REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

CIVIL CASE NO. E438 OF 2024

BETWEEN

FEAST FOODS PROCESSORS ..... PLAINTIFF

VERSUS

KENYA DEVELOPMENT CORPORATION ..... 1ST DEFENDANT

STARTRUCK AUCTIONEERS ..... 2ND DEFENDANT

JUDGMENT

Background and introduction

1. By a Plaint dated 6th August 2024 the plaintiff instituted this suit seeking inter alia, injunctive reliefs, declaratory orders, restructuring of a loan facility and costs of the suit. The suit arises from a loan facility advanced by the 1st defendant to the plaintiff, secured by legal charges over the plaintiff's properties, namely **Title No. 10901/214**

IR No. 65339 situated at Kahawa Sukari, Kiambu County, and **Title No. Kwale/Gulu Kinondo/886** (hereinafter "the suit properties").

2. The Plaintiff prays for judgment against the Defendants in the following terms:

i. A permanent injunction restraining the 1st defendant, its servants, auctioneers, agents, or any of them, from interfering with, advertising for public auction, or offering for sale by public auction the plaintiff's parcel of land known as Title No. 10901/214 IR No. 65339, Kahawa Sukari, Kiambu County.

ii. A permanent injunction restraining the 1st defendant, its servants, auctioneers, receivers, agents, or any of them, from interfering with, advertising for public auction, or offering for sale by public auction the plaintiff's parcel of land known as Title No. Kwale/Gulu Kinondo/886.

iii. A declaration that the defendants' purported public auction is tainted with illegalities and irregularities, and is therefore null and void.

iv. *An order directing the defendant to favourably restructure the loan facility to enable the plaintiff to repay.*

v. *Costs of the suit.*

vi. *Any other order or relief that this Honourable Court may deem fit to grant.*

3. The plaintiff avers that on 20th March 2018, it borrowed and secured a facility of Kenya Shillings 276,700,000.00 from the 1st defendant. The facility was secured by legal charges duly registered over the suit properties. The loan was disbursed under specific conditions, including that payments would be made directly to suppliers in tranches.

4. The plaintiff contends that it encountered unforeseen operational challenges which frustrated its business operations. The plaintiff further asserts that the 1st defendant was aware of these challenges, having been part of the project implementation committee. Despite these difficulties, the plaintiff continued servicing the interest on the loan as agreed, given that there was a moratorium on repayment of the principal sum. The plaintiff also engaged the 1st defendant in

negotiations regarding repayment and kept it informed of efforts to operationalize the business.

5. Notwithstanding these engagements, on 21st June 2024, the 2nd defendant issued a redemption notice and a notification of sale, scheduling a public auction of the charged properties for 21st August 2024. The plaintiff argues that advertising the properties for public auction undermines its ability to revive operations and generate revenue, particularly as it has entered into a sourcing and distributorship agreement with Orana A/S to commence business.

6. The plaintiff further contends that the 1st defendant has not furnished it with regular statements of account despite controlling the disbursement of funds. Additionally, the plaintiff asserts that the suit properties were grossly undervalued by the defendants' agents, and that the valuations relied upon do not reflect the true market value of the properties. The plaintiff maintains that the intended sale is therefore tainted with bad faith, calculated to cause financial harm, diminish its

prospects of operationalization, and undermine its income-generating capacity.

7. The 1st defendant filed a defense and counterclaim dated 12th March 2025, seeking the following prayers:

i. *Dismissal of the plaintiff's suit;*
ii. *Special damages of KES 469,382,966.17 being the outstanding loan interests as at 30th September 2024;*
iii. *Interest on the above from 30th September 2024 until payment in full at agreed rate of 13% per annum;*
iv. *Costs on both the Defence and counterclaim at court's rate from the date of judgement until payment in full.*

8. The 1st defendant acknowledges the existence of the loan facility extended to the plaintiff and the terms thereof. It contends, however, that the plaintiff has refused, failed, and/or neglected to service the interest on the loan, thereby breaching the terms of the loan agreement. The 1st defendant maintains that it has fully complied with the requirements of the law in seeking to realize the

charged properties. It denies the plaintiff's allegations of undervaluation, asserting that the valuations undertaken were proper, lawful, and reflective of the prevailing market conditions.

9. At the hearing of the case, the plaintiff testified as PW1, while the defendants called their witness as DW1. Each of these witnesses reinforced the positions already set out in their respective pleadings and written submissions. Since their testimonies essentially mirrored the parties' pleadings and written submissions which I have also carefully considered, I will not repeat them in detail here, but will instead refer to specific portions where necessary in the course of my analysis.

Analysis and Determination

10. In light of the pleadings filed before me, the issues for determination are whether the plaintiff is entitled to the prayers sought and equally, whether the 1st defendant ought to also succeed in its counterclaim.

11. Before delving into the merits of the suit, I will address the preliminary point of law raised by the 1st defendant. The objection is premised on ***Section 6 of the Civil Procedure Act***, which codifies the doctrine of *res judicata*. The 1st defendant contends that the present suit is barred, as it offends the principle that no court shall proceed with the trial of any suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties, or parties under whom they claim, litigating under the same title.

12. The 1st defendant points to **HCCOMM E443 of 2024**, a suit instituted by a director of the plaintiff company, as involving substantially similar parties and arising from the same loan facility and transactions.

13. I have carefully reviewed the Plaint herein as well as the pleadings in **HCCOMM E443 of 2024.** Both suits are dated 6th August 2024. It is evident that the subject matter in **E443 of 2024** involves substantially similar parties and is hinged upon the same loan facility and transactions. The only

distinction is that the plaintiff in **E443 of 2024** is a director of the plaintiff company herein, and the 4th defendant therein is not a party to the present proceedings.

14. The doctrine of *res judicata* is intended to prevent multiplicity of suits, avoid abuse of the court process, and ensure finality in litigation. However, for the bar to apply, the earlier suit must have been heard and finally determined. I have not been informed that **E443 of 2024** has been determined. It remains pending.

15. Accordingly, while I agree with the 1st defendant that the two suits are substantially similar and arise from the same transaction, the present suit cannot be struck out at this stage on account of *res judicata*. For the sake of finality and in the interests of justice, I shall proceed to determine the matter on its merits.

Whether the plaintiff's suit should succeed:

16. It is a settled principle of contract law that parties to a contract are bound by the terms they have freely negotiated. A court of law cannot rewrite

such contracts unless coercion, fraud, or undue influence are pleaded and proved. In ***National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, [2001] eKLR***, the Court of Appeal emphasized:

> ***"A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."***

17. This principle is directly applicable to the present dispute where the contractual foundation of the claim is not in dispute. The executed letter of offer dated 4th July 2017 as well as a Loan Agreement dated 20th March 2018 and the legal charge of even date have all been produced into evidence. From these documents, it is clear that the plaintiff was undertaking a project to manufacture fruit purée and related products, which the 1st defendant agreed to fund up to a maximum sum of Kshs. 276,700,000.00.

18. The facility was conditional upon the formation of a project implementation committee to provide advice, ensure delivery of project outputs, and achieve project outcomes. The parties further agreed that disbursements would be made in tranches directly to suppliers for the purchase of machinery and provision of working capital. The loan was to be repaid over a period of seven years, inclusive of a twelve-month moratorium, during which interest would be serviced. The facility attracted interest at the variable Central Bank Rate plus 3%, and was secured by a charge over the suit properties, a floating debenture and personal guarantees of the plaintiff's directors.

19. From the statements of account tendered by the 1st defendant, it is evident that as at 31st October 2024, the outstanding loan balance stood at Kshs 473,301,265.42. The plaintiff has not controverted the fact of default, nor has it disputed that the parties engaged in prolonged negotiations with the objective of restructuring the said loan facility.

20. The crux of the dispute concerns one of the charged properties, to wit, **L.R. No. 10901/214**.

The plaintiff contends that the property was undervalued. It is asserted that the valuation furnished by the defendants was undated, and reflected a market value of Kenya Shillings 295,000,000.00, with a forced sale value of Kenya Shillings 221,250,000.00. The plaintiff further avers that, in order to ascertain the true value of the property, it engaged Pinnacle Valuers Limited, who conducted a valuation and prepared a report dated 31st July 2024. According to that report, the subject property was valued at Kenya Shillings 340,000,000.00.

21. The plaintiff further contends that the 1st defendant produced a letter from the 2nd defendant, dated 11th June 2024, wherein it was indicated that the best offer received for the subject property was Kshs 226,000,000.00. The plaintiff asserts that this figure is substantially below the market value and falls below the statutory threshold of 75% of the professional valuation undertaken. According to the plaintiff, 75% of the valuation conducted by Pinnacle Valuers Limited, which placed the property at Kshs 340,000,000.00, amounts to Kshs 255,000,000.00. On this basis, the plaintiff avers

that the 1st defendant breached its statutory duty of care owed to the plaintiff by undervaluing the property.

22. In support of its position, the plaintiff relies on the authorities of ***Isiye & 2 Others V African Banking Corporation Ltd, [2024] KEHC 158 (KLR), Zum Zum Investment Limited V Habib Bank Limited, [2014] KESC 6207 (KLR)***, and ***Patrick Kangethe Edward V Co-operative Bank of Kenya Limited & Another, [2016] eKLR***. The courts emphasized the duty of chargees to ensure that valuations are conducted in accordance with statutory requirements and that the interests of chargors are safeguarded against undervaluation.

23. The 1st defendant, in its response, avers that it duly procured a valuation of the suit property through a qualified valuer, in strict compliance with the requirements of the law. It is its contention that the mere production by the plaintiff of a counter-valuation report does not, of itself, suffice to establish that the property was undervalued. In support of this position, the 1st defendant placed

reliance upon the pronouncements of the Court of Appeal in ***Cedarwood Hotels & Resorts Investment Company Ltd V Kenya Commercial Bank Limited & Another, [2024] KECA 1067 (KLR)***, as well as ***Njoru & Another V Equity Bank Limited & Another, [2025] KECA 86 (KLR)*****,** wherein the Court underscored that the existence of divergent valuations, without more, is not conclusive proof of undervaluation.

24. ***Section 97(2) of the Land Act*** provides imposes a mandatory obligation upon a chargee, prior to the exercise of the statutory power of sale, to procure a forced sale valuation of the charged property by a duly qualified valuer. It provides as follows:

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

25. ***Section 97(3)(a)*** further strengthens this protective framework by introducing a statutory presumption of breach in the following words:

> ***"(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market***
>
> ***(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); .."***

26. The jurisprudence surrounding ***Section 97*** has consistently emphasized the dual requirements imposed upon a chargee prior to the exercise of the statutory power of sale. First, the chargee must ensure that a forced sale valuation is undertaken, and secondly, that such valuation is conducted by a duly qualified valuer. Once these requirements are satisfied, the statutory duty is deemed to have been discharged.

27. It follows that any party dissatisfied with the valuation report bears the burden of dislodging it on substantive grounds that must be anchored in recognized valuation principles, professional standards, and legal parameters. Mere dissatisfaction of a valuation, absent demonstrable error or impropriety, is insufficient to impeach the report. This position was affirmed in ***Olkasasi Limited V Equity Bank [2015] eKLR***, where the Court emphasized that valuation reports are not to be displaced lightly, but only upon credible challenge rooted in professional practice.

28. The Court of Appeal has further clarified the evidentiary threshold in such disputes. In ***Cedarwood Hotels & Resorts Investment Company Ltd, [Supra],*** the Court held that the mere existence of a competing valuation report, particularly one reflecting a significantly higher value than that relied upon by the chargee, does not, without more, establish undervaluation or breach of duty. The Court reaffirmed that the statutory obligation under ***Section 97*** is not to secure the highest conceivable price, but rather to ensure that the sale is conducted at the best price

reasonably obtainable, informed by a professional valuation.

29. Thus, unless the valuation relied upon is shown to be fundamentally flawed, negligent, or conducted in disregard of professional standards, the chargee cannot be faulted merely because another valuer has arrived at a higher figure.

30. In the instant case, there was no allegation that Startruck Auctioneers, the 2nd defendants, were incompetent or unqualified valuers. The valuation report relied upon by the 1st defendants in respect of L.R. No. 10901/214 placed the market value at Kshs. 295,000,000.00 with a forced sale value of Kshs. 221,250,000.00. The said report was however undated, a fact not denied by the 1st defendant. ***Rule 11(b)(x) of the Auctioneers Rules*** is explicit that the reserve price for each parcel of land must be based on a professional valuation carried out not more than twelve months prior to the proposed sale. It provides:

> ***"The reserve price for each separate piece of land based on a professional valuation carried out***

not more than 12 months prior to the proposed sale."

31. The absence of a date on the valuation report renders it impossible for this Court to ascertain whether there was compliance with that statutory requirement. When ***section 97 of the Land Act*** is read in conjunction with the duty imposed upon a chargee to obtain the best price reasonably obtainable at the time of sale, it becomes evident that such duty necessarily encompasses the requirement of a reasonably recent valuation of the charged property. A valuation report that is undated cannot serve as proof that the chargee has discharged its statutory obligation. In the absence of a date, this Court is unable to ascertain whether the valuation was contemporaneous with the proposed sale, and consequently, that the duty under ***section 97*** was fulfilled.

32. Turning to the valuation report prepared by Pinnacle Valuers, dated 31st July 2024, the same returned a market value of Kenya Shillings 340,000,000.00. However, the report did not provide a forced sale value as contemplated under

section 97(2) of the Land Act. The necessity of undertaking a forced sale valuation was emphasized in ***Koileken Ole Kipolonka Orumos V Mellech Engineering & Construction Limited & 2 Others, (2018) eKLR***, where Gikonyo J. observed:

> ***"... the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers."***

33. Consequently, the intended sale of the property for Kenya Shillings 226,000,000.00, as communicated in the 2nd defendant's letter dated 11th June 2024, cannot be validated as being the best price reasonably obtainable. The burden lay squarely

upon the 1st defendant to demonstrate compliance with ***section 97*** by producing evidence that, at the time of sale, the price obtained was indeed the best reasonably obtainable. In the absence of such proof, the statutory duty remains unfulfilled.

34. I also find that the plaintiff has not demonstrated sufficient grounds to warrant the grant of the permanent injunction sought. While the valuations presented by both parties fall short of the statutory threshold, this alone does not justify restraining the 1st defendant from exercising its statutory power of sale. The plaintiff does not deny the existence of the loan facility, nor the indebtedness arising therefrom, and it is evident that the facility has not been serviced in accordance with the agreed terms.

35. In these circumstances, the Court cannot intervene to rewrite or vary the contractual obligations freely undertaken by the parties, nor can it compel the 1st defendant to restructure the loan facility in a manner contrary to the express agreement. To do so would amount to the Court substituting its own terms for those agreed upon by the parties, which is impermissible.

The 1st defendant's Counterclaim:

36. By way of counterclaim, the 1st defendant seeks that the plaintiff's suit be dismissed in its entirety. It further claims special damages being the sums outstanding, interest and costs in respect of both the defence and the counterclaim. The plaintiff contends that the 1st defendant's action of filing a counter claim amounts to seeking multiple remedies in relation to a single debt, a situation not envisaged under the Land Act.

37. ***Section 90(3) of the Act*** provides that where a chargor fails to comply with a statutory notice within ninety days, the chargee may elect one of several remedies, namely: to sue for the money due, appoint a receiver, lease or sublease the charged land, enter into possession, or sell the charged land. The remedies are clearly framed in the alternative and not concurrently exercisable.

38. The parties have cited, among others, ***Clesoi Holdings Limited V Prime Bank Limited, [2016] eKLR*** and ***Spire Bank Limited V Obora & 2 Others, [2022] eKLR***, which affirm that the

remedies under ***section 90*** are in the alternative. The question that arises is whether this renders the 1st defendant's counterclaim invalid.

39. I do not think so. It is evident that the 1st defendant had already elected to exercise its statutory power of sale when the plaintiff instituted this suit. The counterclaim was filed as a direct response to the plaintiff's pleadings and does not, in my view, amount to the simultaneous pursuit of multiple remedies under ***Section 90(3)*** since the counterclaim here is not an independent election of a separate remedy. In any case, the nature of the prayers in the counterclaim are confined to dismissal of the plaintiff's suit, recovery of the outstanding loan sum together with contractual interest, and costs. These are ancillary to the defendant's position in defending the suit and do not prejudice the plaintiff in any material way.

40. As to whether the counterclaim has been proved to the required standard, I find that the plaintiff does not deny the existence of the loan facility or the indebtedness arising therefrom. The evidence before the Court demonstrates that the facility was

advanced, secured by legal charges over the suit properties, and that the plaintiff has failed to service the loan in accordance with the agreed terms. The indebtedness remains outstanding, and the plaintiff has not tendered evidence of repayment sufficient to discharge its obligations.

Disposition

41. Accordingly, I make the following orders:

i. The plaintiff's prayers for permanent injunctions and restructuring of the loan facility are dismissed.

ii. Prayer (iii) of the Plaint succeeds. A declaration be and is hereby issued that the defendants' purported public auction is tainted with illegalities and irregularities and is therefore null and void.

iii. For the avoidance of doubt, in exercising its statutory power of sale, the 1st defendant shall strictly comply with Section 97 of the Land Act, including obtaining a proper valuation reflective of the best price reasonably obtainable at the time of sale.

iv. With respect to the counterclaim, judgment is hereby entered in favour of the 1st

defendant on its counterclaim for the outstanding loan balance of Kenya Shillings 469,382,966.17, together with contractual interest at the agreed rate of 13% per annum from 30th September 2024 until payment in full.

v. Given that the plaintiff has partly succeeded in its claim, and the 1st defendant has succeeded in its counterclaim, I order that each party shall bear its own costs of the suit. The 1st defendant shall, however, be entitled to costs of the counterclaim.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *23RD* DAY OF *MARCH* *2026*.

F. MUGAMBI
JUDGE

Delivered in presence of:
Ms Mukobi for the plaintiff
Mr Wakwaya for the 1st defendant
Court Assistant: Lillian