the corporate signature is forged or if the outsider knew of the internal non-compliance, or knew facts that would lead a reasonable person to inquire further."

87. The plaintiffs' case is hinged on alleged forged documents. However, it is my view that at this interlocutory stage, given the opposing views, it will be premature to delve into the issue of whether the documents that were presented to the 1st defendant were forged or not. However, the court notes that the issue is so crucial in making a determination as to the validity of the charge or otherwise.

88. On adequacy of damages, the court has to consider the same in light of the first issue. If the court were to hold that there was no valid charge or that the documents used were forgeries, and the proposed sale is to proceed, the applicants will have suffered irreparable loss of their property that they allegedly did not offer on security.

89. Thus, I find that the applicants have surmounted the 2nd test under Giella vs Cassman Brown(supra)

90. Even if the court was to be in doubt over the 2nd issue, I find that this court ought not to allow an act that is purported to be unlawful proceed merely because the applicants can be adequately compensated by way of damages. Would the damages really compensate for the loss of jobs and clients who have traded with the company. I don't think so.

91. Therefore, even one balance of convenience. I would still find in favour of the Applicants.

92. I am aware that the 1st respondent has advanced quite a substantial amount of money to the 1st Plaintiff. It has a charge over it and if the suit is to fail, it will have recourse in proceeding with the sale. I also noted that the 1st respondent is said to hold a lien over funds belonging to the 2nd respondent. That in my view, secures the 1st respondent's loan to the 1st applicant.

93. Given the above, the court will ensure that the suit is prosecuted within the shortest time possible. It cannot allow the applicants to fall into slumber after obtaining orders of injunction.

94. In conclusion, I grant the following orders:-

a. An injunction shall issue in terms of prayers 3, 7 and 9 of the motion dated 10th January 2025, but subject to (b) herein.

b. The injunction orders shall be in force for a maximum of 90 days within which the applicants ought to have complied with order 11 of the Civil Procedure Rule and listed the suit for hearing.

c. Costs of the application shall abide by the outcome of the suit.

d. Directions will be given after delivery of this ruling.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF MARCH 2025.

H.M. NYAGA

JUDGE