



**Goshen Acquisitions Limited v Cresat Limited (Commercial Case E509 of 2024)  
[2025] KEHC 5184 (KLR) (Commercial and Tax) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5184 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E509 OF 2024  
JWW MONG'ARE, J  
APRIL 28, 2025**

**BETWEEN**

**GOSHEN ACQUISITIONS LIMITED ..... PLAINTIFF**

**AND**

**CRESAT LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff has by an application dated 28<sup>th</sup> August 2024 moved this Honourable Court under a Certificate of Urgency brought under Sections 3A, and 63 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, Section 90 and 96 of the *Land Act* and it seeks to restrain the Defendant from proceeding to exercise its Statutory Power of Sale over various properties belonging to the Plaintiff and charged to secure the sum of EUR 170,000 under loan agreement dated 26<sup>th</sup> August 2016.
2. The Plaintiff in addition to the prayer seeking to restrain the Defendant argues that the agreement between the parties contains an arbitration clause and that this matter should be referred to arbitration for resolution of the dispute between the parties.
3. The Application is supported by the grounds set out on its face and the supporting affidavit of Solomon Wangwe, a director of the Plaintiff sworn on 14<sup>th</sup> August 2024. The Application is opposed and the Defendant has filed a replying affidavit sworn by Boldewijn Sloet Van Oldrututtenborgh, a director of the Respondent.
4. It is the Applicant's contention that the Statutory Notices and Notice to Sell issued by the Respondent to it are premature and 26<sup>th</sup> February 2024 and 26<sup>th</sup> June 2024 are premature and denies being in default of the amount claimed therein of Kshs.56,393,461/=. Instead, the Applicant argues that the said amount being demanded is erroneous and that the correct amount due is Kshs.48,487,209/= as at 15<sup>th</sup> June 2024 and that there is a genuine dispute as to whether the Applicant is in default as alleged.



5. The Applicant argues that the agreements between the parties contain an arbitration clause and it is only right that this matter be referred to arbitration in line with what the parties agreed to bind themselves to. The Applicant urges the court to restrain the Defendant from proceeding with the intended exercise of its statutory power of sale as it stands to suffer irreparable loss if the charged properties are sold. The Applicant urges the Court to order that the parties refer the matter to arbitration as per the agreement and subsequent addendum to the agreement between the parties.
6. The Respondent in its replying affidavit has urged the court to decline the invitation by the Applicant to restrain it from exercising its statutory power of sale and allow it to proceed with the intended sale as per the two Notices already issued on 26<sup>th</sup> February 2024 and 26<sup>th</sup> June 2024. It argues that these are remedies available to it under the law and especially the *Land Act*, section 90 and 96 thereof and has proceeded to issue the said notices appropriately. The Respondent argues that by the Statutory Notice of 26<sup>th</sup> February 2024 the Applicant was notified it was indeed in default as per the loans agreements and was invited to rectify the default position. Once the same was not rectified, the Respondent issued the Notice to Sell and has all long been in compliance with the law. To date the Applicant is yet to rectify the default position despite being issued with the said notices. The Respondent urges the court to dismiss the application and allow the Respondent to proceed and exercise its rights under the charge.
7. I have carefully considered the Application before this court and the supporting affidavit filed on behalf of the Applicant. Similarly, I have considered the replying affidavit filed in opposition to this application. In addition, I have also looked at the rival submissions filed by the parties and I note that two issues arises for determination by this court, to wit, whether this court should grant the temporary order of injunction sought herein to the Plaintiff and two, if this matter should be referred to Arbitration for determination of the dispute herein.
8. I do not think it is in dispute that for an order of injunction to issue, the Plaintiff is required to satisfy the conditions set out in the case of *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 by demonstrating a prima facie case with a probability of success, that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR)).
9. The parties also agree that what constitutes “a prima facie case” was set out by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) 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 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.
10. A prima facie case flows from what has been pleaded in the plaint. A reading of the Plaint filed alongside the present Notice of Motion application reveals that the Plaintiff acknowledges having been advanced the sum of EUR 170,000. Subsequently and from the annexed refinancing agreements herein, the amount being financed was enhanced on several occasion. In addition, the Plaintiff in the pleadings filed before this court has acknowledged that it is indebted to the Defendants to the tune of Kshs.48,487,209.00/= but disputes the sum claimed by the Respondent of Kshs.56,393,461.00/=. The Plaintiff has not made any proposals on how it intends to redeem the amount it admits to be owing



of Kshs.48,487,209.00/ and has not demonstrated that it has since coming to court made any attempt to redeem the indebtedness. It is therefore clear in my mind that the Plaintiff has not demonstrated that it has a prima facie case as envisioned in the Mrao Case (supra). I find therefore and in line with the dictates set out in the Nguruman case(cited above) the court need not consider the other two principles set out by the Giella case (supra). I find therefore that the Plaintiff has not established that it is deserving of an order of injunction and dismiss that limb of the application.

11. On the second issue identified, I have perused the affidavit by Solomon Wangwe and note that the annexed agreements therein contain arbitration clauses. The Arbitration Act under section 6 provides as follows:-

“ 6. Stay of legal proceedings

1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—(a)that the arbitration agreement is null and void, inoperative or incapable of being performed; or(b)that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
3. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

12. It is therefore my finding that this matter relates to an agreement where parties have chosen to have disputes arising therefrom resolved through arbitration. In line with the said arbitration clauses, this matter is therefore referred for resolution accordingly. Let the parties move the arbitral tribunal accordingly.

13. In conclusion, I find that the application before this court is partly successful. I decline to grant the order of injunction as sought but allow the prayer for the matter to proceed to arbitration. Each party shall bear their own costs of this application. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2025**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

MS. Kamwana holding brief for Harry Karanja for the Plaintiff/Applicant.

Mr. Ogombe for the Defendant.

Amos - Court Assistant

