



Kahuho & 3 others v Letshego Kenya Limited & another (Commercial Case 1 of 2023) [2024] KEHC 10428 (KLR) (20 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL CASE 1 OF 2023
FN MUCHEMI, J
AUGUST 20, 2024**

BETWEEN

**MARY GATHONI KAHUHO 1ST APPLICANT
NICHOLAS GICHUHI KAHUHO 2ND APPLICANT
SIMON NJENGA KAHUHO 3RD APPLICANT
LUCY WAMBUI KAHUHO 4TH APPLICANT**

AND

**LETSHEGO KENYA LIMITED 1ST RESPONDENT
ELIEZER KAMAU MUGO 2ND RESPONDENT**

RULING

Brief Facts

1. The applications for determination dated 7th November 2023 and 20th December 2023 were consolidated on 11th March 2024. The application dated 7th November 2023 seeks for orders of an injunction restraining the defendants, their servants and/or agents from selling, trespassing, transferring, charging, leasing, renting or in any way from interfering with the plaintiffs use and occupation of LR No. Ruiru/Kiu Block 13/960 and or evicting the tenant and or collecting rent thereon or disconnecting electricity and water and any other utility thereon pending the hearing and determination of the suit. The applicants further seek that the court may be pleased to restrain the 1st defendant, its agents and or servants from transferring LR No. Ruiru/Kiu Block 13/960 to the 2nd defendant and or his agent, servant and or allottee or any other person pending the hearing of the suit. The applicants further seek for the court to order and direct that Pink House Management Limited to continue managing the house and all the rental income from LR. No. Ruiru/Block 13/960 be deposited to the 1st applicant’s Equity Account No. 0630197404097 of which 30% be utilized for the



- 1st plaintiff/applicant's upkeep, maintenance and medication and 70% to await the outcome of the suit or further orders. Further, the 1st defendant be directed to furnish the applicants with a true and reconciled statement of loan account as to date and balance thereof if any, with interest if any well tabulated with calculating formula.
2. In opposition to the application, the respondents filed Replying Affidavits dated 25th January 2024 and 8th February 2024 and the interested party filed grounds of opposition dated 22nd April 2024.
 3. The application dated 20th December 2023 is seeking for orders of review of the orders made on 20th November 2023 and in its place to maintain a status quo that had been ordered in MC ELC Case No. 110 of 2023 at Ruiru in which the applicant was and is still in occupation of the premises on LR No. Ruiru/Kiu Block 13/960 Githurai 45 pending the hearing and determination of the suit. The 2nd Defendant further seeks for orders of a temporary injunction stopping the plaintiffs or their agents from interfering with the 2nd defendant's peaceful occupation of the premises described as LR. No. Ruiru/Kiu Block 13/960 Githurai 45.

The Applicants' Case on the application dated 7th November 2023.

4. The applicants state that the 1st applicant is the registered owner if LR. No. RUIRU/KIU BLOCK 3/960. The 1st applicant obtained a loan of Kshs. 3 million from the 1st respondent with LR No. Ruiru/Kiu Block 13/960 as security but was not supplied with copies of the loan documents.
5. The applicants state that on 24/12/2019, the 1st respondent remitted to the 1st applicant Kshs. 2,322,881.45 of the loan facility of Kshs. 3 million payable within 60 months. The 1st applicant avers that she has paid Kshs. 2,898,000/- and the repayment period is not yet over.
6. Upon release of the said amount to the 1st applicant, the 1st respondent's loan officers Mr. Wilson Waweru and Simon Mbugua Muigai took advantage of the age and illiteracy of the 1st applicant demanded monies with menace that they will auction the suit property. The applicants aver that the 1st applicant gave in and paid Kshs. 158,000/- to Simon Mbugua Mungai directly to his account and others in cash which amount the 1st applicant cannot recall was how much due to her age, illiteracy and health conditions.
7. The applicants state that the loan facility was utilized towards construction of eighteen (18) rental residential units on LR. No. Ruiru/Kiu Block 13/960. However due to the amount of Kshs. 158,000/- and other paid in cash, extorted by intimidation and taken by the 1st respondent's officers and staff and coupled with the illegal deductions by the 1st respondent, the said residential units remained uncomplete despite the 1st applicant having purchased construction material which are still lying at the supplier's shops as she did not have monies required for the labour.
8. The applicants argue that the threats, intimidation and extortion by the 1st respondent's officers were an act that frustrated the performance of the contracts and it is unconscionable and illegal for the 1st respondent to purport to sell the suit properties while it is its officers who frustrated the due performance of the contract.
9. Despite the frustrations by the 1st respondent's servants, employees and agents, the applicants aver that they were committed to repayment of the loan facility and have paid Kshs. 2,898,000/- of the principal amount and are committed to payment of the last cents.
10. The applicants state that the 1st respondent has purported to sell the suit property in an opaque manner without giving them statutory notices and or a chance to redeem the suit property and are in the process of selling and transferring it to the 2nd respondent. Further, the 2nd respondent visited the suit property



under the pretext that he was looking for a house to rent. Thereafter, the 2nd respondent visited the suit property and without any explanation purported to give the tenants notice to vacate the house immediately and or pay rent directly to him purporting he had purchased the suit property.

11. The respondents caused the tenants to be arrested and are currently facing malicious charges of creating disturbance in Ruiru MCCR No. E2238 of 2023 Republic vs James Kariuki Mwaura, Julius Gitau & 6 Others. Due to the foregoing, all the tenants have vacated the suit property for fear of being arrested and charged for no apparent reason leaving only the 4th applicant.
12. The applicants aver that unless the court intervenes, they shall suffer irreparable harm. Thus if the suit property is transferred to the 2nd respondent, the applicants will suffer irreparable loss.
13. The applicants state that the 1st respondent was unable to liquidate the said loan facility as agreed as the said residential units are not generating any income and despite the 1st applicant's humble plea to the 1st respondent, they have refused, ignored and neglected to restructure the payment. The applicants further aver that they have asked for copies of loan documents from the 1st respondent who has declined to supply the same to them. The applicants further aver that the 1st respondent made them sign documents that were not complete and they feel they filled details which are unfavourable to them and be ordered to supply the same to be able to file the full details.
14. The applicants aver that they are committed to settle the loan facility and have paid Kshs. 2,898,000/- among other payments.
15. The applicants further state that they have on numerous occasions requested for the copy of the registered legal charge and the 1st applicant's bank statement on the loan facility and the tabulated interest with formula but the 1st respondent has refused, ignored, failed and neglected to furnish the applicants with the said legal charge and the loan statement.
16. The applicants further aver that they did not receive any statutory notices as prescribed under the Land Act despite being in contact and communication with the 1st respondent and its officers, staff and agents.
17. The applicants further state that prior to the auction of the suit property, they sought a restructuring of the loan facility from monthly instalments of Kshs. 84,734.86/- to Kshs. 50,000/- and be given a grace period to organize themselves in order to redeem the 1st applicant's property but the 1st respondent refused to restructure the facility or have a meeting to discuss the restructuring of the facility.
18. The applicants argue that the 1st respondent's realization of the security is premature, malicious, as the 1st respondent has refused to meet with the applicants to discuss a restructuring of the facilities as the repayment period for the loan facility is not over and unless their actions are nipped in the bud and restrained, the respondents will arbitrarily deprive the 1st applicant her property when no public auction took place and without according the applicants an opportunity to pay the outstanding loan amount.
19. The applicants state that they dispute the alleged loan arrears of Kshs. 3,189,152.61/-. Further, the applicants argue that the 1st respondent is guilty of charging punitive interest with a view of frustrating the applicants on payment of the facility.
20. The applicants state that the 1st respondent denied them a chance to redeem the suit property and have purported to auction the suit property in an opaque manner without sending any notice whatsoever to them at Kshs. 10 million without having regard to the law and its current market value which is over Kshs. 24,800,000/- with the sole intention of stealing from them. Further, the applicants state



that the 1st respondent's valuation report dated 14/4/2021 by Prestige Management Valuers Limited clearly indicated that the value of the suit property is Kshs. 23,600,000/-. Thus the sale is tainted with fraud as the suit property was sold way below its forced market value.

21. The applicants argue that the absence of notices as prescribed by the law renders the auction and sale by public auction sale of the 1st applicant's property by the 1st respondent to the 2nd respondent had not accrued and crystalized and it is un exercisable and contrary to all applicable legal provisions and the purported sale is null and void ab initio.
22. The applicants aver that no public auction took place and thus it is null and void. Therefore no good title passed to the 2nd respondent as no public auction took place and the suit property was sold by private treaty.

The 1st Defendant's/Respondent's Case

23. The 1st respondent states that it is a credit only microfinance institution and a licenced financial services provider in Kenya providing loans to individuals across both public and private sectors, as well as Micro and Small Entrepreneurs. On 23rd October 2019, the 1st respondent approved a loan of Kshs. 3 million to the 1st and 3rd applicants for the construction of 18 additional single units on the property known as LR No. RUIRU/KIU 13/960. The letter of offer provided for interest at the rate of 14% per annum, the loan was to be repaid in monthly instalments of Kshs. 84,743.86 within 60 months, the facility was to be secured by a legal charge on the property known as LR No. Ruiru/Kiu Block 13/960 and any payments made to service the facility would prioritize the interest, other charges before being utilized for repayment of the principal amount and the 1st respondent reserved the right to demand repayment at its discretion. Further, clauses 13 and 18 of the letter of offer stipulated that the 1st and 3rd applicants were responsible for paying all fees detailed in the letter of offer.
24. The 1st applicant as per clause 5.4 of the letter of offer represented that the listed security did not include matrimonial, public, trust or community property; offering such property as security had the approval of all persons with access to and use of the property; the 1st respondent's security interest in the security would be disclosed including the remedies available to the 1st respondent as a charge over the security under any applicable laws, to the involved persons.
25. The 1st respondent states that it prepared a charge and had it executed by the 1st and 3rd applicants to which it disbursed Kshs. 3 million which was inclusive of an existing loan of Kshs. 408,737.27/-, processing fees at Kshs 51,825/-, arrangement fee at Kshs. 45,000/- and ad hoc fee of Kshs. 170,556/- totalling to Kshs. 676, 118.53/-.
26. The 1st respondent states that it debited the 1st applicant's accounts with the sum of Kshs. 676,118.53/- which resulted in the applicant's account having a balance of Kshs. 2,322,881.47/-. Following the loan disbursement as per the terms in the letter of offer, the 1st respondent expected the 1st and 3rd applicants to begin repaying the loan monthly instalments. However, the 1st and 3rd applicants defaulted in their repayments leading to the 1st respondent issuing a demand notice dated 18th November 2020 requiring the settlement of Kshs 3,066,621.65/- within 14 days.
27. The 1st respondent states that despite assurances to clear the arrears by 31st August 2021, the 1st and 3rd applicants failed to honour their commitment. As a result, the 1st respondent exercised its statutory power of sale over the suit property to enforce its rights and recover the outstanding amounts owed as per the provisions of clause 7.2 of both the letter of offer and the charge instrument.



28. The 1st respondent in compliance with the law issued a statutory notice dated 15th February 2021 to the 1st and 3rd applicants through registered post according to clause 30.5 of the charge instrument urging them to settle the outstanding loan within 90 days. After the 90 days lapsed, the 1st respondent dispatched to the 1st and 3rd applicants, a notice to sell the suit property dated 24th May 2021 giving them 40 days for rectification, as per the provisions of Section 96 (2) of the Land Act.
29. To execute the sale, the 1st respondent engaged the services of Prestige Management and Valuers who conducted a valuation of the property and prepared a report dated 4th June 2021, indicating a forced value of Kshs 17,700,000/-.
30. The 1st respondent states that it informed the 1st and 3rd applicants about its intention to proceed with the recovery process upon receiving the valuation. the applicants made additional commitments to clear the outstanding dues. Further, in an email dated 18th November 2021, the applicants disclosed to the 1st respondent that the valuer had provided misleading information regarding the occupancy status of all the units in the property.
31. Despite the overstatement of the property's value by Prestige Management Valuers, the 1st respondent in the honest belief that the sale would yield the valued price, instructed Regent Auctioneers to proceed with the public auction to recover the outstanding balance of Kshs 3,189,152.61/- as of 21st July 2021. The 1st respondent avers that Regent Auctioneers served a 45 day notice upon the 1st and 3rd applicants and on its expiration, they proceeded to advertise the property for public auction in the Daily Nation Newspaper on 21st February 2022 followed by a further advertisement in the standard Newspaper dated 23rd May 2022. Unfortunately due to the impact of covid 19 on market dynamics, Regent Auctioneers could not secure bids for the property at the set price.
32. The 1st respondent states that it sought a second opinion from Amazon Valuers Limited and they assessed the suit property at Kshs 13 million as at 23rd March 2023. Following that valuation, Regent Auctioneers proceeded to advertise the property in the Daily Nation on 27th March 2023 inviting bids for the auction scheduled for 20th April 2023.
33. On 20th April 2023, the 1st respondent avers that the 2nd respondent emerged as the highest bidder and deposited Kshs. 2,500,000/- for the suit property.
34. The 1st respondent avers that the applicants have consistently acknowledged their contractual obligations and on numerous occasions, engaged with it concerning repayment arrangements, all of which they ultimately failed to fulfil. Further, the applicants claim of being provided with incomplete documents are unfounded as they willingly signed every page of the letter of offer containing the terms of the facility and also formally executed the charge instrument which was appropriately registered before the loan disbursement. Therefore, the applicants claim lacks merit and seem designed to deceive the court into granting injunctive orders to protect them from their breach of the contract with the 1st respondent to the 1st respondent's detriment.
35. The 1st respondent argues that its relationship with the 1st and 3rd applicants is contractual and it was governed by the letter of offer and the charge instrument which clearly outlined the loan repayment terms. At no point did the 1st respondent instruct any third parties to receive any payments from the 1st and 3rd applicants on its behalf.
36. The 1st respondent avers that the loan account statement shows that by 3rd April 2023, the 1st and 3rd applicants had made a total payment of Kshs. 2,405,862.15/- which was specifically allocated to settling



the accruing interest on the loan facility as stipulated by clause 2.3 letter of offer and clause 2.2 of the charge instrument.

37. The 1st respondent states that it acknowledges the 1st and 3rd respondents post public auction payments and affirms its obligations to refund any surplus funds from the proceeds of the sale of the suit property upon reconciling the loan account.
38. The 1st respondent avers that it acted on good faith and had valid reasons to seek a second opinion on the value of the property when the initial one failed to attract any bids at the auction due to the market dynamics prevailing at the time. There was no intention to act unfairly or to purposefully diminish the value of the security but rather to fulfil its obligations and duties as outlined in the letter of offer, the charge instrument and the provisions of the Land Act.
39. The 1st respondent states that at the time of entering the loan agreement, the 1st applicant declared by affidavit that she was unmarried and that the suit property did not constitute any part of a matrimonial home. However, the 1st respondent states that it recently discovered that the 1st applicant concealed her marital status leading to the approval of the loan based on false information. This information was revealed when one Peter Kahuho applied and was joined as an interested party in Ruiru MCELC Case No. 110 of 2023. The applicants initially sought similar orders in that case but withdrew it to file the present suit. Peter Kahuho seeks to be joined in the current suit as an interested party on the grounds that the suit property is matrimonial and he claims entitlement to a share of the proceeds from the sale of the said property.
40. The 1st respondent argues that the misrepresentation of the 1st applicant's marital status was fraudulent and deceptive. The deception affects the validity of the loan agreement and therefore the 1st respondent urges the court to investigate the 1st applicant's conduct and hold her accountable for her perjury.
41. The 1st respondent states that the application is an abuse of the court process as the suit property has been disposed of pursuant to the provisions of the letter of offer and the charge instrument which the 1st and 3rd applicants acquiesced to before the disbursement of the loan.

The 2nd Defendant/Respondent's Case

42. The 2nd respondent states that the grounds upon which the injunction issued by the court should be reviewed to that of the status quo because the lower court at Ruiru in ELC Case No. E110 of 2023 between the parties had granted status quo and the status quo order was not brought to the attention of the current court.
43. The 2nd respondent states that the status quo allowed him as the purchaser to continue in occupation and possession of the suit property pending the hearing and determination of the applicants suit which they withdrew after filing the current suit.
44. The 2nd respondent states that he purchased the suit property lawfully through public auction on 20th April 2023 and he was issued with a certificate of sale by Regent Auctioneers and made the required deposit of Kshs. 2,500,000/- at the fall of the hammer.
45. The 2nd respondent states that he went to Co-operative Bank of Kenya and applied for the balance of the loan to clear the purchase price and the same was approved. The auctioneers conducting the auction gave him the property immediately after compliance with the auction rules.
46. The 2nd respondent states that he took over the premises, employed a care taker and started managing the property in order to pay off or manage the loan already borrowed from the bank.



47. The 2nd respondent states that soon after possession of the property, the applicants filed MC ELC Case No. 110 of 2023 together with an application for temporary injunction which gave rise to the orders of status quo and physical possession of the property to the 1st respondent. The 2nd respondent avers that he was given possession by the lower court and upon realizing that the court in Ruiru had not evicted him, the said applicants decided to withdraw the suit together with the application pending so as to create a vacuum and confusion. Thus the 2nd respondent argues that the withdrawal thereof was disastrous to the status quo order and his continued possession. The 2nd respondent further states that he filed a preliminary objection as the applicants had filed the earlier suit and obtained the orders then filed the current suit without withdrawing the earlier one. Thus, the interim orders granted by the current court do not address his status as a person in occupation.
48. The 2nd respondent avers that he is ready to defend the applicants suit to the very end because he is the purchaser for value and he is in occupation. The 2nd respondent further asks the court to allow him continue being in occupation as previously ordered by the lower court until the applications are heard and finalized. The 2nd respondent argues that no prejudice shall be suffered by the applicants as he has been in occupation since April 2023 when he purchased the suit property through public auction.
49. The 2nd respondent avers that he is servicing a loan through a repayment plan and the applicants are threatening to evict him from the suit property with a proper eviction order from the court. The 2nd respondent is apprehensive that he shall be cited for contempt as the court was not properly informed that he is in the property because of the orders arising from MC ELC Case No. 110 of 2023 which has since been withdrawn and left a vacuum while in possession.
50. The 2nd respondent states that the only reason why the applicants moved this court is because they failed to secure injunctive orders in their favour from Ruiru Law Courts and not jurisdiction as the value of the property at the auction was Kshs. 10 million.

The Interested Party's Case

51. The interested party opposes the application on the premise that it is misconceived, brought in bad faith, frivolous and scandalous. The interested party states that the sale by the 1st respondent was above board and no legal reasons have been advanced by the applicants to justify the stopping of the sale. As such, the application lacks merit and is an abuse of the court process.
52. The applicants filed a Supplementary Affidavit dated 3rd April 2024 and reiterated what they deponed in their affidavit and further states that the 1st respondent did not inform or explain to them that the amount in terms of the processing fees, arrangement fee and ad hoc fees would be deducted from the loan amount. Further during the execution of the letter of offer and charge, the said amount was never mentioned that it will be deducted from the principal amount. The applicants argue that the 1st respondent had an obligation to tender all material facts and not to conceal information.
53. The applicants further aver that they did not agree that the existing loan of Kshs. 408,737.27/- was to be tied up to the current loan. Furthermore the said loan was secured using a motor vehicle registration number KCD 388W as collateral.
54. The applicants state that the 1st respondent was aware that the purpose of the loan was to construct 18 additional units on the suit property and any single deduction would jeopardize the intended purpose thus frustrating their efforts to repay back the loan.
55. The applicants aver that the 1st respondent deliberately frustrated their capability of remitting the said monthly amount as they were negatively impacted by the onset of covid 19 and despite reaching out to



- the 1st respondent to restructure the loan, the 1st respondent intentionally and without any valid reason refused. Further, the applicants state that they tendered evidence that the 1st applicant was critically ill, in a coma and state of insomnia yet the 1st respondent refused to restructure the loan.
56. The applicants argue that as at 28/7/2023, they managed to pay Kshs. 2,898,000/- towards the loan repayment yet the loan balance reads Kshs. 3,189,152.61/-. The applicants aver that the 1st respondent is charging punitive penalties with a view of defrauding the 1st applicant of the ownership of the suit property.
 57. The applicants state that it was a condition that the 1st applicant had to take a credit life insurance policy through Letshego Kenya Insurance Agency Limited as a condition to be advanced the said loan. The insurance is affiliated by the 1st respondent with the 1st respondent being the first loss payee. Thus, the 1st applicant having fallen sick to the extent of being in a comma and insomnia state for a couple of months, which sickness and medical documents were forwarded to the 1st respondent, the 1st respondent ought to have claimed the sums in arrears from their insurance instead of rushing to dispose of the suit property.
 58. The applicants aver that they did not receive the demand notice dated 18/11/2020 or any other notices including the one by the auctioneer. Further, although the 1st and 3rd applicants were in communication with the 1st respondent, at no time did the 1st respondent notify them of any statutory notices issued or sent via postal address. The applicants argue that it is questionable that the 1st respondent opted to issue statutory notices through registered post when they were aware that the 1st applicant was critically ill and was in a coma and insomnia state. Furthermore, they were communicating with the 3rd applicant through phone calls, WhatsApp, emails and physical meetings. The applicants further state that the postal address belongs to the interested party and when they separated and started living apart with the 1st applicant and requested the postal corporation to change the lock, he was the only person who could access the said postal office.
 59. The applicants aver that the valuation report dated 4/6/2021 is untenable as before the loan was advanced, the suit property was valued at over Kshs. 23 million and after the 1st applicant was advanced the loan, she used the amount to develop the suit property thus increasing its value. Thus, the valuation report does not reflect the true and correct value of the suit property as at 4/6/2021. Further, the applicants aver that they were never informed of the valuation done by Prestige Management Valuer or that the suit property was up for auction.
 60. The applicants aver that the valuation done by Amazon Valuers Limited was not done or prepared on 23/3/2023 as the photos show that the premises is deserted yet as at 27/2/2023, the suit property was occupied with tenants. Further there is no evidence of human activities and the main entrance is closed and it has no signs it has been frequently used. Thus, the report has been manufactured with a view of deceiving this court and justifying the illegal actions and further concealing the conspiracy and collusion by the 1st respondent and the interested party.
 61. The 3rd applicant states that the 1st applicant and the interested party are not married as they parted ways as a result of the interested party's cruelty inflicted on the 1st applicant.
 62. The applicants state that the 2nd respondent had an obligation to pay the balance of the purchase price within 90 days but he failed to do so and therefore no public auction can be said to have taken place. Therefore the 2nd respondent having failed to complete the sale in accordance to the mandatory conditions, the sale cannot be deemed as complete and the property cannot be transferred to him.



The 2nd Defendant/Respondent's Case on the application dated 20th December 2023

63. The 2nd respondent states that he purchased all that premises on LR No. Ruiru/Kiu Block 13/960 Githurai Kiambu vide a public auction by Regent Auctioneers on 20th April 2023. The 2nd respondent states that the said property had been advertised by Regent Auctioneers for sale through the Daily Nation of 27th March 2023 and the said auction was not stopped or contested by the plaintiffs/applicants.
64. The 2nd respondent avers that after the sale, a certificate of sale was issued to him and he paid the requisite deposit of Kshs. 2,500,000/- and processed the balance through Co-operative Bank of Kenya. He then took over the occupation of all the tenants and fixed others.
65. The 2nd respondent states that the plaintiff/applicants filed MC ELC Case No. 110 of 2023 to evict and remove him from the suit property. The court ordered for status quo to be maintained and in very particular terms the court ordered that the 2nd defendant remain in the possession of the suit property pending the hearing of the application filed by the parties and to date the 2nd respondent states that he is in possession and has not been evicted by any court order.
66. The 2nd respondent avers that the plaintiff then withdrew the suit without good reason so that the status quo orders lapsed automatically when he was in occupation. The 2nd respondent further states that the plaintiffs/applicants filed the instant suit with a fresh application and obtained an interim injunction to restrain him and yet he is in possession and has not been evicted by any orders. the 2nd respondent argues that there is need for the court to review its previous orders issued on 20th November 2023 as the 2nd respondent is in possession as per the orders of the lower court in Ruiru.
67. Parties disposed of the application by way of written submissions.

The Applicant's/Plaintiff's Submissions

68. The applicants reiterate what they have deponed in their affidavits and submit that the 2nd respondent has not proved he has a prima facie case as he is not an innocent purchaser for value because no public auction ever took place and the sale is out of collusion and conspiracy by the respondents and the interested party. The applicants further submit that the property was sold by private treaty and was sold way below its value. The applicants further submit that the respondents and the interested party colluded to deny them the suit property by denying them a chance to redeem the property and the purported auction was done in an opaque manner as no single notice was ever given to them. The property was sold at Kshs. 10 million without having regard to the law and its current market value which stands at Kshs. 24,800,000/-.
69. The applicants argue that the suit property has been under the management of Pink House Management Limited and at no material time had the 2nd respondent assumed possession or management of the suit property as alleged. The 2nd respondent thus approached the court with false and misleading information and has approached equity with unclean hands.
70. The applicants rely on the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR and submit that the 2nd respondent shall not suffer irreparable damage if the orders sought are not granted. The applicants argue that there was a meeting between the respondents and the interested party where they planned, colluded and conspired to take property by force and invaded the suit property, disconnected the power and water supply with a view to forcefully take over the suit property. On the said date, one of the defendant's goons, William Kune Mutenei physically assaulted the 4th applicant and caused her bodily injury and he was arrested and charged in Ruiru court.



71. On the issue of balance of convenience, the applicants rely on the cases of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR; *Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 Others* (2016) eKLR and *Amir Suleiman vs Amboseli Resort Limited* [2004] eKLR and submit that the balance of convenience does not tilt in favour of the 2nd respondent.
72. The applicants rely on the cases of *Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another* [2019] eKLR; *East African Industries vs Trufoods* [1972] EA 420; *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358; *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR; *Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002* and *Nairobi High Court Civil Case No. 517 of 2014 Lucy Nungari Ngigi & 4 Others vs National Bank of Kenya Limited & Another* and submit that in an interlocutory application the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.
73. The applicants further rely on the cases of *Dr. Simon Waiharo Chege vs Paramount Bank of Kenya Ltd Nairobi* (Milimani) HCCC No. 36 of 2001 and *Esso Kenya Limited vs Mark Makwata Okiya Civil Appeal No. 69 of 1991* and submit that although the court is not required and forbidden to purport to decide with finality the various relevant facts urged by the parties, the remedy of an injunction being an equitable one, the court will decline to exercise its discretion if the supplicant to the relief is shown to be guilty of conduct which does not meet the approval of the court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances, whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the respondent whether or not he has acted with impunity.

The 1st Respondent's/Defendant's Submissions

74. The 1st respondent relies on Order 40(1)(a) of the *Civil Procedure Rules* and the case of *Giella vs Cassman Brown & Co. Limited* [1973] EA 358 and submits that the applicants have not satisfied the conditions to warrant them the orders sought.
75. Relying on the cases of *Mrao Ltd vs First American Bank of Kenya & 2 Others* (2003) eKLR and *Pius Kipchirchir Kogo vs Frank Kimeli Tenia* (2018) eKLR, the 1st respondent submits that the applicants have failed to establish a prima facie case. The 1st respondent submits that it offered a loan facility of Kshs 3 million to the plaintiffs vide letter of offer dated 23rd October 2019 and the loan was secured by a charge over the 1st applicant's property LR No. Ruiru/Kiu Block 13/960. The applicants accepted the offer and subsequently executed the charge instrument which contained the terms and conditions of the provision of the facility to the 1st and 3rd applicants. The 1st respondent submits that it disbursed the Kshs. 3 million to the 1st applicant account on 20th December 2019 on the strength of the 1st applicant's representations that she was the owner of the suit property.
76. The 1st respondent debited the sum of Kshs. 676,118.53/- from the 1st applicant's account because at the time the applicants had applied for the loan, the 1st applicant had an existing loan of Kshs. 408,737.27/-. As is customary practice in the banking industry, this amount was debited from the account along with the processing fee of Kshs. 51,825.26/-, arrangement fee of Kshs. 45,556/- and ad hoc fees of Kshs. 170,556/-. These deductions were contained in clauses 13 and 19 in the letter of offer which stipulated that the 1st and 3rd applicants were responsible for paying all the fees detailed in the letter of offer. The 1st respondent submits that the applicants never raised any issue with the said deductions until the current suit indicating a lack of honesty in their assertions.



77. The 1st respondent submits that the applicants had access to their account and were provided with an account statement contrary to their claims that it was not provided. The applicants were inconsistent in repaying the monthly instalments of Kshs. 84,743.86/- leading to the 1st respondent to issue a demand notice dated 18th November 2020 requiring the applicant to rectify the default of Kshs. 3,066,621.65/- within 14 days from the date of the demand. The applicants did not regularize their account and as a result the 1st respondent exercised its statutory power of sale over the suit property to enforce its rights and recover the outstanding amounts owed.
78. The 1st respondent relies on Section 90, 96 and 131 of the Land Act and Clause 30.5 of the charge and submits that it issued a statutory notice dated 15th February 2021 to the 1st and 3rd applicants through registered post urging them to settle the outstanding loan of Kshs. 3,093,238.44/- within 90 days. After the lapse of 90 days, the 1st respondent states that it issued a Notice to Sell the suit property dated 24th May 2021 pursuant to Section 96(2) of the Land Act giving the applicants 40 days to rectify the default. The 1st respondent then instructed Regent Auctioneers who issued a 45 days Redemption Notice notifying the applicants of the intention to sell the property by public auction at the lapse of 45 days. The 1st respondent submits that the notices were served upon the applicants through their last known address which they provided at the time of the contract as P.O. Box 51926 Nairobi.
79. The 1st respondent argues that the applicants' denial of being served with the notices is unfounded as the address used was the same one they provided when they applied for the facility and while preparing the charge which they signed. The 1st respondent further submits that the certificate of postage demonstrates that the applicants were duly served with the requisite notices before the sale. Furthermore, the applicants never notified them of any change of address. To support its contention, the 1st respondent relies on the cases of Kyangavo vs Kenya Commercial Bank Limited [2004] eKLR and Emrre Global Investors Ltd vs Housing Finance Company of Kenya Ltd & 2 Others [2014] eKLR.
80. The 1st respondent further relies on Section 97 of the Land Act and submits that it conducted a valuation but denies that the suit property was undervalued. The 1st respondent submits that on 26th May 2021, it instructed Prestige Valuers to undertake a professional valuation of the suit property and report on the open market value, the mortgage value and the estimated forced value. The valuation was undertaken and on 4th June 2021 Prestige Valuers presented their report indicating the mortgage value as Kshs. 18,900,000/-, the forced sale value at Kshs. 17,700,000/- and the capital value for insurance Kshs. 22,200,000/-.
81. Upon receiving the valuation, the 1st respondent notified the applicants of its intention to proceed with the recovery process and in an email dated 18th November 2021, the applicants disclosed that the valuer had provided misleading information regarding the occupancy status of all units in the property.
82. The 1st respondent submits that it chose to proceed with the sale of the property despite the overstatement of the property's value and instructed Regent Auctioneers to proceed with the public auction to recover the outstanding balance of Kshs. 3,189,152.61/-. The 1st respondent further submits that Regent Auctioneers served a 45 day notice upon the applicants and on expiry of the notice, they advertised the property for sale by public auction in the Daily Newspaper on 21st February 2022 followed by a further advertisement in the Standard Newspaper dated 23rd May 2022.
83. The auction did not yield a sale at the forced value of Kshs. 17,700,000/- and the 1st respondent sought a second opinion from Amazon Valuers who valued the property at Kshs. 13 million as of 23rd March 2023. Regent Auctioneers readvertised the property for sale by public auction in the Daily Nation dated 27th March 2023 and the property was sold on 20th April 2023 to the 2nd respondent who emerged the highest bidder with a bid of Kshs. 10 million.



84. The 1st respondent submits that the valuation of the property at Kshs. 13 million represented the accurate market value as of March 2023. The initial valuation had been inflated due to additions made when the suit property was not fully occupied.
85. The 1st respondent submits that as of 20th April 2023, the applicants had repaid Kshs. 2,405,862.15/- and were in arrears of Kshs. 3,017,642.34/-. The payments of Kshs. 2,405,862.15/- were credited directly to the 1st applicant's account and were used to settle interest accruing on the account according to clause 2.3 of the letter of offer and clause 2.2 of the charge.
86. The 1st respondent argues that although he applicants have alleged to making payments to its employees, they have not produced any instructions or provisions in the letter of offer or the charge allowing them to make payments to third parties.
87. The 1st respondent asserts that the 2nd respondent is the lawfully recognized owner of the suit property as the suit property was sold to him through public auction on 20th April 2023. This followed due advertisement of the property in the Daily Newspaper dated 27th March 2023 in line with the provisions of Section 98(2) of the Land Act. Pursuant to Section 98(8) of the Land Act, the 2nd respondent emerged as the highest bidder and therefore the applicants' equity of redemption was extinguished at the fall of the hammer according to Section 99(2) of the Land Act and the case of Joyce Wairimu Karanja vs James Mburu Ngure & Another [2018] eKLR. Thus, the 1st respondent argues that it followed due process before the sale of the property to the 2nd respondent by public auction.
88. The 1st respondent relies on the cases of Pius Kipchirchir Kogo (supra), Simon Njoroge Mburu vs Consolidated Bank of Kenya Ltd [2014] eKLR and Waitbaka vs Industrial and Commercial Development Corporation (2001) eKLR and submits that the applicants have not established that they will suffer irreparable harm which cannot be compensated by damages as the applicants took a loan facility of Kshs. 3 million and defaulted in repaying the loan as per the terms of the letter of offer and the charge. Despite reminders and promises to pay, the applicants failed to follow through and the 1st respondent exercised its statutory power of sale and issued the requisite notices and thereafter sold the suit property to the 2nd respondent thus the suit property is not available.
89. The 1st respondent submits that the balance of convenience favours the refusal to grant an interlocutory injunction against the respondents. The 1st respondent submits that it has demonstrated that it had a charge against the title of the suit property and followed the due process before it sold the property by public auction. To supports its contentions, the 1st respondent relies on the cases of Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 Others and Pius Kipchirchir Kogo (supra) and submits that the applicants will not suffer any inconvenience if its application is not granted because as it stands, the interest in the suit property had already passed to the 2nd respondent.

The 2nd Respondent/Defendant's Submissions

90. The 2nd respondent reiterates what he has deponed in his affidavits and submits that the applicants have admitted that they failed to pay off the loan facility as they stated that the 1st respondent was negatively economically affected by the onset of covid 19 and the 1st applicant was critically ill and in a coma and state of insomnia for a couple of months. The 2nd respondent further states that there is an admission of a demand notice annexed whereby the applicants are aware of the default as they approached the 1st respondent to restructure the repayment plan.
91. The 2nd respondent further submits that the applicants admit in their supplementary affidavit that the statutory notices were served through emails and postal addresses but blame the 1st respondent for the



mode of service. The emails and postal addresses were not denied. The applicants were aware and admit their own fault thus the sale of the property was proper, all the rules and procedures were followed. The 2nd respondent relies on the cases of *Jackson Kipgetich Komen vs K Rep Bank Ltd & 2 Others* [2018] eKLR and *David Katana Ngomba vs Shafi Grewal Kaka* [2014] eKLR to support their submissions.

The Interested Party's Submissions

92. The interested party relies on the cases of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Limited vs Jan Bonde Nelsen & 2 Others* CA No. 77 (2014) eKLR and submits that the applicants have not satisfied the requirements for the grant of the orders of an injunction. Relying on the case of *Moses C. Mubia Njoroge & 2 Others vs Jane W. Lesaloi & 5 Others* (2014) eKLR, the interested party argues that the applicants have not established they have a prima facie case as they claim that they were never served with the statutory notices but the 1st respondent has demonstrated that they served the applicants with the requisite notices.
93. The interested party further submits that the applicants have not shown sufficient cause as to why they failed to settle the loan amounts. The burden is on the 1st applicant to demonstrate that she discharged her responsibility in settling the loan borrowed.
94. The interested party further relies on the case of *Peter Mutisya Musembi & Another vs National Bank of Kenya Ltd* (2010) eKLR and submits that the applicants were fully aware of the consequences in the event of default in repayment of the loan therefore they have not demonstrated that they stand to suffer irreparable harm that cannot be compensated by way of damages. The interested party further argues that the concept of irreparable harm seeks to protect the prima facie case established by the applicants from being rendered nugatory however the applicants have not established a prima facie case.
95. On the issue of balance of convenience, the interested party relies on the case of *Chebii Kipkoech vs Barnabas Tuitok Bargaroria & Another* [2019] eKLR and submits that the balance of convenience tilts in favour of the respondents since the applicants are in breach and the respondents are entitled to exercise their statutory right of sale.

The Law

Whether the applicants have met the requisite conditions to warrant the granting of a temporary injunction.

96. The principles of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs Trufoods* [1972]EA 420 and *Giella vs Cassman Brown & Co. Ltd* [1973]EA 358. Restating the said principles, Ringera J, (as he then was) in *Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002 set them out as follows:-
 - a. A prima facie case with a probability of success at trial;
 - b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;
 - c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
 - d. The conduct of the applicant meets the approval of the court of equity.



97. Similarly, in *Dr. Simon Waibaro Chege vs Paramount Bank of Kenya Ltd Nairobi (Milimani) HCCC No. 360 of 2001*, Ringera J, (as he then was) held:-

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity.”

A prima facie case with a probability of success at trial

98. What then constitutes a *prima facie* case? In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125,

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless an 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....A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “*prima facie* case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “*prima facie*” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a suitable cause of action, the words “*prima facie*” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case 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 being infringed by the opposite party 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.”

99. It is important to note at this juncture that it is not in dispute that the 1st and 3rd applicants took a credit facility with the 1st respondent. The applicants do not dispute that they are in arrears of repayment of



the loan. Their bone of contention is that the 1st respondent did not serve her with the requisite notices and that 1st respondent sold land parcel Ruiru/Kiu Block 13/960 at an undervalued price making the sale illegal.

100. Section 90(1) of the [Land Act](#) 2012 provides:-

If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the charge may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

101. Section 96(1) of the [Land Act](#) 2012, states as follows:-

1. Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargee under section 90(1), a charger may exercise the power to sell the charged land.

102. Once the chargee has decided to exercise its statutory power of sale, section 96(2) of the [Land Act](#) puts another caveat that:

2. Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

103. It is trite law that service of the statutory notices on a chargor is mandatory before the exercise of the power of sale. It is only upon service that a chargor is notified of default of obligation under the charge and given the opportunity to exercise its right of redemption. The issue of service was articulated by the Court of Appeal in [Nyangilo Ochieng & Another vs Fanule Ochieng & 2 Others](#) [1995-1998] 2 EA 260 as follows:-

The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the charge to make sure that there is compliance with the requirements. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. It must be understood that in the face of denial of receipt of statutory notice or notices, it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer of the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya. It is quite possible that such notices were sent but that fact in the face of the denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the “villain in the matter”. In absence of proof of such posting the Court is constrained to hold that the sale by auction was void.

104. On perusal of the documents, the three-month statutory notice under Section 90(1) and (2) dated 15th February 2021 has been addressed to the 1st and 3rd applicants *vide* a postal address reading P. O.



Box 51926-00200 Nairobi. The certificate of postage shows that the letters were sent to the 1st and 3rd applicants on 16th February 2021 to the similar address in the statutory notice. The forty days' notice to sell under Section 96(2) of the *Land Act* dated 24th May 2021 bears a similar address of the 1st and 3rd applicants namely P.O. Box 51926-00200 Nairobi. The certificate of postage show that the letters were sent on 29th May 2021 to the 1st and 3rd applicants to the similar address as in the notice to sell. The 1st respondent has not annexed the 45 days redemption notice it alleges was sent by Regent Auctioneers. Therefore it is evident that the 1st and 3rd applicants were not served with the 45 days redemption notice as alleged.

105. The Letter of Offer dated 23rd October 2019 and 30th September 2016 provide in Clause 14 that:-

Any notice or demand for payment by Letshego Kenya Limited under this letter shall be deemed to have been properly served on the borrower/guarantors if delivered by hand or sent by registered post, telex or facsimile at the addresses notified to the Letshego Kenya Limited in writing by the borrower or at the registered offices or any of the principal places of business of the borrower.

Physical address of the borrower P.O. Box 51926-00200.

106. The Charge indicates in Clause 30.5 that:-

That any notice required or authorized by law or by this charge shall be deemed to have been properly served by the charge on the charger and/or borrowers if left at the charged property or at the principal place of business of the charger and/or borrowers or sent by registered post to his last known postal address or sent by telex or facsimile to the charger and/or borrower's last known relevant address. Any notice hand delivered as aforesaid shall be deemed to have been given upon delivery at the relevant address and any notice sent by registered post shall be deemed to have been served on the addressee at 10.00 a.m. on the seventh succeeding business day following the day of posting notwithstanding that it be undelivered or returned undelivered and, in proving service, it shall be sufficient to prove that the notice or demand was properly addressed and posted. Any notice or demand sent by telex or facsimile shall be deemed to have been served at the time of transmission.

107. In light of the above it is evident that the 1st respondent did not effectively serve the 45 days redemption notice upon the 1st and 3rd applicants. It is therefore my considered view that based on failure to serve the requisite 45 days redemption notice constitutes non-compliance with the law. Having found that the requisite notice was not served upon the applicants, it is my considered view that the 1st respondent could not exercise its power of sale on the security as the right to sell had not accrued which renders the sale of land parcel Ruiru/Kiu Block 13/960 premature.

108. The applicants have submitted that the 1st respondent sold the suit property at an undervalued price of Kshs. 10 million whereas it valued the same property in 2021 at a market value of Kshs. 23,600,000/-. Pursuant to Section 97 of the *Land Act*, a chargee owes a duty of care to a chargor to obtain the best price reasonable at the time of selling the charged property. It provides:-

1. A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any charge under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of the sale.
2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.



109. The importance of undertaking a forced valuation was explained in the case of *Koileken Ole Kipolonka Oromos vs Mellech Engineering & Construction Limited & 2 Others* (2018) eKLR where Gikonyo J. held that:

“..the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under section 97(2) of the *Land Act* is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers.”

110. In this application, the discrepancy in the value of the suit property between 2021 and 2023 when the property was sold amounts to a sum of Kshs. 10,600,000/- which is quite substantial. Furthermore, the applicants have annexed a valuation report indicating the current market value at Kshs. 24,800,000/-. Thus, in view of the fact that the suit property has already been sold, these issues cannot be determined at this interlocutory stage and would need to proceed to trial. It is therefore my considered opinion that the applicants have established a *prima facie* case.

Irreparable Injury

111. In *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016]eKLR the court considered Halsbury's Laws of England on what irreparable loss is and stated that:-

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

112. Similarly, in *Maithya vs Housing Finance Co. of Kenya & Another* [2003] 1 EA 133 at 139 where Honourable Nyamu J, stated as follows:-

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities....Loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the respondent cannot pay damages should it become necessary.”

113. Therefore, have the applicants demonstrated that they will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? The applicants submit that the 1st applicant shall suffer irreparably as she has no income to cater for her medication, her general maintenance and basic needs and her health may deteriorate further as she relies on the rental income to earn a living and cater for her daily medication.

114. It is my considered opinion that based on that argument the applicants have not shown that they stand to suffer irreparable harm. However, at this juncture since the court has established that the 1st



respondent did not serve the 1st and 3rd applicants with the requisite notice for redemption rendering the sale premature hence causing irreparable harm to the applicants.

Balance of Convenience Test

115. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

116. Taking into account the foregoing analysis, it is my considered view that the balance of convenience tilts in favour of the applicants because the inconvenience caused to them will be much greater than that caused to the 1st respondent's in the event that the court upon hearing and determination of this case finds that the 1st respondent did not serve the requisite notice before it exercised its statutory power of sale. The 2nd respondent has argued that he purchased the suit property lawfully at the public auction and collects rental income from the said property. The court at this juncture cannot determine whether the 2nd respondent purchased the suit premises lawfully through public auction and therefore these are issues that ought to be addressed during the hearing. Thus, the balance of convenience in this regard tilts in favour of the applicants. Furthermore, since the court has found that the matter ought to be ventilated at trial, it is prudent that the orders it made on 6th February 2024 are sustained as the acquisition of the property by the 2nd respondent will be determined upon making a finding on whether the 1st respondent's statutory power of sale was properly exercised.

117. It is not in dispute that the 1st respondent is still holding the surplus of the sale of the security after clearing the loan. This was admitted in these proceedings the 1st respondent said it is ready to refund the balance of the proceeds to the 1st applicant. On the other hand the 2nd respondent says that he took possession of the property, after purchase, employed a caretaker and is collecting rent to facilitate repayment of the purchase loan from Cooperative bank. This being the position, this court shall give directions on the collection and preservation of the rent.

Conclusion

118. I have carefully considered the arguments of the parties, the law and the evidence supporting the two applications. I reach a conclusion that the application dated 7th November 2023 is merited in that it has passed the test of granting an injunction as required by the law.

The application dated 20th December 2023 fails and it is hereby dismissed.

119. In regard to the application dated 7th November 2023, I hereby allow it in the following terms:-

- a. That an injunction do issue against the 1st and 2nd respondent, their servants and/or agents from selling, trespassing, transferring charging, leasing, renting or interfering with the plaintiffs use and occupation of Land Reference Number Ruiru/Kiu Block 3/960 and/ or collecting



rent thereon or disconnecting electricity and water and any other utility thereon, pending the hearing and determination of this suit.

- b. That pending the determination of the suit, the property LR No. Ruiru/Kiu Block 3/960 be managed by a property manager agreed on between the applicants and the first respondent and the rent be deposited in an interest earning account in the names of the advocates on record for the applicants and the 1st respondent with effect from 1st September 2024.
- c. That the 1st respondent do furnish the applicants with accounts of the loan and interests outstanding at the time of sale of the property LR Ruiru/Kiu Block 3/960 as well as the accounts for proceeds of the said auction.

120. That the costs of this application do abide in the suit.

121. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 20TH DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

