



**Convex Commodity Merchants Limited & 2 others v Stanbic
Bank Kenya Limited & another (Commercial Case E355 of 2023)
[2025] KEHC 9491 (KLR) (Commercial and Tax) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E355 OF 2023**

A MABEYA, J

JULY 3, 2025

BETWEEN

**CONVEX COMMODITY MERCHANTS LIMITED 1ST PLAINTIFF
CONVEX COMMERCIAL LOGISTICS LIMITED 2ND PLAINTIFF
JAMES WAIHAKA 3RD PLAINTIFF**

AND

**STANBIC BANK KENYA LIMITED 1ST DEFENDANT
GARAM INVESTMENTS AUCTIONEER 2ND DEFENDANT**

RULING

1. The applicants moved this Court for injunctive orders vide an application dated 9/8/2023. The same was brought under Order 40 Rules 1, 2, 3, 4 and 8, Order 50 Rule 1 of the Civil Procedure Rules 2010, sections 1A, 1B & 3A of the *Civil Procedure Act*, Article 40 of *the Constitution* and Rule 2 (2) of the High Court (Practice & Procedure) Rules of the *Judicature Act*.
2. The applicants sought the following orders: -
...
 - e. That pending the hearing and determination of this Suit, a temporary order of injunction do issue restraining the respondents whether by themselves, their agents, employees, assigns, servants or representatives, from howsoever attaching, advertising for sale or offering for sale by public auction or private treaty, appointing receivers or administrators and/or in any other manner whatsoever, interfering with or otherwise dealing with the plaintiffs' property



described as the Edible Oil processing plant together with machinery erected on properties described as LR No. 18474225 and LR No. 18474/229 or any other assets registered in favour of the plaintiffs.

- f. That an order do issue compelling the 1st respondent to honour the findings of its appointed consultants PricewaterhouseCoopers (PWC) - Financial and Operational Review report dated 1st December 2022 and to provide additional financing for the completion of the refinery as recommended in this report.
 - g. That in the alternative and without prejudice to the foregoing, an order do issue compelling the 1st respondent to allow the plaintiff a period of twelve months within which to secure alternative financing for the completion of the Edible Oils Refinery on the suit property.
 - h. That this Honourable Court be pleased to issue any other order that it may deem fit for the ends of justice to be met.
 - i. That costs of this application be provided for.”
3. The application was based on the grounds set out on the face of the Motion and the supporting affidavit of the 3rd applicant. These were that; being in the business of commodities trading with edible oil accounting for 30% of its trading business, the 1st applicant resolved to set up an edible oils refinery locally and it therefore engaged the 1st respondent towards granting finances for completion of the plant/refinery which it received vide an offer letter dated 9/12/2020.
 4. That there were occasional delays in disbursement of the facility by the 1st respondent forcing the plaintiffs to divert funds from trading and logistics business into the construction of the refinery. That the construction was further beset by numerous challenges brought about by the Covid 19 outbreak thus the projections for construction would require revision.
 5. That on 21/6/2023, the 2nd respondent served the applicants with a 45 days Notification of Sale threatening to sell off by public auction on 29/8/2023, the Edible Oil processing plant together with machinery housed on the suit properties on account of an alleged erroneous debt owing by the 1st applicant to the 1st respondent in the sum of Kshs. 2,074,141,143.19 and USD 15,795.89, respectively.
 6. That the 1st respondent had instructed the 2nd respondent to proceed and advertise the suit properties for sale which advertisement if not prohibited, would occasion great prejudice to the applicants and will further clog the 1st applicant’s equity of redemption.
 7. The applicants complained that Messrs. Axis Real Estate Limited had conducted a valuation of the processing plant and gave a grossly undervalue market price of Kshs. 1,695,800,000/= and a forced sale value of Kshs. 1,271,850,000/= as at 12/4/2023. That the 1st respondent’s valuers Messrs. Turner and Townsend Limited had earlier on valued the suit property at Kshs. 5,465,125,770.53 on 14/7/2022.
 8. That the applicants had since secured alternative financing from Kenya Development Corporation (KDC) in the amount of Kshs. 500,000,000/- towards the completion and commissioning of the refinery and were negotiating a facility for USD 18,465,492/= with Ethos Asset Management INC, a project finance lender based in America for purposes of taking over its facilities with the 1st respondent.
 9. That all this information had been disclosed to the 1st respondent who still persisted with its intention to auction off the refinery in violation of the 2nd applicant’s equity of redemption. That the facilities from KDC and Ethos Asset Management INC would be withdrawn in the event recovery action in the form of a Newspaper advertisement is published by the 2nd respondent.



10. On the foregoing grounds, the applicants sought the various injunctive orders set out above.
11. In opposition, the 1st respondent relied on a replying affidavit sworn on the 27/3/2024 by one Collins Sabatia and a further affidavit sworn on 21/6/2024. It was deposed that the 1st applicant maintained various accounts with the Bank to which the Bank disbursed funds for the 1st applicant's utilization.
12. That subsequently, the bank issued a facility for the amalgamated sum of Kshs.1,540,378,356/= vide a letter of amendment dated 15/11/2022 which the 1st plaintiff failed to repay resulting in the outstanding balance of Kshs. 1,61,289,483.59 and which continues to accrue interest and stood at Kshs.2,040,778,421.09 as at 20/6/2024. That the 1st applicant had overdrawn its current account in the sum of USD 14,070.
13. The 2nd respondent also opposed the Motion vide its replying affidavit sworn on the 13/6/2024 by Joseph M. Gikonyo. He deposed that following the lapse of the 90-day statutory demand notice dated 31/1/2023, and the 40-days' Notice to sell dated 4/5/2023, he received instructions on the 20/6/2023 from the 1st respondent to sell the suit properties. He also received a Report and Valuation in respect of the suit property dated 12/4/2023 from the 1st respondent.
14. That he then prepared the Redemption Notice and served the same upon the applicants via email. This was acknowledged, by leaving the same at the applicants' physical address and via registered post. He subsequently prepared a Certificate of Service dated 22/6/2024 evidencing service of the same upon the applicants.
15. Mr. Gikonyo deposed that he was an agent of the 1st respondent acting under the 1st respondent's instructions and thus urged the Court to dismiss the application.
16. I have considered the rival contestations and the submissions on record.
17. This being an application for interlocutory injunction, the same is governed by the well-established principles laid down in the case of *Giella v Casman Brown & Co. Ltd* [1973] 358. These are that; an applicant must establish a prima facie case with a probability of success, must establish that he/she stands to suffer a loss irreparable by an award of damages if the injunction is denied and where the court is in doubt, it will determine the matter on a balance of the convenience.
18. In *Otieno vs. Premier Bank Kenya Ltd & 2 Others* [2024] KEHC 6832 (KLR) (10 June, 2024) (Ruling), the court quoted with approval the holding in *Dr Simon Waiharo Chege v Paramount Bank of Kenya Ltd Nairobi (Milimani) HCCC No 360 of 2001*, wherein it was held as follows: -

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”



19. The first issue is whether the applicants have established a prima facie case with a probability of success. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, the Court of Appeal defined prima facie as 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. It is not sufficient to raise issues, but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial.
20. In this case, the applicants have not denied obtaining finance from the 1st respondent. They have also not denied default. The reason they give for the default is that the same was occasioned by a variety of issues, including the failure by the 1st respondent to disburse the finances as and when required leading the applicants to pay from their business thereby affecting the flow of their finances for repayment of the facilities.
21. That as a result, they had been forced to seek alternative financing whose financing model was in line with customary project financing practices and that they had engaged various investors willing to take up the debt owed to the 1st respondent.
22. The applicants further alleged that the respondents had undervalued the suit properties. They alleged that Ms. Axis Real Estates Ltd had valued the plant at Kshs.1,695,800,000/- in April, 2023, yet the 1st respondent's own business advisers Turner and Townsend Ltd had in July, 2022, when the plant was still under construction, placed the value thereof at Kshs.5,465,125,770/25.
23. In rebuttal, the respondents described the 1st applicant as a blatant defaulter. That the applicants were not entitled to the mandatory orders for additional financing as they were in breach of the facility letters by failing to make the loan repayments despite the facilities being advanced. That the bank was under no obligation to provide additional funding and thus the 1st applicant cannot maintain legitimate expectation for the same.
24. It is a common ground that the applicants financed the construction of their edible oils processing plant by offering up the suit properties as security for the loan facility under loan agreement annexed by parties in their respective affidavits. Equally, the applicants do not deny having defaulted in making the periodical payments as agreed and attributes the same to, inter-alia, hard economic circumstances. The applicants further averred and submitted that they were served with unlawful Notice to Sell.
25. Section 90(1) of the *Land Act*, 2012 provides that: -

“If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the Chargee may serve on the Chargor a Notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.”
26. Section 96(1) of the same Act on the other hand provides: -

“Where a Chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the Chargor under section 90 (1), a Chargee may exercise the power to sell the charged land.”



27. The respondents annexed the 90 days' statutory notice of sale dated 31/1/2023 and the 40 days' notice to sell dated 4/5/2023. In those notices, it demanded that the applicants do rectify the default with respect to the outstanding payments but the applicants did not do so.
28. I appreciate the applicants' complaint that the 1st respondent delayed some disbursements which may have led to the delay in the completion of the construction of the plant and therefore delayed operationalization thereof. That this may have contributed to the default. However, the applicants did not specifically prove the alleged delayed disbursements, the amounts thereof and the periods applicable for the Court to appreciate the gravity or the extent the same led to the default.
29. The applicants sought that this Court compel the 1st respondent to provide additional financing for the completion of the refinery as recommended in its report or that in the alternative, that the Court affords the applicants twelve months to acquire alternative financing for completion of the Edible Oil Processing Factory.
30. It is trite that parties are bound by their contracts and a Court cannot rewrite the contract for the parties. The Court of Appeal has firmly laid it that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. See *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR.
31. Further, it is not enough to claim as averred by the applicants that the facility agreement failed to provide for a moratorium on payment during the construction phase thus are an unenforceable for being an unconscionable bargain. At what time did the applicants realize that they had entered into an unconscionable bargain, before or after accruing the debt?
32. The view which this Court takes is that, since it is clear that the applicants are in default and that the respondent bank has complied with sections 90(1) and 96(1) of the *Land Act* 2012, it is difficult to see how the applicants can be entitled to any injunction. The respondent bank's statutory power of sale has arisen.
33. There was a contention that the applicants wanted an opportunity to secure alternative financing. That may be so. There was no concrete evidence that the applicants had applied for the same and there was a process by those alternative sources to release the alleged financing. There was no specific prayer and timelines to procure the same with certainty.
34. Although the plaintiff contended that the defendant had clogged its equity of redemption by listing it in the CRB and thereby blocking it from accessing alternative financing, there should have been a separate application to unplug that fact before pursuing the injunction. That would have helped the plaintiff access alternative financing and offset the outstanding. To some extent, this Court opines that it is wrong for a lender to list a defaulting borrower with the CRB and refuse to lift such listing and expect the borrower to get alternative financing to repay. However, since the Law is silent on that issue, I say no more.
35. In this regard, the Court is of the opinion and so holds, that the applicants have not established a *facie* case with a probability of success. They fail on the first principle of the *Giella vs Cassman Brown* case.
36. The second principle is that an applicant must show that unless an injunction is granted, he may otherwise suffer loss that cannot be compensated by an award of damages. In the present case, the applicants allege that if the plant is disposed off by the 1st respondent in the exercise of its statutory power of sale, they will lose their livelihood and thereby suffer irreparable damage.



37. There is no doubt that once a property has been charged to secure financial accommodation, it ipso facto becomes a commodity for sale once there is default and there is no commodity for sale whose loss cannot be compensated by an award in damages. A Chargor who offers his property as security clearly anticipates the sale of the property in the event that he fails to service the loan.
38. In this regard, the claim that the applicants will be rendered destitute or lose their processing plant thus outweigh the 1st respondent's contribution does not assist in advancing their case. The Court is therefore not convinced that there is any evidence that the applicants would suffer irreparable damages if the injunction is not granted.
39. On the third limb, the balance of convenience tilts in favor of letting the 1st respondent recoup its outlay.
40. Accordingly, the application dated 9/8/2023 is found to be without merit and is hereby dismissed with costs to the respondents.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE

