Kiewa Group Limited & another v Cooperative Bank of Kenya Limited & another (Commercial Case E492 of 2024) [2026] KEHC 537 (KLR) (Commercial & Admiralty) (23 January 2026) (Ruling)

Neutral citation: [2026] KEHC 537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND ADMIRALTY

COMMERCIAL CASE E492 OF 2024

MN MWANGI, J

JANUARY 23, 2026

BETWEEN

KIEWA GROUP LIMITED ..... 1ST PLAINTIFF

EQUATORIAL NUT PROCESSORS LIMTED ..... 2ND PLAINTIFF

AND

COOPERATIVE BANK OF KENYA LIMITED ..... 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The Notice of Motion application before me is dated 19th August 2024. It has been brought under the provisions of Article 40 of *the Constitution* of Kenya, 2010, Order 40 Rule 1(a) of the Civil Procedure Rules, 2010, and Section 97 of the *Land Act*, No. 6 of 2012. The applicants seek the following orders:-

    a. Spent;

    b. Spent;

    c. That a temporary injunction do issue restraining the 1st and 2nd defendants/respondents, their employees, servants and/or agents, jointly and severally from advertising for sale, auctioning, selling, transferring, disposing (sic), dealing and/or interfering whatsoever with the plaintiff's/ applicant's (sic) land L.R. NO. 19148/3 (original Number 1948/1/2 pending the hearing and determination of the suit; and

    d. That the costs of this application be provided.

2. The application is supported by an affidavit sworn on 19th August 2024, by Ms Wairimu Kanina, the 1st plaintiff's Director. She averred that the 2nd plaintiff is the owner of all that parcel of land known as L.R. No. 19148/3 (Original Number 1948/1/2), and has a banker – customer relationship with the 1st defendant, and that the 2nd plaintiff has a chargor – chargee relationship with the 1st defendant.

3. She also averred that the relationship between the 1st plaintiff and the 1st defendant begun with letters of credit which later mutated through various illegal restructures starting with a letter of offer dated 15th December 2014, wherein the 1st defendant approved a restructure of the facilities i.e. PIF OI US 2.524 Million and USD 1.674 Million, followed by a letter of offer dated 9th June 2016, wherein the 1st defendant approved a restructure of facilities and renewal of LC/PIF/Guarantee limit of USD 1 Million. Ms Kanina deposed that the third restructuring of the existing term loan was vide a letter of offer dated 28th March 2019, where an additional financing of Kshs.105 Million was approved.

4. That vide a letter of offer dated 13th August 2019, the 1st defendant approved extension of the principal and interest on the short term facility, and that vide a letter of offer dated 7th November 2019, the 1st defendant approved extension of repayment for thirty (30) days. Ms Kanina averred that vide another letter of offer dated 28th June 2021, the 1st defendant approved restructure of the 1st plaintiff's facilities with a moratorium of the principal (amount) and interest for six (6) months.

5. She contended that the aforesaid multiple restructures of the initial letters of credit issued to the 1st plaintiff were illegal and irregular for being devoid of the plaintiff's approval through Board Resolutions and were generally forced down the throats of the plaintiffs, resulting in the current confusion on the actual amount owed by the plaintiffs and the amounts paid by them to the 1st defendant.

6. Ms Kanina deposed that as a result of the multiple restructuring, various bank accounts namely; 026B3190427700, 026B3190427701, 026B3190427702, 016B3190427700, 016B3190427701, 016B3190427702, 016B3190427716, 016B3190427719, 016B3190427722, 016B3190427723, 016B3190427729, 016B3190427736, 016B3190427739, 01136190427700, 016B3190427738, 01894190427700, and 016B3190427737, were opened for the plaintiffs by the 1st defendant. She contended that the accounts further led to the misuse of the loan facility and made it difficult to track on loan repayments, and was generally meant to confuse the plaintiffs and make it difficult to understand the set up.

7. Ms Kanina stated that the initial letters of credit advanced to the 1st plaintiff/applicant were secured by a legal charge over the 2nd plaintiff's land L.R. No. 19148/3 (Original Number 1948/1/2) dated 16th July 2014, and registered on 21st July 2014, a variation of charge and further charge over the 2nd plaintiff's land LR. No. 19148/3 (Original Number 1948/1/2) dated 30th July 2014, and registered on 5th August 2014, a second further charge over the 2nd plaintiff's land LR No. 19148/3 (Original Number 1948/1/2) dated 23rd December 2014 and registered on 29th December 2014 and a further variation of charge of Kshs.540,000,000/= over the 2nd plaintiff's land L.R No. 19148/3 registered on 4th September 2017.

8. She further stated that other securities were in the form of an existing all asset fixed and floating debenture for Kshs.397,025,650.00 over the assets of the 1st plaintiff, Directors' personal guarantees of Kshs.600,000,000/= for each Director, corporate guarantee from the 2nd plaintiff for Kshs.397,000,000/=, corporate guarantee from the 2nd plaintiff for USD 544,850.00 and corporate guarantee from Greystone Industries Limited for Kshs.600,000,000/=

9. Ms Kanina averred that the sum claimed of Kshs.490,450,873.38.00 was vehemently disputed by the 1st plaintiffs, who appointed M/S Nahashon Ngugi & Associates, an Audit firm, to analyze the 1st plaintiff's bank account statements at the 1st defendant.

10. She further averred that an analysis of the 1st plaintiff's bank account statements by the said Audit firm identified fundamental flaws which led to the arrears fictitiously accumulating to the said Kshs.490,450,873.38, which flaws were inconsistencies in the closing and opening balances and transaction from USD to Kenya Shillings, which created a difference of Kshs.200,958,050.00. She stated that other flaws were in converting the loan from USD to Kenya Shillings.

11. She contended that the 1st defendant used a higher exchange rate than the Central Bank of Kenya's authorized conversion rate obtaining at the time, and that there were unexplained debits in the 1st plaintiff's bank statements. She asserted that the Audit Report by the plaintiffs' Auditors M/S Nahashon Ngugi & Associates concluded that the 1st defendant's demand constitutes an unexplained colossal amount of Kshs.218,162,118.00, an amount that contravenes the in duplum Rule, which is applicable in Kenya.

12. The plaintiffs contended that they are set to suffer irreparable loss as their right to redeem the 2nd plaintiff's land, L.R. No. 19148/3 (Original Number 1948/1/2) is irreplaceable and/or unsubstitutable in the event that the substratum of the application and suit is defeated by the defendants selling of the 2nd plaintiff's land.

13. She stated that her Advocate had advised her that the plaintiffs have satisfied the conditions for consideration in being granted an injunction as was settled in the case of Giella v Cassman Brown & Company Limited .

14. Ms Kanina contended that the alleged statutory Notices of sale by the defendants do not meet the required standard in law, as they were not properly served upon the plaintiffs, thereby making them a nullity.

15. The 1st defendant filed a lengthy replying affidavit sworn on 5th November 2024, by Ms Florence W. Njuguna, the Legal Manager in charge of Litigation and Debt Recovery and Special Assets in the Legal Services Department.

16. She stated that the order for temporary injunction to restrain the defendants, their employees, servants and or agents, jointly and severally from advertising for sale, auctioning, selling, transferring, disposing of, dealing and/or interacting with property L.R. No. 19148/3) (Original Number 1948/1/2) (I.R. No. 120208) issued on 21st August 2024, does not refrain the plaintiffs from performing their obligations inter alia, servicing the outstanding liabilities to the bank, or varying their obligations under the facilities.

17. She stated that the plaintiffs should continue complying with their contractual obligations to pay the sum of Kshs.639,442,062.63 as at 5th November 2024 in servicing the outstanding facility, which amount continues to accrue interest until payment in full.

18. She confirmed the existence of a banker-customer relationship between the 1st defendant and the plaintiffs, respectively, as a result of which the 1st defendant advanced to the plaintiffs and Greystone Industries Limited various facilities and restructures of debt payment, inter alia, vide a letter of offer dated 24th February 2012, wherein the 1st defendant granted the 1st plaintiff two (2) facilities, a letter of credit in the amount of USD.3,692,470.00 and a short term loan in the amount of

USD.600,000.00, wherein the terms listed in paragraph 5(a) of the replying affidavit were introduced into the relationship.

19. Ms Njuguna averred that vide an offer letter dated 25th October 2012 the interest rate applicable on the short term loan was reviewed to LIBOR plus 10% with a floor of 10.5% per annum, and 3 months plus 9.5 % with a floor of 9.5 % per annum and a restructuring fee of 0.5% in addition to the bank recovering structuring (sic) fees on the total facility at 1%.

20. She further averred that vide an offer letter dated 25th October 2012, the 1st defendant granted the 1st plaintiff five (5) facilities inter alia, post import financing for the sum of USD 1,450,000.00 to be used to liquidate the maturing letters of credit and reviewing various facilities, that is, the existing letters of credit of USD 900,000.00, short term loan of USD 135,000.00, letter of credit of USD 3,692,470.00, and a short term loan in the sum of USD 600,000.00

21. It was stated by Ms Njuguna that vide an offer letter dated 18th April 2013, the 1st plaintiff was granted sight letters of credit/post import finance of USD 1,800,000.00 for 180 days; advance payment guarantee of USD 875,890.45 for 12 months; an overdraft of USD 1,411,000.00 for 12 months and letters of credit of USD 585,000.00 for 6 months, whose terms of the offer letter are as captured in paragraph 5(d) of the replying affidavit.

22. She averred that the 1st plaintiff vide an application dated 31st October 2014, and an offer letter dated 15th December 2014, was granted a term loan facility of USD 4,198,000.00, an overdraft facility of USD 300,000.00, and an advance payment guarantee of the sum of USD 875,890.00, whose consequences are as captured in paragraph 5(e)(i) to (iii) of the replying affidavit.

23. Further, that vide an offer letter dated 9th June 2016, the 1st defendant approved restructuring of facilities and renewal of the LC/PIF/Guarantee limit of USD 1 Million.

24. Ms Njuguna deposed that vide an offer letter dated 5th February, 2018, the 1st defendant approved consolidation and refinancing of the existing term loan, overdraft and overdraft current account.

25. In addition, that vide an offer letter dated 28th March 2019, the 1st defendant approved a restructuring of the existing term loan and additional financing of Kshs.105 Million.

26. Further, that the said facility was reviewed through a letter dated 21st May 2019, providing that the LPO financing would be up to a maximum of 80% of the LPO value and all the proceeds from the LPO contracts would be utilized towards paying off the LPO facility as well as existing term facility, while the 1st plaintiff would not have access to LPO contract proceeds.

27. Ms Njuguna stated that vide a letter dated 13th August 2019, the 1st defendant approved the extension of the principal and interest of the short term facility of Kshs.6,679,520.00 under account No. 016B3190427710 for a further 60 days making the facilities due in November 2019.

28. That vide an offer letter dated 7th November 2019, the 1st respondent reviewed the facilities which resulted in extension of the repayment date for a further period of 30 days for loan account 016B319042770 and 016B319042779 of Kshs.28,332,000/= and Kshs.287,367,798.00, respectively, and the revision of the short term facility from 90 days to 120 days.

29. Further, that the 1st defendant vide an offer letter dated 3rd April 2020, reviewed the facilities to the 1st plaintiff by consolidating the overdrawn amount of Kshs.30,472,823.00 and restructuring it with the loans on account 016B3190427724 and account 016B3190427727 which were outstanding at Kshs.17,000,000/= and Kshs.422,606.05 excluding accrued penalty and interest in arrears and

requiring the restructured amount to be paid within 60 days, and also as set out in paragraphs 5(l)(i) and (ii).

30. Ms Njuguna deposed that the 1st plaintiff's facilities were varied vide an offer letter dated 25th June 2020, and the parties agreed to extend the performance bond of Kshs.30,076,161.00 in favour of KPLC for 6 months, extend the unsecured bid bond limit of Kshs.6,000,000/= in favour of Savanna Cement for a period of 12 months, restructure the short term loans on loan account 016B3190427732, 016B319042773 and 016B3190427730, with a moratorium on both principal and interest for a period of 6 months.

31. She also referred to another offer letter dated 25th June 2020, where the plaintiffs and the 1st defendant agreed that any principal and interest in arrears would be loaded to the new principal loan account for 12 months, all accrued interest would be moved to new loan accounts, the applicable interest would be based on the 1st defendant's base rate, then at 9% plus a margin of 3.5 %, and the interest during the moratorium was to be paid by the 1st plaintiff after the expiry of the moratorium period.

32. She also stated that there was another variation to the facilities granted to the 1st plaintiff vide an offer letter dated 3rd August 2020 with the effect that the 1st defendant would allow one off issuance of a performance bond to KPLC of Kshs.3,557,487.00 issuance and inter-availing of a performance bond of USD 38,400.00 in favour of the World Food Programme to the 2nd plaintiff as a one-off basis from its existing limits; and financing and inter-availing of LPO financing of USD 614, 400.00 being 80% of the contract value on a one-off basis from its existing limits and also as per paragraph 5(0)(i) of the replying affidavit.

33. She stated that the 1st plaintiff and the 1st defendant thereafter entered into an offer letter dated 26th October 2020, whose terms are as set out in paragraph 5(p)(i) to (ix) of the replying affidavit.

34. She referred to an additional offer letter dated 28th June 2021, in which the 1st defendant approved the restructure of the 1st plaintiff's moratorium of the principal and interest for six (6) months.

35. Ms Njuguna admitted that the 2nd plaintiff is the registered proprietor of all that piece of land known as L.R. No. 19148/3 (Original Number 1948/1/2) and asserted that the 2nd defendant offered the said facility as a continuing security for the payment of the secured obligations or so much thereof as may from time to time be outstanding notwithstanding the death, bankruptcy or incapacity of the chargor or any settlement of account or other matter whatsoever.

36. She agreed with the plaintiffs that L.R. No. 19148/3 (Original Number 1948/1/2) was provided to the 1st defendant as security for facilities obtained by the 1st plaintiff and Greystone Industries Limited.

37. Like Ms Kanina, she outlined the securities guaranteeing the loan and stated that pursuant to the further variation of charge, there is a borrower-lender relationship between the 1st plaintiff and Greystone Industries as the borrowers, and the 1st defendant as the lender.

38. She expressed the view that the primary dispute between the parties herein arises from the plaintiff disputing the statement of accounts and the loan arrears with the 1st defendant in the sum of Kshs.490,450,873.00, as the plaintiffs allege that the 1st defendant applied punitive interest and unexplained penalties to the loan facilities.

39. She denied the contention by Ms Kanina that the initial letter of credit was illegal and irregular, and devoid of the plaintiffs' approval through Board Resolutions and was issued under duress, which duress has not been demonstrated. Ms Njuguna referred to Board Resolutions exhibited at pages 301 and 324 of the annexures to her affidavit.

40. She asserted that the plaintiffs and Greystone Industries Limited have at all material times represented and warranted that they had the necessary authority to borrow under the terms and conditions set out in the various offer letters, demonstrating that consent was given.

41. Ms Njuguna averred that the 1st defendant was aware of the facilities disbursed to the 1st plaintiff and Greystone Industries Limited, the amounts paid thereof and outstanding as at 6th June 2024. She outlined the said amounts in paragraphs 17 and 18 of her affidavit. She listed the account numbers opened by the 1st defendant for the 1st plaintiff as per the offer letters and general terms and conditions, subsequent to restructuring of the facilities between the 1st defendant, the 1st plaintiff and Greystone Industries Limited.

42. She denied the plaintiffs' contention that multiple accounts resulted in the misuse of the loan facility or made it difficult to track loan payments thereby confusing the plaintiffs and making it difficult to understand the set up.

43. Ms Njuguna stated that the 1st defendant opted to exercise its statutory power of sale and served a Statutory Notice dated 7th December 2021, upon the plaintiffs and Greystone Industries Limited via registered and ordinary post, as well as to the email addresses previously used by the parties in correspondence before issuance of the said Statutory Notice. She stated that as at 7th December 2021, the plaintiffs and Greystone Industries Limited owed the 1st defendant the sum of Kshs.443,465,216.88 an amount that continued to accrue interest, in breach of the addendum Ref: OLA/30254/2021/06/28.

44. She further stated that the plaintiffs and Greystone Industries Limited were obliged under the terms of the offer letter addendum to pay the term loan facility by debiting to its account in sixty (60) months exclusive of six (6) months moratorium on the principal amount and interest, and to repay the short term facility in one bullet instalment of both the principal and interest, after six (6) months of the offer letter.

45. She stated that the plaintiffs and Greystone Industries Limited were also required to build up escrow funds of Kshs.2,000,000/= to be utilized to pay interest on the short term loan and the balance thereof to reduce the debt upon expiry of the extension, failure to which the moratorium extension granted in the offer letter would lapse, and a Statutory Notice would be issued.

46. She averred that the plaintiffs and Greystone Industries Limited did not comply with the provisions of the addendum offer letter and have refused, failed and/or neglected to disclose to this Court that they were serial defaulters having not made any payment towards servicing the facilities since the 30th June 2022, when the last restructure was done and they have never completed payment of the facilities since 2012, when the facilities were initially granted.

47. She stated that the plaintiffs, Greystone Industries Limited and the 1st defendant have also been engaged in negotiations about the settlement of outstanding liabilities to the 1st defendant and she was aware that the plaintiffs in the meeting of 6th December 2021, pledged to repay the outstanding debt through disposal of non-core assets; furnishing a schedule of assets to be disposed of effecting a lump sum payment of Kshs.200,000,000/= to the 1st defendant by 28th March 2022; and issuing an undertaking for the payment of the said sum, but they failed to honour their pledge and the proposal to date.

48. She deposed that she was aware that the plaintiffs vide a letter dated 2nd March 2022, proposed to pay 45% of the outstanding debt for the 1st defendant to hold off instructing the 2nd defendant herein to issue a 45 days' Notification, and that the plaintiffs were aware that the 1st defendant had commenced the process to sell off the charged property.

49. She contended that the plaintiffs could settle the instalments due on the facility but have been unwilling to do so for the past 41 months and have unduly prejudiced the 1st defendant and its depositors by continuing to carry on business with their funds and obstinately refusing to pay what they claim is due as per the computations, but which is denied by the 1st defendant.

50. Ms Njuguna stated that the 1st defendant thereafter issued the plaintiffs with a 40 days' Notification of Sale vide a letter dated 9th March 2022, advising them to rectify the default and settle all outstanding balances owed to the 1st defendant within 40 days from the date of service of the Notification of Sale, failure to which the 1st defendant would exercise its statutory power of sale as per the law. She stated that through their Advocates then, J. Louis Onguto Advocates, the plaintiffs in a letter dated 15th June 2022, expressly admitted to being served with the 2nd defendant's Notification of Sale.

51. That thereafter, a valuation of the charged property was done and sent to the plaintiffs' deponent and Dr. Peter Munga and the plaintiffs' Financial Analyst via email, as well as to the plaintiffs and Greystone Industries Limited.

52. Ms Njuguna stated that the 2nd respondent issued a 45 days' Redemption Notice dated 3rd June 2022, informing the 2nd plaintiff of the time within which it was required to redeem is property by paying Kshs.490,450,873.38 to avert the risk of the said property being sold by public auction on 23rd August 2022.

53. In reference to the Audit Report prepared on behalf of the 1st plaintiff by M/s Nahashon Ngugi & Associates, she averred that the same is inaccurate, prepared in bad faith to deceive and mislead this Court to the extent that it does not indicate the amount due and outstanding as at June 2022 when it was prepared, or take into account the accrued interest to the facilities as a result of the plaintiffs' default.

54. She further stated that the Audit Report did not take into account several documents listed in paragraphs 39(a) to (s) of the 1st defendant's affidavit, and the various letters of credit issued to the 1st plaintiff, the maturity dates thereof and applicable commissions. She contended that the said Report is inconclusive.

55. Ms Njuguna contended that there were no fundamental flaws in computation of the amounts outstanding from the 1st defendant as alluded to by the plaintiff, and explained the alleged inconsistencies in paragraph 44(a) to (e) of her affidavit.

56. She denied that the amounts being demanded by the 1st defendant are in breach of the in duplum rule, given that the borrowers have been in default of the principal amount and interest since they were granted the facilities in 2012. She further stated that the plaintiffs had requested for multiple restructures on both the said principal and interest leading to capitalization. She asserted that they acknowledged indebtedness in the amount of Kshs.405,159,005.00 vide letters of offer dated 25th February 2021 and 4th June 2021 which amount continues to accrue interest until payment in full.

57. She contended that the 1st defendant is at the risk of being unable to recover the outstanding loan amount which has already outstripped the value of the charged property and continues to suffer undue prejudice as it has been kept out of its money which it might not be able to recover if the orders being sought in the application herein are granted.

58. Ms Njuguna stated that the plaintiffs are underserving of the equitable relief of injunction as it was obtained through material non-disclosure and concealment of material facts, trickery and bad

faith, which successfully misled the Court into believing that the 1st defendant did not comply with substantial and procedural steps in pursuing the remedy of the statutory power of sale.

59. The plaintiffs filed a further affidavit sworn on 22nd November 2024 by Ms Kanina, in which she mostly reiterated her earlier averments. In the defendants' further affidavit sworn on 17th December 2024 by Ms Njuguna, she largely reiterated earlier averments made in her replying affidavit.

60. The plaintiffs' written submissions dated 22nd November 2024 were filed by the firm of J. K. Gachie & Co. Advocates. The defendants' written submissions dated 27th January 2025 were filed by TripleOKLaw LLP.

61. In regard to their written submissions, Mr. Okoli, learned Counsel for the plaintiffs cited the case of Giella v Cassman Brown and Company Limited (1973) EA 358, where the Court outlined the conditions that a party must satisfy in order for a Court to grant an interlocutory injunction. As to whether the plaintiffs have established a prima facie case against the defendants, he submitted that the initial letters of credit issued to the 1st plaintiff and the subsequent restructuring of the loan facilities were devoid of the plaintiffs' approval through Board Resolutions and were generally what has resulted in the current confusion on the amount owed by the plaintiffs and the amounts they have paid to the 1st defendant.

62. Counsel referred to the Audit Report annexed to the plaintiffs' affidavit, which he submitted exposed fundamental flaws which led to the arrears fictitiously accumulating to the amount of Kshs.490,450,873.38, which Report concluded that the 1st defendant's demand constitutes an unexplained colossal amount of Kshs.218,162,118.00 which contravenes the in duplum rule, applicable in Kenya.

63. Mr. Okoli contended that the Statutory Notices of sale allegedly sent to the plaintiffs do not meet the required standard in law as they were not properly served upon the plaintiffs and are a nullity. The plaintiffs' Counsel further contended that although the 1st defendant attempted to sell the plaintiff's land via public auction, the said sale was conducted without the plaintiff being properly served with a 90 days' Statutory Notice under Section 90 of the *Land Act*, a 40 days' Statutory Notice under Section 96(2) of the *Land Act* and a 45 days' Redemption Notice pursuant to Rule 15(d) of the Auctioneers Rules of 1997.

64. In regard to the applicability of the in duplum rule to this case, Mr. Okoli relied on the case of Kenya Hotels Limited v Oriental Commercial Bank Limited (formerly known as Delphis Bank Limited [2019] eKLR, where the Court stated that the in duplum rule is to the effect that interest ceases to accumulate upon any amount of the loan owing, once the accrued interest equals the amount of loan advanced.

65. Counsel submitted that if the 1st defendant is to proceed with the sale of the 2nd plaintiff's land L.R. No. 19148/3 (Original Number 1948/1/2), the said plaintiff's rights of ownership over the said land will be breached contrary to the provisions of Article 40 of *the Constitution* of Kenya, 2010, as well as Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012. He cited the case of Mrao Limited v First America bank of Kenya Limited & 2 others [2003] eKLR 125, where the Court of Appeal defined what a prima facie case is.

66. The plaintiffs' Counsel contended that if this Court allows the sale of the 2nd plaintiff's property contrary to known sale procedures, the plaintiffs will suffer irreparable injury that cannot be compensated by way of damages. He relied on the case of Family Bank Limited v Tassels Limited & 20 others [2021] eKLR, to support the plaintiff's position.

67. On the issue of the balance of convenience, Mr. Okoli submitted that the balance of convenience tilts in the plaintiffs' favour. He relied on the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR, on what constitutes a balance of convenience. He asserted that if the injunction being sought by the plaintiffs herein is not granted, they are bound to suffer greater inconvenience as opposed to the defendants, since the 2nd plaintiff will lose its ownership rights over Land L.R. No. 19148/3 (Original Number 1948/1/2) on account of the failure to serve the plaintiffs with the said Statutory Notices prior to advertisement of the said land via public auction.

68. Counsel submitted that the plaintiffs have proved the principles necessary for being granted the injunctive relief being sought.

69. Mr. Muthee, the defendants' Counsel relied on the case of Giella v Cassman Brown & Co. Ltd (supra), on the principles for a restraining injunction. He also relied on the case of Mrao v First American Bank of Kenya Ltd & 2 others (supra), which defined what a prima facie case is. He cited the case of Shiva Carriers Limited v Imperial Bank Limited & another [2018] eKLR, also on the same issue.

70. In addressing the issue of whether the plaintiffs have established a prima facie case, Mr. Muthee submitted that the instant case is peculiar in that while the plaintiffs' deny service of the requisite Notices in their submissions, they have expressly admitted in their letter dated 18th January 2022 to having received the Statutory Notices, and they have expressly admitted in the affidavit of Wairimu Kanina that they were served with the Statutory Notice demanding Kshs.490,450,873.38.

71. Further, that the plaintiffs have also admitted to having been served by the Auctioneer with the 45 days' Redemption Notice in the letter dated 15th June 2020, from Louis Onguto & Co. Advocates and the supporting affidavit of Ms Kanina sworn on 19th June 2022.

72. Mr. Muthee submitted that given the plaintiffs' admission and acknowledgment on oath that they were served with the requisite Notices, the burden of proof does not shift to the defendants. He contended that the plaintiffs have failed to demonstrate that the 1st defendant is exercising its statutory power of sale without issuing the requisite Notices

73. He stated that the 1st defendant's threat of selling the charged property is lawful having issued the plaintiffs with Notices as per Sections 90(2)(d) and 90(3)(e) of the *Land Act*, and complying with statutory requirements cannot be in breach, violation or result to the perceived breach of the plaintiffs' rights.

74. On the issue of the plaintiffs' assertions that there were no Board Resolutions authorizing restructuring of the facilities, Mr. Muthee stated that the plaintiffs have not indicated that the Resolutions placed before the Court are forgeries, and they have not denied that they originate from them. Counsel asserted that the plaintiffs have failed to establish a prima facie case with a probability of success.

75. Mr. Muthee addressed the issue of the in duplum rule by submitting that although the plaintiffs claim that the 1st defendant is in breach of the said Rule, they have failed to tender any proof to support the said allegation.

76. He cited Section 107(1) of the Evidence which places the legal burden of proof upon the party who invokes the said law, and contended that the plaintiffs have failed to demonstrate the interest charged and expenses incurred in recovery of the amount owed at the time the loan was declared non-performing, was double the principal amount.

77. Counsel disputed the Audit Report prepared by M/s Nahashon Ngugi & Associates and contended that the said Report does not demonstrate how the 1st defendant is in breach of the in duplum rule.

He termed the said Report as being speculative and erroneous. He stated that the defendants have demonstrated in their affidavits that the amounts owed by the plaintiffs comprised the outstanding principal and interest owing, and they are not in breach of the in duplum rule.

78. In addition, Counsel stated that the plaintiffs have admitted in the Audit Report that the loan balance stands at Kshs.177,609,194.00, but they have failed to settle the outstanding loan balance or make the required monthly instalments since June 2021.

79. In submitting that the plaintiffs will not suffer irreparable injury which cannot be compensated by an award of damages if an interlocutory injunction is not granted, Mr. Muthee cited the case of J. M. v SMK & 4 others [2022] eKLR, where Odunga J., (as he then was), defined irreparable loss as an injury that is actual, substantial and demonstrable. He also cited the case of Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020] eKLR, to demonstrate that the 1st defendant is exercising its statutory power of sale under Section 96 of the *Land Act*, and that under Section 99(4) of the said Act, damages can be an adequate remedy, if the Court eventually finds that the property should not have been sold, since the property charged is capable of valuation.

80. The defendants' Counsel relied on the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (supra), where the term balance of convenience was defined. He also cited the case of Paul Gitonga Wanjau v Gathathi Tea Factory Company Ltd & 2 others [2016] eKLR, on the same issue.

81. Mr. Muthee submitted that in this instance, the balance of convenience tilts in favour of the defendants as the plaintiffs have failed to demonstrate that they will suffer any irreparable injury if the order for an injunction is denied, while the 1st defendant will be kept out of its money and restrained from exercising its statutory and contractual remedies which have accrued.

82. Counsel contended that the plaintiffs in filing the present application are attempting to use their consistent breach of their contractual obligations as a ground for this Court to grant the equitable order of injunction. He urged this Court to dismiss the present application with costs.

ANALYSIS AND DETERMINATION.

83. I have considered the application and the affidavit filed in support thereof, the replying affidavit by the defendants, the further affidavits as well as the written submissions by the parties' Advocates. The issue for determination is if the plaintiffs should be granted an interlocutory injunction pending the hearing and determination of the suit between the parties herein.

84. In its affidavit in support of the instant application, the 1st plaintiff has not denied that it was advanced the amounts indicated in the letters of offer. Their bone of contention is that the letters of credit issued to the 1st plaintiff mutated through various irregular and illegal restructures, for being devoid of the plaintiffs' approval through Board Resolutions, and that the restructures were forced down their throats leading to the current confusion of the actual amount owed by them, and what has been paid to the 1st defendant. To controvert the said contention, the defendants attached the annexures at pages 301 to 324 of their replying affidavit to show Board approvals of the 1st plaintiff's initial borrowing and restructures, and that the 2nd plaintiff's Board of Directors approved to guarantee the financing of the 1st plaintiff. The said documents range from the years 2012 to 2018.

85. The defendants at pages 463 to 464 of their annexures exhibited a 90 days' Statutory Notice addressed to the 1st plaintiff's Directors and Dr. Munga. It is dated 7th December 2021. On the face of it, it is indicated that an advance copy was sent by email and the said Notice was also to be sent by Registered Post to the 1st plaintiff's Directors. It was copied to the 2nd plaintiff. The documents exhibited by the defendants show that a follow up letter dated 18th January 2022, was sent to the Directors of the 1st

plaintiff, which notified them that the period of the Statutory Notice issued would lapse on 7th March 2022.

86. A Notification of Sale of the charged property is exhibited at pages 470 and 471. On the face of it, it was to be sent to the Directors of the 1st plaintiff, a copy was to be sent by ordinary mail and an advance copy by email. The Notification of Sale is dated 9th March 2022. At page 472 of the defendants' annexures, it is shown that it was sent by email to the Directors of the 1st plaintiff and Dr. P. K. Munga.

87. On 8th April 2022, the 1st defendant sent a copy of a Valuation Report to the 1st plaintiff's Financial Analyst, as well as to several people working for the 1st defendant. The email was copied to Dr. Peter Munga. A copy of the Valuation Report is exhibited in the defendants' annexures.

88. The 2nd defendant's Redemption Notice dated 3rd June, 2022 is shown to have been sent by Registered Post to the 2nd plaintiff.

89. On 15th June 2022, J. Loius Onguto Advocates on behalf of its client, the 1st plaintiff, wrote to the 1st defendant expressing their client's dismay upon receipt of a letter from the 2nd defendant who had been instructed by the 1st defendant to sell off the charged property L. R. No. 19148/3.

90. The said law firm also expressed concern that the 1st defendant had not formally acknowledged receipt of their letter of 8th June 2022, and had not given any feedback on the queries raised in the Audit Report. J. Louis Onguto & Co. Advocates informed the 1st defendant that they were keen to have the unexplained amount in the Audit Report ironed out within the shortest time possible, and not later than Wednesday, 22nd June 2022.

91. Although the 1st defendant asserts that the 90 days' Statutory Notice dated 7th December 2021 was served upon the plaintiffs via Registered Post and on the face of it, it was indicated that advance copies had been sent by email to the 1st plaintiff's Directors and Mr. P.K. Munga, the 1st plaintiff denied having received the 90 days' Statutory Notice. In view of the said denial, the burden of proof shifted to the 1st defendant to prove that the said Notice was indeed sent to the 1st plaintiff by Registered Post and to its Directors via email as alleged. See the provisions of Sections 107 to 109 of the *Evidence Act*, on the burden of proof.

92. On the issue of service of a Statutory Notice, the Court of Appeal in the case of Stephen Boro Gitiha v Nicholas Ruthiru Gatoto & 2 others [2017] KECA 463 (KLR), cited a previous decision of the said Court in Ochieng and another vs Ochieng & others [1995 – 98] 2EA 260 (CAK), where it was held as follows:

> " It is for the chargee to make sure there was compliance with the requirements of Section 74(1) of the Registered *land Act* and the burden was not in any manner on the chargor. Once the chargor alleges non-receipt of the Statutory Notice it is for the charge (sic) to prove, that the notice was in fact sent. The bank had failed to produce stamps showing proof of posting of the registered letter(s) containing statutory notice. In the absence of proof of such posting, the sale by auction is void. A sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land sold..."

93. In addition, the Court of Appeal in the Stephen Boro Gitiha v Nicholas Ruthiru Gatoto & 2 others case (supra), stated thus on service of Statutory Notices-

> " The case at bar is at all fours with that decision and the conclusions the learned Judge arrived at were therefore correct in law. Section 74(1) of the RLA was designed to offer protection to

the chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and courts could not lightly treat or minimize any breach of the said right....."

94. In this case, although Ms Njuguna averred that the 90 days' Statutory Notice was sent to the 1st plaintiff by way of Registered Post, the 1st defendant failed to demonstrate service of the said Notice by producing a copy of the certificate of posting as evidence of actual postage of the said Statutory Notice, to confirm that service was indeed effected.

95. The 1st defendant averred to having sent advance copies of the 90 days' Statutory Notice to the Directors of the 1st plaintiff via email, and to Dr. P.K. Munga. In the case of BOD County Referral Hospital Kitale & another v DN (suing through her next friend & grandmother SK) (Civil Appeal E043 of 2023) [2025] KEHC 5344 (KLR) (30 April 2025) (Judgment), Hon. Justice Mrima, in considering the import of Order 5 Rule 22B(4) of the Civil Procedure Rules, stated as follows on the issue of service through email-

.....an email delivery receipt is a notification confirming that an email message was delivered to the recipient's mailbox. It must, however, be understood that an email delivery receipt is different from an email read receipt. The latter is a notification confirming that the email message was opened and/or read by the recipient. ..... How then does a sender of an email get a delivery receipt? For one to receive a delivery or read receipt in respect of an email sent to a recipient, the sender must activate the appropriate settings in the email set up. Once the settings are in place, a delivered and/or read receipt, as the case may be, will automatically be received by the sender once the email is delivered and/or read. It is that delivery receipt which the law calls upon a sender to annex to an affidavit of service as evidence of service through electronic mail

The Respondent's Counsel in this case did not, therefore, meet that requirement of law. What was annexed to the affidavit of service was the email as to send the Appellants' email address and nothing more. There was no evidence confirming that the email was delivered to xxxx.com. Without an email delivery receipt on record, there is no evidence of service and nothing more should turn on such. (Emphasis added).

96. Although the above decision arose from the issue of non-service of Hearing Notices and what was required as proof of service, the said decision is applicable in this instance, as it addressed how service via email can be confirmed. In this instance, the impugned Statutory Notice was dated 7th December 2021. In order to prove service of the same via email, the 1st defendant in line with the provisions of Order 22B(4) of the Civil Procedure Rules (as amended), ought to have annexed "email delivered and read receipt" to its documents, as proof of service of the 90 days' Statutory Notice via email. That was however not done.

97. Arising from the 1st defendant's letter to the1st plaintiff's Directors dated 18th January 2022, it is clear that due to the lack of clarity as to how the 1st defendant had arrived at the outstanding total sum of Ksh.443,465,216.88, the plaintiffs procured the services of an Auditor, M/S Nahashon Ngugi & Associates to undertake an audit of the facilities taken from the said defendant.

98. In a letter addressed to the Director of the 1st plaintiff herein, the Auditor indicated that the loan balance outstanding as per Kiewa (1st plaintiff) records was Kshs.177,609,194.00, as per schedule A.

99. The said Auditor reported having analyzed the loan statements and bank current account statements and noticed some entries that required explanation, such as inconsistences in the closing and opening balances, that the translation of USD to Kenya shillings was questionable, that there was improper

application of conversion of USD to Kenya Shillings on 28th March 2018, which led to a difference of Kshs.75,500,352.00.

100. The Auditor also stated that upon analyzing the two current account statements, one in USD (Account No. 02120190427700 and the other one in Kshs. (Account No. 01136190427700), they noted from the USD statement 34 transactions amounting to USD.1,676,476.00 equal to Kshs.171,000,552.00 that were unsupported, and from the Kenya Shillings statement, there were 17 transactions amounting to Ksh.47,161,566.00 that were not supported, giving rise to a total unexplained amount to Ksh.218,162,118.00.

101. It is apparent from the letter by J. Louis Onguto & Co. Advocates that when they sought answers from the 1st defendant on various issues flagged in the Audit Report, the 1st defendant either ignored or neglected to respond to the issues raised, and only did so on 28th June 2022, after being reminded by the said Advocates to respond to the queries raised.

102. I hold the position that when a chargor seeks information from the chargee arising from facilities advanced to the chargor, the chargee is under an obligation to comprehensively and with clarity give feedback to the chargor on how the amounts being demanded were arrived at.

103. Even assuming that the Statutory Notices addressed to the Directors of the 1st plaintiff, had been properly served, the copy exhibited by the defendants in their annexures does not bear a breakdown of the principal amounts that were being claimed from the 1st plaintiff, as well as the interest and penalty interest due from the said facilities. The Statutory Notice contains a composite amount.

104. In an application for an interlocutory injunction, the principles laid down in the case of Giella Vs Cassman Brown & Company Limited (supra), have to be satisfied. On the issue of whether the plaintiffs herein have established a prima facie case with a probability of success, my finding is that failure to properly effect service of the Statutory Notice invalidated the realization of the security deposited with 1st defendant. The legal position is that proper service of a Statutory Notice is the one that puts into motion the process of realization of the security, following default of payment of loan facilities.

105. It is my considered view that if the suit property is sold, the plaintiffs will suffer irreparable injury that cannot be compensated by damages due to the non-service of a Statutory Notice as required under the provisions of Section 90(1) of the *Land Act*.

106. Further, if the 2nd plaintiff's property is sold in the face lack of evidence of proper service of a Statutory Notice, it will set in motion a process that will invalid and unlawful.

107. The Audit Report however shows what there is an undisputed amount of Kshs.177,609,194.00 which the Auditor arrived at after reviewing the documents indicated in the Audit Report. Ms Kanina also admitted in her affidavit filed in ELC No. E246 of 2022, that the 1st plaintiff is indebted to the 1st defendant to the tune of the said amount. Having so admitted, the said amount must be paid to the 1st defendant. Bearing in mind the amount in the said admission and that market value of the suit property as per the Valuation Report is Kshs.330,000,000/=, I hold that the balance of convenience tilts in favour of the plaintiffs.

108. In addition, the contention that the interest has infringed the in duplum rule cannot be ruled out. That is an issue that needs to go for trial. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (supra), the Court defined balance of convenience as follows:

> " The meaning of balance of convenience in favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called the balance of convenience it is really the balance of inconvenience, and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting"

109. Given the circumstances of this case, although the issues at hand rests on the validity of the amount of money being claimed, and that the assertion that the 1st defendant would be in a position to compensate the plaintiffs, the 2nd plaintiff should not be deprived of its land through public auction when the facts clearly indicate that 1st defendant neither produced a certificate of posting as proof that the Statutory Notice was served on the plaintiffs by way of Registered Post nor "email delivered and read receipts" to confirm that the plaintiffs actually received the Statutory Notice.

110. In the case of Waithaka v Industrial and Commercial Development Corporation [2001] eKLR, the Court addressed the exception to the rule that damages would recompense a borrower because a bank has the financial means to do so. The Court stated as follows –

> " As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.
>
> By using the word "normally" the Court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the applicant this may move a Court of equity to say:
>
> "money is not everything at all times and in all circumstances and don't you think you can violate another citizen's rights only at the pain of damages." In the instant case although I have found myself in doubt as to the existence of the prima facie case I have said enough to show that the plaintiff has an arguable case and that the defendant's conduct may be regarded as high handed and probably unfounded in law. All in all, I think this is one case which should be outside the normal rule of no interlocutory injunction if damages will be adequate recompense.

111. Having analyzed the facts and applied the relevant law and authorities, I find that the plaintiffs are entitled to an order of interlocutory injunction pending the hearing and determination of the case between the parties herein, subject to the plaintiffs paying the undisputed sum of Ksh.177,609,194.00, within eighteen (18) months on a quarterly basis to the 1st defendant, from the date of this Ruling. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD OF JANUARY 2026. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Ochieng h/b for Mr. Gachie for the plaintiffs/applicants

Mr. Bwire h/b for Mr. Kiche for the 1st & 2nd defendants/respondents

Ms B. Wokabi – Court Assistant.