

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E759 OF 2024

BETWEEN

THREE N INTERNATIONAL LIMITED.....
.....PLAINTIFF

AND

I&M BANK
LIMITED.....DEF
ENDANT

RULING

Introduction and Background

1. What is before the court for determination is the application dated 13th December 2024 by the Plaintiff seeking an interlocutory injunction to stop the Defendant (“the Bank”) from trespassing, advertising, or selling the property known as **KAJIADO/PURKO/126** (“the suit property”) pending hearing and determination of the suit. It also seeks to compel the Bank to provide a full and detailed statement of all accounts and facilities to clarify how the interest and outstanding amount were calculated.

2. The application is supported by the affidavits of the Plaintiff's director, BERNARD MUTEITHIA KIBIRA, sworn on 13th December 2024 and 5th February 2025 and opposed by the Bank through the replying affidavit of its Debt Recovery Manager, Credit, LILIAN OMANJI, sworn 27th January 2025. The application was canvassed by way of written submissions which I have considered and I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

3. As submitted by the parties, the main issue for determination is whether the court ought to grant the injunctive order sought by the Plaintiff. For the Plaintiff to obtain the injunction, it must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in its favour (See **Giella v Cassman Brown & Co., Ltd. [1973] E.A. 358**). In **Nguruman Limited v Jan Bonde Nielsen & 2 others [2013] KECA 347 (KLR)**, the Court of Appeal reiterated these conditions and further clarified that they are to be applied as separate, distinct and logical hurdles which an Applicant is expected to surmount sequentially. This means that if the

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.

4. As to what constitutes a *prima facie* case, the parties rightly submit that the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)** 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.” The Plaintiff's position, as detailed in its depositions is based on the grounds that the Bank failed to serve the mandatory 90-day statutory notice before exercising its power of sale and that the 45-day redemption notice served by auctioneers is alleged to be invalid and insufficient. The Plaintiff further contends that the Bank, unilaterally and without communication, merged accounts and changed interest rates and that these changes were made without the required authorization from the Central Bank of Kenya, rendering the interest charged illegal and usurious.
5. The Plaintiff claims to have paid over Kshs. 100 million against an original loan of Kshs. 130 million and was shocked to be presented

with an outstanding balance of Kshs. 100 million. It argues that these figures are exaggerated, fictitious and designed to prevent redemption of the property and the Plaintiff alleges that the Bank is acting in bad faith. That despite receiving nearly Kshs. 30 million in six months and discussing a restructuring plan, the Bank abruptly instructed auctioneers and the Plaintiff believes the sale is shrouded in secrecy to sell the suit property, which it values at over Kshs. 1 billion, to a favoured purchaser at a fraction of its value, as no public advertisement has been placed.

6. The Plaintiff states that the suit property is home to a five-star resort that supports the company's directors and over 100 employees and that its sale would cause irreparable damage to the company and its stakeholders. The Plaintiff argues that the Kshs. 30 million paid recently was misapplied by the Bank instead of being used to reduce the arrears, which would have made the debt manageable.
7. In response, the Bank depones that the application is based on material misrepresentation and non-disclosure and is a mere delaying tactic to prevent the Bank from rightfully selling the charged property to recover the debt. The Bank states that the Plaintiff has explicitly admitted to the debt and the existence of arrears in its own affidavit and that the debt,

totaling Kshs.103,897,198.32/= as of 20th December 2024, is not disputed. It states that the facilities were secured by inter alia a Fixed and Floating Debenture over the Plaintiff's assets, a Legal Charge over the suit property and Personal Guarantees from the Plaintiff's directors.

8. The Bank asserts it has fully complied with all legal requirements before exercising its power of sale. It claims that it served a Demand Notice, a 90-Day Statutory Notice, a 40-Day Notification of Sale and a 45-Day Redemption Notice and a Notification of Sale from the auctioneers. That despite the Bank's extensive accommodation, concessions and indulgence, the Plaintiff consistently failed to meet its repayment obligations. The Bank highlights a specific meeting on 31st October 2024 where the Plaintiff agreed to pay Kshs.15,000,000/= by 7th November 2024 but failed to do so, prompting the Bank to proceed with the sale.
9. The Bank denies applying wrong, illegal, and irregular interest rates, stating that all interest was charged per the facility agreements and that rate change notifications were sent to and opened by the Plaintiff. The Bank states that all payments received from the Plaintiff were correctly applied to the loan accounts and it accuses the Plaintiff of willingly and maliciously attempting to mislead the Court about the total amount paid. The Bank confirms

it cancelled the Bills Discounting Facility in June 2023, as was its right, and applied the outstanding balance and it asserts that a court cannot restrain a chargee from selling a charged property unless the full amount demanded is paid by the chargor. Further, that a mortgagee cannot be restrained from selling simply because the amount due is in dispute and that the Plaintiff has not shown it would suffer irreparable injury that cannot be compensated by damages.

10. The Bank reiterates that the Plaintiff is guilty of material non-disclosure and has not come to court with clean hands and concludes that the Plaintiff's application is an abuse of Court process and without merit.

11. I have gone through the parties' pleadings and submissions. At Para. 21 of the affidavit of 13th December 2024, the Plaintiff depones that *"...at the beginning of the year 2023, the Plaintiff/Applicant's revenue decreased due to the debts owed to the Plaintiff/Applicant by various Clients and in particular the Ministry of Housing and the County Government of Uasin Gishu which owed the Company a substantial amount of money which has hampered the regular servicing of the loans leading to arrears."* At paras. 27 and 28, the Plaintiff references a meeting between the parties on 31st October 2024 and that *"...a formula for restructuring*

and clearing the arrears was reached...” and that the Plaintiff committed Kshs. 30 million in a bid to “clear the outstanding loan” and that it shared its “repayment plan” with the Bank.

12. I note that although the Plaintiff admitted in its depositions that it is indebted to the Bank, it has also put forward that it has made substantive payments to redeem the loan. From the position taken by the Plaintiff, it received a loan for Kshs.130,000,000/= and has indeed paid Kshs.100,000,000/=. It is not disputed that the Plaintiff when served with notices paid a total of Kshs.30,000,000/= within a period of 6 months in 2024. What therefore emerges that the Plaintiff has not neglected their obligations under the loan but has been willing to comply despite the setbacks brought by the Covid 19 period and failure by third party actors to meet their end of the bargain. In the circumstances, I am satisfied that the Plaintiff has established a prima facie case to warrant this court consider the other two parameters for grant of an interim injunction set out in *Giella(supra).*

13. The second principle for consideration by the court when granting an order of injunction is whether failure to grant the injunction will cause irreparable harm. The Plaintiff has pleaded that the suit property is a world class resort that employs over 100 members of staff and provides them and their families with a livelihood. This

averment has not been controverted by the Defendant and remains factual. It is therefore clear to the court that it is not only the Plaintiff that shall be deprived of its property if the Bank proceeds with the intended sale. There are other collateral person related to the loss which include the staff and employees of the resort that is on the suit premises. To allow the intended auction of the suit property would inevitably occasion harm to more than the Plaintiff. The following paragraph in *Halsbury's Laws of England*^[14] is instructive. It reads:-

"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

14. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "*irreparable harm*"?. **Robert Sharpe**, in "*Injunctions and Specific Performance*", states that "*irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.*"

15. Flowing from the above definition, I am satisfied that to allow the Plaintiff's property to be sold when it has demonstrated its willingness to continue servicing the loan, given more time, would visit irreparable harm to those that are directly employed by the Resort and their families, which may not be compensable by an award of damages. I find therefore that this principle has been met towards granting of an injunction.

16. In addition to the above, it has also not been denied that almost immediately after the issuance of the 90-day and 40-day notices on 12th March 2024, the Plaintiff made substantial payments totaling close to Kshs. 30 million between May and October 2024. This is clear act of demonstrates that the Plaintiff has capacity to settle its current indebtedness with the plaintiff and therefore the balance of convenience tilts towards granting of the prayers sought herein.

17. I am however alive to the fact that the Defendant as rights guaranteed under the charge and in granting the application, I must balance the rights of both parties before this court. I will therefore allow the application on condition that the Plaintiff makes good the promise of payment of Kshs.15,000,000/= agreed upon during the discussions on the restructuring of the loan facility. This payment has to be made within three months or 90 days from the date herein. Failure to do so, the application herein shall stand dismissed and all the prayers sought therein shall be deemed vacated without further reference to this court, and the Defendant will be at liberty to proceed to exercise its statutory power of sale of the subject properties

Conclusion and Disposition

18. The Plaintiff's application dated 13th December 2024 is allowed with conditions as set out above. Costs are in the cause.

DATED SIGNED and DELIVERED virtually at NAIROBI this 1st DAY of DECEMBER 2025

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Nga'ang'a holding brief for Mr. Kimani for the
Plaintiff/applicant.
2. Ms. Gecaga holding brief for Mr. Karingu for the
Defendant/Respondent.
3. Ivan - Court Assistant

ORIGINAL