



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. E021 OF 2025

CRIJ COMMODITIES &

HAULAGE

(EAST

AFRICA)

LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BANK OF BARODA (KENYA) LIMITED.....

DEFENDANT/RESPONDENT

MAYWOOD

AUCTIONEERS.....INTERESTED PARTY

RULING

1. Before me is the Notice of Motion dated 23/9/2025 pursuant to Order 40 Rule 1 and 3 and Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act seeking that:

- i. *Spent*
- ii. *Spent*
- iii. *An interlocutory order do issue restraining the Defendant whether by themselves, their servants and/or agents from selling, transferring or in whatever manner alienating the land parcel known as Kiirua/Naari-Miatei/1224 pending the hearing and determination of the main suit.*
- iv. *Spent*
- v. *An interlocutory order do issue restraining the Defendant whether by themselves, their servants and/or agents from proceeding with the sale by way of public auction, or in any other way, of Kiirua/Naari-Miatei/1224 slated for 25th September, 2025 pending the hearing and determination of the main suit.*

vi. *An order do issue compelling the Defendant to conduct a recent valuation for the suit property and share the same with the Plaintiff.*

vii. *An order do issue compelling the Defendant to provide an up-to-date loan statement to the Plaintiff.*

viii. *The Honourable Court be pleased to issue any other order in the interests of justice.*

ix. *The costs of this application be provided for.*

2. The application is premised on the grounds that the 1st Defendant extended a financial facility to the Plaintiff for the construction of a multi-million-shilling book manufacturing industry on L.R No. Kiirua/Naari-Maitei/1224. The interested party, at the behest of the Defendant caused to be published in a local daily newspaper an advertisement for the public auction of the suit property. The proposed sale, in the manner so advertised, will occasion the Plaintiff irreparable loss and damage, the Defendant having failed

to comply with the mandatory statutory prerequisites, including but not limited to the issuance of the requisite statutory notices under the Land Act, the Land Registration Act and the Auctioneers Act. Prior to advertising the property for sale by public auction, the Defendant had not procured a current and valid valuation report as required by law. Further, the Defendant refused to address material contractual issues raised by the Plaintiff, to wit the adverse effects of the Covid-19 pandemic on the business, the levying of interest during the agreed moratorium period, the effects of the unexpected changes in tax laws in 2020 and the Defendant's unwillingness to provide adequate working capital necessary for the resumption of operations, which deliberate bottlenecks effectively frustrated the Plaintiff's ability to perform its contractual obligations.

3. Additionally, that the Defendant maliciously listed the Plaintiff and its Directors with the Credit Reference Bureau, thereby rendering it impossible for the Plaintiff to secure alternative financing to revive the business. The

Defendant further declined to issue written consent to enable the Plaintiff introduce other investors who were willing to redeem the loan, and failed to disburse the requisite working capital upon completion of the construction and commissioning of the machinery. The Defendant thereby imposed unethical business impediments and unconscionable contractual hurdles which, taken cumulatively, severely crippled the Plaintiff's business operations, rendering performance of the contractual obligations practically impossible. Those actions constitute a calculated scheme to pave the way for the sale of the suit property by public auction under the guise of the exercise of a statutory power of sale, whereas the Defendant's true intention is to take over the business or transfer it to its cronies through the back door, and it is fair and just that the intended public auction of the suit property be restrained.

4. The Respondent opposed the application vide a replying affidavit sworn by Alfred Arunga, its employee, on 3/11/2025. He terms the application a misguided

misrepresentation of facts and an abuse of the court process, which ought to be dismissed with costs. He maintains that, subsequent to the Plaintiff's default in its obligation to repay the loan facility extended to it, despite having been granted a moratorium period of 1 year 7 months, the Defendant was entitled to exercise its statutory power of sale of the charged property upon service on the Plaintiff of the requisite notices. In his view, the application is an attempt to infringe on the Defendant's right to realize its security, which right has accrued on account of the Plaintiff's breach, and is in jeopardy in the wake of the foreseeable scenario where the outstanding amount surpasses the forced value of the secured property.

5. The Plaintiff swore a supplementary affidavit on 15/12/2023 in support of its application.

6. The Defendant swore a further affidavit on 28/11/2025 in opposition to the application. It contended that the secured property had since been sold via public auction on 25/9/2025 to Spread Masters Limited, and as such, the

interim orders of injunction of 25/9/2025 had been overtaken by events. It pointed out that the auction took place before service of the orders of 25/9/2025 was effected upon it, and the said orders could not operate retrospectively to stop a transaction that had already commenced.

7. The application was canvassed by way of written submissions, which I have duly considered and will not rehash them. It will suffice just to summarize them.
8. The Plaintiff submitted that the sale, if at all any, by public auction, was in violation of the duty of care bestowed upon the Respondent to obtain the best price reasonably obtainable at the time of sale, and relied on **Home Afrika Limited v Ecobank Kenya Limited (Insolvency Cause 010 of 2021) [2023] KEHC 1802 (KLR) (Commercial and Tax) (10 March 2023) (Ruling) and NCBA Bank Kenya PPLC v Angran Limited (2021) eKLR.**
9. It was its submission that it satisfied the threshold set out in **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** and **Mrao Ltd v First American Bank of Kenya Ltd &**

2 others (2003) KLR for grant of the injunctive reliefs sought.

10. The respondent framed the following issues for determination;

a. Whether the terms of the loan facilities were unconscionable?

b. Whether the court orders are overtaken by events?

c. Whether the Applicant should be granted injunctive orders?

11. It was submitted that the argument by the applicant that the terms of the loan agreement and restructure were unconscionable is misconceived and merely designed to deprive the respondent of its legal right to realize its security. That the applicant voluntarily executed the loan restructure letter of offer and benefited from the terms therein which extended the repayment and moratorium period. Further, that the applicant's board resolutions annexed in the respondent's further affidavit prove that the applicant understood the terms and conditions of the

restructured loan facilities, thus contractually binding all the parties. That the applicant's averments that it was duped into entering into an unconscionable loan agreement are mere allegations with no supporting evidence. Cited in support of this submission was the case of **Ajwang T/A Milambo Bajaj Spares & Services V SBM Bank & Another [2025] KEHC 10061 (KLR).**

12. It was further submitted that the applicant's constant reliance on the Covid-19 pandemic to justify its position of default holds no water. That the effects of Covid-19 were not limited to the applicant. That the Respondent, as a going concern, had to postpone its primary source of revenue for the sake of the Applicant, through the deferment of loan repayments as well as extension of moratorium periods. That the applicant is contractually bound by the terms of the loan agreement and restructure. Cited in support of this submission was the case of **Crown Bus Services Limited V Scania Credit Solutions Proprietary Limited & Another [2025] KEHC 12182 (KLR).**

13. It was further submitted that the court orders issued on the 25th November 2025 were overtaken by events as the Court orders were served upon the interested party after the auction had already been conducted and the subject property sold to the successful bidder. That the auction was conducted in line with the provisions of the Auctioneers Act and the property was sold to the highest bidder. That the terms of sale were advertised and complied with, while the deposit was paid as per the said terms and therefore, the applicant is seeking orders to prevent a sale by auction that has already occurred. That the court orders could not operate retrospectively to stop a sale that had already commenced, completed and the successful bidder already issued with a Memorandum of Sale.
14. On whether the applicant has established a prima facie case to warrant the grant of the orders, the respondent answered in the negative, as the applicant failed to make any payments despite benefitting from the FIDL facility

issued to cushion the applicant from the effects of Covid-19 pandemic.

Analysis & Determination

15. The sole issue for determination is whether the injunctive reliefs sought should issue.
16. The application is predicted on Order 40 Rule 1 of the Civil Procedure Rules, which provides as follows;

“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.”

17. The conditions for grant of temporary injunction were set out in the *locus classicus* case of **Giella v Cassman Brown (supra)** as follows;

“An applicant must show a prima facie case with probability of success, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, when the court is in doubt, it will decide the application on the balance of convenience.”

17. As to what constitutes a prima facie case, the parties have correctly cited **Mrao Limited v First American Bank of Kenya Limited (supra)** where it was held as follows;

A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter."

18. The material before the court shows that the Plaintiff was advanced various overdraft facilities by the 1st Defendant and duly executed a letter of offer on 27/12/2019, wherein it is provided at paragraph 11 thereof that one of the instances when a default occurs is where the Borrower fails to perform any of its obligations under the security.
19. It is noted that the charge over L.R No. Kiirua/Naari/Maitei/1224 was created and duly registered in favour of the 1st Defendant on 5/2/2020.
20. The Plaintiff has admitted its indebtedness to the Defendant. It merely gave reasons for the inability to

make payment as agreed. It also acknowledged receipt of the auctioneer's notification dated 11th February 2025, but denied the service of the earlier notices.

21. From the replying affidavit, it is clear that the 1st respondent duly sent the statutory notices dated 17th October 2022, to the registered address that the applicant provided when it applied for the loan facility. The directors were also duly notified.
22. When the Plaintiff utterly refused to rectify the default, the Defendant issued the 90 days Statutory Notice dated 17/10/2022, the 40 days' Notice to sell dated 1/3/2023 and the Auctioneer's 45 days Redemption Notice dated 24/7/2025 which were all served via registered post, as evidenced by the exhibited certificates of postages dated 3/11/2022 and 2/3/2023.
23. Therefore, the Plaintiff's contention that it was not served with the proper legal notices is far from the truth. The plaintiff has acknowledged that it commenced communications with the bank after the receipt of the

notices. It is thus not proper that on one hand it claims non-service and on the other hand acknowledges service.

24. Having already been served with the statutory notices, it was not necessary for fresh statutory notices to issue to the plaintiff, who was already aware of its own default and the bank's intention to enforce its statutory right.
25. I am thus satisfied that the 1st respondent duly issued the requisite statutory notices to the Plaintiff, and was justified in realizing the security.
26. The Plaintiff voluntarily offered the charged property as security for the loan advanced to it by the Defendant, fully aware that in the event of unremedied default, the 1st Defendant's right to exercise its statutory power of sale would crystallize.
27. It is trite law that the 1st Respondent has a duty set by the law at section 97(2) of the Land Act to obtain, the best price reasonably obtainable at the time of the sale. The said section provides as follows;-

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.

28. The applicant's assertion is that the respondents did not share the valuation report which was prepared before the intended sale. The 1st respondent has exhibited a copy of a valuation report dated 28th May 2025. It shows that the market value for the land and improvements at Ksh. 31,200,000/=, and machinery to be Ksh. 18,600,000/= the forced value is placed at Ksh. 23,400,000/= and Ksh. 14,000,000/= respectively. This amount was sufficient to recover the outstanding loan as at the time of issuance of the statutory notices.
29. I have examined the said report. On the face of it, it has taken account of the developments on the property. The forced value is within the legal limit set by the law and complies with section 97 of the Land Act. As such there is no ground to fault the valuation report.
30. The applicant has dwelt on the effects of Covid 19 on its business. In my view it is not the duty of this court to

rewrite a contract between parties. The claim by the applicant appears to be geared towards asking the court to rewrite the contract between the parties. Once the parties execute a contract between them, it is their duty to perform their obligations therein. The court is only called upon to enforce

a contract, not to alter it to the advantage of one party and to the disadvantage of the other party. The applicant was the one in breach of the contract and the respondent was correct to invoke its statutory power of sale.

31. It is thus clear that the applicant has failed to surmount the first hurdle under **Giella vs Cassman Brown (supra)**.

32. On whether there will be substantial loss incapable of compensation by way of damages, the court is guided by several authorities.

33. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen (2017) eKLR**, had this to say as to what amounts to an irreparable injury: -

” An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

34. Equally, in the case of ***Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR*** the court defined an irreparable injury as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant

should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect

himself from the consequences of the apprehended injury.”

35. It is trite law that once a party offers a security for a loan that security becomes a commodity for sale. This was reiterated in ***Bii v Kenya Commercial Bank Limited (2001) KLR 458*** where it was held as follows;

“Is the applicant’s probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. So, although Mr. Wandaba’s eloquence nearly induced in

me tears of sympathy for the applicant, I am on a rational consideration of the matter impelled to conclude that the applicant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award. The Application fails on this ground too."

36. In **Kihara v Barclays Bank (K) Ltd (2001) 2 EA 420**, the Court addressed the same issue and held thus: -

"The mere fact that a borrower has a claim in damages against a lender which is equal to or in excess of the debt due does not at law entitle it to resist the lender's attempt to exercise its statutory power of sale when this has properly arisen...As the Plaintiff had put up the property as security for the loan with full knowledge that should he default it would be sold, he had converted it into a commodity for sale

and there was no commodity for sale the loss of which could not be adequately compensated in damages.”

37. The Applicant voluntarily charged the property with full knowledge that, in the event of default, it would be subject to sale.
38. It is thus my view that the applicant has also failed the second test under ***Giella v Cassman Brown Limited*** (supra).
39. I will for argument’s sake consider if on a balance of convenience, the applicant ought to be granted the orders sought.
40. In ***Amir Suleiman - Versus - Amboseli Resort Limited (2015) eKLR*** the learned judge offered elaboration on what is meant by “balance of convenience” and stated; -

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

41. Even if one is to look at the matter on a balance of convenience, the same tilts in favour of the 1st respondent who advanced the applicant funds with the expectation that the applicant would observe its obligations, which did not happen. The respondent has the right to exercise the power of sale as agreed. Once the applicant fell into arrears, then under the contract between the parties, the entire balance became due and payable.
42. I have also noted that there is an averment by the 1st respondent that the property were sold on 25th September 2025 and that the application has been overtaken by events. That the orders were served after the sale had taken place.
43. Whereas this has been contested by the applicant, at this stage the court does not have sufficient material to decide on the issue. If the sale was improperly done then there is a remedy to the applicant, in the form of damages.
44. The upshot from the foregoing analysis is that the Plaintiff's application dated 23/9/2025 is bereft of merit and it is hereby dismissed with costs.

45. The respondent is at liberty, should there still be default of payment, to proceed to exercise its statutory power of sale.
46. For the avoidance of any doubt, the respondent need not issue any fresh statutory notices. It should just comply with the law on advertisement of the property.
47. Orders accordingly.

Dated, Signed and Delivered at MERU this 4th March day of March, 2026.

H. M. NYAGA

JUDGE