REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMM NO. E252 OF 2025

MAXCARE PRODUCTS LIMITED...……..……..PLAINTIFF/APPLICANT

-VERSUS-

VICTORIA COMMERCIAL BANK……...DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 26th March 2025, pursuant to the provisions of Order 40 Rules 1 & 2 and Order 50 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the law. The plaintiff seeks orders to refer the parties herein to Court-annexed mediation to resolve issues arising from the implementation of the facility dated 26th February 2024 and an order restraining the defendant, whether acting directly or through its servants, agents, employees, Auctioneers, or any other persons acting on its instructions, from advertising for sale, selling, disposing of, transferring, taking possession of, or otherwise dealing with all securities and assets pledged under the said facility, pending the hearing and determination of this suit.

2. The application is premised on grounds on the face of the Motion, and it is supported by affidavits sworn on 26th March 2025 and 9th June 2025 by Mr. Sheil Haria, the plaintiff's Director. Mr. Haria averred that between April 2022 and February 2024, the defendant advanced the plaintiff various credit facilities which were periodically renewed and adjusted, culminating in a facility of Kshs.260,000,000/= issued on 26th February 2024. He stated that the relationship remained cordial, with open discussions on the plaintiff's

operations and financial challenges and the plaintiff made repayments, albeit with some delays. He deposed that due to financial strain, the plaintiff sought and was granted adjustments to repayment terms in June 2024, though arrears later accumulated as repayments reduced.

3. He stated that as a result of the foregoing, the plaintiff formally requested restructuring of repayments, interest, and charges in January 2025 following cash flow challenges and temporary factory closure. He deposed that while engagements continued and revenues were routed through the defendant's account, the defendant issued statutory and demand notices for arrears and later demanded immediate repayment of the entire facility amounting to Kshs.276,517,100.65. Mr. Haria claimed that despite site visits and ongoing engagements suggesting possible restructuring, no substantive resolution was reached. He contended that enforcement measures, including the threatened sale of pledged assets, would be unjust and undermine the long-term nature of the facility intended to run until the year 2034.

4. Mr. Haria averred that the defendant has since served the plaintiff with a Statutory Notice dated 3rd April 2025 asserting rights over the charged securities. He explained that he did not immediately serve the Court Orders as parties were engaged in ongoing discussions aimed at resolving the dispute between the parties herein amicably, including liquidation of a fixed deposit account to partially settle arrears and written proposals outlining efforts to regularize the loan and facilitate restructuring. He further averred that although the defendant initially acknowledged these efforts and indicated that the matter would be reviewed, it later reiterated its intention to proceed with enforcement under the Statutory Notice, notwithstanding meetings and assurances of further engagement. Mr. Haria asserted that subsequent demands for substantial lump-sum payments as a pre-condition to

restructuring were viewed as unreasonable and not made in good faith, despite the plaintiff having reduced arrears by over Kshs.10,000,000/= since January 2025.

5. In opposition to the application herein, the defendant filed a replying affidavit sworn on 2nd July 2025 by Mr. Clement Gitau, the defendant's Recoveries Manager. Mr. Gitau averred that the defendant extended various credit facilities to the plaintiff between 2021 & 2022, which the plaintiff defaulted on, prompting the defendant, purely as a commercial and discretionary indulgence, to restructure the debt through a facility letter dated 25th May 2023 for Kshs.200,000,000/=, repayable by a bullet payment at maturity. He deposed that following further default, the defendant again restructured the facilities through a second facility letter dated 26th February 2024, granting a Kshs.260,000,000/= ten-year term loan repayable by monthly instalments, secured by debentures over the plaintiff's assets, a specific charge over an auto diaper machine, a third-party legal charge over residential property, and personal guarantees.

6. Mr. Gitau stated that the 2024 facility was granted at the defendant's sole discretion and it did not create any legitimate expectation of further restructuring. He further stated that the said facility was breached almost immediately when the plaintiff unilaterally reduced repayments without consent. He averred that the defendant issued a valid 90-day Statutory Notice under Section 90 of the Land Act, and despite expiry of the notice period, the plaintiff neither cleared the arrears nor presented a viable restructuring proposal. Mr. Gitau maintained that its right to enforce the securities has crystallized and averred that restructuring is a commercial discretion rather than a legal entitlement.

7. In a rejoinder, the plaintiff filed a supplementary affidavit sworn on 26th August 2025 by Mr. Sheil Haria, the plaintiff's Director. Mr. Haria confirmed that on 3rd July 2025, the Court granted the plaintiff an injunction on condition that it deposited Kshs.2,000,000/= with the defendant within thirty (35) days, towards the loan arrears. He averred that the plaintiff fully complied with this condition as evidenced by the statement of account attached to his affidavit. He asserted that the plaintiff continues to make commercial decisions aimed at growing the business and meeting its financial obligations.

8. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed on 26th August 2025 by the law firm of KM Associates, while the defendants' submissions were filed on 29th July 2025 by the law firm of Kisilu, Wandati & Co. Advocates.

9. Mr. Mutea, learned Counsel for the plaintiff submitted that the plaintiff has satisfied the principles for being granted an injunctive relief as set out in the case of **Giella v Cassman Brown & Co. Ltd** [1973] EA 358. He argued that the plaintiff has established a *prima facie* case based on the parties' facility agreements and contended that the defendant's demand for immediate repayment of Kshs.276,517,100.65 within the first year of a ten-year facility is premature, contrary to the contractual intention, and made in bad faith. He maintained that through a consistent course of conduct, varying repayment dates, inviting and entertaining restructuring proposals, accepting partial payments, and engaging in discussions, the defendant created a legitimate expectation that restructuring would be negotiated in good faith and that enforcement would not be pursued while talks were ongoing.

10. He relied on the Supreme Court case of **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others** [2014] KESC 53 (KLR), and asserted that issuance of Statutory Notices by the defendant during negotiations amounted to unfair and arbitrary conduct.

11. Counsel submitted that the plaintiff stands to suffer irreparable harm incapable of monetary compensation if enforcement proceeds, as the threatened sale of its core manufacturing machine and a Director's family home would halt production, collapse the business, destroy goodwill, lead to employee redundancies and disrupt family stability, consequences that damages cannot adequately remedy. On the balance of convenience, Mr. Mutea argued that preserving the *status quo* poses minimal prejudice to the defendant, whose securities remain intact, while enforcement would result in the total collapse of the plaintiff's operations.

12. Mr. Mutea emphasized its good faith, including compliance with the Court Order to deposit Kshs.2,000,000/= and stated that equity favours protection from disproportionate harm pending the determination of the dispute herein.

13. In the end, he urged this Court to find that the defendant's enforcement is premature, unreasonable, and inconsistent with the commercial purpose of the ten-year facility, and to promote Court-annexed mediation in line with Article 159(2)(c) of the Constitution and established jurisprudence encouraging alternative dispute resolution in commercial matters. To buttress this submission, Mr. Mutea referred to the Court of Appeal case of **Muthinja & another v Henry & 1756 others** [2015] KECA 304 (KLR).

14. Mr. Wandati, learned Counsel for the defendant also cited the case of **Giella v Cassman Brown & Co. Ltd** (supra), and submitted that in order for the Court to grant an order of interlocutory injunction, an applicant has to

sequentially establish a *prima facie* case, irreparable harm, and that the balance of convenience favours the grant of the relief. Counsel contended that the plaintiff has failed to demonstrate any legally protectable right that has been infringed or is under threat, as it does not dispute the existence of the loan facilities, the securities created, or its repeated defaults under both the original and restructured facilities. Mr. Wandati explained that the said facilities were restructured twice purely as acts of commercial discretion, without creating any entitlement to further indulgence, yet the plaintiff again defaulted by making unilateral and insufficient repayments.

15. He maintained that the defendant lawfully issued Statutory Notices under the Land Act and that dissatisfaction with enforcement or requests for further restructuring do not constitute a *prima facie* case. Mr. Wandati further submitted that the plaintiff has not demonstrated any irreparable harm that it stands to suffer, as the charged property was voluntarily offered as security for an undisputed debt and any loss arising from its sale is compensable by damages, with statutory safeguards available under the Land Act. He asserted that the balance of convenience tilts in favour of enforcement, given the substantial arrears exceeding Kshs.270 Million, the defendant's statutory and contractual right to realize its security and the prejudice that continued delay would cause to recovery.

ANALYSIS AND DETERMINATION.

16. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit by the defendant and the written submissions by Counsel for the parties. The issues that arise for determination are –

i) **Whether the plaintiff has made out a case to warrant being granted an order of interlocutory injunction; and**
ii) **Whether this dispute is suitable for referral to Court-annexed mediation.**

Whether the plaintiff has made out a case to warrant being granted an order of interlocutory injunction.

17. Interlocutory injunctions are provided for under the provisions of Order 40 Rules 1(a) & (b) of the Civil Procedure, 2010, which states that -

Where in any suit it is proved by affidavit or otherwise -

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

18. In the case of **Giella v Cassman Brown** (supra), the Court set out the conditions that must be met in an application for an interlocutory injunction. The Court of Appeal in the case of **Nguruman Limited v Jan Bonde**

Nielsen & 2 others [2014] KECA 606 (KLR), in dealing with an application for interlocutory injunction held that -

> ***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) ally any doubts as to (b) by showing that the balance of convenience is in his favour.***

19. The Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] KECA 175 (KLR), considered what constitutes a *prima case* and held that -

> ***"So what is a prima facie case", I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as 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.***

20. It is not disputed that the parties herein entered into multiple facility agreements, culminating in a facility letter dated 26th February 2024 for Kshs. 260,000,000/=, intended to run for ten (10) years until 2034, and secured by various assets. It is also not disputed that the plaintiff faced financial difficulties and fell into arrears, which prompted ongoing discussions between the parties herein regarding possible restructuring. Upon perusal of

the averments made by the parties herein, it is evident that over the years, the defendant varied repayment schedules, considered restructuring proposals, accepted partial payments, and conducted site visits and meetings with the plaintiff.

21. The plaintiff does not deny defaulting on its loan repayment obligations or that it remains indebted to the defendant. To the contrary, the instant application is heavily anchored on grounds that the parties herein having engaged in discussions and encouraged compliance with certain conditions, the defendant abruptly issued Statutory Notices and demanded full repayment of the entire facility within the first year of a ten-year loan. The plaintiff contended that this conduct created a legitimate expectation that enforcement would be suspended while negotiations were ongoing, rendering the acceleration of the facility premature and unreasonable.

22. Upon review of the correspondence between the parties herein annexed to the plaintiff's affidavits in support of the instant application, it is clear that there is no evidence of a legitimate expectation for indefinite restructuring on which the plaintiff can rely. Restructuring of a loan facility is a matter of commercial discretion and not a legal right. This Court can therefore not compel a lender to restructure a facility, or rewrite the parties' contract under the guise of granting an equitable relief. The evidence adduced shows that the defendant had previously indulged the plaintiff through multiple restructuring arrangements, yet the latter repeatedly defaulted on its repayment obligations. Nothing in the facility documents and the correspondence between the parties herein establishes a legitimate expectation of perpetual restructuring.

23. Further to the foregoing, it is not disputed that the defendant issued a Statutory Notice in accordance with Section 90 of the Land Act following the

plaintiff's default. Additionally, as at the time this suit was filed, the plaintiff's equity of redemption had not been extinguished, as the Statutory Notices contemplated under the Land Act and the Auctioneer's Rules had not been issued. As at the date of this Ruling, only the 90-day Statutory Notice has been served, meaning that the plaintiff still retains the opportunity to redeem the charged properties, as the defendant's statutory power of sale has not yet crystallized.

24. In light of the above, the validity of the charge instruments and the 90-day Statutory Notice served having not been successfully challenged, this Court is not persuaded that the plaintiff has demonstrated a *prima facie* case with a likelihood of success to warrant being granted an order of temporary injunction.

25. As to whether the plaintiff will suffer irreparable harm in the event that the orders being sought herein are not granted, I am not persuaded that this is the case. The validity of the charge instruments and the 90-day Statutory Notice served having not been successfully challenged, this Court finds that the plaintiff has failed to establish a *prima facie* case with a probability of success. It is now well settled that a property offered as security becomes a commodity for sale in the event of default. This was the holding by the Court in the oft cited case of **Shimmers Plaza Limited v National Bank of Kenya Limited** [2013] KEHC 363 (KLR), where it was held that –

> ***The judge below found that no prima facie case was established and secondly that damages could infact be an adequate compensation as the appellant's guaranteed security had been converted into a commodity for sale upon the same being charged to the respondent.***

26. Given the above decision and having considered the fact that the value of all the charged properties can be readily ascertained through valuation, the defendant being a financial institution would be capable of compensating the plaintiff if the suit is ultimately decided in its favour. Further, this Court has already found that the plaintiff's equity of redemption has not yet been extinguished. In the circumstances, I am persuaded that the plaintiff does not stand to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed.

27. The issue of balance of convenience does not arise since this Court is not in doubt. However, based on the analysis I have made, the balance of convenience tilts in favour of the defendant.

Whether this dispute is suitable for referral to Court-annexed mediation.

28. This Court is cognizant of the provisions of Article 159(2)(c) of the Constitution of Kenya which obligates Courts to promote alternative forms of dispute resolution, including mediation, reconciliation, and arbitration, so long as the same are not repugnant to justice or inconsistent with the Constitution or any written law. This constitutional imperative is reinforced by the overriding objective under Sections 1A and 1B of the Civil Procedure Act, which requires Courts to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes.

29. It is evident from the pleadings filed and the evidence adduced that the relationship between the parties herein is contractual and commercial in nature, arising from a series of credit facilities culminating in the Facility Letter dated 26th February 2024. The dispute does not turn on the validity of the facility or the securities created thereunder. The plaintiff does not deny the existence of the indebtedness. This Court notes that prior to the

commencement of these proceedings, and even thereafter, the parties herein engaged in negotiations aimed at restructuring the loan facility. The plaintiff made restructuring proposals, routed revenues through the defendant's account, liquidated a fixed deposit to partially reduce arrears, and continued to service the loan, albeit irregularly. On its part, the defendant acknowledged the proposals, conducted site visits, and engaged the plaintiff in discussions before ultimately issuing Statutory Notices and signaling its intention to enforce the securities. This history demonstrates that the parties themselves considered the dispute amenable to negotiated settlement and were willing to engage, albeit unsuccessfully, outside the adversarial process.

30. The defendant's objection to mediation is premised on the argument that restructuring is a matter of pure commercial discretion and not a legal entitlement, and that its statutory right of enforcement has crystallized. While that position may ultimately be upheld at trial, it does not in itself, render the dispute unsuitable for mediation. Court-annexed mediation does not compel a party to cede its legal rights, instead, it provides a structured forum within which parties may explore mutually acceptable solutions, including repayment schedules, restructuring terms, conditional enforcement, or agreed exit mechanisms, without prejudice to their respective legal positions.

31. This Court is also alive to the fact that the facility in question is a long-term ten-year arrangement intended to run until 2034 and that immediate enforcement would likely terminate the commercial relationship altogether. Mediation therefore presents an opportunity for the parties to preserve, restructure, or orderly conclude that relationship in a manner that safeguards both the defendant's recovery interests and the plaintiff's business continuity. Given the magnitude of the facility and the complexity of the

securities involved, a negotiated solution may well be more efficacious, proportionate and commercially viable than protracted litigation.

32. Most importantly, no allegation of fraud, illegality, or public interest considerations have been raised that would render the dispute unsuitable for mediation. The issues are largely factual, commercial, and discretionary in nature, and therefore fall squarely within the category of disputes that Court-annexed mediation is designed to address.

33. In the circumstances, and guided by the constitutional and statutory duty to promote alternative dispute resolution, this Court is satisfied that this matter is appropriate for referral to Court-annexed mediation. Such referral will not prejudice either party, as the litigation process remains available should mediation fail.

34. The upshot is that the plaintiff's application dated 26th March 2025 is partly merited. Consequently, I make the following orders –

    i) **The parties herein are referred to Court-annexed mediation for a period of forty-five (45) days, for purposes of exploring an amicable resolution of the issues arising from the implementation and enforcement of the facility dated 26th February 2024;**
    ii) **Costs shall be in the cause.**

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** on this **20th** day of **February 2026. Ruling delivered through Microsoft Teams Online Platform.**

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mutea for the plaintiff/applicant

Ms Nyakoa h/b for Mr. Wandati for the respondent

Ms B. Wakabi – Court Assistant.