

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**HCCC NO. E034 OF 2025**

**CAPE SUPPLIERS LIMITED.....1<sup>ST</sup>**

**PLAINTIFF/APPLICANT**

**ALGRAVE DISTRIBUTORS**

**LIMITED.....2<sup>ND</sup>**

**PLAINTIFF/APPLICANT**

**ALGARVE ENERGY LIMITED.....3<sup>RD</sup>**

**PLAINTIFF/APPLICANT**

**ALGARVE DISTILLERS LIMITED.....4<sup>TH</sup>**

**PLAINTIFF/APPLICANT**

**KINARO KIBANYA.....5<sup>TH</sup>**

**PLAINTIFF/APPLICANT**

**DORCAS WANJIRU.....6<sup>TH</sup>**

**PLAINTIFF/APPLICANT**

**VERSUS**

**DIAMOND TRUST BANK KENYA**

**LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. Before this Court is the Plaintiffs’/Applicants’ Notice of Motion dated 22<sup>nd</sup> January 2025, brought under Order 40 Rules 1, 2, 3 and 8, Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act,

Article 40 of the Constitution, and all other enabling provisions of the law.

2. The Applicants seek, inter alia, temporary injunctive orders restraining the Defendant/Respondent, whether by themselves, their agents, employees, assigns, servants or representatives from exercising its statutory power of sale over L.R. No. 1/660 Nairobi and L.R. No. 1870/IX/128 Nairobi, pending the hearing and determination of the suit. In the alternative, the 1<sup>st</sup> Plaintiff prays for a period of twelve (12) months within which to secure a takeover of the outstanding facility from a reputable financial institution.
3. The application is premised on the grounds on the face of it and supported by the affidavit of Kinaro Kibanya, the 5<sup>th</sup> Applicant and sole director of the 3<sup>rd</sup> Plaintiff/applicant sworn on 22<sup>nd</sup> January 2025. He contends the 1<sup>st</sup> Applicant had a long-standing relationship with the Respondent and pursuant to a letter of offer dated 25<sup>th</sup> June 2018, the Defendant/Respondent advanced the 1<sup>st</sup> Plaintiff a term loan facility of Kshs. 896,776,4047/=; the loan facility was subsequently restricted in June 2019 at the request of the 1<sup>st</sup> Applicant and a moratorium was extended; it was a term of the revised letter of offer that the loan term would be repaid within a ten (10) years by 120 equal monthly instalments; shortly after the extension the country was hit by COVID- 19 pandemic; the negative effects of the pandemic curtailed the applicants' compliance with the

terms of the loan facility; that the COVID-19 pandemic and the Kenya Revenue Authority agency notices which froze the 1<sup>st</sup> Applicant's account, severely impaired their cash flows.

4. Further, he contends that the parties have been engaging in continuous discussions on the extension of a further moratorium and accommodation of the 1<sup>st</sup> applicant. the 1<sup>st</sup> applicant has made considerable efforts to get alternative financial institutions to secure a takeover of the Respondent's facility, this information has been communicated to the Respondent, despite the negotiations the Respondent served statutory notices demanding settlement of the alleged outstanding facility and a notification of sale threatening to exercise its statutory power of sale over the suit properties, the Respondent has proceeded to have the 1<sup>st</sup> Applicant negatively listed in the Credit Reference Bureaus, which action has impeded the 1<sup>st</sup> Applicant's access to credit facilities.
5. The application is opposed through the replying affidavit of Faith Ndonga, sworn on 5<sup>th</sup> February 2025. The Defendant maintains that the Applicants are in persistent default of the loan facility despite numerous accommodation by the Respondent, that indulgences and moratoria were repeatedly granted but dishonoured. She contends that all requisite statutory notices under Sections 90 and 96 of the Land Act, 2012 were duly issued and served, and that the

application is intended solely to delay the lawful exercise of the statutory power of sale.

6. The application was heard by way of written submissions. The applicant's submissions are dated 7<sup>th</sup> October 2025, while the Defendants submissions are dated 10<sup>th</sup> March 2025.

### **Analysis and determination**

7. I have carefully considered the application, the affidavits on record, and the rival submissions. The sole issue for determination is whether the Applicants have satisfied the threshold for the grant of an interlocutory injunction.
8. The principles governing the grant of interlocutory injunctions are settled. In **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, the Court held that an applicant must establish:

***“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”***

9. The Court of Appeal reiterated these principles in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] KECA 606 (KLR)**, stating:

***“These are the three pillars on which rests the platform of judicial discretion to grant a temporary injunction... The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied...”***

10. The nature of a prima facie case was further elucidated by the Court of Appeal in **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** fashioned a definition for “*prima facie case*” in civil cases in the following words:

***“In civil cases, a prima facie case 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”***

11. It is not disputed that the Applicants obtained substantial financial facilities from the Respondent pursuant to a letter of offer dated 25<sup>th</sup> June 2018, later restructured in June 2019 over a ten-year tenure. It is further not disputed that the facility is in arrears. The Applicants candidly admit default but attribute the same to the COVID-19 pandemic, Kenya Revenue Authority agency notices, and consequential cash flow disruptions.
12. On a *prima facie* case, the Applicants submit that their right arises from three interrelated circumstances: the restructuring of the facility in June 2019, spreading repayment over ten years; the Respondent's repeated grant of moratoria during the COVID-19 period; and ongoing refinancing efforts with third-party institutions known to the Respondent.
13. According to the Applicants, these factors created a legitimate commercial expectation that the Respondent would not precipitously invoke its statutory remedies while restructuring and refinancing discussions were active. They contend that the Respondent's conduct amounts to inequitable and commercially unreasonable enforcement.
14. The Respondent's position is straightforward, that default has crystallized; statutory notices under Sections 90 and 96 of the Land Act were duly issued; and the statutory power of sale has therefore lawfully arisen. The Respondent points to correspondence dated 25<sup>th</sup> April

2024 and 20<sup>th</sup> May 2024 in which the Applicants acknowledged arrears and further contends that admission of default disentitles the Applicants to injunctive relief.

15. The Respondent further argues that negotiations for restructuring or refinancing do not suspend a chargee's statutory remedies unless expressly agreed, and that the application was filed prematurely before expiry of the statutory notice period.

16. The Court must approach this issue with caution. It is indeed settled that a court will not restrain a chargee merely to afford a borrower more time. In **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] 1 EA 86 (CA)**, the Court of Appeal held:

***“The chargee must strictly comply with the terms of the statute and the charge before he can exercise the power of sale.”***

17. The Applicants, however, advance a more nuanced case. They do not deny indebtedness. Their contention is that the facility was formally restructured in June 2019 over a ten-year tenure which has not lapsed. They assert that the Respondent, having agreed to spread repayment over that period and having granted indulgences during the COVID-19 period, cannot, in equity and commercial good faith, accelerate enforcement in a manner

inconsistent with the restructured terms and ongoing engagement.

18. The Applicants further contend that they have demonstrated *bona fide* efforts to refinance the facility through Mauritius Commercial Bank, and that the Respondent was aware of and engaged in discussions regarding such takeover proposals. They argue that enforcement at this stage is premature and commercially unreasonable.

19. As hereinabove noted, the Court must be cautious. It is settled law that a court will not restrain a chargee merely to afford a borrower more time. A dispute as to the amount due or the pendency of redemption proceedings is not sufficient. Similarly, where statutory notices have been properly issued, courts are slow to interfere.

20. The Court must also consider the doctrine of equity in mortgage transactions. While a chargee's power of sale is statutory, its exercise must be consistent with principles of good faith and commercial reasonableness. In **National Bank of Kenya Ltd v Shimmers Plaza Ltd [2009] eKLR**, the Court of Appeal underscored that:

***“The statutory power of sale is a creature of statute and must be exercised strictly in accordance with the law.”***

21. Strict compliance extends beyond mere issuance of notices, it encompasses compliance with the contractual matrix within which the statutory power arises. Where there is a serious question as to whether enforcement is premature in light of restructured repayment obligations, that question is properly triable.
22. The Applicants have placed before the Court evidence of advanced refinancing engagements with identified financial institutions. Whether those negotiations will ultimately succeed is not the present inquiry. The question is whether the Respondent's immediate enforcement, in the face of those negotiations and within a subsisting ten-year repayment structure, raises a triable issue.
23. Applying the test in ***Mrao***, I am satisfied that the Applicants have demonstrated the existence of a right capable of protection, namely, the equity of redemption within a restructured facility tenure, that is arguably threatened by the intended sale. I therefore find that the Applicants have established a *prima facie* case.
24. On irreparable harm, the Applicants contend that the injury apprehended transcends mere monetary loss. They state that the suit properties are integral to their ongoing commercial operations and form the backbone of their revenue generation. It is argued that their sale would cripple the Applicants' business model, disrupt existing contractual relationships, imperil hundreds of employees, and potentially render the enterprise insolvent. Further,

the Applicants assert that realization of the securities at this stage would jeopardize ongoing refinancing negotiations with Mauritius Commercial Bank (MCB), thereby foreclosing a viable pathway toward full settlement of the outstanding facility.

25. The Respondent, on the other hand, maintains that the properties were voluntarily offered as security and are therefore commodities for sale. It is argued that once property is charged, it becomes a commercial asset available for realization upon default, and that any loss occasioned by sale is compensable in damages.
26. The law is clear that the mere fact that property has been charged does not automatically negate the possibility of irreparable harm. While courts have often held that charged property is in the nature of a commercial commodity, that principle is not absolute. The question is whether, in the circumstances of the case, damages would be an adequate remedy.
27. The suit properties are immovable assets. Once sold pursuant to the statutory power of sale, they would vest in third parties and, by operation of Section 99 of the Land Act, the equity of redemption would be extinguished. The sale would be irreversible, irrespective of the eventual outcome of the suit.
28. The loss of property may constitute irreparable injury where the sale is shown to be tainted with illegality or impropriety. The Court recognized that where the legality

of the exercise of the statutory power is seriously questioned, the injury flowing from an unlawful sale cannot always be reduced to a monetary equivalent - See **Mrao (Supra)**.

29. In the present matter, the Applicants' case is that the intended sale is premature and inconsistent with the restructured facility and ongoing refinancing efforts. If the sale were to proceed and the Applicants ultimately succeed at trial, the substratum of the suit would have been irretrievably lost.
30. Additionally, the Applicants' uncontroverted evidence is that the properties are not merely passive investment assets but operational anchors of their business activities. Their forced sale would not simply result in transfer of ownership; it would disrupt commercial continuity and potentially collapse the enterprise. Such disruption, including reputational harm and termination of commercial engagements, is not easily quantifiable.
31. I am therefore satisfied that the Applicants have demonstrated that the harm apprehended is not purely pecuniary and that damages would not be an adequate remedy in the circumstances.
32. On the balance of convenience, the Respondent is a secured lender. Its interests are protected by duly registered charges over the suit properties. Interest continues to accrue, and the debt remains secured. The Respondent's security is therefore preserved pending trial.

33. Conversely, if the sale proceeds at this interlocutory stage and the Applicants subsequently succeed, the court would be unable to restore the *status quo*. The suit would be rendered nugatory.
34. In those circumstances, the balance of convenience tilts in favour of preserving the *status quo* pending the hearing and determination of the suit.
35. I am therefore persuaded that the Applicants have satisfied all three limbs of the **Giella** test.
36. In the premises, I find that the Notice of Motion dated 22<sup>nd</sup> January 2025 is merited. Accordingly, I make the following orders:

- i. A temporary injunction is hereby issued restraining the Defendant/Respondent, whether by itself, its agents, servants or assigns, from exercising its statutory power of sale over L.R. No. 1/660 Nairobi and L.R. No. 1870/IX/128 Nairobi pending the hearing and determination of the suit.***
- ii. Costs of the application shall abide the outcome of the suit.***

Orders accordingly.

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

This **12<sup>th</sup>** day of **February** 2026.

**P.M. MULWA**

**JUDGE**

**In the presence of:**

*Ms. Kiiru* for Plaintiffs/Applicants

*Mr. Kisinga* for Defendant

Court Assistant: *Carlos*