African Banking Corporation Ltd v Intex Construction Limited & another (Commercial Miscellaneous Application 430 of 2017) [2026] KEHC 6111 (KLR) (Commercial and Tax) (24 April 2026) (Ruling)

Neutral citation: [2026] KEHC 6111 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL MISCELLANEOUS APPLICATION 430 OF 2017

MN MWANGI, J

APRIL 24, 2026

BETWEEN

AFRICAN BANKING CORPORATION LTD ..... APPLICANT

AND

INTEX CONSTRUCTION LIMITED ..... 1ST RESPONDENT

SAMIT GEHLOT ..... 2ND RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 2nd September 2025 filed pursuant to Sections 1A, 1B, 3A and 34 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Section 56(2) of the *Land Registration Act* as well as Sections 90 and 96 of the said Act.

2. The applicants seek a temporary injunction restraining the respondent from advertising for sale, selling, entering into, accessing, alienating, transferring, interfering with and/or in any manner whatsoever altering, dealing with the 1st applicant's property known as Title Number Athi River/Athi River 5/44 (hereinafter referred to as the subject property) until the issue of whether there is a recoverable debt against the 1st applicant is determined in HCCC No. 282 of 2017- African Banking Corporation Ltd v Intex Construction Limited & another. The applicants also seek orders restraining the respondent from exercising its statutory power of sale pursuant to the Statutory Notice dated 11th July 2025 and that the same be declared null and void. The applicant also prays for costs of the application.

3. The application is premised on the grounds set out on the face of the Motion and it is supported by an affidavit sworn on the 2nd September 2025, by Mr. Samit Gehlot. He averred that he is the 2nd applicant and the Managing Director of the 1st applicant. He also averred that the dispute between the parties herein arose between 2013 and 2014, wherein the applicants applied for various loan facilities

from the respondent, which were secured by various securities, the subject property being one of them. He stated that due to variation of interest rates, he transferred some of the loan to KCB Bank, which monies were not enough to cater for the loan, thus the loan was restructured.

4. Mr. Gehlot averred that the applicants further executed an Assignment of Contract Receivables to the effect that all receivables from the Kenya Rural Roads Authority would be paid to the 1st applicant through the respondent's bank. He contended that the respondent once again mishandled the facilities and charged exorbitant rates which forced the applicants to halt the payment of contract receivables into the account with the respondent. He stated that this led to the filing of HCCC No. 282 of 2017 wherein the respondent sought orders to compel the applicants to direct all the receivables into the account. He stated that by consent of the parties, the Court ordered that receivables be deposited into a joint account in the names of the Counsel for the parties. Mr. Gehlot further stated that the Court ordered on consent that the firm of Ernest and Young LLP (E&Y LLP) would carry out an audit on the outstanding principal sums and the interest due.

5. He stated that when the Audit Report was completed, the respondent filed an application dated 30th August 2019 seeking judgment on the findings of the Report as well as payments of monies made into an escrow account, for which the Court on 28th July 2020 had ordered to be paid to the respondent, and Kshs.281,256,062.00 was paid. Mr. Gehlot deposed that another Report was done on the accounts which established the balance was Kshs.536,799,126.00 which left a balance of Kshs.255,543,064.00 unpaid, given that Kshs.281,256,062.00 was already paid and for which the respondent filed an application seeking entry of judgment on the said sum. He stated that the respondent herein also obtained a Court order for recognition and execution of the informal charge on the subject property.

6. Mr. Gehlot contended that execution of the Statutory Notice which sought to recover the same debt pending in HCCC 282 of 2017, is untenable. He stated that the Kenya Rural Roads Authority has been depositing money into the escrow account which serves as security to the respondent's claim. He further stated that the amount paid as at 1st September 2025 was Kshs.259,585,554.00, yet the amount demanded in the Statutory Notice was Kshs.1,160,286,020.03, which is four times the amount advanced of Kshs.300,000,000/=, which is in violation of the in duplum rule and Section 44 of the *Banking Act*.

7. According to the applicant, the Ruling of 26th January 2024 has been overtaken by events and its execution is unattainable. He explained that the debt of Kshs.255,543,064.00 was paid from the escrow account and if there is any outstanding debt, an account should be taken in the full trial of the main suit.

8. He stated that the rights of the respondent to recover the debts are secured in various securities hence there will no prejudice. He deposed that the respondent cannot claim payment yet it has secured the funds in the escrow account. He argued that the Statutory Notice was procedurally defective because the monies secured through the informal charge have not yet been deemed repayable. He further argued that he stands to lose prime land due to the irregularly issued Statutory Notice, which will negatively impact the business. He urged this Court to allow the instant application in the interest of justice and fairness.

9. The respondent opposed the Motion through a replying affidavit sworn by Ms Kajuju Marete sworn on 22nd October 2025. She averred that the applicants were granted various loan facilities secured by the subject property for the sum of Kshs.300,000,000/=. She stated that the 2nd applicant surrendered the original Title for registration of the charge which could not be done since the 2nd applicant refused to cooperate and obtain consent from the Land Control Board, which then created an informal charge. Ms Kajuju took the position that the applicants defaulted in the loan repayment and that the

respondent obtained leave of the Court through a Ruling of 26th January 2024, to sell the subject property to recover the monies.

10. Ms Kajuju averred that in light of the said Ruling, the respondent issued the Statutory Notice dated 11th July 2025, which prompted the filing of this application. She stated that the balance due as at 30th June 2025 was Kshs.1,160,286,020.03.

11. She stated that the applicants on diverse dates of 2014 and 2016, applied and were granted various facilities which were secured through legal charge of Nairobi/Block 92/86 for Kshs.100,000,000/=, and the informal charge of the subject property, among others which accrue interest. She confirmed that the parties entered into an Assignment of Contact Receivables with projects of the Kenya Rural Roads Authority, whereby the proceeds would be paid to the 1st applicant through its bank account but the said applicant later instructed the said Kenya Rural Roads Authority to pay through an undisclosed bank which shows fraud.

12. Ms Kajuju averred that it then obtained Court orders to stop payment of the contract receivables to any other bank, other than the respondent, and the Court ordered the same to be paid into a joint account of both Advocates. She further averred that by consent of the parties herein, the Court ordered the firm of Ernest and Young LLP to carry out an audit exercise to verify the interest charged which firm issued a Report. She stated that the applicants being dissatisfied with the said Report, instructed Mazars LLP to conduct a forensic audit of the accounts which showed that the debt owed was Kshs.536,799,126.00 out of which Kshs.281,256,062.00, was held in an escrow account and had been released. She stated that the amount due was Kshs.255,543,064.00, for which judgment on admission was entered on 25th September 2025 and the Court further ordered reconciliation of accounts to be undertaken.

13. She argued that the proceedings of enforcement of receivables or any other security does not preclude the respondent from pursuing other securities including the informal charge. She referred to a decision by Hon. Mabeya J., of 28th October 2022 in HCOMM NO. E607 of 2021, wherein he stated 'a secured creditor may pursue any of the securities given at any given time, at once or one after another.' She argued that the respondent is acting within its legal rights by proceeding with the statutory power of sale.

14. Ms Kajuju stated that the fact that the chargor disputes the amount from the loan accounts is not a ground to stop the chargee from exercising the power of sale. She further deposed that where there is default, there is no basis of restraining the respondent from exercising its rights. She deposed that the existence of the dispute on the debt owed and a pending suit cannot act as an injunction stopping the respondent from enforcing its rights. She argued that the respondent has only issued a 90 days' Notice, thus the application herein is premature as the 1st applicant still has an opportunity to remedy the default.

15. The respondent maintained that the application has not met the threshold under Giella V Cassman Brown & Company Limited (1973) EA 358, and Mrao Ltd v First American Bank of Kenya & 2 others [2003] eKLR. He argued that the instant application is only meant to delay justice and ought to be dismissed with costs to the respondent.

16. In a rejoinder, the applicant filed a further affidavit sworn on 6th November 2025 by Mr. Samit Gehlot. She contended that the loan facility in this matter is one and the same as the one in several other files. He denied that the outstanding loan amount is Kshs.1,160,286,020.03 since the amount is not supported by any evidence or calculations. He maintained that the principal loan was Kshs.300,000,000/= and it cannot have escalated four times as against the in duplum rule. He stated that the Mazars Report showed that the outstanding loan amount was Kshs.536,799,126.00 inclusive of penalties and interest,

which amount was fully settled and there is no other debt outstanding and if there is, it can only be determined through reconciliation of accounts.

17. He further stated that in the Ruling delivered in HCCC No. 282 of 2017 -African Banking Corporation v Intex Construction Limited & another, the Court therein entered Judgment on admission in favour of the respondent for the sum of Kshs.255,543,064.00. He stated that the respondent through a letter dated 13th October 2025, forwarded a consent to the applicant for execution to facilitate release of Kshs.255,543,064.00 from the escrow account, which it executed on 27th October 2025. He stated that the fully executed consent was forwarded to the applicant for its record. Mr. Gehlot stated that the total amount paid in settlement of the outstanding debt is Kshs.536,799,126.00 which is as per the Mazars Report, which is even more than the outstanding debt of Kshs.463,455,956.60 pleaded by the respondent in HCCC No. 282 of 2017 - African Banking Corporation v Intex Construction Limited & another.

18. Mr. Gehlot stated that there is no other debt owed to the respondent and if there is, the Court in HCCC No. 282 of 2017 African Banking Corporation v Intex Construction Limited & another, in the Ruling of 25th September 2025 ordered that the same can only be determined through reconciliation of accounts and full trial of the suit.

19. He also stated that the Court had ordered all securities related to the debt in question to remain in place pending the full determination of the said suit. He argued that allowing the respondent to sell the suit property in a settlement of an already paid debt would result in unjust enrichment and would be contrary to the Court Ruling of 25th September 2025. He urged this Court to allow the application in the interest of justice and fairness.

20. The application was canvassed by way of written submissions. The applicant's submissions dated 6th November 2025 were filed by the law firm of Oraro & Company Advocates, whereas the respondent's submissions dated 21st November 2025 were filed by the law firm of Kimani Michuki Advocates.

21. Ms Mangich, learned Counsel for the applicant, submitted that Hon. Judge Mulwa, in the Ruling of 25th September 2025 entered Judgment on admission and ordered for the securities to remain in place pending full determination of the suit. Counsel stated that the property in issue herein is one of them. She also stated that since a Court of equal status to that one delivered the Ruling of 26th January 2024, which the respondent is now executing, this Court can deal with the matters arising herein. She urged this Court to allow the application and cited the case of Dutch Flower Group Kenya Limited v Commissioner of Domestic Taxes [2025] KEHC 12581 (KLR) (Commercial and Tax), to support her argument. She maintained that the applicant has cleared the outstanding debt and the respondent cannot illegally sell the subject property to recover an unsupported loan amount of Kshs.1,160,286,020.03. She cited the case of Nahashon Njagi Nyagah v Savings and Loan Kenya Limited & another [2017] KEHC 7804 (KLR).

22. Counsel submitted that this Court has the power to stop the sale of the subject property if its sale violates Section 90(3) of the *Land Act*. She argued that the debt being pursued in the main suit is the same one as under the informal charge, and allowing it to proceed will lead to unjust enrichment. She submitted that under Section 90 of the *Land Act*, the literal and purposive interpretation is that the respondent can only pursue one remedy at a time. She cited the cases of Njer V Kenya Commercial Bank Limited & another (Civil Case 24 of 2018) [2025] KEHC 8705R (KLR) (20th June 2025) (Judgment), David Karanja Kamau v Harrison Wambugu Gaita & another [2020] eKLR, Spire Bank Limited v Obora & 2 others (Civil Suit E640 of 2021) [2022] KEHC 13791 and Victoria Commercial Bank Limited v ADM Consulting Limited & 2 others (Commercial Case E516 of 2024) [2025] KEHC 14563 (KLR), to support her submissions. Ms Mangich urged this Court to halt the sale of the subject

property since there is a Court order in place directing the securities to remain in place pending the determination of the suit, the outstanding amount if any is unknown, and that the sale of the subject property will be void and repugnant to Section 90(3) of the *Land Act*. She also urged this Court to allow the application.

23. Mr. Gakunga, learned Counsel for the respondent maintained that the Court cannot issue an interlocutory injunction simply because the outstanding amount is unknown. He cited the cases of Fina Bank Ltd V Ronak Ltd [2001] 1 EA 65, Mrao Limited v First American Bank of Kenya Ltd & others (supra), J.L. Lavuna & others v Civil Servants Housing Co Ltd & another Civil Appl. No. Nai/14/95 which was cited in John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] KECA 219 (KLR) and Murungi v ABSA Bank Kenya PLC (Civil Case No E005 of 2025 [2025] KEHC 12681 (KLR) 9th September, 2025.

24. Counsel stated that it is within the respondent's legal rights to pursue any of the securities issued by the applicants at any time and in no particular order. He cited the cases of Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank (Kenya) [2017] KEHC 2495 (KLR), Spire Bank Limited v Obora & 2 others [2022], Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 others & another [2013] eKLR, as well as Ecobank Kenya Limited v Francis Tole Mwakidedi [2018] eKLR, to support his submissions.

25. He argued that the applicants have not fulfilled the conditions set out in Giella v Cassman Brown & Company Ltd (supra). He stated that there is no prima facie case as required by the case of Mrao v First American Bank of Kenya Limited & 2 others (supra) and Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR. He further argued that there is no irreparable harm to be suffered that cannot be remedied by way of damages. To support that assertion, he cited the case of Nguruman Limited v Jan Bonde Nielson & 2 others (supra), Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR and Kitur vs Standard Chartered Bank & 2 others (2002) 1 KLR.

26. He stated that since the applicants do not have a prima facie case and have not demonstrated that they will suffer irreparable harm, the balance of convenience tilts against the order of injunction. He stated that the applicants bear the burden to show inconvenience and relied on the cases of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR, Thathy v Middle East Bank (K) Ltd (2002) 1KLR 595 and John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd (supra). He submitted that the applicants having not demonstrated the required grounds to warrant injunctive orders, the application should be dismissed with costs to the respondent.

Analysis And Determination.

27. I have considered the instant application, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit and the written submissions by Counsel for the parties. The issue for that arises for determination is whether the applicants are entitled to being granted a temporary injunction.

28. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010, which states that: -

    1. 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.

29. In an application for an interlocutory injunction, the applicant bears the burden to satisfy the Court that it should grant such an order. The Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others (supra), which relied on the principles established in the Giella v Cassman Brown & Co. Ltd (supra) held as follows: -

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

30. The Court of Appeal in the case of Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (supra), considered what constitutes a prima facie 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 to call for an explanation or rebuttal from the latter.
>
> A prima facie case is 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.

31. In this case, this Court has been called upon to determine whether the rights of the applicants have been infringed by the respondent in order to establish whether they have a prima facie case or not.

32. It is not in dispute that the 1st applicant obtained various credit facilities from the respondent which were secured by various securities including the subject security herein. What is in dispute is the outstanding amount owing. According to the applicants the full debt that had been secured by the subject property was fully paid through the monies held in the escrow account and the balance was paid after Judgment was entered on admission.

33. The respondent on its part argued that the 1st applicant obtained numerous loan facilities secured by various securities and there is an outstanding amount of over one Billion Kenya Shillings which the 1st applicant still owes. It is trite that a Court should not grant an injunction for the sole reason that the amount owed is in dispute. This Court is guided by the Court of Appeal decision in Giro Commercial Bank Limited v Halid Hamad Mutesi [2002] eKLR, which held: -

> It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. In that case, where the debt is admitted as due and the loan is not being serviced, the Court should not grant an injunction.

34. In this case, inasmuch as the issue in question revolves around the amount owing, the applicant asserts that the said amount was fully repaid as seen in the previous Court decisions and the Reports prepared

by Ernest and Young LLP and Mazars LLP. This Court finds that despite the fact that the issue of reconciliation of accounts is not a ground for interlocutory injunction, there is need for trial to be conducted to establish the actual balances outstanding. If indeed the amount owing has been fully settled, selling the subject property when there is no debt will be prejudicial to the applicants. In the circumstances, it is my finding that the applicants have established a prima facie case. There is then a question of whether the Statutory Notice was procedurally issued or not. This Court is of the considered view that its legality can only be determined once the issue of the outstanding debt is established.

35. This Court relies on the case of Nahashon Njage Nyaggah v Savings & Loan Kenya Limited & another [2017] KEHC 7804 (KLR), where the Court held as follows: -

> A bank cannot purport to exercise its power of sale when the bank as a lender does not know what it is owned by a debtor, and more importantly for this case, does not even make any counter-claim. What then would be the basis for exercising its power of sale? It is the finding of this Court that the plaintiff has established on a balance of probability a case for permanent injunction against the 1st defendant bank restraining the 1st defendant and the 2nd defendant from exercising any purported statutory power of sale over the suit property.
>
> The Court is satisfied that a prayer for permanent injunction against the sale of the suit property has been proved on a balance of probability on the basis that either the mortgage debt has been fully repaid by the plaintiff...

36. On the issue of irreparable injury, the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others (supra) discussed thus: -

> On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury.
>
> Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. 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.

37. The applicants took the position that since they have repaid the loan that was advanced to the 1st applicant, which was secured by the security herein, they stand to suffer irreparable injury and reputational damage if the subject property is sold. This Court is persuaded that given the dispute on the balance of the amount owed, the sale of the subject property will occasion them irreparable injury which cannot be compensated by way on award of damages.

38. When it comes to the balance of convenience, the same was defined in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (supra), where it was held that:-

> The meaning of balance of convenience will 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 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.

39. This Court finds that the balance of convenience tilts in favour of the applicants owing to the numerous Court Orders in HCCC No. 282 of 2017, stating that the subject properties should remain as is, pending the determination of the suit and the fact that that the amount owing and secured by the subject property herein is alleged to have been fully repaid. There is also the claim that the amount of over 1 Billion Kenya Shillings being claimed by the respondent contravenes the in duplum rule for being 4 times the amount of Kshs.300,000,000/=, that was borrowed by the 1st applicant.

40. For the above reasons, this Court is satisfied that the applicants have proved their case for being granted an interlocutory injunction. I make the following orders: -

    a. An order of temporary injunction is hereby issued restraining the respondent from advertising for sale, selling, entering into, accessing, alienating, transferring, interfering with and/or in any manner whatsoever altering, dealing with the 1st applicant's property known as Title Number Athi River/Athi River 5/44 pending the hearing and determination of the recoverable debt against the 1st Applicant is determined in HCCC No. 282 of 2017- African Banking Corporation Ltd v Intex Construction Limited & another.

    b. The Statutory notice dated 11thJuly 2025 issued against Title Number Athi River/Athi River 5/44 shall be held in abeyance pending the hearing and determination of the suit in HCCC No. 282 of 2017 – African Banking Corporation Ltd v Intex Construction Limited & another.

    c. Costs shall be in the cause.

    It is so ordered.

DATED, SIGNED AND DELIVERED IN KIAMBU ON 24TH DAY OF APRIL, 2026. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. George Oraro (SC) with Mr. George Ochieng & Ms Mangich for the applicants

Mr. Gakunga for the respondent

Mr. Muthomi – Court Assistant.