



**Infinity Industrial Parl Limited v Bank of Baroda (Kenya) Limited (Commercial Case E322 of 2024) [2025] KEHC 12055 (KLR) (Commercial and Tax) (14 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12055 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E322 OF 2024**

**PM MULWA, J**

**AUGUST 14, 2025**

**BETWEEN**

**INFINITY INDUSTRIAL PARL LIMITED ..... PLAINTIFF**

**AND**

**BANK OF BARODA (KENYA) LIMITED ..... DEFENDANT**

**RULING**

1. The Applicant moved this Court by way of a Notice of Motion dated 13<sup>th</sup> June 2024 brought under Sections 1A, 1B, 3A and 63(c) & (e) of the *Civil Procedure Act*, and Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules. In substance, the Applicant seeks:
  - i. A temporary injunction restraining the Defendant/Respondent, whether by itself, its employees, servants, and/or agents or any person whatsoever acting on their behalf, from advertising for sale, selling by public auction or private treaty, disposing of, completing by conveyance or transfer of any sale concluded by auction or private treaty, taking possession, appointing receivers or administrators, or exercising any power of a charge to lease, let, charge or otherwise interfering with LR No. 31978 (original No. 11522) Nairobi, Njiru, along the Eastern Bypass;
  - ii. An order compelling the Defendant/Respondent to discharge/release a further 15 acres of land Reference No. 31978(original no. 11522) Nairobi, to enable the Plaintiff proceed with phase II of the project including infrastructure works and the development of 50 warehouses;
  - iii. An order compelling the Defendant/ Respondent to withdraw and/ or otherwise suspend any adverse notices or information sent to any licensed reference bureau by the Defendant in relation to the subject of the loan facility.



- iv. That the costs of the application be borne by the Respondent/Defendant.
2. The motion is supported by the affidavits of Ashok Rupshi Shah sworn on 13<sup>th</sup> June 2024 and 2<sup>nd</sup> September 2024. He avers that the Applicant is undertaking a large-scale industrial park development for SMEs on a 200-acre parcel of land, LR No. 31978, with a projected 15-year gestation period and the expectation of accommodating up to 1,000 SMEs.
  3. The Applicant contends that pursuant to an offer letter dated 26<sup>th</sup> June 2019, the Respondent extended a loan facility of Kshs. 1,976,890,000/= comprising a takeover loan from Equity Bank, a fresh overdraft facility, and a fresh term loan. The facility was secured by charges over various properties, including LR. 11522, and a charge was created on 30<sup>th</sup> September 2019 over property known as L.R. 11522, L.R. 3734/59 (original 3734/344) situated on Chalbi Drive (off James Gichuru Road) and House No. 1 at Amer Residences along General Mathenge Drive. A replacement charge was created on 23<sup>rd</sup> February 2022 and registered on 27<sup>th</sup> April 2022 to allow the Applicant to surrender title LR. 11522 for change of user on condition that the new titles will be surrendered to secure a fresh legal charge.
  4. It is alleged that delays occasioned by the Respondent, particularly in discharging LR. 11522 to facilitate change of user, disrupted project timelines and caused loss of expected revenue. The Applicant asserts that although Phase 1 is complete, the Respondent has declined to release an additional 15 acres required for Phase 2, thus frustrating the Applicant's ability to secure financing from other investors. It is argued that the risk of losing a multi-billion-shilling investment renders damages an inadequate remedy.
  5. The application is opposed through a replying affidavit sworn on 11<sup>th</sup> July 2024 by Wilson Mwaura, the Respondent's officer. He denies any wrongful delay in the discharge of title, stating that the Applicant failed to collect the title upon approval in March 2020, only re-engaging in November 2020. The Respondent contends that the partial discharge of certain securities was effected on 17<sup>th</sup> February 2022 after sufficient reasons were furnished and a professional undertaking given.
  6. It is further deponed that delays in the project were partly due to the Covid-19 pandemic, during which the Applicant sought and obtained a moratorium. The Respondent avers that the Applicant has defaulted on interest payments, including a sum of Kshs. 55.94 million which was due on 29<sup>th</sup> September 2023, and only cleared after three months. The Respondent asserts that the loan facility is now non-performing, no statutory notices have been issued, and that the orders sought are premature. It is argued that the application is a stratagem to avoid repayment and that the Applicant has not established a prima facie case.
  7. He avers that at the date of filing this application, negotiations were still underway on how to effectively regularize the loan account in conformity with the terms of the charge instrument. He contends that the Defendant ought to follow the CBK guidelines in listing non-performing account holders, otherwise failure to do so may lead to the Defendant being ordered to pay exorbitant fines in lieu. He urges the court to dismiss the suit and the plaint on the grounds that no sufficient cause has been advanced and that no prima facie case has been established to allow the granting of the orders.
  8. The application was canvassed by way of written submissions. The Applicant's submissions are dated 2<sup>nd</sup> September 2024 while those of the Respondent are dated 25<sup>th</sup> September 2024. Both parties reiterated their respective positions and cited various authorities on the grant of temporary injunctions, including *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.



## Analysis and determination

9. I have considered the application, the affidavits in support and in opposition, together with the rival submissions. In my view, three issues arise for determination:
  - i. Whether the Applicant has met the threshold for the grant of a temporary injunction.
  - ii. Whether the mandatory orders for release of 15 acres and withdrawal of credit bureau listings should be issued at the interlocutory stage.
  - iii. Who should bear the costs of the application.
10. The principles governing the grant of interlocutory injunctions are well settled in the *Giella v Cassman Brown* case – that; an applicant must establish a prima facie case with a probability of success; demonstrate that they stand to suffer irreparable harm that cannot be adequately compensated by damages; and, if the Court is in doubt, the matter should be decided on a balance of convenience.
11. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR further opined that:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”
12. At this stage, the Court is not required to make definitive findings on contested issues. As observed in *Lucy Nungari Ngigi & 4 Others v National Bank of Kenya Limited & Another* [2015] eKLR, substantive disputes on contractual obligations, the exercise of statutory power of sale, or alleged breaches should be reserved for determination at trial to avoid prejudicing the hearing of the main suit.
13. A prima facie case as described in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 as:

“...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.”
14. The Applicant seeks, first, to restrain the Respondent from exercising its statutory power of sale, and second, to compel the release of 15 acres of the charged property to facilitate Phase 2 of its industrial park project. It is common ground that the loan facility is secured by the suit property and that the Applicant has experienced periods of default.
15. The Applicant attributes delays in project completion to the Respondent’s alleged failure to discharge part of the charged property in a timely manner to allow for a change of user. However, the facility agreement and charge instruments are clear, and the Respondent is entitled to hold the security until repayment obligations are met or until otherwise agreed in writing.



16. The Respondent admits there was a period before partial release of securities but attributes this partly to the Applicant's own inaction and delay, and the necessity of maintaining adequate security. The facility is also acknowledged to be in arrears. As for the threat of sale, the Respondent avers that no statutory notice has been issued, and thus no immediate sale is imminent.
17. The Court is mindful that it must interpret the parties' obligations not only within the four corners of their contractual documents but also in light of the statutory regime governing charged securities.
18. From the agreed facts, the Applicant is the registered owner of the suit property, which was offered as security for a substantial loan facility from the Respondent. The Applicant's development of the property is ongoing, but financing arrangements for Phase 2 remain dependent on the release of additional land, a matter which is contested.
19. On the basis of the material placed before me, I am not satisfied that the Applicant has demonstrated the existence of a prima facie case with a probability of success so as to warrant the grant of the injunctive reliefs sought. The threshold under the first limb of the test in *Nguruman Limited* (supra) has therefore not been met. As was emphasized in that decision, the three limbs, prima facie case, irreparable harm, and balance of convenience are to be considered sequentially. A failure to establish the first limb is fatal to the application, and the court need not, and indeed should not, proceed to consider the remaining limbs. In the circumstances, the Applicant's case falters at the first hurdle.
20. On the issue of a mandatory injunction, the same is issued where special circumstances are shown, after the establishment of a prima facie case. In *Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR the court was of the view that:

“...at the interlocutory stage, the case has to be unusually strong and clear before a mandatory injunction will be granted, and that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted.”
21. In the present case, the orders sought in prayers (ii) and (iii) of the motion are in the nature of mandatory injunctions, compelling the Respondent to release part of the charged property and to withdraw alleged adverse listings. These are substantive acts which, if granted, would go beyond preserving the status quo and effectively confer the Applicant part of the final relief sought in the main suit. Such relief cannot issue at the interlocutory stage unless the Court is satisfied that the Applicant's case is unusually strong, clear, and not open to serious doubt. From the material placed before me, the disputes surrounding the alleged agreement to release the additional 15 acres, the question of default, and the parties' respective obligations under the facility agreement are contested matters best resolved upon full evidence at trial.
22. Further, the prayer for withdrawal or suspension of alleged credit bureau listings has not been supported by cogent evidence of actual listing, the specific dates, or the precise adverse reports in question. In the absence of such proof, the Court cannot grant what would in effect be a final order without a conclusive determination on the merits.
23. Consequently, I find that the Notice of Motion dated 13<sup>th</sup> June 2024 is bereft of merit and the same is dismissed with costs to the Respondent.

It is so ordered



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF AUGUST 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Ms. Jane Okoth for Plaintiff/Applicant

Mr. Ng'ang'a for Defendant/Respondent

Court Assistant: Godfrey

