

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E679 OF 2024

BETWEEN

**CEER PROCESSING
LIMITED.....PLAINTIFF**

AND

**KENYA DEVELOPMENT CORPORATION
LIMITED.....1ST DEFENDANT**

**JAMES MABTIA T/A JOYLAND AUCTIONEERS.....2ND
DEFENDANT**

RULING

Introduction and Background

1. By an application dated 14th November 2024, the Plaintiff seeks an interlocutory injunction to stop the Defendants from proclaiming, attaching, or selling the Plaintiff's properties, based on a proclamation notice dated 5th November 2024, pending the hearing of this suit. The application is supported by the affidavit of the Plaintiff's Managing Director, PETER NGOTHO KILONZO, sworn on 14th November 2024 and opposed by the 1st Defendant ("the

Defendant”) through the replying affidavit of its Ag. Assistant, Portfolio Management, SARAH NJOROGE, sworn 3rd December 2024. 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

2. 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.

3. As to what constitutes a prima facie case, 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.”
4. The Plaintiff acknowledges receiving a loan of Kshs. 95 million from the Defendant, secured by a fixed and floating debenture and it admits that it stopped servicing the loan around May 2024, attributing this to the non-payment of a government contract. The Plaintiff claims that after a 21-day "Notice of Intention to Invoke Insolvency" dated 7th May 2024 lapsed, the Defendant failed to serve any further statutory or contractual notices before moving to recover the debt.
5. It states that the 2nd Defendant (“the Auctioneer”) allegedly stormed its premises on 6th November 2024 and issued a proclamation of attachment without presenting a warrant, court decree, or prior communication. The Plaintiff challenges the amount

claimed by the Defendant, citing a known "system error" mentioned in a letter from the Defendant dated 11th November 2023 and it argues a reconciliation of the accounts is necessary. The Plaintiff states that if the auction proceeds, it will suffer significant and irreparable loss, as the properties in question are essential for its business operations and it further contends that it has met the legal tests for an injunction by demonstrating procedural irregularities and that the balance of convenience favours preserving the status quo to prevent injustice.

6. In response, the Defendant depones that despite a loan restructure in May 2021, the Plaintiff failed to maintain consistent repayments and that as of 3rd December 2024, the outstanding balances were Kshs.11,754,880.31/= for the initial loan that is fully in arrears and Kshs.28,899,219.50/= for the additional loan that is in arrears of Kshs.18,333,060.02/=. The Defendant claims that it followed due process as it issued multiple demand notices in March 2022 and January 2023 and that it also issued Notices of Intention to Invoke Insolvency in April 2022 and May 2024 as required by law. That the Auctioneer was instructed in accordance with the Chattels Mortgage, which allows for seizure and sale upon default.

7. The Defendant states that the Plaintiff's claim of system errors by the Defendant affecting amortization was corrected, and the Plaintiff was notified. It asserts that the Plaintiff's repayment proposals were not honored and that the current loan statements are accurate and binding. In sum, the Defendant states that the Plaintiff has not met the legal threshold for an injunction and that the intended sale is a lawful exercise of contractual and statutory power and as such, the suit and application are defective and should be dismissed.
8. Upon careful consideration of the pleadings and the parties submissions, I note that this Court is called to determine if the Applicant has made out a case for grant of the interim orders of injunction pending the hearing and determination of the main suit. Going through the parties' pleadings and submissions, it is clear that although Plaintiff is admittedly indebted to the Defendant, what is in dispute is the level of indebtedness. The Applicant argues that the 2nd Respondent proceeded to proclaim its tools of trade without issuing proper notices as anticipated by law. That despite being indebted the 1st Respondent admitted to a systems error that left the amount due unclear and subject to determination through a proper forensic audit. I further note that the Applicant argues that

the 1st Respondent first issued it with an Insolvency Notice but appeared to have abandoned that route only for the 2nd Respondent to descend on the Applicant and without any further notification proceeded to proclaim the Applicant's goods and consequentially any attempt to sell the said goods would paralyze their operations and cripple their business.

9. I have considered the arguments put forth in opposition and the position taken that the Chattels Mortgage in place allows them to seize the goods once an incident of default occurs. I further note that the Respondent acknowledges that indeed there was a system error and that the same was corrected and that they followed the law in the proclamation. The Applicant maintains that this systems error has created doubts as to how much is due and that can only be corrected once an audit is carried out and that this therefore raises a triable issue for determination at trial. I am persuaded that indeed the Applicant has established a prima facie case in line with ***Mrao(supra)***.

10. Having found that the Applicant has established a prima facie case, I now turn to the next tenet set out in *Giella(supra)* as to whether the Applicant stands to suffer irreparable harm which is not compensable by an award of damages. I note from the Pleadings,

the 1st Defendant, Kenya Development Corporation admits that the loan facility herein went to secure acquisition of machinery, vehicles and equipment and that they continue to hold an All-Asset Debenture over the said assets of the Applicant. I agree with the Applicant that if the proclamation is allowed to stand, the Applicant's business will be crippled and all operations thereto shall cease occasioning more harm as it has the collateral effect of rendering himself and the staff employed at the plant out of work. On the flipside, allowing the Applicant to continue to operate will enable it to resume too repay the loan which is fully secured by the Debenture and Guarantees from the borrower's directors. I am satisfied therefore that this second hurdle has been met.

11. As to the in whose favour the balance of convenience tilts, it goes without saying that the Respondent security is in place and therefore the balance tilts in allowing the Application herein.

Conclusion and Disposition

12. I find therefore, the Plaintiff has established a case for grant of the orders of Interim Injunction sought herein in the application dated 14th November 2024. In view of the fact that the Applicant, despite being successful in the present application admits to still being

indebted to the Respondent, I find that this is a proper case where each party should bear their own costs of this application.

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

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J.W.W. MONG'ARE
JUDGE

IN THE PRESENCE OF

1. Ms. Esami holding brief for Mr. Nyamu for the Plaintiff.
2. Ms. Kariuki for the 1st Defendant/Respondent.
3. Ivan - Court Assistant