

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**COMMERCIAL SUIT NO. E501 OF 2025**

**DORCAS** **WANJIRU.....1<sup>ST</sup>**  
**PLAINTIFF/APPLICANT**

**ALGARVE** **DISTRIBUTORS** **LIMITED.....2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**

**VERSUS**

**ACCESS** **BANK** **(KENYA)** **PLC.....1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**

**WATTS** **AUCTIONS.....2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of the Applicant’s Notice of Motion dated 30<sup>th</sup> July 2025 brought under Order 40 Rules 1, 2, 3, 4 and 8, Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Article 40 of the Constitution, and all other enabling provisions of the law. The Plaintiffs/Applicants seek, in substance, as follows

- i. A temporary injunction restraining the Defendants/Respondents from attaching, advertising for sale, offering for sale, auctioning, transferring, disposing of, or in any way interfering with the 1st Plaintiff’s property known as Title Number Nairobi/Block 112/187 (herein called the suit*

*property) pending the hearing and determination of the application and the suit.*

- ii. In the alternative, they seek an order for maintenance of the status quo, to the effect that the Plaintiff shall remain in quiet and peaceful possession of the suit property without any interference whatsoever from the Defendants/Respondent.*
- iii. A declaration that the intended sale of the suit property scheduled for 14<sup>th</sup> August 2025 is premature, unlawful and irregular, together with costs and such further orders as the Court may deem fit.*

2. The application is premised on the grounds of the face of the record and supported by the affidavit of Dorcas Wanjiru, the 1<sup>st</sup> Plaintiff. She depones that she is the registered proprietor of the suit property, which is her matrimonial and residential home. She further states that the 2<sup>nd</sup> Plaintiff is a company engaged in the business of supply and distribution of alcoholic beverages.
3. She contends on 6<sup>th</sup> May 2021, that the 2<sup>nd</sup> Plaintiff entered into a contract with Shandong Kelang Biological Equipment Company Limited, a Chinese company, for the supply of a 2000-litre beer brewery system for the sum of USD 630,000. On or about 24<sup>th</sup> September 2021, the 2<sup>nd</sup> Plaintiff entered into a further contract with a related Chinese company, Shandong Angie Bio-Fermentation Equipment Co. Ltd, for the supply of 2,000 pieces of 30-litre Keg Barrels valued at USD 125,000. To

achieve this, the 2<sup>nd</sup> Plaintiff sought financial accommodation from the 1<sup>st</sup> Defendant.

4. She avers that by a Letter of Offer dated 30<sup>th</sup> August 2021, the 1<sup>st</sup> Defendant advanced to the 2<sup>nd</sup> Plaintiff a loan facility of Kshs. 60,000,000/= secured by a legal charge over the suit property and personal guarantees. She further avers that upon disbursement, the 2<sup>nd</sup> Plaintiff remitted USD 405,350 to the Shandong Kelang Biological Equipment Company Limited and USD 68,605 to the Shandong Angie Bio-Fermentation Equipment Company. She avers that despite payment, the suppliers failed to deliver the equipment and later ceased communication.
5. It is the Applicants' case that the matter was reported to the Kenyan authorities and to the Chinese Embassy, but the funded equipment was never supplied. According to the 1<sup>st</sup> Plaintiff, the purpose of the loan was thereby frustrated through no fault of the Plaintiffs. She avers that discussions thereafter ensued between the Plaintiffs and the bank, culminating in the restructuring of the facility in November 2022 and later negotiations for the substitution of the charged property with alternative security. She states that in or about May 2024, the Plaintiffs engaged the bank for substitution of the charged property, and that the bank required payment of Kshs. 1,000,000/= as a condition precedent, and that the Plaintiffs complied with that condition in good faith.
6. The gravamen of the application is that, notwithstanding those engagements, the 1<sup>st</sup> Defendant proceeded with the

enforcement of its statutory power of sale. The 1<sup>st</sup> Plaintiff avers that on 5<sup>th</sup> June 2025, she was served with a Notification of Sale scheduling an auction of the suit property for 14<sup>th</sup> August 2025. She contends that the said notification is invalid because she had not been served with the other mandatory notices under Section 90 of the Land Act.

7. She further complains that the intended sale had already been advertised in a newspaper without compliance with the statutory process, and that the 1<sup>st</sup> Defendant had also made unilateral and irregular variations to the loan account. She states that unless the Court intervenes, the Applicants will suffer irreparable loss, including the loss of the matrimonial home.
8. The application is opposed by the Replying Affidavit of Elisha Nyikuli, the Head of Legal and Company Secretariat of the 1<sup>st</sup> Defendant, sworn on 8<sup>th</sup> August 2025. He avers that the 2<sup>nd</sup> Plaintiff approached the 1<sup>st</sup> Defendant for a credit facility to finance business expansion and diversification, for the installation of a beer line and the purchase of keg barrels. He confirms that the 1<sup>st</sup> Defendant issued a Letter of Offer dated 30<sup>th</sup> August 2021, granting a loan facility of Kshs. 60,000,000/= repayable in 36 monthly instalments, secured by a first legal charge over Nairobi/Block 112/187 together with personal guarantees of Nancy Nduta Kimani and John Nganga Guchu.
9. The deponent further avers that the 1<sup>st</sup> Plaintiff, together with his spouse, duly executed the relevant instruments as

guarantor and consented to the charge over the suit property. He states that the 2<sup>nd</sup> Plaintiff subsequently defaulted in repayment, leading to engagement with the bank and restructuring discussions. According to him, the 1<sup>st</sup> Defendant restructured the facility through a consolidation and restructuring letter dated 25<sup>th</sup> November 2022, but despite the restructuring, the 2<sup>nd</sup> Plaintiff continued in default and the loan account remained irregular.

10. The 1<sup>st</sup> Defendant's position is that it thereafter lawfully exercised its statutory power of sale by issuing and serving the requisite 90-day statutory notice and 40-day notice to sell upon the Plaintiffs, including the spouse of the chargor. The deponent asserts that the Plaintiffs' claim that no notices were issued is untrue. He also avers that the restructuring letters did not discharge the charge. That the bank was not responsible for the conduct of the Chinese suppliers; and that the bank was under no obligation to accept substitute security. He maintains that the bank fully complied with the law and that the application is merely an attempt to obstruct the realization of a non-performing loan.
11. The application was heard by way of written submissions. The applicant filed submissions dated 13<sup>th</sup> October 2025, while the 1<sup>st</sup> Defendant's submissions are dated 24<sup>th</sup> September 2025.
12. The Plaintiffs submit that they have met the threshold for the grant of interlocutory injunctive relief. They argue that the

2<sup>nd</sup> Plaintiff obtained the loan facility for the specific purpose of acquiring and installing a beer brewery system, but that the foreign suppliers failed to deliver the equipment and instead fraudulently converted the funds, thereby frustrating the very purpose of the facility. They further submit that they acted in good faith by engaging the bank in restructuring arrangements and initiating substitution of the charged property with alternative security, and that the bank acted prematurely and inequitably by moving to realize the security notwithstanding those engagements.

13. On statutory compliance, the Applicants submit that they were never served with the mandatory statutory notices under Sections 90 and 96 of the Land Act. They argue that the Notification of Sale dated 5<sup>th</sup> June 2025 was the first notice they received and that the notices exhibited by the Respondent contain material inconsistencies, particularly in the certificates of postage, thereby casting doubt on their authenticity and service. They also invoke the doctrine of frustration and argue that the guarantee and charge executed by the 1<sup>st</sup> Plaintiff were premised on a specific commercial purpose which has since been defeated, and that the 1<sup>st</sup> Plaintiff, being a third-party guarantor and not the principal debtor, is entitled to protection, especially because the charged property is her matrimonial home. They maintain that they have satisfied the principles in **Giella v Cassman Brown & Co. Ltd.**

14. The 1<sup>st</sup> Defendant, on its part, submits that the loan facility, the legal charge and the default are all undisputed. It

argues that despite restructuring, the 2<sup>nd</sup> Plaintiff failed to regularize the account. The Respondent contends that it fully complied with the law in exercising the statutory power of sale by issuing and serving the requisite 90-day and 40-day notices, and that the Applicants' allegation of non-service is unfounded. It further submits that the alleged failure of the Plaintiffs' commercial transaction with third-party suppliers is irrelevant to the bank's right to enforce the charge, that the charge remains valid notwithstanding the failure of the underlying business venture, and that the application is a stratagem to delay realization of the security.

### **Analysis and determination**

15. I have carefully considered the Notice of Motion, the affidavits sworn both in support and in opposition, together with the rival submissions of counsel. In my view, the only issue that arises for determination is whether the Plaintiffs/Applicants have met the threshold for the grant of an interlocutory injunction.

16. The law governing the issuance of interlocutory orders is primarily contained in the cited case of **Giella v Cassman Brown [1973] E.A. 358** at p. 360 where it was stated that:

***“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not***

***adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.***

17. The above principles were reaffirmed by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Court emphasized that the three requirements are sequential hurdles.

18. The first limb is whether the applicant has established a prima facie case with a probability of success. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125**, the Court of Appeal defined a prima facie case as one:

***“...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.”***

19. In the present case, there is no dispute that the 2<sup>nd</sup> Plaintiff obtained from the 1<sup>st</sup> Defendant a loan facility of Kshs. 60,000,000/=, secured by a legal charge over Title No. Nairobi/Block 112/187, registered in the name of the 1<sup>st</sup> Plaintiff, who executed the charge as guarantor. It is equally common ground that the facility fell into arrears notwithstanding restructuring efforts, and that the default persists

20. The legal position in such circumstances is settled. A chargee's statutory power of sale crystallizes upon default, provided that the statutory prerequisites are complied with. A chargor who is admittedly in default cannot restrain a chargee from exercising that right merely on account of disputes as to the amount due or collateral grievances. (See **Andrew Muriuki Wanjohi v Equity Building Society & 2 Others [2006] eKLR**).
21. The Applicants, however, advance two principal grounds. First, that the commercial objective of the loan was frustrated by third-party suppliers who failed to deliver equipment despite payment. Secondly, that the statutory notices required under Sections 90 and 96 of the Land Act were neither properly issued nor served.
22. On the issue of frustration, I am not persuaded that it affords a basis for restraining the exercise of the statutory power of sale. The relationship between the parties is governed by the charge instrument and the loan agreement. The failure of a third-party commercial venture does not discharge the borrower's obligations under a contract of lending. As was stated in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, a court of law cannot rewrite a contract for parties, and that parties are bound by the terms of their bargain unless coercion, fraud or undue influence is shown.
23. Further, a charge is an independent security, enforceable in accordance with its terms and the law and a chargee is

entitled to realize its security upon default, subject only to compliance with service of the mandatory notices.

24. Similarly, negotiations for substitution of security, however advanced, do not amount to a legally binding variation in the absence of a formal discharge or executed agreement. The charge therefore, remains valid and enforceable.

25. The second issue concerns compliance with the statutory notice regime under Sections 90 and 96 of the Land Act. The Applicants contend that no valid statutory notices were issued or served, and that the Notification of Sale dated 5<sup>th</sup> June 2025 constituted the first effective communication of the intended realization of the security. They further impugn the authenticity and regularity of the notices exhibited by the 1<sup>st</sup> Defendant, pointing out that both the ninety (90) day statutory notice dated 29<sup>th</sup> October 2024 and the forty (40) day notice to sell dated 10<sup>th</sup> February 2025 bear certificates of postage stamped on the same date, namely 5<sup>th</sup> November 2024. In their view, that anomaly casts serious doubt on whether the notices were properly issued and served in accordance with the law.

26. The 1<sup>st</sup> Defendant maintains that all requisite notices were duly issued and served, through postal address No. 41195-00100 as per the title records, and upon the spouse of the chargor through postal address No. 61958-00200.

27. Service of statutory notices goes to the root of the statutory process. It is a mandatory condition precedent to the valid exercise of the statutory power of sale. The burden of

proving service lies with the chargee pursuant to Sections 107–109 of the Evidence Act. In **Nyagilo Ochieng & Another v Fanuel B. Ochieng & 2 Others [1996] eKLR**, the Court of Appeal held that mere production of notices is insufficient and service must be strictly proved.

28. A cursory inspection of the said certificates of posting availed before the court supports the Applicant's assertion, all notices were posted on 5<sup>th</sup> November 2024. That circumstance, without more, casts doubt on the regularity of the statutory process. In the absence of cogent evidence of proper service, I am not satisfied that the Respondent has discharged its evidential burden.
29. The consequence of lack of proof of service of the statutory notice is fatal. Without compliance with Sections 90 and 96 of the Land Act, the statutory power of sale does not crystallize. Any intended sale of the suit property by public auction is unlawful and illegal. The chargee had no lawful power to sell the charged property for default in payment of the debt.
30. I am therefore satisfied that the Applicants have established a *prima facie* case with a probability of success.
31. Since the 1<sup>st</sup> Defendant failed in its intention to exercise its statutory power as provided by the law, I find that the court was justified in granting the order of injunction to restrain the defendant from disposing of the suit property pending the hearing of this case.

32. The second limb is on whether the Applicants will suffer irreparable harm. The Applicants contend that the suit property is their matrimonial home and that its sale would occasion irreparable loss. It is true that once a charged property is sold, the chargor's equity of redemption is extinguished. (See **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125**).
33. However, it is equally settled that property offered as security becomes a commodity for sale upon default. In **Maithya v Housing Finance Co. of Kenya Ltd & another [2003] 1 EA 133 at 139**, the Court held that where a chargor has knowingly offered property as security, such property acquires a commercial character and its loss is in appropriate cases, compensable by damages.
34. Further in **HCCC No. 82 of 2006 Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation)** it was held that:
- "... Any property, whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".***
35. While I am not wholly persuaded that irreparable harm has been established in the strict sense, where the intended sale is challenged on grounds of non-compliance with

mandatory statutory safeguards, the Court must act with circumspection to prevent an unlawful process.

36. Lastly, on the balance of convenience, I am satisfied that it tilts in favour of preserving the *status quo*. Should the sale proceed with the non-compliance of the statutory requirements, the prejudice suffered by the Applicants would be irreversible. Conversely, the Respondent's interests remain secured and can be protected pending the determination of the suit.

37. In the result, I find that the Applicants have met the threshold for the grant of an interlocutory injunction.

38. Accordingly, I make the following orders:

***i. Pending the hearing and determination of the suit, an injunction is hereby issued restraining the Defendants/Respondents, whether by themselves, their agents, servants or employees, from selling, transferring, alienating, disposing of, or in any other manner interfering with Title No. Nairobi/Block 112/187.***

***ii. The costs shall be in the cause.***

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

This **30<sup>th</sup>** day of **April** 2026.

**P.M. MULWA**  
**JUDGE**

**In the presence of:**

*Ms. Kinuthia h/b for Ms. Kiiru for Plaintiff/Applicant*

*Ms. Mwaura h/b for Mr. Mugo for 1<sup>st</sup> Defendant*  
Court Assistant: *Lispa*