CM ADVOCATES LLP



KENYA HIGH COURT CLARIFIES PRIORITY BETWEEN APARTMENT PURCHASERS AND SECURED LENDERS IN DEVELOPER INSOLVENCIES

In re Cytton High Yields Solutions (In Liquidation) (Insolvency Petition E063 of 2021) [2026] KEHC 12992 (KLR) (Commercial and Tax) (7 August 2026).

2nd September 2026

EXECUTIVE SUMMARY

The High Court of Kenya has delivered a significant decision on the competing rights of apartment purchasers and secured lenders where a property developer enters liquidation. In a composite ruling delivered on 7th August 2026, the Court held that a lender's registered charge does not automatically defeat the interests of purchasers who fully paid for their units before the charge was registered and can prove those payments through reliable documentary evidence.

Purchasers who acquire units after registration of a charge will ordinarily take subject to the lender's security. They cannot generally rely on private arrangements with the developer to defeat the lender's statutory power of sale, particularly where the lender did not provide its prior written consent.

> *".....a Purchaser who deals with a chargor in respect of charged property, without the chargee's consent and in breach of the charge, acquires no interest capable of prevailing against the chargee."*

AT A GLANCE — THREE-CATEGORY FRAMEWORK

1. Pre-Charge Purchasers
Fully paid before charge registration (23 Aug 2019). May exclude unit from sale if genuine agreement + full payment proved.

2. Post-Charge Purchasers
Agreements or material payments after charge. Ordinarily subject to charge. Can protect unit by paying full value directly to the Bank.

3. Transition Purchasers
Started before, completed after. Protected if post-charge instalments redirected to lender; otherwise credit only for pre-charge payments.

Key takeaway: Priority turns on transaction timing, lender consent, payment routing, and — above all — reliable, unit-specific proof of payment. Collective assertions or general equity will not substitute for documentary evidence.

1. BACKGROUND

The ruling arose from the liquidation of Cytonn High Yield Solutions LLP and competing claims relating to apartment units within The Alma development. The principal contest involved individual apartment purchasers, the developer, SBM Bank Kenya Limited as secured lender, the Official Receiver and various investor groups.

The Bank's charge over the development was registered on 23rd August 2019. Several purchasers contended that they had acquired and paid for their units before the Bank's security was created. Other purchasers entered into sale agreements or continued making payments after the charge had been registered.

The Court was required to determine whether the purchasers were bona fide purchasers for value without notice; whether their interests prevailed over the Bank's registered charge; whether particular units should be excluded from the lender's proposed sale; the lawfulness of the Bank's verification exercise; and related procedural questions including joinder of approximately 25,000 investors and the validity of a consent between the Official Receiver and the Bank.

---

2. THE COURT'S THREE-CATEGORY FRAMEWORK

a) Purchasers Who Fully Paid Before Registration of the Charge

Purchasers who entered into agreements and fully paid before 23 August 2019 may have acquired a beneficial interest in the unit. Once the developer received full value and parted with the beneficial interest, it retained only the bare legal title and could not confer upon the lender a better interest than it possessed.

A qualifying purchaser is entitled to have the unit excluded from the pool of assets available for sale. Protection is not automatic: the purchaser must prove a genuine enforceable agreement, full payment in accordance with that agreement before registration, and honesty and diligence. An early agreement date without credible proof of payment is insufficient.

b) Purchasers Who Transacted After Registration of the Charge

The registered charge was a matter of public record. A reasonably diligent purchaser was expected to conduct an official search at the Lands Registry. A search would have disclosed the charge and the prohibition against selling or parting with possession without the Bank's prior written consent.

A purchaser who acquires an interest in charged property without the chargee's consent does not ordinarily obtain an interest capable of prevailing over the registered security. Private arrangements between developer and purchaser cannot bind a secured lender that was neither party nor privy to those arrangements. Units sold after 23 August 2019 without written consent remained available for the Bank's statutory power of sale. A post-charge purchaser may still protect the unit by paying its full value directly to the Bank.

c) Transition Purchasers

These purchasers entered into agreements and commenced payment before registration but completed payment afterwards. A transition purchaser who, upon becoming aware of the charge, redirected outstanding instalments to the secured lender demonstrated the diligence and good faith required by equity. Where the full sequence of payments (pre-charge to developer + post-charge to Bank) can be proved, the unit can be protected.

Where the purchaser continued making post-charge payments into the developer's accounts despite the registered interest, those payments will not ordinarily bind the Bank unless absence of notice is demonstrated. Credit may still be given for genuine pre-charge payments, with the balance to be settled with the Bank to prevent sale.

3. PROOF OF PAYMENT IS DECISIVE

The Court applied the Supreme Court's formulation of the doctrine of the bona fide purchaser for value without notice. The doctrine requires three cumulative elements: innocence and good faith, purchase for value, and acquisition of a legal estate. The burden of proving those elements rests initially upon the purchaser.

Proof of payment must be credible, complete and traceable to the particular transaction

Evidence that ordinarily satisfies the standard	Evidence that will not ordinarily suffice
• Original or certified bank statements • Real Time Gross Settlement (RTGS) confirmations • Original bank-generated transfer confirmations • Receipts issued by the developer linked to the unit • Evidence connecting any third-party payment to the purchaser • Records clearly identifying the unit and the agreement	• An agreement for sale standing alone • Uncertified or materially redacted bank statements • Cheques without evidence of clearance • Deposits by unexplained third parties • Payment information recreated in emails • Unsupported assertions of transfers • Internal conversion documents lacking proof of the underlying investment

Once a purchaser produces credible evidence of a genuine sale agreement and payment, the evidential burden shifts to the lender. The lender cannot rely on a general assertion that it is unable to verify payments made into accounts maintained by another bank. It must provide a specific, evidence-based response to the particular purchaser's claim.

4. THE SIGNIFICANCE OF THE LENDER'S KNOWLEDGE OF EXISTING PRE-SALES

The lending documents demonstrated the Bank's knowledge that the development was already substantially pre-sold before the facility was advanced. The developer had informed the Bank that approximately 60% of the units had been sold. The facility documents required the developer to provide existing pre-sale contracts and later required pre-sale collections to be paid into an escrow account.

The Bank therefore took its security with actual knowledge that pre-existing purchasers might have acquired interests in particular units. The developer's failure to disclose all pre-sale contracts was a breach of its obligations to the Bank — but that breach could not automatically be imposed upon an innocent purchaser who had no participation in the breach and no visibility over the financing arrangements.

The ruling reinforces the importance of comprehensive lender due diligence before project financing is advanced. A lender that knows a development contains pre-sold units should reconcile the developer's sales register, purchaser agreements and payment records before completing its security or disbursing the facility.

5. VERIFICATION MUST BE CONDUCTED UNIT BY UNIT

The Court upheld the Bank's role in conducting the verification exercise and rejected the argument that the process was invalid merely because it had not been conducted jointly with the developer. Verification of purchaser claims is inherently a case-by-case exercise. Each purchaser must particularize and prove the claim using documents relating to that purchaser's own transaction.

The lender is entitled to verify documents and transactions within its knowledge and control. It is not required to reconstruct a purchaser's case from records held by the developer and not produced by the purchaser. However, once credible evidence is presented, the lender must consider it objectively and provide a specific response. A uniform or blanket rejection of purchaser claims would be inconsistent with the evidential approach required by the Court.

The Court further indicated that the redemption notice and notification of sale might require reconsideration to reflect any pre-charge purchaser interests subsequently validated through the verification process.

---

6. THE OFFICIAL RECEIVER'S AUTHORITY AND THE CONSENT WITH THE SECURED LENDER

The Court declined to set aside the consent entered into between the Official Receiver (as liquidator) and the secured lender. A consent order, once adopted by the Court, has the same effect as a judgment and may only be set aside on established grounds (fraud, collusion, misrepresentation, material mistake, or other circumstances that would invalidate an ordinary contract). None of those grounds had been established.

Under paragraphs 2 and 3 of Part 1 of the Third Schedule to the Insolvency Act, a liquidator may enter into compromises and arrangements concerning the company's property, liabilities and creditor claims where this serves the collective interests of creditors. The Official Receiver was therefore legally entitled to agree with the secured lender on the manner in which its claim and enforcement rights would be addressed within the liquidation.

Although the consent remained binding, it did not extinguish independently established purchaser rights. Any unit proved to have been fully paid for before registration of the charge — and therefore not available to be charged — had to be excluded from the lender's enforcement process. Likewise, any residue remaining after satisfaction of the secured lender's lawful claim remained subject to administration and distribution by the Official Receiver in accordance with the statutory ranking of claims.

---

7. TREATMENT OF RELATED-PARTY AND INTERCOMPANY CLAIMS

The Court reaffirmed that connected entities, contributories and related parties cannot use internal loan notes, mezzanine arrangements or intercompany transactions to remove assets from the pool available to general creditors. Section 449(3) of the Insolvency Act requires contributories and connected interests to await payment in full of general creditors before receiving any distribution.

An investor's association with a group of related entities does not, without more, establish a secured or proprietary interest in a particular asset. A claimant asserting secured-creditor status must produce clear evidence of the underlying debt, the security instrument, attachment of the security to the relevant asset, registration or perfection of the security, and the amount outstanding.

8. OUTCOME OF THE APPLICATIONS

Most purchaser applications were dismissed because the applicants failed to produce adequate evidence of payment, entered into transactions after registration of the charge without demonstrating the secured lender's prior written consent, or suffered from both deficiencies.

Successful pre-charge claim

One pre-charge purchaser application succeeded where the applicants produced prima facie RTGS records demonstrating full payment before registration. The beneficial interest had already passed; the unit was not available to be charged or sold.

Held in abeyance

Another pre-charge application was held in abeyance to allow the purchaser to engage with the lender and produce original, unaltered bank-issued statements. The Court showed willingness to permit curing of evidential deficiencies where the transaction pre-dated the charge.

Limited post-charge recognition

A post-charge purchaser obtained only limited recognition for payments already acknowledged in the lender's verification affidavit. The balance (alleged conversion of an existing investment) was rejected for lack of proof of existence, value and actual application.

Joinder application dismissed

The application seeking joinder of approximately 25,000 fund investors was dismissed. The same question was pending before the Court of Appeal (sub judice). Independently, a list of names and telephone contacts did not establish investor status, amounts owed, or ranking of any security claimed.

The overall outcome demonstrates that purchaser claims will be determined individually by reference to the date of the transaction, the timing and destination of payments, the existence of the lender's consent, and the quality of the supporting evidence. Neither collective assertions nor general equitable considerations will substitute for reliable, unit-specific documentary proof.

---

9. PRACTICAL IMPLICATIONS

(a) Property Developers

- Maintain accurate and continuously updated, unit-by-unit sales registers.
- Disclose all existing and subsequent sales to the project lender.
- Ensure purchaser agreements properly reflect the restrictions contained in the financing documents.
- Route purchaser funds only through designated project or escrow accounts.
- Where the project property is charged, obtain the lender's written consent before selling or leasing any unit.
- Establish transparent release-price and partial-discharge procedures as part of the financing and sale arrangements.
- Procure discharges promptly once the agreed conditions have been satisfied.
- Align sales documentation, financing arrangements and payment collection procedures to avoid exposing the developer and purchasers to substantial losses if the project becomes distressed.

(b) Banks and Project Financiers

- Undertake comprehensive pre-disbursement due diligence on existing sales and purchaser payments.
- Reconcile the title, developer's sales register, pre-sale agreements and project collection accounts before advancing funds.
- Identify any units that may already be subject to pre-existing beneficial interests.
- Ensure financing documents require continuing disclosure of sales and variations by the developer.
- Require sale proceeds to be paid into controlled or escrow accounts.
- Establish clear procedures for lender consent, release prices and partial discharges.
- Monitor compliance with pre-sale and collection covenants throughout the facility term.
- Where enforcement becomes necessary, undertake a reasoned, unit-specific verification process.
- Avoid assuming that a registered charge automatically displaces every purchaser claim, particularly where purchasers may have acquired interests before registration of the charge.

(c) Purchasers and Conveyancing Advocates

- Conduct an official title search before signing the agreement and repeat the search before making substantial payments or completing the transaction.
- Where the property is charged, obtain the lender's prior written consent, confirm the amount and process required to secure a partial discharge, and ensure payments are made only into the authorised account.
- Retain original or certified bank records for every payment; ensure each transfer identifies the purchaser, the relevant unit and the applicable agreement.
- Obtain receipts and periodic statements of account from the developer and insist upon registration of the transfer, lease or partial discharge without undue delay.
- Remember: possession of a unit, an agreement for sale or proof of partial payment may not, without more, defeat a registered charge.

(d) Insolvency Practitioners

- Identify proprietary, secured and unsecured claims before distributing or realising assets; distinguish pre-charge purchaser interests from post-charge contractual claims.
- Adopt a transparent verification protocol that states the evidence required, allows claimants a reasonable opportunity to address identified documentary deficiencies, and records the reasons for accepting or rejecting each claim.
- Preserve equal treatment among creditors of the same rank and document how any compromise with a secured lender serves the interests of the general body of creditors.

CONCLUSION

The ruling is a significant development in Kenyan insolvency, secured lending and real estate law. It does not establish a universal rule that apartment purchasers always prevail over secured lenders — or that a registered charge invariably defeats purchaser claims.

Priority depends on the interest the developer retained when the charge was created, whether the purchaser acted diligently, whether the lender knew of or consented to the transaction, how payments were routed, and whether those payments can be proved through reliable, transaction-linked evidence.

For developers, lenders and purchasers, the decision underscores that rigorous due diligence, properly structured escrow arrangements, lender consent, contemporaneous partial discharges and reliable payment records are not merely administrative safeguards. They may ultimately determine whether a purchaser retains a home and whether a lender can realise its security.

CM ADVOCATES LLP

CONTACT US:

For advice concerning real estate development, project finance, property acquisitions, secured lending, distressed developments, debt restructuring, insolvency proceedings, enforcement or related litigation, please contact:

Real Estate, Development & Built Environment Practice:
E: REDBE@cmadvocates.com

Real Estate, Banking and Finance Department
E: RBF@cmadvocates.com

Debt Recovery, Restructuring & Insolvency (DRRI) Practice
E: drri@cmadvocates.com

Dispute Resolution & Appellate Practice Group
E: disputeresolution@cmadvocates.com

CM Advocates LLP – Contact Details

Head Office Nairobi
I&M Bank House, 7th Floor, 2nd Ngong Avenue
T: +254 20 2210978 or +254 716 209673
P.O. Box 22588 – 00505, Nairobi Kenya
E: law@cmadvocates.com

Mombasa Office
Links Plaza, 3rd Floor, Links Road, Nyali
T: +254 041 447 0758 / +254 41 447 0548
P.O. Box 90056 – 80100, Mombasa Kenya
E: mombasaoffice@cmadvocates.com

Regional Presence
Uganda | Tanzania | Rwanda | Zambia | Ethiopia | South Sudan

www.cmadvocates.com

Disclaimer: *This regulatory alert is provided for general information only and does not constitute legal advice. The ruling may be subject to appeal, review or subsequent judicial consideration. Specific legal advice should be obtained regarding the facts and documentation of each matter.*

© CM Advocates LLP. All Rights Reserved.