Mwangi t/a Quinam Investments Limited & another v Equity Bank Kenya PLC & another (Civil Case E017 of 2024) [2024] KEHC 16210 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16210 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL CASE E017 OF 2024

FN MUCHEMI, J

DECEMBER 19, 2024

BETWEEN

NANCY WAMBUI MWANGI T/A QUINAM INVESTMENTS LIMITED ..... PLAINTIFF

AND

ANTONY MUITA JOHNSON ..... APPLICANT

AND

EQUITY BANK KENYA PLC ..... 1ST DEFENDANT

GRACE MAINA T/A SUNLIGHT AUCTIONEERS LIMITED . 2ND DEFENDANT

RULING

Brief facts

1. The application for determination dated 16th July 2024 seeks for orders of an injunction restraining the defendants, their servants and/or agents from selling by private treaty or public auction, leasing, entering into occupation, trespassing or interfering with all that parcel of land known as premise 670 on LR. No. 28239 located at Thika Greens within Kiambu County until the hearing and determination of the suit.

2. In opposition to the application, the respondents filed Grounds of Opposition dated 15th August 2024 and Replying Affidavit dated 23rd August 2024.

The Applicants' Case.

3. The 1st applicant states that on 14th March 2022, she took out a loan from the 1st respondent for a sum of Kshs. 43,400,000/- secured by property known as premises no. 670 on LR. No. 28239 located in Thika Greens within Kiambu County.

4. The 1st applicant avers that she was served with a redemption notice and notification of sale dated 23rd April 2024 by the 2nd respondent informing the applicants of the intention to sell the suit property by way of public auction after the expiry of 45 days which expired on 8th June 2024. Upon perusal of the notification of sale and redemption notice issued by the 2nd respondent, the applicants state that they refer to premise 670 of LR. No. 28339 whereas the property in dispute as captured in the letter of offer dated 14th March 2022 is premise 670 on LR. No. 28239 hence contradictory, misleading and defective.

5. The 1st applicant avers that neither the 2nd applicant nor herself were issued with the 90 days and 40 days statutory notices as required by law. Furthermore, the applicants aver that the valuation of the suit property was only undertaken when the loan facility was being issued which is contrary to Section 97 of the Land Act. The applicants further state that the notification of sale by the 2nd respondent does not indicate the market value or the forced sale value contrary to Rule 11(b)(x) of the Auctioneers Rules and therefore the scheduled auction is defective.

6. The applicants state that the suit property was advertised for sale via auction on 19th July 2024 vide an advertisement dated 3rd July 2024.

7. The applicants argue that they have a right to redeem the property and the lack of proper notices within the proper timelines impedes their statutory right of equity and redemption which is further sought to be foreclosed through an auction slated for 19th July 2024.

8. The applicants further state that if the auction is allowed to proceed as is, they shall be exposed to suffer great prejudice and loss as there is a rebuttable presumption that the property will be sold at a price that is less than the current market value and against the Auctioneer Rules. Furthermore, the applicants state that they shall suffer irreparable loss incapable of compensation by way of an award by damages as the property constitutes their matrimonial home for the last ten years.

9. The applicants argue that the 1st respondent's exercise of statutory power of sale is illegal, null and void ab initio for want of compliance with Sections 90 and 97 of the Land Act and the Auctioneer Rules, thus ought to be set aside.

10. The applicants are apprehensive that unless the orders sought are granted, the 2nd respondent will proceed with the auction causing prejudice and substantial loss to them. The applicants further state that they have made steps towards clearing the arrears with the involvement of the 1st respondent by disposing off other properties to clear the loan arrears arising from the loan amount.

11. The applicants argue that they have a prima facie case with high chances of success.

The Respondents' Case.

12. The respondents state that on 14th March 2022, the 1st respondent advanced its credit facilities to the 1st plaintiff for a sum of Kshs. 43,400,000/-. The loan facilities were granted against the collateral security over premises number 670 erected on LR No. 28239 Thika Greens furnished by the guarantors, the plaintiffs by way of First and Further Legal Charge and also their personal guarantee, as such director of the borrower and charger and the legal charges were duly registered.

13. The respondents aver that sometime in August 2022 the 1st plaintiff started experiencing loan repayment challenges and abandoned servicing the loan. Upon default by the borrower, the 1st respondent issued demand notices to the borrower and the plaintiffs which they responded to by seeking indulgence.

14. The respondents state that around 22nd September 2023, the borrower applied to the 1st respondent for rescheduling of the credit facility, which the 1st respondent agreed to in the following terms, facility 1; the outstanding amount of Kshs. 20,254,735.70/- as at 24/10/2023 in loan account number 0090584XXXXXX be repaid in lump sum within 120 days and facility 2; the outstanding amount of Kshs. 4,429,006/- as at 24/10/2023 in loan account number 0090584505417 be repaid in lump sum within 120 days or upon receipt of payment, whichever is earlier.

15. The respondents aver that the borrower has not cleared its loan with the 1st respondent but has instead diverted its business proceeds elsewhere. Furthermore, the plaintiffs have admitted default of payment of the loan which stands at Kshs. 35,101,165.70/- as at 25/7/2024 and it continues to accrue interest and other professional charges.

16. The respondents state that the 1st respondent issued and served upon the borrower and the plaintiffs with a demand and statutory notice under Section 90 of the Land Act dated 23rd October 2023. The respondents further issued and served upon the borrower and the plaintiffs with a 40 days redemption notice under Section 96(2) (3) of the Land Act dated 26th February 2024.

17. The respondents argue that the borrower and the plaintiffs still continued to default payment and failed to redeem the charged property before lapse of the statutory notice periods thus the 1st respondent's statutory right to realize the charge crystallized and became exercisable. Consequently, on 18th April 2024, the 1st respondent issued instructions to the 2nd respondent to realize the charge and sell by public auction the charged property erected on LR No. 28239.

18. The respondents state that the 2nd respondent issued a 45 days redemption notice and notification of sale both dated 23/4/2023 which were served upon the plaintiffs and the borrower. The charged property was scheduled to be sold in a public auction set on 19th July 2024 and the intended sale notified in an advert in the local newspaper. However the sale could not tale place as the plaintiffs approached the court and were favoured with a court order issued on 18th July 2024 halting the sale.

19. The respondents argue that the allegations made by the plaintiffs in their affidavit are false, made in bad faith and calculated to mislead the Honourable court. The plaintiffs are undeserving of the equitable remedies sought as the realization process has been within the knowledge of the plaintiffs and the exercise is being carried out within the parameters of the law. Furthermore, the plaintiffs have always been furnished with the bank statement which reflects the status of the borrower's loan account.

20. The respondents aver that before the 1st respondent issued instructions to the 2nd respondent to realize the charge, the 1st respondent had commissioned M/s Acumen Valuers Limited, an independent valuer to undertake the valuation of the said property with a view to establish the reserve price. The valuer established the market value of Kshs. 33 million and the forced sale value to be Kshs. 24,750,000/-. Thus, the 1st respondent states that it bench marked the reserve price relying on the independent valuation report submitted to it by the valuer.

21. The respondents aver that the plaintiffs and the borrower are the ones in breach of the lending contract in failing to discharge their obligation by defaulting payment of the loans, a breach which they have acknowledged in writing but failed to remedy.

22. The respondents state that once a property is offered as security, it becomes a commodity for sale and there is no commodity of sale whose loss cannot be compensated adequately in damages. Thus, the applicants' case can only lie in damages if any.

23. The respondents aver that the 1st respondent has a statutory right to sell the charged property and there is nothing illegal barring it from exercising that right. The plaintiffs charged the suit property as guarantors with the full knowledge and understanding that should the borrower default in the loan repayment, the charged property would be sold to answer the debt outstanding.

24. The respondents state that they have not sought the bank's consent to sell by private treaty, the property LR. No. MN/1/14798.

25. The respondents state that the plaintiffs are abusively using the court process to frustrate and obstruct the 1st respondent in realizing the charge by bringing the instant case. The respondents urge the court to direct the plaintiffs to deposit the sum of Kshs. 35,101,165.70/-.

26. The respondents aver that if the orders sought are granted, it will create more hardship to the 1st respondent rather than create an advantage to the plaintiffs, as it has already embarked in the realization process, advertised for sale, incurred charges and will deprive the 1st respondent of its chargee's interest in the suit property and the statutory right of sale, provided under the Land Act. The 1st respondent further states that it will be immensely prejudiced as it has to meet a sum of Kshs. 375,000/- expended in arranging the auction, including the auctioneer's fees and advertisements carried in the print media, leaving the 1st respondent with an unwarranted exposure of Kshs. 375,000/-, which costs accumulate the amount owing by the borrower and may become irrecoverable if they further escalate.

27. The respondents argue that the plaintiffs have not made a prima facie case nor furnished an undertaking as to damages and payment of the auctioneer charges to warrant being granted the orders sought. The respondents further state that the 1st respondent is a banking institution with vast resources and therefore capable to compensate the plaintiffs in damages if any may be found due, as the value of the suit property is known and quantifiable.

28. The applicants filed a Supplementary Affidavit dated 9th September 2024 and state that it beats logic why the 1st respondent would send the demand notice via postal service as against personal service when their physical address and telephone numbers are known to the 1st respondent and has been the normal mode of service of all other notices from the respondents.

29. The applicants further state that the postal address 29 Maragua is for the Catholic Diocese of Murang'a Ichagaki Parish which they utilize and upon receipt of any correspondence, the respective recipients are notified and called upon to collect the correspondence from the church registry. The plaintiffs further state that they have perused the church register on all correspondences received and have established that there weren't any correspondences sent in their names or the borrower's name. the applicants aver that all previous correspondences have been sent to their email address or personally delivered to them and therefore the respondents by sending the notices via registered post is a ruse to keep the notices from reaching them.

30. The applicants argue that a certificate of postage is not proof or confirmation of receipt of the statutory notices as service takes effect after they have received or collected the registered mail from the Postal Corporation of Kenya. Furthermore, it is incumbent upon the 1st respondent to ensure that the registered mail sent through registered post is received and present evidence of receipt and the date it was collected or received.

31. The applicants aver that the valuation report dated 5th July 2024 was never availed to them before and therefore they could not ascertain the value of the property or even the forced sale value. The applicants state that the respondents have a duty under Section 97 of the Land Act to obtain the best price reasonably obtainable at the time of sale and therefore required to ensure a forced sale valuation is

obtained. Further under Rule 11(b)(x) of the Auctioneers Rules, a professional valuation of the reserve price must be carried out no more than 12 months prior to the proposed sale. Thus the applicants argue that the notification of sale and advertisement by the 2nd respondent does not capture any amount and as such if the public auction is allowed to proceed it will be prejudicial to them.

32. The applicants further state that the 1st respondent is perpetuating illegalities with a view of gaining an advantage and auction off their property irregularly.

33. The respondents filed a Further Replying Affidavit dated 14th October 2024 and state that they had the option to effect service through registered post. Furthermore, the respondents state that the applicants disclosed the postal address 29 Maragua as their personal address and not under the care of the Catholic Diocese of Muranga, Ichagaki Parish.

34. The respondents argue that the letter dated 6th September 2024 by the Catholic Diocese of Muranga states that the mail or documents pertaining to the applicants were not retrieved from the rental box, by the church. However, no reason or explanation has been given by the church why they were not retrieved.

35. The respondents state that when the applicants failed to receive the letters from the said rental box, they were returned to the sender with the remarks "unclaimed RTS".

36. The respondents argue that the certificate of postage upon issuance of the post master is an indisputable evidence that the correspondence was duly received at the post office for mailing to the addressee. It is the duty of the addressee to receive or reject the mail and one cannot tell the content of mail unless it is accepted and opened but the applicants declined the letters and they were returned to the sender unclaimed.

37. The respondents state that the valuation report was prepared on the instruction of the bank in keeping with the law and the applicants did not call for a copy or show interest in it. Further, the 1st respondent states that the reserved price is not statutorily required to be captured in the notification of sale and the advertisement placed in the newspapers and puts the applicants to strict proof. The respondents argue that the advertisement merely gave a notice to the effect that the sale is subject to a reserve price which price cannot be disclosed to the participating bidders or the entire world so as to encourage competitive bidding and secure the best price achievable. The auctioneer accepts the bids subject to his discretion guided by the reserve price set.

38. Parties disposed of the application by way of written submissions.

The Applicants'/Plaintiffs' Submissions

39. The applicants rely on the cases of Giella vs Cassman Brown & Company Ltd (1973) EA 358 and Moses C. Muhia Njoroge & 2 Others vs Jane W. Lesaloi & 5 Others High Court ELC Case Number 514 of 2013 and submit that they have a prima facie case with high chances of success. The applicants argue that the respondents are unjustly trying to auction their property to realize the outstanding loan without issuing the requisite statutory notices to the applicants and their guarantors in line with the Land Act. Further, the 1st respondent has breached its duty of care to them in failing to ensure that a forced sale valuation has been undertaken before the property is advertised for sale by way of public auction.

40. The applicants further submit that the notices are defective as they reference LR No. 28339 whereas the property charged is LR. No. 28239. The applicants argue that the line of communication between them and the 1st respondent was through their telephone number and physical service at their physical

address but the 1st respondent deviated from the normal method of service to registered post. Further, the notices sent via registered post were never received at P.O. Box 29 Maragua and neither did the guarantors or the borrower receive any of the notices contrary to Section 96(1) of the Land Act.

41. The applicants rely on Rule 15 of the Auctioneers Rules and submits that the erroneous notification of sale issued by the 2nd respondent dose not indicate a value of the property. The applicants thus submit that compliance with the prerequisites with regard to correctness of the notices and service thereof was mandatory and noncompliance with the prerequisites rendered the entire process undertaken by the 1st respondent to realize the security invalid.

42. The applicants submit that they stand to suffer irreparable loss as the property to be auctioned is their matrimonial home where they have lived together as husband and wife for over ten years. Further, there are glaring discrepancies in the notices allegedly served by the respondents on the property to be auctioned and the applicants submit that their equity right of redemption will have been denied. The applicants argue that the injunctive orders will serve to preserve the suit property to avoid the instant suit being rendered nugatory and also avert their further harassment. The applicants submit that the respondents can be adequately compensated by way of damages if they are successful.

43. The applicants rely on the cases of Jan N. Elsen vs Herman Philiphs Steya also known as Hermannus Philiphs Steyn & 2 Others [2012] eKLR and Kenleb Cods vs New Gatitu Services Station [1990] KLR 557 and submit that the balance of convenience lies in their favour. The applicants further submit that they have in full disclosure admitted to the outstanding debt but they have proven that there are discrepancies and failure to serve mandatory notices as per the Land Act. The erroneous notices and subsequent failure to serve the same will deny them their right to try and redeem the property. The applicants further state that they have taken steps working towards clearing the outstanding loan amount with the involvement of the 1st respondent where they are disposing off other properties to clear the loan arrears.

The Respondents'/Defendants' Submissions

44. The respondents rely on the cases of Giella vs Cassman Brown & Co. Ltd [1973] EA 358 and Mrao Ltd vs First American Bank of Kenya & 2 Others (2003) KLR 123 and submit that the applicants have not established a prima facie case with high chances of success as they have shown that they served the applicants with the statutory notices in strict compliance with the law. Further, the 2nd respondent effected service of the 45 days redemption notice and notification of sale upon the applicants through postal and personal service and advertised the sale in a local newspaper . the respondents submit that the applicants have not given any notice of change of address to the 1st respondent.

45. The respondents rely on Clause 42 of the Further Charge and submit that they sent the statutory notices to the applicants who declined to receive them and therefore the notices were returned to the sender with the remarks "unclaimed RTS". According to the respondent, it is applicants who chose not to accept the statutory notices.

46. The respondents argue that the 1st respondent was well within the law and contract when it opted to exercise its statutory right of sale over the suit property and release the charge. The applicants offered premises number 670 erected on LR. No. 28239 as security and a First and Further Legal Charge was created. Pursuant to Section 96 of the Land Act, the respondents submit that the applicants were served with the statutory notices after default of the loan advanced to the 1st applicant thus, the 1st respondent's statutory right of sale crystallized and became exercisable.

47. The respondents rely on the case of Priscillah Krobought Grant vs Kenya Commercial Finance Co. Ltd & 2 Others Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95) V.R) (unreported) and submit that a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a chargee from exercising its statutory power of sale. The respondents further rely on the case of Hosea Mundui Kiplagat vs Kenya Commercial Bank (2012) eKLR and submit that a guarantee is a continuing security and shall remain in force until the subject debt is satisfied. The respondents argue that the 1st applicant has an outstanding loan balance of Kshs. 35,101,165.70/- as at 25/7/2024 which continues to accrue interest and therefore the applicants should not be calling for stoppage of sale until they clear their debt in full.

48. The respondents submit that the 1st applicant admitted to its indebtness and confirmed the inability to pay back the loan even after the 1st respondent agree to accommodate the applicants and gave easier payment terms by extending the repayment period.

49. The respondents submit that they further engaged the services of M/s Acumen Valuers Limited to conduct a valuation over the charged property in line with Section 97(2) of the Land Act which valuation was done and report submitted on 6/7/2024. Thus, the respondents argue that in exercising their power of sale, they have complied strictly with the laid down laws.

50. The respondents submit that the applicants voluntarily offered property premises number 670 erected on LR. No. 28239 as collateral security with full knowledge and understanding that in the event of default of repayment of the loan, the charged property would be sold to answer the debt outstanding. Relying on the cases of Bii vs Kenya Commercial Bank Limited (2001) KLR 458 and Sammy Japheth Kavuku vs Equity Bank Limited & Another [2014] eKLR, the respondents argue that once a property is offered as security, it becomes a commodity of sale whose loss can be quantified and compensated adequately in damages. Thus, the value of the charged property being ascertainable, the applicants can be compensated in damages if any.

51. The respondents submit that the applicants have not given an undertaking as to damages nor offered any security for due performance.

52. The respondents rely on the case of Juma Muchemi vs AFC Milimani HCC No. 1265 of 2001 and submit that if the parties voluntarily intended that the credit facility was limited to 365 days, the 1st respondent had a right not to extend the period and the court must enforce that intention because it is not the court's duty to rewrite the contract but to enforce the parties' intention.

53. The respondents argue that if the injunctive orders sought are granted, the 1st respondent stands to suffer a disadvantage more than the applicants will gain an advantage. Thus, the balance of convenience rightly tilts in favour of the respondents.

54. The respondents further rely on the case of Kyangaro vs Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126 and submit that an injunction is an equitable remedy and a party seeking equity must come to court with clean hands which is contrary to the applicants as they seek to vary the terms of the charge thereby grating them a clean slate free from the consequences of persistent default of payment of the credit facility. The applicants remain guilty of indolence and in breach of the lending contract despite the numerous opportunities afforded to them to redeem the charged property. The respondents submit that the applicants are attempting to stop the 1st respondent from realizing the charge which is a legal process and therefore this is an act of abuse of the court process.

55. The applicants filed Supplementary written submissions dated 14th November 2024 and submit that the respondents have not denied that the normal mode of service has been physically and through

their telephone numbers. The applicants further submit that there is undisputed proof that the notices alleged to have been served to them were never served as the respondents were aware all along that the notices were never delivered and were returned to the sender but have not made any effort to serve the notices again to them. The applicants therefore argue that the respondents are unjustly trying to auction their property to realize the outstanding loan without issuing the requisite statutory notices to the applicants and the guarantor in line with the Act. The applicants submit that the respondents having confirmed that they were never served have now established a prima facie case.

56. The applicants rely on the cases of Elizabeth Wambui Njuguna vs Housing Finance Co. of Kenya Ltd [2006] eKLR and HCCC No. 1678 of 2001 (Milimani) Samuel Kiarie Muigai vs Housing Finance Co. Kenya Ltd & Another and submit that the failure by the respondents to serve them with the requisite statutory notices is an irregularity that is fatal to the respondents' exercise of its statutory power of sale. The applicants further argue that the respondents have not alluded to any further steps taken to regularize service of the statutory notices once they were returned to the sender. Thus, the applicants argue that they were never served and neither were the guarantors served with the statutory notices.

57. The applicants submit that the process of realizing the outstanding loan amount is tainted with illegality, irregularities and inconsistencies.

Issue for determination

58. The main issue for determination is whether the applicants have met the requisite conditions to warrant the granting of a temporary injunction.

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

59. 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.

60. Similarly, in Dr. Simon Waiharo 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

61. 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."

62. It is not disputed the 1st applicant took a credit facility with the 1st respondent. Further, the applicants do not dispute that they are in arrears of the said loan facility. The applicants' bone of contention is that the 1st respondent did not serve them with the requisite notices, that the 1st respondent failed to carry out a valuation before putting up the suit premises up for sale and that the notices are defective as they refer to premises number 670 on LR. No. 28339 as opposed to LR. No. 28239.

63. 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.

64. 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.

65. 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.

66. 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 Nyagilo 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.

67. On perusal of the documents, the three-month statutory notice under Section 90(1) and (2) dated 23rd October 2023 has been addressed to the applicants vide a postal address P. O. Box 29-10205 Maragua. The certificate of posting shows that the said notice was sent to the applicants on a similar address. The forty days' notice to sell under Section 96(2) of the Land Act dated 26th February 2024, has been addressed to the applicants vide postal address P.O. Box 29-10205 Maragua. The certificate of posting also shows that the said notice was sent to the applicants on a similar address.

68. The 45 days redemption notice and notification of sale were addressed to the 1st applicant as Quinam Investment Limited with her address as P.O. Box 29 Maragua. Further, the 2nd respondent, a licensed auctioneer swore an affidavit stating that she served the applicants at Thika Greens Resort on 24th April 2024 and further sent the said notices vide registered mail to Quinam Investment Limited. The 2nd respondent however failed to prove service to Quinam Investment Limited as she did not annex any certificate of posting.

69. The Letters of Offer dated 14th March 2022 provide in Clause 14 that:-

A notice or demand for payment by the Bank under this Letter shall be deemed to have been properly served on the Borrower and/or Guarantor if issued through any one of the following means:-

a. If delivered by hand or sent by registered post the Borrower and/or Guarantor shown in section A of this letter or at the registered offices or any of the principal places of business of the Borrower in Kenya. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by registered post, five (5) days after the date of posting (notwithstanding that it be undelivered or returned undelivered). Where a notice or demand is sent by registered post it will be sufficient to prove that the notice or demand was properly addressed and posted.

b. By electronic media including phone, SMS, email, internet or other convenient means as notified to the Bank by the Borrower and/or Guarantor or;

c. Through print media by a notice published in two local dailies of nationwide circulation in Kenya.

70. The Charge and Further Charge indicates in Clause 34.6 and 42 respectively that:-

> Any notice required or authorized by law or by this Charge shall be deemed to have been properly served by the Chargee on the Chargors and/or Borrower if served on any one of the directors or on the secretary of the Borrower or delivered to the chargors and/or the Borrower at his/its registered office or at any of its principal places of business in Kenya or sent by registered post to its last known postal address or left at the Charged property or sent by telex or facsimile to the Chargors 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 am 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.

71. In light of the above it is evident that the 1st respondent did not effectively serve the statutory notices upon the applicants. The respondents did not prove by certificate of posting that the 2nd respondent served the 45 days redemption notice and notification of sale upon the borrower Quinam Investment Limited. It is therefore my considered opinion that based on failure to serve the 45 days redemption notice and notification of sale, the applicants have demonstrated a prima facie case. Having found that the requisite notices were not served upon the applicants, it is my considered view that the 1st respondent could not exercise its power to sell the charged property as the right to sell had not accrued.

72. The applicants further submitted that the 1st respondent did not carry out a valuation of the suit property before putting up the property for sale by public auction. 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.

73. The importance of undertaking a forced valuation was explained in the case of Koileken Ole Kipolonka Orumos 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."

74. The 1st respondent annexed a valuation report dated 4th July 2024 which set out the market value as Kshs. 33million and the forced sale value as Kshs. 24,750,000/-. As such, the 1st respondent discharged its duty under Section 97 of the Land Act by ensuring that forced valuation was established by the valuer.

75. The applicants further argued that the said notices were defective as they quoted the wrong land reference number. On perusal of the record, the 90 days statutory notice, 40 days' notice to sell, 45 days redemption notice and notification of sale all refer to the property as Premises number 670 on LR No. 28339 (Original No. 13131) Thika Greens. It is evident that the suit property is LR No. 28239 and further the applicants have not denied that they put up the suit property as collateral security over the loan. The only discrepancy is on the number 3 which cannot be said to make the notices defective as the premise number and the original title is okay and further the applicants have not denied that they put up their suit property up for collateral. Furthermore, the notice does not relate to a property that they possess which could cause confusion. It is clear that number 3 is a mere error on the respondents' part which does not make the notices defective. Neither does it absolve the applicants from liability under the charge.

76. Based on the failure to effect proper service upon the applicants, it is my considered opinion that the applicants have established a prima facie case.

Irreparable Injury

77. 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."

78. 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."

79. In my view, the applicants have 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 suit property is their matrimonial home for over 10 years.

80. The law is clear that once a property is offered as security it becomes a commodity of sale. It is therefore my considered view that the applicants have not shown that they stand to suffer irreparable harm. However, since the court has established that the respondents did no serve the applicants with the requisite notices, in the event that the sale by public auction was to proceed irreparable harm would be caused to the applicants.

Balance of Convenience Test

81. 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 inunction will be greater than which is likely to arise from granting it.

82. It is my considered opinion that the balance of convenience tilts in favour of the applicants because the inconvenience likely to be caused to them will be much greater than that caused to the respondents should the court finally find that the respondents did not serve the requisite notices before the 1st respondent exercised its statutory power of sale. Thus the balance of convenience tilts in favour of the applicants.

Conclusion

83. I thus opine that the applicants have met the threshold as set out in the case of Giella vs Cassman Brown and therefore an injunction ought to issue in their favour.

84. Consequently, the application dated 16th July 2024 has merit and is hereby allowed in the following terms: -

    a. That orders of injunction to issue restraining the defendants, their servants and/or agent from selling by private treaty or public auction, leasing, trespassing or interfering with premises 670 on L.R. No. 28239 located at Thika Greens within Kiambu County until the hearing and determination of this suit.

b. That the applicants shall within 45 days deposit a sum of KSh.500,000/= in the 1st respondent's bank account to meet the costs incurred by the 1st respondent in the events leading to the institution of this suit.

c. The applicants shall continue servicing the loan as per the agreement of the parties pending the hearing and determination of this suit.

85. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE