

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
COMMERCIAL SUIT NO. E317 OF 2025

PAJETA ACRES LIMITED.....PLAINTIFF

VERSUS

COMITY LLP.....DEFENDANT

RULING

1. Before the Court for determination are three applications; the Plaintiff’s application dated 7th May 2025; the Defendant’s application dated 5th June 2025; and the Plaintiff’s application dated 30th June 2025. All three applications arise from the same commercial relationship and relate to the exercise of rights under a Loan Agreement dated 31st October 2023 and a Fixed and Floating Debenture dated 30th January 2024. They further question the propriety of the interim injunctive orders issued on 8th May and 10th June 2025. For convenience, I consider each in turn before addressing the common issues that arise.

Plaintiff’s Application dated 7th May 2025

2. The Plaintiff seeks a temporary injunction restraining the Defendant from exercising any contractual or statutory enforcement powers under the Loan Agreement or Debenture, including the appointment of an administrator or receiver, taking possession of or selling assets, issuing statutory notices under the Insolvency Act, or petitioning for liquidation.

3. The application is supported by the affidavit of *Solomon Wangwe*, a Director of the Plaintiff. He avers that the Defendant advanced loans totaling Kshs. 282,806,633.00 toward the purchase of Land Reference No. 2782/6, Nanyuki. A 10% deposit was provided by Replay Capital as part of a contribution arrangement allegedly known to the Defendant. The Plaintiff contends that the Defendant financed the remaining balance and that the parties contemplated change of user, subdivision, infrastructural development and subsequent sale of plots.
4. The Plaintiff impugns the Defendant's notices dated 17th December 2024 and 8th April 2025 declaring events of default pursuant to clause 16.1.2 and 16.1.3 of the Loan Agreement. It denies breach, insists that repayment obligations commence on 31st December 2025, and argues that no monetary or performance default has occurred. The Plaintiff further states that a caution registered by Replay Capital is not attributable to it, as it has no contractual relationship with Replay; and that the Defendant's enforcement steps are premature.
5. The Defendant opposes the application through the affidavit of *Dhruv Lalitchandra Pandit*. He asserts that the Kshs. 24 million deposit allegedly provided by Replay Capital was never disclosed as either a loan or a financing arrangement, contrary to clause 16.1.3 of the Loan Agreement, which criminalizes failure to disclose material information affecting the borrower's ability to perform its obligations. He contends that Replay Capital's caution, premised on an alleged beneficial interest in 40 acres of the secured property, materially undermines the Defendant's security position. The Defendant denies that

repayment has not yet fallen due and maintains that the Plaintiff has not satisfied the threshold for injunctive relief.

Defendant's Application dated 5th June 2025

6. The Defendant's application seeks:

- i. A prohibitory order against any dealings with LR No. 27882/6 pending determination of the Plaintiff's 7 May 2025 application; and*
- ii. An injunction restraining any appointment of an administrator or initiation of insolvency processes by the Plaintiff or third parties in relation to the loan.*

7. The application is premised on the assertion that non-disclosure of Replay Capital's involvement constitutes an event of default under clause 16.1.3. The Defendant argues that the caution registered by Replay Capital materially prejudices its rights under the Debenture and creates a real risk of further dealings adverse to its interest. It asserts a *prima facie* case and avers that it stands to suffer irreparable harm if injunctive relief is not granted, particularly since the Plaintiff obtained an interim injunction restraining the Defendant from enforcing its security while the Defendant's own position remains unprotected.

Plaintiff's Application dated 30th June 2025

8. The Plaintiff seeks to stay or set aside the interim orders issued by Gikonyo, J. on 10th June 2025. It alleges that the orders were procured through material non-disclosure, specifically concerning the caution registered by Replay Capital. It asserts

that the Defendant has no proprietary interest in the project land, hence the Court lacks jurisdiction, and the matter falls under the ELC. It contends further that due to the existing caution, the Defendant faces no imminent harm, and that damages would suffice. It argues that the injunction has paralyzed its real estate project and upset project timelines.

9. In response, the Defendant, through Pandit, maintains that there was no non-disclosure: it consistently acknowledged that the caution was not registered by the Defendant. It states that the caution evidences a third-party claim that severely prejudices its secured interest. It disputes that damages would be adequate given the Plaintiff's alleged default and its diminishing capacity to repay. It argues that the Plaintiff has not satisfied the threshold under Order 40 Rule 7 of the Civil Procedure Rules for discharge or variation of an injunction.

Analysis and determination

10. I have considered the three applications, the affidavits filed in support and in opposition, the respective written submissions, and the authorities cited. The issues that arise for determination are as follows:

- i. Whether the Plaintiff has met the threshold for a temporary injunction in its application dated 7th May 2025.*
- ii. Whether the Defendant has satisfied the criteria for interim protective orders in its application dated 5th June 2025.*

- iii. *Whether the Plaintiff has met the legal threshold for the discharge or variation of the injunction issued on 10th June 2025.*
- iv. *What orders ought to issue as to costs.*

Applicable legal principles

11. The principles governing the grant of temporary injunctions are well settled in **Giella v Cassman Brown & Co Ltd [1973] EA 358** – that is, a prima facie case, irreparable injury not compensable by damages, and if in doubt, balance of convenience. The definition of a prima facie case was clarified in **Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR** as one showing a right that has been infringed or is about to be infringed.
12. In matters involving secured creditors, Kenyan courts have emphasized that contractual rights under debentures and loan agreements should not lightly be interfered with unless compelling grounds exist. (See **National Bank of Kenya Ltd v Shimmers Plaza Ltd [2009] eKLR**).
13. Where an application seeks to set aside an injunction, Order 40 Rule 7 requires proof of material non-disclosure or substantially changed circumstances.

Whether the Plaintiff has met the threshold for injunctive relief in its application dated 7th May 2025

11. On the first limb, the Plaintiff denies being in default and argues that repayment obligations commence on 31st December 2025. However, the Defendant's notices of default were

grounded not on repayment but on alleged failure to disclose material information, specifically the involvement of Replay Capital and the alleged beneficial claim over 40 acres. Clause 16.1.3 of the Loan Agreement expressly designates non-disclosure of material information as an event of default.

12. The Plaintiff's position, that the contribution arrangement with Replay Capital was informal and known to the Defendant, remains unsupported by documentary evidence. By contrast, the Defendant has produced the caution registered by Replay Capital, which undeniably affects the integrity of the charged property. A borrower's duty of full disclosure in secured lending is not a matter of mere convenience; it is foundational to risk assessment. As was held in **National Bank of Kenya v Pipeplastic Samkolit (K) Ltd [2002] EA 503**, parties are bound by the terms of their contract unless illegality or fraud is demonstrated. None has been shown here.
13. The Plaintiff therefore faces difficulty in demonstrating a *prima facie* case. Even assuming arguendo that the repayment date had not fallen due, the existence of a material encumbrance, registered by a third party claiming beneficial interest, strikes at the core of the Defendant's security and is capable of constituting an event of default.
14. On irreparable harm, the Plaintiff asserts that enforcement of the Debenture will cripple its real estate project. However, as held in **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86**, injury that is compensable by damages cannot constitute irreparable harm. Moreover, the subject property is encumbered by the

Defendant's charge, which is a contractual consequence the Plaintiff accepted.

15. The balance of convenience does not favour restraining the Defendant from exercising its enforcement rights while a caution attributed to the Plaintiff's own contributor remains unresolved. As the Court observed in **Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR**, a chargee's statutory power of sale should not be inhibited absent clear evidence of illegality or fraud.

16. I therefore find that the Plaintiff has not met the threshold for a temporary injunction.

Whether the Defendant has established a case for protective injunctive orders in the application dated 5th June 2025

18. The Defendant seeks orders restraining any dealings with the property and preventing insolvency-related actions. In evaluating the application, the same **Giella** principles apply.

19. The Defendant's concern is two-fold; first, that the presence of Replay Capital's caution and alleged beneficial claim prejudices its security; and second, that the Plaintiff, having obtained interim orders restraining enforcement, remains at liberty to dispose of or otherwise encumber the property.

20. The Court is persuaded that the Defendant has demonstrated a *prima facie* case. A chargee whose security is compromised by undisclosed third-party claims is entitled to seek preservation orders. In **Mrao Ltd (supra)**, the Court held that the security of a lender must not be jeopardized pending the determination of a dispute.

21. As to irreparable harm, the existence of a caution grounded on a claim adverse to the Defendant's security constitutes a direct threat to the integrity and enforceability of the charge. Until the underlying dispute is resolved, the Court must preserve the substratum of the suit.

22. The balance of convenience similarly favours protection of the charged property and of the Defendant's interests as a secured creditor.

23. I therefore find merit in the Defendant's application.

Whether the Plaintiff has satisfied the legal threshold for setting aside the injunction issued on 10th June 2025

23. An injunction may be discharged, varied, or set aside under Order 40 Rule 7 of the Civil Procedure Rules. The applicable principles were discussed in **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**, and more recently in **Uhuru Highway Development Ltd v CBK** (*supra*). A party seeking discharge must show:

- i. material non-disclosure;*
- ii. change of circumstances; or*
- iii. that the order causes undue hardship or is otherwise unjust.*

24. The Plaintiff alleges material non-disclosure. However, the Defendant's evidence, including the replying affidavit, demonstrates that the Defendant neither concealed the existence of the caution nor claimed responsibility for it. The caution itself is a matter of public record. There is no demonstration that the Court would have reached a different decision had the allegedly omitted facts been disclosed.

25. The Plaintiff also argues that the Court lacks jurisdiction and that the matter falls under the jurisdiction of the Environment and Land Court. However, the dispute is grounded in the enforcement of a commercial loan and debenture. As held in **Co-operative Bank of Kenya Ltd v Patrick Kang'ethe Njuguna & 5 others [2017] eKLR**, where the core of the dispute concerns contractual rights and securities, jurisdiction lies in the Commercial Division of the High Court, not the ELC.
26. The Plaintiff has not shown any material change of circumstances since issuance of the order. Nor has it demonstrated undue hardship beyond normal commercial consequences.
27. Accordingly, the Plaintiff has not met the threshold for variation or discharge of the order.
27. The Court is confronted with competing injunctions, the Plaintiff seeks to restrain enforcement, while the Defendant seeks to preserve the property and its security. The overarching task is to maintain the *status quo* most conducive to a fair adjudication of the dispute. As emphasized in **Charity Wakio & Another v Engineering Board of Kenya [2019] eKLR**, interim orders should not confer an unlawful advantage on any party.
28. In this case, restraining the Defendant from enforcement while leaving the Plaintiff free to deal with the property creates an asymmetrical risk profile contrary to equity. Conversely, preventing all dealings with the property while the suit is pending preserves the subject matter without undermining the ultimate merits.

29. For the reasons stated, I issue the following orders:
- i. The Plaintiff's application dated 7th May 2025 is hereby dismissed.***
 - ii. The Defendant's application dated 5th June 2025 is allowed. Accordingly, a temporary injunction is hereby issued restraining the Plaintiff, its agents, or any third party from selling, transferring, charging, subdividing, alienating, or in any way dealing with LR No. 2782/6 pending the hearing and determination of the suit.***
 - iii. The Plaintiff's application dated 30th June 2025 is dismissed.***
 - iv. The interim orders issued on 10th June 2025 are hereby varied to align with order (b) above.***
 - v. Costs of all three applications shall abide the outcome of the main suit.***

Orders accordingly.

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

This **11th** day of **December** 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Kiarie & Ms. Anita Masaki for Plaintiff

Mr. Wandati for Defendant

Court Assistant: *Carlos*

