Alternative Energy Solutions Ltd & 2 others v Industrial & Commercial Development Corporation & another (Commercial Case E325 of 2023) [2025] KEHC 11681 (KLR) (Commercial and Tax) (30 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11681 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E325 OF 2023

MN MWANGI, J

JULY 30, 2025

BETWEEN

ALTERNATIVE ENERGY SOLUTIONS LTD ..... 1ST PLAINTIFF

RAJESH KENT A.K.A RAJESH RANBIR KEHARCHAND KENT ..... 2ND PLAINTIFF

AB INTERNATIONAL ENTERPRISES (KENYA) LTD ..... 3RD PLAINTIFF

AND

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION .... 1ST DEFENDANT

KENYA DEVELOPMENT CORPORATION ..... 2ND DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 26th June 2023 filed by the plaintiffs pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 39 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law. The plaintiffs' prayers are for orders that pending the hearing and determination of this suit, the Notice dated 16th June 2023 from the 2nd defendant notifying the 1st plaintiff (AESL) of its intention to appoint a Receiver Manager to maintain its status quo ante be suspended, and that any Receiver Manager, Administrator, or other person appointed by the defendants be restrained from entering the 1st plaintiff's premises on LR No. 28382 (Thika plot) or exercising rights under the debentures dated 30th June 2016 and 15th October 2018 without the 1st plaintiff's consent, that the defendants be restrained by way of an injunction from exercising any rights under the charge and further charge over LR No. 28382 created by the 2nd plaintiff,

and that the 1st defendant be restrained by way of an injunction from exercising any rights under the charge and further charge over LR No. 11895/49 created by the 3rd plaintiff.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Rajesh Kent, the 2nd plaintiff herein and a Director of the 1st plaintiff company. Mr. Kent averred that he is the registered proprietor of L.R. No. 28382 (Thika plot), measuring approx. 5 acres, whereas the 3rd plaintiff is the registered lessee of Godown No. 15 adjoining parking on LR No. 11895/1204 (Oasis Park Godown), leased from Tuffsteel Ltd.

3. He stated that in 2015, the 1st plaintiff approached the 1st defendant for a financial facility of Kshs.211,450,000/=, and that the 1st defendant initially represented that the aforesaid facility would be non-recourse (secured primarily by project cash flows). He further stated that the 1st & 3rd plaintiffs relied on verbal and written assurances from the 1st defendant, which included the fact that the Oasis Park Godown charge was temporary and would be discharged upon arrival/installation of plant equipment and that the Thika plot would be the main collateral after subdivision and transfer to the 1st plaintiff.

4. Mr. Kent stated that the 1st defendant issued a term sheet and later approved a loan of Kshs.189,7000,000/= on 7th April 2016, which was followed by an offer letter dated 11th April 2016 which required legal charges over the Oasis Park Godown and Thika plot, direct disbursement to machinery suppliers, execution of relevant agreements to protect the 1st defendant's interests and that the facility was to be for five years including a 6-month moratorium. He averred that as per the offer letter, the facility would attract interest of base rate, plus 3% equivalent to 16% per annum on a reducing balance revisable at the discretion of the 1st defendant. Mr. Kent averred that the aforesaid loan was to be secured by a first-ranking legal charge over a 1.5-acre parcel excised from the Thika plot, to be registered in the 1st plaintiff's name, but the 1st defendant prepared documents that secured the entire Thika plot without proper authority or disclosure. Mr. Kent asserted that the plaintiffs were induced into creating security over their properties based on false and/or fraudulent misrepresentation by the 1st defendant, thus exposing their properties to enforcement actions and unexpected legal and financial risks contrary to their initial understanding.

5. It was stated by Mr. Kent that despite the 1st defendant's indication on 8th June 2016 that it would discharge 3.5 acres of the Thika plot upon subdivision and creation of a first-ranking charge over a 1.5-acre portion, it failed to follow through with the subdivision or the intended legal arrangements. He further stated that the 1st plaintiff requested a waiver of interest and partial discharge of securities in 2021 and 2022 due to over-collateralization, unfulfilled promises, and inability to raise further funding, but the defendants rejected the said requests citing non-performance of the loan.

6. Mr. Kent deposed that the 1st plaintiff proposed a loan restructuring and release of securities after 12 months of compliance, which request was still rejected by the 2nd defendant. He contended that the Loan Agreement, securities, and terms thereof were obtained and enforced fraudulently by the defendants thus undermining the 1st plaintiff's financial operations and contractual rights. He invoked the legal principle that fraud vitiates contracts, asserting that the 1st defendant abused its lender position to impose unjust terms and block the 1st plaintiff's recovery.

7. It was averred by Mr. Kent that although the 1st defendant's Board sanctioned the increment of the facility by an amount of Kshs.20,000,000/=, only Kshs. 10,000,000/= was disbursed despite the fact that all conditions precedent to disbursement including Board resolutions, execution of amended Agreements, creation of additional securities, and payment of outstanding dues and fees were closed on or around 15th October 2018. He further averred that the 1st defendant failed to fund essential

machinery despite knowing that the project couldn't be profitable without them. Mr. Kent stated that the 1st defendant acted in bad faith by underfunding and partially fulfilling its approvals. He further stated that the 1st defendant inserted a punitive interest clause of 12.5% in the Loan Agreement, which was not approved by its Board rendering it unenforceable. He asserted that the aforesaid clause was included in the said Agreement to cause, or risk financial harm to the 1st plaintiff and restrict its ability to repay the loan.

8. He averred that the 1st defendant has since issued a statutory notice of sale, and issued an insolvency notice in October 2019 demanding over Kshs.270,000,000/=, with no clarity on the discrepancy in the amounts demanded. The above notwithstanding, Mr. Kent asserted that the 1st plaintiff faced severe financial hardship due to the Covid – 19 Pandemic, which compounded with the earlier financial distress caused by the 1st defendant's actions, led to the 1st plaintiff's loan defaults and inability to meet its obligations. He contended that while the Central Bank of Kenya encouraged relief, the 1st defendant demanded that the 1st plaintiff continues debt repayments during the Pandemic, which was a recognized force majeure event, despite significant economic strain. He stated that the 2nd defendant issued a demand for Kshs.361,7000,000/= on grounds that the 1st plaintiff couldn't repay without an additional production line it couldn't internally fund. He further stated that the 2nd defendant's demand to raise proposed repayments to Kshs.4,5000,000/= per month from Kshs.3,500,000/= was oppressive and unreasonable.

9. Mr. Kent contended that despite the fact that the 2nd defendant invited the 1st plaintiff to be showcased at the Dubai Expo 2020 and pitched its project to investors with a USD 4,500,000.00 capital raise goal, and despite the existence of a GSM Policy by the National Treasury, the 2nd defendant failed to issue any letter of support or comfort to the 1st plaintiff, which are customary tools to attract investors. It was stated by Mr. Kent that on 7th February 2022, a joint model showed that the 1st plaintiff could not support Kshs.3,500,000/= monthly payments short-term, but long-term viability was promising and on 10th February 2022, the 2nd defendant confirmed an outstanding loan balance of Kshs.365,000,000/=. It was stated that on 15th February 2022, the 2nd defendant proposed repayment of Kshs.240,000,000/= over 10 years and a 12-month moratorium on interest/principal for the additional facility. That on 21st February 2022, the 1st plaintiff responded with a counter proposal seeking restructuring based on 2018 balances, waiver of Kshs.44,900,000/= penalty interest, rescheduling, waiver of restructuring fee, exemption of debenture, and discharge of collateral.

10. Mr. Kent contended that in breach of the 1st plaintiff's legitimate expectation, the 2nd defendant neither considered the 1st plaintiff's comments in good faith nor provided adequate reasons for rejecting the 1st plaintiff's counter proposal. That thereafter, the 2nd defendant issued fresh statutory notices and an insolvency notice in September 2022, threatening sale of charged properties and insolvency proceedings unless Kshs.386,000,000/= was paid. Mr. Kent averred that the 1st plaintiff sought for restructuring of the facilities advanced by the defendants, while updating the 2nd defendant on the progress of raising external capital to finance its expansion and climate-related projects. He further averred that the 1st plaintiff had secured or was in the process of securing funding from the International Finance Corporation, the Trade Development Bank, British International Investments and Lightrock BV. He asserted that the Trade Development Bank visited the project in December 2022 and confirmed the intention of proceeding with funding, and it thereafter issued a credit memorandum in March 2023, but internal restructuring delayed final steps. He stated that International Finance Corporation (IFC) on the other hand committed USD 8,000,000.00 but the final sign-off was delayed by the technical lead's schedule.

11. Mr. Kent deposed that despite the foregoing, on 2nd February 2023, the 2nd defendant issued 40-day notices of sale of the 1st plaintiff's properties demanding Kshs.325,000,000/=. That on 27th April 2023, the 2nd defendant issued a second insolvency notice, reiterating the Kshs.325,000,000/= demand. Mr. Kent deposed that there are discrepancies in the 2nd defendant's demands such as the fact that amounts varied significantly from Kshs.386,000,000/= in 2022 to Kshs.325,000,000/= in 2023, without any explanation whatsoever.

12. He contended that on 19th May 2023, the 2nd defendant issued a pre-listing notification to report the 1st plaintiff to CRBs and on 20th June 2023, the 2nd defendant served the 1st plaintiff with a Notice of Appointment of Receiver Manager, citing prolonged loan default. Mr. Kent asserted that the restructuring discussions and continued engagement by the defendants amounted to a waiver of its repayment defaults. He disputed the legality and validity of the appointment of the Receiver Manager on grounds that the underlying debentures are invalid as they secured loans obtained fraudulently. Mr. Kent averred that the 2nd defendant's actions breached its statutory duty under Section 3(2)(c) of the ICDC Act to ensure investments contribute to Kenya's development.

13. In opposition to the application, the defendants filed a replying affidavit sworn on 11th October 2023 by Mr. Robert Chesire, the Assistant Manager, Research, Policy and Innovation in the defendant corporation. Mr. Chesire averred that no fraud or misrepresentation occurred in the creation of the debentures and/or legal charges over the Thika plot and Oasis Park Godown. He asserted that as per the letters dated 29th September 2017 and 5th June 2018, the plaintiffs voluntarily offered the securities and accepted the terms in writing. He denied the allegations by the plaintiffs that delays were caused by the defendants since the latter were not responsible for machinery procurement from India. To the contrary, he contended that delays stemmed from the plaintiffs' own poor planning.

14. It was stated by Mr. Chesire that the defendants disbursed funds timely, including an amount of Kshs.10,000,000/= that the plaintiffs requested for and later vide a letter dated 7th May 2021, the plaintiffs confirmed in writing that no further funds were needed. He deposed that the plaintiffs defaulted in their loan repayment obligations as early as 2017, well before the COVID-19 Pandemic, and failed to meet restructuring proposals including a Kshs.2,400,000/= monthly payment plan beginning April 2022. Mr. Chesire asserted that the defendants acted within their contractual rights, specifically Clause 7 of the debenture dated 30th June 2016, in appointing a Receiver after repeated defaults and issuing statutory and insolvency notices. He averred that the plaintiffs requested waivers and release of securities while in default, which the defendants refused to accede to, since the requests were inconsistent with their lending policy.

15. The instant application was canvassed by way of written submissions. The plaintiffs' submissions were filed on 17th September 2024 by the law firm of Mungu & Company Advocates, whereas the defendants' submissions were filed by the law firm of Osoro, Onyiego & Manyara Advocates on 21st November 2024.

16. Mr. Mungu, learned Counsel for the plaintiffs cited the decisions in Giella v Cassman Brown [1973] E.A 358 and Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] eKLR, and submitted that the 1st plaintiff validly applied for and was granted a loan by the defendants based on agreed terms, including the use of secondary securities to be discharged upon installation of plant and machinery, with a debenture over those assets as the main security, but the defendants later reneged on these terms. Counsel further submitted that despite the fact that it was known to both parties that timely disbursement was critical, the defendants caused unexplained delays in disbursing funds to the machinery fabricators, which delayed the project, increased costs, and disrupted cash flow. Counsel

argued that these delays amounted to both a breach of contract and a violation of constitutional rights, particularly, under the *Fair Administrative Action Act*.

17. Mr. Munyu contended that for the additional loan of Kshs.20,000,000/=, the defendants were to disburse the full amount, but only Kshs.10,000,000/= was released. He stated that the partial disbursement resulted in failure of consideration, despite the facility being accepted on 1st June 2018 and not fully disbursed by 16th January 2019. Counsel asserted that the plaintiffs have demonstrated a prima facie case with a likelihood of success. He submitted that damages would not be sufficient to compensate the plaintiffs for the loss they stand to suffer in the event that the orders being sought herein are not granted due to potential delays in recovery from statutory bodies like the defendants. He argued that the project's environmental and public interest benefits cannot be quantified in monetary terms. He asserted that the balance of convenience tilts in favour of the plaintiffs

18. Ms. Kemunto, learned Counsel for the defendants relied on the case of Caliph Properties Limited v Barbel Sharma & another [2015] eKLR, in contending that the plaintiffs are acting in bad faith and with unclean hands, thereby violating the equitable principle that one must not seek equity while defying Court orders. She argued that the Court order issued on 27th July 2023 required the plaintiffs to continue repaying the loan and for the defendants to pause receivership and enforcement of the statutory power of sale, but while the defendants have complied, the plaintiffs have failed to make payments as required. Counsel stated that loan repayments are essential for funding other development projects since the defendants are publicly funded institutions.

19. Ms Kemunto referred to the case of Giella v Cassman Brown (supra) and the Court of Appeal case of Mrao Limited v First American Bank of Kenya Limited & 2 others (supra), and submitted that the plaintiffs have failed to repay a loan advanced to them by the defendants, despite benefiting from interim Court orders which have prevented the defendants from recovering the said debt. She further submitted that the plaintiffs are in breach of interim Court orders and have offered no justification for the non-payment, causing the defendants to suffer financial loss. She argued that the plaintiffs would not suffer irreparable harm if the interim orders are lifted, as any damage to them can be compensated monetarily. She stated that the defendants are public bodies, whose funds, sourced from taxpayers, are being withheld unfairly. She concluded her submissions by asserting that the balance of convenience tilts in favour of the defendants since both sides agree that the loan was disbursed but not repaid.

Analysis And Determination.

20. Having considered the application herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the defendants, as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether an order for temporary injunction should issue against the defendants.

21. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states as hereunder –

    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.

22. The principles for being granted an interim injunction were summarized by the Court in the oft cited case of Giella v Cassman Brown & Co. Ltd (supra) as follows –

    i. First, the applicant must demonstrate a prima facie case with a probability of success at the trial;

    ii. Second, an injunction will not normally be issued unless the applicant might otherwise suffer irreparable loss or injury; and

    iii. If the court is in doubt as to the second principle, it shall decide the application on a balance of convenience.

23. What constitutes a prima facie case was defined by the Court of Appeal in the case of Mrao Ltd v. First American Bank of Kenya Ltd & 2 others (supra) as follows -

> 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 as to call for an explanation or rebuttal from the latter. A prima facie case is more than 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.

24. It is not disputed that the defendants advanced loan facilities to the plaintiffs, who contended that there are several irregularities as to how the said loan was procured and the terms of the facilities' offer letter. For instance, the plaintiffs assert that the defendants made several false and fraudulent misrepresentations including the fact that the loan was to be secured by a first-ranking legal charge over a 1.5 acre parcel of land excised from the Thika plot, which was to be registered in the 1st plaintiff's name, but the 1st defendant prepared documents that secured the entire Thika plot without proper authority or disclosure. The plaintiffs contend that the said representations induced them into procuring the subject loans in the first place.

25. The defendants on the other hand aver that there was no fraud or misrepresentation in the creation of the debentures and/or legal charges over the suit properties. They assert that the plaintiffs voluntarily offered the suit properties as securities and accepted the terms in writing. In addition, the defendants state that they disbursed funds in a timely manner, but the plaintiffs defaulted in their loan repayment obligations as early as 2017, well before the COVID-19 Pandemic, and also failed to meet restructuring proposals.

26. It is not disputed that the defendant advanced financial facilities to the plaintiffs secured by inter alia, charges over the suit properties. On perusal of the plaintiffs' affidavit in support of the application herein, it is evident that in as much as the plaintiffs contend that there are several irregularities in the manner in which the said loan was procured and the contents of the facilities' offer letter, they have neither alleged nor demonstrated that they were coerced into executing the offer letters and/or charges over the suit properties to secure the loan facilities advanced to them by the defendants. Despite claiming that some of the clauses in the offer letters and charges were contrary to what had been agreed on between the parties herein, the plaintiffs do not deny having received financial facilities. To the contrary, this Court notes that despite being aware of the said discrepancies, the plaintiffs approached

the defendants for a further financing of Kshs.20,000,000/= out of which the defendants advanced to the plaintiffs Kshs. 10,000,000/=.

27. On perusal of the Court record, it is evident that on 27th July 2023, Mr. Munyu, learned Counsel for the plaintiffs appeared before Hon. Judge Mabeya and stated that the plaintiffs were advanced Kshs.189,000,000/= in 2016 but as at 27th July 2023, the outstanding amount was Kshs.300,000,000/= out of which only Kshs. 50,000,000/= had been paid.

28. Further, as correctly stated by the defendants, upon issuance of the status quo orders on 27th July 2023, the Court categorically stated that the Receiver appointed by the defendants should not take over the plaintiffs. The plaintiffs in turn were ordered to continue servicing the facility. It is however not in contest that since the issuance of the status quo orders, the plaintiffs have not serviced the facility advanced to them by the defendants. In the premise, I am inclined to believe that the plaintiffs' debt to the defendants is not disputed.

29. In addition to the foregoing, the plaintiffs averred that they had secured or were in the process of securing funding from the IFC, the Trade Development Bank (TDB), British International Investments (BII) and Lightrock BV. They further averred that the TDB visited the project in December 2022 and confirmed the intent to proceed with funding and thereafter issued a credit memorandum in March 2023, but internal restructuring delayed final steps. The plaintiffs stated that the IFC on the other hand committed USD 8,000,000.00 but the final sign-off was delayed by the Technical Lead's schedule. This Court however notes that as at the time of writing this ruling, the plaintiffs had not alleged by way of a further affidavit or otherwise demonstrated that they were able to secure financing from the said entities approximately two years from the dates mentioned above.

30. Upon perusal of Clause 7 of the debenture dated 30th June 2016, I agree with the defendants that they have the right to appoint a Receiver Manager after repeated defaults and after issuance of statutory and insolvency notices. The plaintiffs do not deny that they have repeatedly defaulted in their loan repayment obligations and that the defendants have duly issued them with statutory and insolvency notices. I am therefore persuaded that the defendants were within their rights to issue the plaintiffs with a Notice of their intention to appoint a Receiver Manager to manage the affairs of the 1st plaintiff in order to maintain its status quo before issuance of the said Notice.

31. In view of the foregoing, I am persuaded that the plaintiffs have not established a prima facie case with a probability of success to warrant this Court to grant them an order of injunction against the defendants and/or suspend the Notice dated 16th June 2023 issued to the 1st plaintiff by the 2nd defendant.

32. As to whether the defendants will suffer irreparable harm and damage that cannot be compensated by an award of damages in the event that the orders being sought are not granted, I am not persuaded that this is the case. I am of the considered view that the defendants stand to suffer substantial loss and damage in the event that the instant application is allowed, especially so because they advanced a substantial amount of money to the plaintiffs, who admit that as at 27th July 2023, they were indebted to the defendants to the tune of Kshs. 300,000,000/=. I note that the said amount has neither been paid off or substantially reduced. It is my finding that the balance of convenience tilts in favour of the defendants. I am therefore not inclined to grant the orders being sought by the plaintiffs.

33. The upshot is that the instant application is bereft of merits. It is hereby dismissed with costs to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JULY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Khasira h/b for Mr. Mungu for the plaintiffs/applicants

Ms Kemunto for the defendants/respondents

Ms B. Wokabi – Court Assistant.