

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND TAX DIVISION
HCCOMM NO. E577 OF 2025

**FREDWOODS TRADERS COMPANY
LIMITED.....PLAINTIFF/APPLICANT**

VERSUS

**STANBIC BANK LIMITED.....1ST
DEFENDANT/RESPONDENT**

**CONVEX COMMODITY
MERCHANTS LTD.....2ND
DEFENDANT/RESPONDENT**

**CONVEX COMMERCIAL
LOGISTICS LTD.....3RD
DEFENDANT/RESPONDENT**

**GARAM INVESTMENTS
AUCTIONEERS.....4TH
DEFENDANT/RESPONDENT**

RULING

1. This ruling is in respect of two applications filed by the Plaintiff and the 1st Defendant/Respondent. The Plaintiff’s application is dated 4th September 2025, while the 1st Defendant’s application is dated 15th September 2025. Both applications were heard together orally. I will first determine the application by the Plaintiff.
2. The Notice of Motion dated 4th September 2025 seeks, inter alia, the following substantive orders:

- i. Temporary injunction restraining the 1st Defendant/ Respondents, whether by themselves, agents, employees, servants, or any person acting at their behest, from auctioning, transferring, alienating, disposing, selling, assigning or in any other manner dealing with the 2nd Defendant's/Respondent's Brand-new edible oil processing plant erected on L.R. Nos. 18474/225 and 18474/229 situate in EPZ Athi-river, Machakos County.*
- ii. An order suspending the auction scheduled for 9th September 2025 by the 4th Defendant/Respondent.*
- iii. The commanding officer OCS Kitengela Police Station does supervise the enforcement of the court orders.*
- iv. That the costs of the application be borne by the Defendants /Respondents.*

3. The application is supported by the affidavit of Monica Wanjiru, a director of the Plaintiff company. She avers that the Plaintiff entered into a construction financing agreement dated 7th March 2023 with the 2nd Defendant for a facility of Kshs. 1,250,000,000/=, to finance the construction of a brand-new edible oil processing plant on L.R. Nos. 18474/225 and 18474/229, EPZ Athi River. It was a term of the agreement that repayment would be from the proceeds of the commercial operations of the plant scheduled for commissioning in October 2025.

4. The Plaintiff contends that the 1st Defendant has now commenced the process of exercising its statutory power of sale over the same properties. She maintains that the Plaintiff, being a financier, has a first lien over the 2nd Defendant's assets having advanced substantial funds, and that unless restrained, the Plaintiff will suffer irreparable loss as the plant is on the verge of being sold before operations begin.

The 2nd and 3rd Defendants' position

5. In support of the Plaintiff's application, James Waithaka, a director of the 2nd and 3rd Defendants/Respondents, swore a replying affidavit dated 7th October 2025. He deposes that the Plaintiff came into play and provided additional financing after the 1st Defendant declined or failed to advance further funds necessary to complete the project. He further avers that the 1st Defendant's valuation of the project is grossly understated, placing it at Kshs. 2.2 billion, whereas an independent valuation places the property at Kshs. 7,272,625,000/=. He contends that the undervaluation is intended to facilitate the sale of the charged property at a throwaway price, which would unjustly prejudice both the 2nd Defendant and the Plaintiff, who have substantial financial investment in the project.

The 1st and 4th Defendants' Response

6. In opposition, the 1st and 4th Respondents filed a replying affidavit sworn by Collins Sabatia, the Manager of Non-Performing Loans at the 1st Defendant bank, on 19th September 2025. He deposes that pursuant to various loan

facilities created around December 2020, the 1st Defendant granted to the 2nd Defendant overdraft facilities, term loans, and letters of credit secured by: All Assets Debenture over the assets and properties of the 2nd Defendant, Legal charges over L.R. 18474/225 and 18474/229, Guarantees and indemnities by the directors and associated companies; and Deed of Subordination of shareholder loans.

7. He avers that the 2nd Defendant defaulted on repayment, falling into arrears amounting to Kshs. 3,173,787,725/= and USD 21,904.15, prompting the 1st Defendant to issue statutory notices and proceed to exercise its statutory power of sale.
8. The 1st Defendant avers that the 2nd Defendant had previously sought injunctive relief before this Court to stop the sale, which was dismissed, and further sought a stay of execution in the Court of Appeal, which was equally dismissed. He contends that the Plaintiff's current application amounts to forum shopping and an abuse of court process, having concealed the existence of previous proceedings.
9. It is the 1st Defendant's further contention that the alleged construction financing agreement relied upon by the Plaintiff is neither executed, witnessed, nor registered, and that there is no evidence of disbursement of the alleged Kshs. 1.25 billion. Moreover, the property L.R. 18474/228 mentioned therein is distinct and registered in the name of

Convex Commercial Logistics Limited, not the 2nd Defendant. Consequently, the Plaintiff has no registrable interest or enforceable lien over the charged property.

10. He maintains that the Plaintiff has not established any prima facie right capable of protection by way of injunction, the harm complained of is pecuniary in nature, and that if proved can be compensated by way of damages.

The application dated 15th September 2025

11. This application seeks to set aside or stay the orders of this court issued on 8th September 2025 that purported to stop the 1st Defendant from executing a public auction in exercise of its valid and lawful statutory power of sale over the suit properties known as L. R. 18474/229 and 18474/225. And that the suit filed herein, together with the application, be struck out for disclosing no cause of action, scandalous, frivolous and an abuse of the court record.

12. It is premised on the grounds that the orders of 8th September 2025 were issued ex-parte through misrepresentation of facts and material non-disclosure.

13. The application is opposed by the replying affidavit of Monica Wanjiru, sworn on 7th October 2025.

Analysis and determination

14. I have carefully considered both applications, the affidavits on record, and the rival submissions. The main issues for determination are:

- i. Whether the Plaintiff has satisfied the conditions for the grant of a temporary injunction.*

ii. *Whether the orders issued on 8th September 2025 should be set aside for abuse of process.*

15. The granting of interim relief hinges on whether the applicant has demonstrated a *prima facie* case with a probability of success, irreparable harm, and the balance of convenience (See **Giella v Cassman Brown & Co Ltd [1973] EA 358**).

16. On the first limb, a *prima facie* case was defined in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, as:

“...a case 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.”

17. The Plaintiff’s claim is premised on an alleged construction financing agreement dated 7th March 2023, which it asserts created a lien over the 2nd Defendant’s assets.

18. The 1st Defendant, on the other hand, disputes the Plaintiff’s position, maintaining that the alleged financing agreement is neither executed nor registered. From the record, the 1st Defendant has demonstrated that its charge and debenture were duly registered and perfected long before the purported arrangement between the Plaintiff and the 2nd Defendant. By virtue of Section 25(1) of the Land Registration Act, 2012, the rights of a registered proprietor or chargee are indefeasible and can only be defeated by

fraud or misrepresentation to which the proprietor is proved to have been a party. A perusal of the document titled "Construction Financing Agreement" annexed to the Plaintiff's affidavit reveals that it was not executed by any of the parties, nor has the Plaintiff provided proof that the alleged sum of Kshs. 1.25 billion was ever disbursed to the 2nd Defendant.

19. Under Section 3(3) of the Law of Contract Act (Cap 23), a contract for the disposition of an interest in land must be in writing, signed by all parties, and attested. Further, no registered charge, debenture, or other security instrument has been exhibited to demonstrate any proprietary interest capable of taking precedence over the 1st Defendant's registered securities. Pursuant to Section 79 of the Land Act, 2012, a charge becomes effective only upon registration.
20. The Plaintiff has not shown that its alleged interest was ever registered or noted against the titles to L.R. Nos. 18474/225 and 18474/229. Consequently, the Plaintiff's purported lien, being unregistered and unsupported by any registrable instrument, cannot override or suspend the 1st Defendant's statutory power of sale duly conferred under Sections 90 and 96 of the Land Act, 2012.
21. Regarding the contention that the property is grossly undervalued, it is trite that valuation disputes alone cannot restrain a chargee from exercising its statutory power of sale. The mere allegation of undervaluation does not constitute proof of irregularity unless the applicant demonstrates bad faith or failure to follow statutory

procedure. The Plaintiff has not shown that the 1st Defendant breached any mandatory requirement under Section 97(2) of the Land Act concerning the duty of care in sale.

22. On the issue of irreparable harm, the Plaintiff's alleged loss, being pecuniary in nature and quantifiable, can be adequately compensated by an award of damages should the court ultimately find in its favour. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen** (supra) emphasized that irreparable harm means injury that is substantial and cannot be remedied by monetary compensation. The Plaintiff has not discharged this burden.
23. Finally, on the balance of convenience, the 1st Defendant is a chargee whose statutory rights have already crystalized following default. A chargee's right to realize security cannot be lightly curtailed unless there exists clear evidence of illegality or fraud. Interfering with its exercise of that right without legal justification would unjustly impede a secured creditor's enforcement of its security.
24. The 1st Defendant has demonstrated that the 2nd Defendant previously sought injunctive relief before this Court and the Court of Appeal, which applications were dismissed. The Plaintiff, who claims to be its financier, now seeks the same relief on identical grounds. This is a clear abuse of the court process, as litigation must come to an end.
25. In the premises, I find that the Plaintiff has not satisfied the threshold for the grant of an injunction. The Notice of

Motion dated 4th September 2025 is accordingly dismissed with costs to the 1st Defendant.

26. Having so found, it follows that the orders of stay issued by this Court on 8th September 2025 ought to be and are hereby vacated. Consequently, the 1st Defendant's application dated 15th September 2025 succeeds to the extent that the interim orders issued on 8th September 2025 are set aside forthwith.
27. The 1st Defendant also urges the Court to strike out the suit on the ground that it discloses no reasonable cause of action and is otherwise an abuse of the court process. It is, however, trite law that the power to strike out a pleading is a draconian measure that must be exercised sparingly and only in the clearest of cases. The Court of Appeal in **D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1** held that striking out a suit is a drastic step which should only be taken when it is plain and obvious that the pleading discloses no reasonable cause of action or defence and that no amendment can cure the defect.
28. In the present case, while the Plaintiff's pleadings may be wanting in evidential substance regarding the alleged financing arrangement, the Court must be cautious not to shut out a litigant from the seat of justice where there may be issues requiring ventilation through trial. The test is whether the suit is so hopeless that it plainly and obviously cannot succeed.
29. Having reviewed the pleadings and submissions, I am not persuaded that the instant case meets that threshold.

Accordingly, the 1st Defendant's prayer for striking out the suit is declined. The issues raised are better determined upon full hearing where parties will have an opportunity to adduce evidence and test their respective claims through cross-examination.

30. In view of the foregoing analysis, the Plaintiff's application dated 4th September 2025 is dismissed with costs. The 1st Defendant's application dated 15th September 2025 is allowed to the extent stated above.

Orders accordingly.

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **October** 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Mutai h/b for Mr. Kiarie for Plaintiff

Ms. Lubano for 1st Defendant

Ms. Kiiru for 2nd and 3rd Defendants

Court Assistant: Carlos