



**Jungle Cashews (EPZ) Limited v Guaranty Trust Bank (Kenya)
Limited (Commercial Miscellaneous Application E665 of 2024)
[2025] KEHC 4989 (KLR) (Commercial and Tax) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

COMMERCIAL MISCELLANEOUS APPLICATION E665 OF 2024

PM MULWA, J

APRIL 24, 2025

BETWEEN

JUNGLE CASHEWS (EPZ) LIMITED APPLICANT

AND

GUARANTY TRUST BANK (KENYA) LIMITED RESPONDENT

RULING

1. The Plaintiffs applicants have moved the court by the Notice of Motion dated 21st August 2024, seeking the following orders:
 - i. Spent
 - ii. Spent
 - iii. That a permanent injunction be issued restraining the Defendant, whether by itself, its agents, representatives, and/or servants, from selling, transferring, or otherwise disposing of the 1st Plaintiff's asset, namely the Pasteurizing Machine, to any third party, pending the hearing and determination of the suit.
 - iv. That the Respondent be compelled to provide a valuation report(s), documentary evidence of bids, and a detailed explanation of how the sale price of Kshs. 70,000,000 was arrived at, together with a proper statement of accounts showing how the said sale proceeds were applied to the 1st Plaintiff's accounts.
 - v. That this Honourable Court be pleased to issue such further orders and directions as it may deem just and fit in the circumstances.



- vi. That the costs of this application be provided for.
2. The application is supported by the affidavits of Patrick Kimani Wainaina, the 2nd Plaintiff and a director of the 1st Plaintiff. The Plaintiffs contend that the Defendant unlawfully disposed of the secured asset in violation of the statutory procedures stipulated under the debenture agreement and relevant laws. It is further alleged that the 1st Plaintiff's right of redemption was infringed, and that the Defendant failed to exhaust available remedies before initiating the sale of the secured asset.
 3. In opposing, the defendant filed a Replying Affidavit sworn on 11th September 2024 by Teddy Donat, the Defendant's Head of Credit Risk Management. He contends that the application is defective, particularly concerning the 5th Plaintiff, who is under administration and did not obtain leave of the Court as required under Section 560(1)(d) of the *Insolvency Act*.
 4. He further asserts that the statutory power of sale was lawfully exercised following persistent defaults, with all requisite notices duly issued, and that the asset was sold at fair market value on 20th June 2024, with the full knowledge and acquiescence of the Plaintiffs. The Defendant maintains that the loan amounts are undisputed, and as of 9th September 2024, the 1st Plaintiff remained in arrears in the sums of USD 4,311,795.88 and Kshs. 447,142,376.68.
 5. The application was canvassed by way of written submissions, supplemented by oral highlights from learned counsel for the respective parties. I have duly considered the submissions, the pleadings and the applicable law. The main issue that falls for determination is whether the application is merited.
 6. The principles applicable to the grant of an interlocutory injunction are now well established in the *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, and restated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. These are: that the applicant must establish a prima facie case with a probability of success; that unless the injunction is granted, the applicant will suffer irreparable injury; and if the Court is in doubt, it should decide the matter on a balance of convenience.
 7. In the *Nguruman* case (*supra*) the Court of Appeal clarified that the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
 8. The meaning of a prima facie case was elucidated in Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it is -

“a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”
 9. The Plaintiffs allege that the Defendant's invocation of the power of sale was irregular and contrary to the debenture instrument. While the Court is mindful of the sentiments expressed in *Mrao Ltd* (*supra*), it is trite law that the mere existence of a dispute on the amount due or the initiation of a redemption suit is not sufficient to restrain the exercise of a statutory power of sale. A mortgagee will only be restrained in exceptional circumstances, such as where the debt is paid into Court or where the amount claimed is excessive and unjustified.



10. Further, Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 permits the grant of an injunction where it is demonstrated that the subject property is in danger of being wasted, damaged, alienated or wrongfully sold.
11. From the evidence, it is not in dispute that the 1st Plaintiff received loan facilities from the Defendant. The 2nd to 5th Plaintiffs acted as guarantors and a debenture was executed over the Pasteurizing Machine. After default on repayments, the facilities were restructured, default recurred, and notices of sale were issued pursuant to the power of sale.
12. The Plaintiffs contend that the Defendant ought to have exercised alternative remedies under the debenture, particularly the option of taking over and managing the 1st Plaintiff's operations. However, the debt is not denied. The Court reiterates the principle in *Mrao Ltd* (supra), that it cannot restrain a chargee merely on account of a contested debt where the right to sell has lawfully accrued.
13. I find the reasoning in *Amos Wangeera Njoroge & 9 Others v Serah Wamuyu Muriuki & Another* [2014] eKLR instructive:

“Once property is offered as security for a loan...such property becomes commercial property which can be offered in the market for sale in case of default...In such cases, an award of damages would be an adequate remedy.”
14. Similarly, in *Halsbury's Laws of England*, volume 32 (4th edition) at paragraph 725:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged.”
15. I am therefore not satisfied that the Plaintiffs have demonstrated a prima facie case. The first limb of the *Giella* case is not met.
16. More crucially, the evidence indicates that the debenture asset was sold on 20th June 2024. An injunction cannot issue to restrain an act that has already taken place. Injunctive relief must operate prospectively and not retrospectively. Accordingly, the prayer for injunction is declined.
17. On the prayer for disclosure of accounts, the Defendant rightly contends that the request is premature. Disclosure is governed by the procedural framework applicable post-pleadings and during the pre-trial phase. No exceptional circumstances have been demonstrated to warrant a departure. I therefore decline this prayer at this stage, without prejudice to the Applicants renewing the request after close of pleadings.
18. On the objection raised by the Respondent concerning the 5th Plaintiff, Section 560(1)(d) of the *Insolvency Act* is explicit. No proceedings may be commenced or continued against a company under administration without leave of the Court. The 5th Plaintiff is under administration, and no leave was sought. I find that the objection is meritorious. Accordingly, I find that the application is fatally defective insofar as it relates to the 5th Plaintiff. However, that procedural irregularity does not render the entire suit incompetent. The claims by the 1st to 4th Plaintiffs remain properly before the Court and shall be considered on their merits.
19. In the result, I find that the Notice of Motion dated 21st August 2024 is bereft of merit. It is accordingly dismissed with costs to the Defendant.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI



THIS 24TH DAY OF APRIL 2025.

PETER M. MULWA

JUDGE

