

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E181 OF 2025

**MEGA WHOLESALERS LIMITED1ST PLAINTIFF
/APPLICANT**

**MEGA TRANSPORTERS COMPANY LIMITED2ND PLAINTIFF
/APPLICANT**

**LAVINGTON HOUSING & INVESTMENTS LIMITED.....3RD PLAINTIFF
/APPLICANT**

-VERSUS-

**DIAMOND TRUST BANK.....1ST DEFENDANT
/RESPONDENT**

**DALALI TRANSPORTERS AUCTIONEERS2ND DEFENDANT
/RESPONDENT**

RULING

Introduction

1. Before me for determination is the Plaintiffs'/Applicants' Notice of Motion dated **11th March 2025**, brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act, Sections 104 and 106 of the Land Act, 2012, and Article 159 of the Constitution.
2. The Applicants seek, principally, temporary injunctive orders restraining the Respondents from exercising the statutory power of sale over several charged properties pending the hearing and determination of the suit, and an order compelling the 1st Respondent to write down alleged overcharged interest.

3. The application is supported by the affidavit of even date, as well as a supplementary affidavit dated 11th July 2025, both sworn by **Abdi Mohamed Ali**, a director of the Applicants. The Applicants contend that they have been servicing their loan obligations, that the Respondents failed to issue proper statutory notices under the Land Act and Auctioneers Rules, and that the debt claimed is inflated in violation of the *in duplum rule*.
4. The 1st Respondent opposed the application through a Replying Affidavit sworn by Faith Ndonga, its Legal Manager. The Bank avers that the Applicants are in substantial arrears, that all requisite statutory notices under Sections 90 and 96 of the Land Act were duly served, and that the auction was properly scheduled. The Respondent maintains that the Applicants' default is admitted and that the Bank is entitled to exercise its statutory power of sale.

Background

1. The Applicants, Mega Wholesalers Limited, Mega Transporters Company Limited, and Lavington Housing & Investments Limited, are long-standing customers of the 1st Respondent, Diamond Trust Bank Kenya Limited (DTB). The relationship dates back to 2008 when the Applicants began accessing various loan and overdraft facilities. Over time, these facilities were secured by charges over several properties, namely:
 - i. LR No. 36/III/101 (Plot No. 101, Eastleigh, Nairobi);
 - ii. LR No. 36/II/145 (Plot No. 145, Eastleigh, Nairobi);
 - iii. LR No. 1160/1061 (Karen Splendor Homes Unit 9, Nairobi);
 - iv. Eldoret Municipality Block 6/238 (Mega House, Eldoret);
 - and
 - v. Eldoret Municipality Block 10/38 (Eldoret).
2. Following DTB's acquisition of Habib Bank Limited Kenya in 2017, the Applicants' facilities were consolidated and restructured under DTB's portfolio. The record shows multiple Letters of Offer issued between

2008 and 2023, including overdraft facilities, term loans, and guarantees. The most significant restructuring occurred under the Letter of Offer dated 26th October 2023 (annexure “FN 3”), which amalgamated outstanding facilities into **Term Loan V** of Kshs.816,613,756/=, repayable over thirty-three (33) months after a moratorium period.

3. The Applicants aver that they have consistently serviced their loans and have no history of default. They argue that the Respondents’ attempt to auction the charged properties is unlawful, procedurally defective, and commercially oppressive. They maintain that the Respondents failed to issue mandatory statutory notices, redemption notices, and valuations, and that the debt figures advanced are inflated by punitive interest contrary to the *in duplum* rule.
4. The Respondents, on the other hand, contend that the Applicants are in arrears of **Kshs.698,588,274.65/=**, and that the total outstanding facilities stand at **Kshs.2,310,878,138.61/=** (annexure “FN 12”). They argue that despite indulgences, including moratoria on repayment, the Applicants have failed to regularize their accounts. Consequently, the 1st Respondent issued statutory notices under Section 90 of the Land Act on 24th July 2024 (annexure “FN 5”), notifications of sale under Section 96 on 28th October 2024 (annexure “FN 7”), and redemption notices through Dalali Traders Auctioneers on 19th December 2024 (annexure “FN 10”). Newspaper advertisements of the auction were published on 24th February and 4th March 2025 (annexure “FN 11”).
5. It is against this backdrop that the Applicants moved this Court under Certificate of Urgency seeking injunctive relief to restrain the Respondents from exercising their statutory power of sale pending determination of the suit.

Parties' Submissions

(a) Applicants' Submissions

6. The Applicants, through learned counsel Okello Okoth Advocates LLP, argued that they have met the threshold for grant of an interlocutory injunction as set out in *Giella v Cassman Brown* [1973] EA 358. Relying on **Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR**, the Applicants argued that they have established a prima facie case, as their proprietary rights under Article 40 of the Constitution are threatened by unlawful auction.
7. Counsel emphasizes that the Respondents failed to comply with Rule 15 of the Auctioneers Rules by not stipulating the value of the properties or the redemption amount, having failed to conduct a forced sale valuation under Section 97(2) of the Land Act. The Applicants argue that these omissions render the intended auction unlawful.
8. On irreparable harm, the Applicants submit that sale of the properties would collapse their wholesale and transport businesses, cause massive job losses, and dispossess a director of his residence. They rely on *Joseph Siro Mosiona v HFCK* (2008) and *Trustees of Maximum Miracle Centre v Equity Bank (K) Ltd* [2021] KEHC 237, where courts held that damages are not an adequate remedy where proprietary rights are threatened.
9. On balance of convenience, the Applicants argue that the Respondents suffer no prejudice if injunction is granted, since securities remain intact and accounts accessible. They cite *Robert Mugo Wa Karanja v Eco Bank (Kenya) Ltd* [2019] eKLR, where the Court held that lenders remain protected by securities pending trial.
10. Finally, the Applicants contend that the Respondents have levied interest and charges beyond the principal, in violation of Section 44A of the Banking Act. They rely on *Housing Finance Co. of Kenya Ltd v*

Scholarstica Nyaguthii Muturi & Another [2020] eKLR and *Bomet Teachers Training College Ltd v Bank of Africa Ltd* [2021] eKLR, urging the Court to order DTB to render true accounts excluding penalty interest and default charges.

(b) Respondents' Submissions

11. The Respondents, through learned counsel Jackson Muema Kisinga Advocates, submit that the Applicants have not met the threshold for injunction. They argue that the Applicants are in substantial arrears and that DTB has complied with all statutory requirements under the Land Act and Auctioneers Rules. They annex statutory notices (annexure "FN 5"), notifications of sale (annexure "FN 7"), redemption notices (annexure "FN 10"), and advertisements (annexure "FN 11") to demonstrate compliance.
12. Counsel relies on *Nguruman Ltd v Jan Bonde Nielsen* [2014] eKLR to argue that all three conditions under *Giella v Cassman Brown* must be satisfied sequentially. They submit that the Applicants have not established a prima facie case, as mere dispute over interest rates does not amount to infringement of rights. They further argue that damages are an adequate remedy, and that the balance of convenience favours the Bank, which risks irrecoverable loss of colossal sums if injunction is granted.
13. On locus standi, the Respondents contend that some of the charged properties are registered in the name of Abdi Mohamed Ali, not the corporate Applicants, and therefore the Applicants lack standing to challenge the Bank's exercise of statutory power of sale over those properties.
14. On the *in duplum* rule, the Respondents submit that the Applicants' allegations are premature and can only be determined at trial upon production of accounts. They argue that the loan statements

(annexure “FN 12”) demonstrate lawful computation of interest and arrears.

15. In conclusion, the Respondents urge the Court to dismiss the application with costs, arguing that the Applicants are seeking to shield themselves from lawful recovery of debts while continuing to default.

Analysis and Determination

16. Having carefully considered the application, the response thereto, submissions, and the applicable law, I find the following as requiring this Court’s determination: -
- i. Whether the Applicants have the requisite locus standi
 - ii. Whether the Applicants have met the threshold for the grant of an interlocutory injunction.
 - iii. Whether the Respondents are in breach of the *in duplum* rule.

Whether the Applicants have the requisite locus standi

17. The Respondents submitted that the Applicants lack locus standi to challenge the exercise of the statutory power of sale over some of the charged properties, specifically LR No. 36/III/101, LR No. 36/II/145, and LR No. 1160/1061, which are registered in the name of **Abdi Mohamed Ali**. They argue that since the Applicants are not the registered proprietors of those parcels, they cannot maintain an action to restrain sale of property they do not own.
18. The Applicants counter that the facilities were advanced to them as borrowers, and the properties were charged to secure their indebtedness. They argue that as borrowers and beneficiaries of the facilities, they have a direct and substantial interest in the securities, and therefore locus standi to challenge unlawful realization of the charges.

19. The law on locus standi in matters of charges is settled. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal held that a chargor whose property is threatened with sale has standing to challenge the process. Similarly, in **Sammy Japheth Kiume v Housing Finance Co. of Kenya Ltd [2015] eKLR**, the Court held that a borrower, though not the registered proprietor, has sufficient interest to challenge the manner in which securities offered on its behalf are enforced, since the borrower bears the financial liability.
20. Further, Section 90 of the Land Act requires service of statutory notices not only on the registered proprietor but also on the borrower. This statutory recognition of the borrower's interest affirms that both the chargor and borrower have locus standi to challenge unlawful realization of securities. The Applicants, being the borrowers, are directly affected by the threatened sale, and therefore have standing to seek injunctive relief.
21. In the premises, I therefore find that the Applicants have locus standi to challenge the 1st Respondents' exercise of statutory power of sale, notwithstanding that some of the charged properties are registered in the name of Abdi Mohamed Ali. The Applicants' financial liability and contractual relationship with the 1st Respondent confer sufficient interest to sustain the application.

Whether the Applicants have met the threshold for the grant of an interlocutory injunction.

22. The principles governing interlocutory injunctions are settled in **Giella v Cassman Brown [1973] EA 358**. The Court of Appeal in **Nguruman Ltd v Jan Bonde Nielsen [2014] eKLR** clarified that the three conditions are: prima facie case, irreparable harm, and balance of convenience. The Court clarified that these are distinct hurdles to be surmounted sequentially, when it stated that:

“.... the fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since **Giella** case (supra) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a *prima facie* level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86**. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the

applicant to injunction directly without crossing the other hurdles in between.”

23. With the above in mind, I now turn to determine whether the Applicants have met the threshold for the grant of interlocutory injunctive relief sought.

i) Prima Facie Case

24. From the decision in **Nguruman Ltd v Jan Bonde Nielsen (supra)**, it is evident that the first hurdle under **Giella v Cassman Brown** is whether the Applicants have established a prima facie case with a probability of success. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others** [2003] KLR 125 defined a prima facie case as one in which, on the material presented, a tribunal properly directing itself would conclude that there exists a right apparently infringed by the opposite party as to call for an explanation or rebuttal.

25. The Applicants allege that the Respondents failed to serve statutory notices under Sections 90 and 96 of the Land Act, failed to issue redemption notices under Rule 15 of the Auctioneers Rules, and did not conduct a forced sale valuation under Section 97(2) of the Land Act. They further allege violation of the *in duplum* rule under Section 44A of the Banking Act.

26. The Respondents, however, annexed statutory notices dated 24th July 2024 (annexure “FN 5”), notifications of sale dated 28th October 2024 (annexure “FN 7”), certificates of posting (annexures “FN 6” and “FN 8”), and redemption notices dated 19th December 2024 (annexure “FN 10”). They also produced newspaper advertisements of the auction (annexure “FN 11”).

27. On the face of the record, compliance appears prima facie established. However, whether the service was effective, whether a valuation was undertaken, and whether the interest exceeded the principal are factual issues requiring trial. In **Nguruman Ltd v Jan Bonde Nielsen & 2 Others** [2014] eKLR, the Court of Appeal cautioned that at the interlocutory stage, the court does not conduct a mini-trial but only determines whether arguable rights are threatened. I am satisfied that the Applicants have raised arguable issues sufficient to establish a prima facie case.
28. Further, Article 40 of the Constitution guarantees the right to property, subject to lawful limitation. Where compliance with statutory safeguards is disputed, the Court must intervene to preserve rights pending trial. I therefore find that the Applicants have established a prima facie case

(ii) Irreparable Harm

29. The second hurdle is whether the Applicants would suffer irreparable harm not compensable by damages. In **Halsbury's Laws of England** (3rd Ed., Vol. 21, para. 739), irreparable injury is defined as injury which is substantial and cannot be adequately remedied by damages.
30. The Applicants contend that sale of the properties would collapse their wholesale and transport businesses, render employees jobless, and dispossess a director of his residence. They rely on **Joseph Siro Mosiona v Housing Finance Company of Kenya Ltd & 3 Others** [2008] KEHC 3673 (KLR), where the Court held that damages are not an automatic remedy in cases where a breach of law is alleged.

31. The Respondents, on their part, argue that damages suffice, citing **Nguruman Ltd v Jan Bonde Nielsen** (supra), where the Court of Appeal held that if damages are an adequate remedy and the respondent is capable of paying, no injunction should issue. The Respondents assert that once property is charged, it becomes a commodity for sale and any loss can be compensated in damages.
32. While it is true that charged property is a commodity for sale, the Applicants have demonstrated that the properties are integral to their business operations. Eviction and auction would disrupt ongoing contracts, employment, and market share. Such harm is not easily quantifiable in damages. I am persuaded that irreparable injury has been shown. The risk of collapse of a commercial enterprise and loss of market share constitutes, in my view, irreparable harm.

(iii) Balance of Convenience

33. The third hurdle is the balance of convenience. In **Paul Gitonga Wanjau v Gathuthis Tea Factory Co. Ltd & 2 Others [2016] eKLR**, the Court held that where doubt exists, the court considers the comparative inconvenience to each party.
34. Similarly, in **Chebii Kipkoech v Barnabas Tuitoek Bargarioria & Another [2019] eKLR**, the Court held that the balance of convenience favours the party who would suffer greater harm if the injunction is refused.
35. In the present case, the Applicants continue to service part of the loan, albeit with arrears. The Respondents hold securities and remain protected. If injunction is denied, the Applicants risk losing properties before trial. If granted, the Respondents' recovery is delayed but not extinguished.

36. The principles in **Giella v Cassman Brown (1973) EA 358** guide the Court. The Applicants have raised arguable issues regarding statutory compliance and interest charges. They also face potential irreparable harm if their distribution centres and residential property are sold. However, the Respondents have demonstrated substantial arrears and a contractual right to exercise statutory power of sale.
37. In circumstances such as in the present case, a conditional stay is, in my view, appropriate to preserve the substratum of the suit while ensuring the Respondents are not unduly prejudiced.
38. In the premises, the Court, in the exercise of the Court's equitable and inherent jurisdiction, is satisfied that a conditional interim injunction is the just order in the circumstances.

Whether the Respondents are in breach of the *in duplum* rule.

39. The Applicants allege a violation of Section 44A of the Banking Act, citing **Housing Finance Company of Kenya Ltd v Scholarstica Nyaguthii Muturi & Another [2020] eKLR**, where the Court of Appeal held that interest ceases to accrue once it equals the principal. They also rely on **Bomet Teachers Training College Ltd v Bank of Africa Ltd & Mistan Auctioneers [2021] eKLR**, where the Court held that violation of the *in duplum* rule can only be ascertained at trial upon proof of amounts advanced and repaid.
40. The Respondents disputed the allegation, annexing loan statements (annexure "FN 12") showing total outstanding facilities of Kshs. 2.3 billion. The question whether interest has exceeded the principal is obviously a matter of accounting evidence, best determined at trial. At the interlocutory stage, the Court cannot conclusively pronounce on this issue. I therefore reserve determination of the *in duplum* issue for full trial.

Disposition

41. Accordingly, I make the following conditional orders:
- i. A temporary injunction is hereby issued restraining the Respondents, their agents, servants, or auctioneers from alienating, selling, taking possession of, or otherwise interfering with the Applicants' use and occupation of the charged properties pending hearing and determination of the suit.
 - ii. The Plaintiffs shall continue servicing the loan by paying the undisputed monthly instalment of **Kshs.500,000/= (five hundred thousand only)** towards reduction of the outstanding debt, in line with the restructuring agreement of 26th October 2023, commencing within 30 days of this Ruling.
 - iii. The Plaintiffs shall, within 30 days, deposit a sum of **Kshs.100,000,000/= (one hundred million only)** into a joint interest-earning escrow account in the names of the parties' advocates as security pending trial.
 - iv. In the event that the Applicants fail to comply with any of the payment conditions set out in (ii) and (iii) above, the temporary injunction shall automatically stand vacated, and the 1st Respondent shall be at liberty to proceed with the realization of the securities without further reference to this Court.
 - v. The 1st Respondent is directed to provide the Applicants with a comprehensive and updated Statement of Account within **fourteen (30) days** of this Ruling, detailing all interest and penalty charges for the purpose of the main suit's reconciliation.
 - vi. Costs of the application shall be in the cause.

42. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

15TH JANUARY 2026

A handwritten signature in blue ink, appearing to read 'Ado Moses', is written over a light-colored rectangular background.

ADO MOSES

JUDGE

In the presence of: -

C/A - Moses

Ms. Okoth.....for the Applicant.

Kisinga.....for the Respondent.

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