



REPUBLIC OF KENYA



KENYA LAW
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**Githinji v Kenya Commercial Bank Limited & another (Civil Case
E006 of 2021) [2023] KEHC 333 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE E006 OF 2021
FN MUCHEMI, J
JANUARY 26, 2023**

BETWEEN

MARTHA WANJIRU GITHINJI PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

GEORGE WAMARIU NDUMIA 2ND DEFENDANT

RULING

1. This application dated 26th July 2021 is brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 40 Rule 1, 2, 3, 7 and 10 and Order 51 Rule 1, 2 and 3 of the Civil Procedure Rules seeking for orders of an injunction to restrain the 1st respondent from exercising its statutory powers of sale, selling or advertising for sale or dealing in any manner, land parcel Tetu/Unjiru/1456 and the 2nd respondent from selling land parcel Tetu/Unjiru/1457 or any portion of the same pending the hearing and determination of the suit.
2. The respondents opposed this application through separate affidavits sworn on October 7, 2021 and September 30, 2021 respectively.

The Applicant's case

3. The applicant states that she borrowed a loan facility of Kshs.11,500,000/= from the 1st respondent on September 18, 2015 for purchase of L.R No.tetu/Unjiru/1456 and Tetu/Unjiru/1457 for consideration of Kshs. 13,500,000/-. The applicant avers that in considering her loan application, the 1st respondent carried out a valuation on the suit properties vide Acumen Valuers Ltd which reported that the market value of land parcel Tetu/Unjiru/1456 was Kshs. 15 million whilst its forced sale value was Kshs. 11,250,000/- whereas land parcel Tetu/Unjiru/1457 was Kshs. 8,500,000/- whilst its forced sale value was Kshs. 6,375,000/-. Pursuant to the loan agreement, the security for the loan amount of



- Kshs. 11,500,000/- was the two suit properties which were valued by Acumen Valuers Ltd for Kshs. 23.5 million. On March 21, 2016, the transactions were completed and the applicant became the charged the properties registered owner.
4. The applicant states that she serviced the loan without any problems between March 2016 and early 2017 till the government suspended the harvesting of trees in January 2017 causing consequential damage to her timber business which eventually collapsed. The applicant further contends that in 2017 she sought to sell land parcel Tetu/Unjiru/1457 after sub dividing it into 8 plots and that she had sought from the 1st respondent permission to sub divide the land parcel but the 1st respondent did not grant her request in writing.
 5. The applicant further contends that she entered into an oral agreement with the 2nd respondent to purchase land parcel Tetu/Unjiru/1457 at a consideration of Kshs. 8 million. The oral agreement was replaced by a written agreement dated April 2019. Pursuant to the written agreement, the applicant states that the 2nd respondent made some payment instalments of the total purchase price through her bank account with Equity Bank.
 6. The applicant states that the respondents were working together to defraud her of her property. The 1st respondent arranged for a fraudulent sale to be conducted and the valuers, Trans Country Valuers valued the property at a market value of Kshs. 4 million and a forced sale value of Kshs. 3 million. The applicant further avers that at the duration of time from the initial valuation in 2015 and the valuation carried out in 2019 which is a period of 4 years, the value of the property decreased tremendously which is not understandable. Furthermore, she conducted her own valuation through Rwingo Valuers and they established the forced sale value of the said property as at July 2019 was Kshs. 6,075,000/-.
 7. The applicant further states that the advertisement for the sale indicated that the said land parcel was to be sold in September and October 2019. The applicant further states that the certificate of the purported sale issued by the 1st respondent's auctioneers did not indicate when the sale of that property at the price of Kshs. 3,100,000/- took place.
 8. The applicant states that the respondents defrauded her by trapping her and selling land parcel Tetu/Unjiru/1457 for Kshs. 3,100,000/- thus enabling the 2nd respondent to make a huge profit by sub dividing it and selling it in the form of one eighth acre plots. Further the respondents defrauded her by the 1st respondent selling land parcel Tetu/Unjiru/1456 fraudulently as it sold Tetu/Unjiru/1457 thus helping the 2nd respondent remove her from the neighbourhood of the suit properties. The applicant further avers that she has not been served with the 90 day statutory demand notice. She contends that she stands to suffer irreparable injury as she and her children will not have any home to live in if the property is sold.

The 1st Respondent's Case

9. The 1st respondent states that in September 2015, the applicant requested it to finance her in the purchase of property and brought an agreement of sale to the 1st respondent. The 1st respondent evaluated the application and granted a mortgage facility for a sum of Kenya Shillings Eleven Million One Hundred and Fifty Thousand (Kshs. 11,150,000/-) to the applicant to purchase land parcels Tetu/Unjiru/ 1456 and Tetu/Unjiru/1457. The 1st respondent issued a Letter of Offer and acceptance dated September 18, 2015 and the loan facility was secured by the collateral security in Title No. Tetu/Unjiru/1456 and Tetu/Unjiru/1457 by way of a First Legal Charge. Upon transfer being effected in favour of the applicant and the perfection of the securities done, the funds were drawn to the applicant's account and disbursed to the vendor and consequently the applicant utilized the facility.



10. In September 2016, the applicant applied to be granted by the 1st respondent a loan facility of Kenya Shillings Two Million (Kshs. 2,000,000/-) to finance working capital requirement for her business. The 1st respondent states that the same was approved and the applicant was issued with a Letter of Offer dated September 30, 2016. The applicant secured this second credit facility by the collateral security in Title No. Tetu/Unjiru/1456 and 1457 by way of further legal charge. The 1st respondent states that the additional facility brought the credit facilities granted to an aggregate sum of Kshs. 13,150,000/-.
11. The 1st respondent avers that the applicant defaulted in the payment of the loan together with interest and thus the bank was compelled to issue demand notices for payment of arrears outstanding at Kshs. 634,364.48/- as at August 9, 2018. The 1st respondent contends that at first, the applicant was issued with informal demands to which she responded by seeking indulgence and the 1st respondent issued the applicant with a demand notice dated August 9, 2018.
12. The 1st respondent argues that the applicant did not rectify the default within the notice period and consequently, the 1st respondent issued and served the applicant with the first statutory notice pursuant to Section 90(3) of the Land Act No. 6 of 2012 dated September 19, 2018 and advised her to settle the arrears which were outstanding at Kshs. 1,000,704.12/ as at August 24, 2018. The 1st respondent states that the notice did not elicit any response and it issued the applicant with the second statutory notice/redemption notice dated March 27, 2019 which notice was to lapse on May 8, 2019 by which the applicant had not regularized the account.
13. The 1st respondent states that its statutory right to realize the charges crystallized and became exercisable and the 1st respondent instructed M/s Mustan Auctioneers to realize and sell by public auction the charged properties. Consequently, the auctioneer issued the 45 day redemption notice and notification of sale and served the same upon the applicant.
14. The 1st respondent avers that the redemption notice discloses the suit property, it is addressed to the proprietor and the applicant was duly served with a proper statutory notice. The 1st respondent further avers that the notices were in strict compliance with Rule 15 of the Auctioneers Rules and the applicant was well aware of the 1st respondent's intention to realize the suit property.
15. The 1st respondent states that it instructed Transcounty Valuers Limited who carried out an independent valuation over the both properties and they established the market value of land parcel Tetu/Unjiru/1457 at Kshs. 4 million and recommended a forced sale value at Kshs. 3,000,000/-. The 1st respondent thereafter sold the said property during a public auction on October 24, 2019 to the 2nd respondent for Kshs. 3,100,000/-as indicated in the Memorandum of Sale dated 24th October 2019. As such, the 1st respondent states that the applicant's equity of redemption as regards land parcel Tetu/Unjiru/1457 was extinguished at the fall of the auctioneers hammer during the said public auction and the 1st respondent contends that the present application has been overtaken by events.
16. The 1st respondent avers that after the sale of land parcel Tetu/Unjiru/1457 and the proceeds thereof appropriated to the applicant's loan account, there was still an outstanding loan balance of Kshs. 9,806,658.95/- and arrears of Kshs. 3,150,390.27/- as at October 15, 2020. Despite several reminders to the applicant, she failed to heed to the notices prompting the 1st respondent to issue instructions to M/s Galaxy Auctioneers to realise the charge over the property Tetu/Unjiru/1456.
17. The 1st respondent states that the auctioneers served the applicant with 45 days redemption notice and notification of sale in respect of Title No. Tetu/Unjiru/1456. The 1st respondent states that the applicant failed to heed to the said redemption notice prompting it to advertise the charged property for sale and intends on selling it by public auction.



18. The 1st respondent contends that it has a statutory right to sell the charged property as the applicant charged the suit land, as a guarantor with the full knowledge and understanding that in the event of default, the charged property would be sold to service the debt. The 1st respondent further argues that the applicant is the one in breach of the lending contract in failing to discharge her obligation by defaulting payment, a breach which the applicant has acknowledged in writing and to date the default has not been remedied.
19. The 1st respondent further argues that the applicant has always been supplied with monthly bank statements and has been granted an explanation on any entry in the statement that required her explanation and thus she ought to be stopped from abdicating her legal obligations under the contracts. The 1st respondent argues that the applicant's act of obstructing the realization of the charges is by itself an act of dereliction of duty, geared to defeat the 1st respondent's interest in the charged properties and thus the court should decline to grant the injunction sought. Furthermore, the 1st respondent states that the applicant has constantly been in arrears as she has not been paying to the 1st respondent the whole monthly instalments of Kshs. 179,153/- to meet the principal and interest as required.
20. Contrary to the applicant's allegations that she has diligently been making repayments the 1st respondent contends that the applicant has diverted her business proceeds elsewhere and thus no funds have been getting into her account from October 2017 to date leading to accumulation of heavy arrears. The 1st respondent states that as at July 31, 2021, the first loan was outstanding at Kshs. 10,057,305.55/- while the second loan had a balance of 162,563.40/-.
21. The 1st respondent states that the applicant is abusively using the court process to frustrate and obstruct it in realizing the charge. The applicant has always had the knowledge of default of payment of the loan and indebtedness and thus she ought to be stopped from raising side issues.
22. The 1st respondent states 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. The 1st respondent further argues that if the orders sought are granted, it will create more hardship to it as it will deprive the 1st respondent its charge interest in the suit property, the statutory right of sale provided under the Land Act and the sum of Kshs. 10,219,868.95/-. Further, the 1st respondent states that it has incurred Kshs. 350,000/- for the auction scheduled on August 20, 2021 which was stopped before take-off vide a court order given on July 27, 2021 and thus all these costs accumulate the amount owing by the applicant and may become irrecoverable if they escalate to higher levels.
23. The 1st respondent states that the applicant has not demonstrated a prima facie case nor has she furnished an undertaking to damages to warrant being granted the orders sought and further the applicant acknowledges in writing being indebted to the 1st respondent. Moreover, the 1st respondent avers that it is a banking institution with vast resources and therefore capable to compensate the applicant in damages, if any may be found due, as the value of the suit property is known and quantifiable. Further, the 1st respondent states that the applicant's case could only lie in damages.

The 2nd Respondent's Case

24. The 2nd respondent states that pursuant to the mortgage facility letter dated September 18, 2015, the loan was to be repaid by making monthly instalments of Kshs. 179,153. Moreover, the 2nd respondent states that the applicant was not making regular loan repayments and the loan was in arrears at a sum of Kshs. 11,370,628.20/- as at July 10, 2019.



25. The 2nd respondent states that the 1st respondent in exercising its statutory power of sale afforded the applicant an equitable right of redemption which the applicant failed and having charged the suit properties, the 1st respondent had to recover the amount owed which had become due upon default.
26. The 2nd respondent avers that at no time was he duty bound to collect the sum of Kshs. 3,100,000/- for and on behalf of the applicant which formed part of the proceed of the sale of land parcel Tetu/Unjiru/1457 sold by public auction on October 24, 2019.
27. The 2nd respondent states that the applicant approached him and indicated that she was in arrears and had charged land parcels Tetu/Unjiru 1456 and 1457 with the 1st respondent to secure a sum of Kshs. 13,150,000/-. The 2nd respondent entered into a sale agreement with the applicant on April 5, 2019 for the sale of land parcel Tetu/Unjiru/1457 at a value of Kshs. 8 million. The 2nd respondent avers that at the execution of the agreement, he advanced Kshs. 4million to the applicant and the balance was to be paid upon the applicant executing all the requisite documents to facilitate the transfer of the said land to him. It was a term of the agreement, that the completion period shall be ninety days from the date of execution of the sale agreement which clause the applicant breached. Thus the applicant having defaulted and failed to honour the mortgage facility, the applicant was given 45 days redemption notice by Mistan Auctioneers starting from June 26, 2019 which the applicant failed to honour. The applicant was thereafter given a subsequent 45 days redemption notice by Mistan Auctioneers beginning July 18, 2019 which redemption notice, the applicant did not honour. As a result, the 2nd respondent contends that the 1st respondent duly exercised its statutory power of sale and advertised the suit property for sale.
28. The 2nd respondent states that having paid the applicant Kshs. 4 million and a further sum of Kshs. 200,000/- the applicant failed to offset the loan balance and it was not until October 7, 2019 that the 2nd respondent states that he saw an advert for sale by public auction in the Daily Nation for L.R No. Tetu/Unjiru/1457 which was scheduled on October 24, 2019. The 2nd respondent states that he bid for the property and upon the fall of the hammer he was declared the highest bidder and a certificate of sale issued. He avers that he paid a total of Kshs. 7,300,000/- towards the acquisition of land parcel Tetu/Unjiru/1457 and as late as January 14, 2020, the applicant through her advocates were demanding payment of Kshs. 700,000/-long after the auction had been conducted.
29. The 2nd respondent states that he has extensively developed the said land parcel which forms part of his matrimonial home and has sold part of the land to other third parties who are not parties to the suit herein and thus they are likely to be condemned unheard breaching the rules of natural justice.
30. In his Further Affidavit sworn on April 20, 2022 the applicant avers that the 1st respondent breached its duty to act honestly when exercising its statutory power of sale and failed to take reasonable precautions to obtain the true market value of the charged property. She further avers that the 1st respondent acted fraudulently in exercising its statutory power of sale and it failed to give her the 90 days' notice of its intention to exercise its statutory power of sale for no accompanying certificate of postage was shown by the 1st respondent. The applicant states further that the 1st respondent was wrong in selling the property to a person who had entered into a contract with her for the purchase of the same property. It was further reiterated that the 1st respondent sold the suit property at a much lower value to the 2nd respondent than its actual value and thus her indebtedness to the 1st respondent did not reduce substantially.
31. The applicant avers that she stands to suffer irreparably as she stands to lose her home whereas the 1st respondent is unlikely to suffer as it is a banking institution with vast resources and it will not collapse if the suit is heard and a proper reconciliation undertaken as to the amount she owes. The applicant



further states that she is willing to make the necessary loan repayments once a proper reconciliation is undertaken as to the actual amount owed in light of the lower valuation. Moreover, the applicant states that she has continued to service the loan to the best of her ability.

32. The applicant avers that in respect of the charge statutory notice dated September 19, 2018, the 1st respondent used the wrong postal address which differs with the one in the charge and all the correspondence exchanged between her and the 1st respondent. The applicant further states that the certificate of posting in respect of the statutory notice dated March 27, 2019 does not set out the actual address of the intended recipients but refers to listed letters.
33. The applicant states that the 2nd respondent is not a bona fide purchaser for value as he was not present when she applied for and was granted the loan and when she allegedly defaulted. It was further stated that the 2nd respondent does not deny that they had initially entered into a verbal agreement for the sale of the charged property in 2018 which was only formalized by a written contract on April 5, 2019. The applicant further contends that if the 2nd respondent had cleared the payment within 90 days as per the said agreement, she would have been able to reduce her indebtedness to the 1st respondent and organized to pay the remaining amount as proposed in her letter. The 2nd respondent failed to pay the purchase price and as a result, the 1st respondent sought to exercise its statutory right of sale. The applicant also avers that by the 2nd respondent paying Kshs. 3,100,000/- at the auction, was not a coincidence considering the 1st respondent's valuer in 2015 had valued the same property at a market value of Kshs. 8,500,000/- and its forced sale value at Kshs. 6,375,000/-. As such, the applicant states that there can be no reasonable explanation for the depreciation in value between 2015 and 2019 when the property was subjected to sale by public auction.
34. The applicant avers that the 1st respondent did not exercise a duty of care to obtain the best price reasonably obtainable at the time of sale while selling the charged property and thus she is entitled to damages from the forced sale of land parcel Tetu/Unjiru/1457 and for the damages to be utilized to offset her indebtedness to the 1st respondent.
35. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

36. The applicant relies on the cases of *Giella vs Cassman Brown* (1973) EA 358 and *Jan Bolden Nielsen vs Herman Phillipus Steyn* also known as *Hermannus Phillipus Steyn & 2 Others* (2012) eKLR and submits that she has met the threshold to warrant the grant of the orders of an injunction. The applicant further relies on the case of *Mrao vs First American Limited and Others* (2003) KLR 125 and submits that she has made a prima facie case. She further submitted that she was never served with the statutory notices in respect to land parcel Tetu/Unjiru/1457. As demonstrated in her affidavits, the applicant relies on the cases of *Moses Kibiego Yator vs Eco Bank Kenya Limited* [2014] eKLR and *Bhagwani Singh Kalsi vs National Housing Corporation* [2018] eKLR and submits that the statutory notice dated September 19, 2018 was sent to the wrong address in Nairobi while her address in the charge and all the correspondence between her and the 1st respondent has been in Nyeri. Further, the certificate of posting annexed at page 54 refers to the posting of 47 listed letters however no addresses of the said 47 letters has been annexed. Moreover, the list of letters to be dispatched refers to 37 letters and not 47 letters as alleged in the certificate of posting.
37. The applicant further submitted that the 1st respondent did not issue her with the 90 days' notice of its intention to exercise its statutory power of sale contrary to what was stipulated in the cases of *Trust*



Bank Ltd vs Eros Chemist & Another [2000] eKLR and Nyagila Ochieng & Another vs Fanuel B. Ochieng & 2 Others [1996] eKLR.

38. The applicant further submits that in respect of the 2nd statutory notice, the correct address was used but the certificate of posting is the same exact one as in respect of the first statutory notice. Additionally, whilst the statutory notice is dated March 27, 2019, the stamp on the certificate of posting dates September 29, 2018 which is eight months prior to the issuance of the certificate of posting. It further does not enclose the list of letters which were being dispatched which are stated a 47 listed letters however the list of letters to be sent out from the 1st respondent's legal department only makes reference to 14 letters. The applicant submits that evidently, she was never served with the statutory notices prior to the purported sale of land parcel Tetu/Unjiru/1457. The applicant further relies on the case of Lorna Catherine Phillips vs I & M Bank Limited & Another [2017] eKLR and that it is difficult for the court to determine whether there was proper service and thus it may be necessary for the 1st respondent to tender further evidence at trial.
39. The applicant relies on the cases of Mbuthia vs Jimba Credit Finance Corporation & Another [1988] eKLR and Palmy Company Limited vs Consolidated Bank of Kenya Ltd [2014] eKLR that there is an excessive decrease in the value of the land parcel Tetu/Unjiru/1457 which was valued in 2015 at a market value of Kshs. 8.5 million and a forced sale value of Kshs. 6,375,000/- however the property was sold in 2019 for Kshs. 3 million which is a decrease of Kshs. 3,375,000/-. Moreover, the applicant submitted that she undertook a valuation of the property in 2021 through Rwingo Valuers and found out that as at July 2019 the property would have a market value of Kshs. 8.1 million and a forced sale value of Kshs. 6,075,000/-. As such, the applicant submits that the sale of the said property for Kshs. 3 million based on the 1st respondent's valuer was an undervaluation whose effect was to deprive her off her investment and saddle her with an increasing loan amount which was barely offset by the sale of her property. To support her contentions, the applicant relies on the cases of Levi House Construction & Engineering Ltd vs ABC Bank & Another [2021] eKLR and Mosioma vs Housing Finance Co. Ltd & 3 Others [2021] KEHC 72 (KLR).
40. The applicant contends that as the 1st respondent failed to serve her with the required statutory notices, the intended sale in respect to land parcel Tetu/Unjiru/1456 is premature.
41. The applicant refers to the cases of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR and Stars & Garters Restaurant vs National Bank of Kenya [2019]eKLR and submitted that she stands to suffer irreparable injury as land parcel Tetu/Unjiru/1456 shall be sold in noncompliance with the law as the applicant has demonstrated that she was never served with the statutory notices in respect of land parcel Tetu/Unjiru/1457 and further the said land parcel was sold at an undervaluation without any reasonable explanation. Thus she contends that if the land L.R No. Tetu/Unjiru/1456 is sold in noncompliance with the law, it cannot be recovered and she cannot be compensated by way of damages.
42. The applicant further submits that although the 2nd respondent stated that he has sold portions of L.R. No. Tetu/Unjiru/1457 to third parties he has not provided any proof of the same and thus urges the court to draw an adverse inference that there has been no purported sales. The applicant relies on the case of Kenya Akiba Micro Financing Limited vs Ezekiel Chebii & 14 Others [2012] eKLR contending that he who alleges must prove. As such, the applicant argues that she will be rendered homeless if the injunction is not granted.
43. The applicant submits that she has met the first two grounds required for the granting of an injunction and therefore does not need to demonstrate that the balance of convenience tilts in her favour. In any event, the applicant relies on the case of Stars & Farter Restaurant (supra) and submits that the 1st



respondent still has the security provided by the applicant and its fear that the interest on the loan may outstrip the value of the suit property would be taken care by the orders to be issued by the court.

44. The applicant further submits that the court ought to do justice to the parties before it and that the interest of the parties must be balanced. The applicant further relies on the case of *E. Muriu Kamau & Another vs National Bank of Kenya* [2009] eKLR and submits that the 1st respondent has not demonstrated what damage or hardship it would suffer if the injunction is granted whereas the 2nd respondent did not prove that he has sold portions of the suit property to third parties whereas the applicant stands to lose her lifetime investments and rendered homeless if the orders sought are not granted.
45. The applicant refers to the cases of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & Others* [2014] eKLR and *Republic vs Communication Authority of Kenya & Another ex parte Legal Advice Centre aka Kituo Cha Sheria* [2015] eKLR and submits that costs ought to be awarded to her as she was constrained to file an application for an injunction because the 1st respondent did not comply with the law in selling her property and sold her property to the 2nd respondent at an undervalue price of 3million. Further, the 1st respondent advertised for sale land parcel Tetu/Unjiru/1456 without serving any statutory notices and was about to sell the same prior to the issuance of the interim orders herein.

The 1st Respondent's Submissions

46. The 1st respondent relies on the case of *Giella vs Cassman Brown & Co. Limited* [1973] EA 358 and submits that the applicant has not satisfied the conditions to warrant her the orders sought. On the issue of a prima facie case, the 1st respondent relies on the case of *Mrao Limited vs First American Bank of Kenya & 2 Others* (2003) KLR 123 arguing that the applicant has not demonstrated that she has a prima facie case with a probability of success. The 1st respondent argues that the relationship between them and the applicant is contractual based on the Letters of Offer dated September 18, 2015 and September 30, 2016 and the charge and further charge. The applicant entered into the contract voluntarily and therefore if and when the 1st respondent's right to exercise the statutory power of sale arose due to default by the applicant, the court ought to enforce that intention as it is not the court's duty to rewrite the contract between the parties.
47. The 1st respondent submits that it was well within the law and contract to exercise its statutory right of sale and the applicant by signing the lending contract knew and consented to the 1st respondent's right to exercise its power of sale in the event of default of payment of the loan. Furthermore, the applicant has admitted to being indebted to the 1st respondent.
48. The 1st respondent states that the realization process began in September 2018 and it served the applicant with all the requisite statutory notices as annexed to its replying affidavit. Further, the auctioneer M/s Galaxy Auctioneers did effect service of the 45 days redemption notice and notification of sale upon the applicant through postal service.
49. The 1st respondent relies on Section 96 of the *Land Act* No. 6 of 2012 and submits that it is trite law that the charge following the due procedure should not be curtailed from exercising its statutory power of sale. The 1st respondent argues that its statutory right of sale crystallised when the applicant was served with the statutory notices and defaulted on the payment of the loan advanced to her.
50. The 1st respondent relies on the case of *Priscillah Kroboug Grant vs Kenya Commercial Finance Co. Ltd and 2 Others*, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95) (unreported) and submits that a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a charge from exercising its statutory power of sale.



51. The 1st respondent argues that a guarantee is a continuing security and shall remain in force until the subject debt is satisfied. To support this contention, the 1st respondent relies on the case of Hosea Mundui Kiplagat vs Kenya Commercial Bank (2021) eKLR. The 1st respondent contends that the applicant's 1st outstanding loan stood at Kshs. 10,057,305.55/- as at 15/10/2020 whereas the 2nd loan had a balance of Kshs. 162,563.40/- making an aggregate sum of Kshs. 10,219,868.95/- which continues to accrue interest. The 1st respondent further submits that the applicant diverted her business proceeds elsewhere and has not serviced the loan since December 2019 to date, a period of over 30 months. Moreover, the applicant has tactfully admitted her indebtedness to the 1st respondent and confirmed her ability to repay the loan.
52. The 1st respondent submits that it has proved service of the statutory notices and strictly complied with the realization procedure as set out in law therefore displacing any allegations of impropriety. The 1st respondent further submits that the applicant has not rebutted its allegations by filing a further affidavit. Moreover, the 1st respondent submits that it has not infringed on the applicant's statutory rights and therefore it should not be prevented from giving effect to the statutory notices issued and realise the charge.
53. The 1st respondent relies on Section 97(2) of the Land Act No. 6 of 2012 and submits that it engaged the services of M/s Fahari Valuers Limited to conduct an independent valuation over the charged property and they filed a report on October 14, 2020. The 1st respondent states that it does not direct process and it is for the valuer to set a certain value.
54. The 1st respondent submits that the applicant voluntarily offered the suit properties as collateral security with the full knowledge and understanding that in the event of default of repayment of the loan, the suit properties would be sold to answer the outstanding debt. Furthermore, the 1st respondent submits that it is trite law that once a property is offered as security, it becomes a commodity of sale whose loss can be quantified and compensated adequately in damages. To support its contentions the 1st respondent relies on the cases of Peter Kamau Munene vs Kenya Commercial Bank Limited [2015] eKLR, Sammy Japheth Kavuku vs Equity Bank Limited & Another [2014] eKLR and Mrao Ltd vs First American Bank of Kenya Ltd [2003] KLR 125.
55. The 1st respondent submits that the applicant has not given any undertaking as to damages nor offered any security for due performance. The 1st respondent further relies on the case of Simon Njoroge Mburu vs Consolidated Bank of Kenya (2014) eKLR and submits that the value of the charged property is ascertainable and the applicant can be compensated by way of damages. Further, the 1st respondent states that it is a sound financial institution with a vast asset base and would be in a position to recompense.
56. On the issue of balance of convenience, the 1st respondent submits that if the injunctive orders are granted, it stands to suffer a disadvantage more than the applicant as she remains in complete default of her obligations under the lending contract. The 1st respondent argues that the applicant has shown tendencies of failing to honour her contractual obligations and if an injunction is granted, the value of the suit property might turn out to be insufficient to satisfy the debt. The 1st respondent further contends that through a letter dated October 15, 2020, the 1st respondent granted the applicant the consent to sub divide the suit land and sell by private treaty provided that the loan was cleared in full. However, the 1st respondent contends that the applicant failed to sell the property and the 1st respondent believes that the application was meant to hoodwink it to stop the realization of the charge process.



57. The 1st respondent further submits that an injunction is an equitable remedy and the party seeking it must come to court with clean hands. The 1st respondent makes reference to the case of *Kyangaro vs Kenya Commercial Bank Ltd & Another* (2004) 1 KLR 126 and submits that the applicant's conduct is below the standard required of a litigant coming to a court of equity. The applicant remains guilty of laches despite the numerous opportunities afforded to her to redeem the suit property. The 1st respondent submits that the applicant in filing the current suit is attempting to stop the 1st respondent in realizing the charge, which is a legal process and therefore the applicant is abusing the court process.

The Law

Whether the plaintiff/applicant has met the requisite conditions to warrant the granting of a temporary injunction.

58. 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.
59. 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

60. 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.”

61. It is not in dispute that the applicant was advanced a credit facility by the 1st respondent and that she does not dispute that she is in arrears of repayment. The applicant’s bone of contention is that the 1st respondent did not serve her with the requisite statutory notices and that 1st respondent sold L.R No. Tetu/Unjiru/1457 at an undervalued price rendering the sale illegal and fraudulent. The applicant was under a contractual obligation to service the facility advanced to her and in default the consequences were inevitable provided that the law was complied with.

62. 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.

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

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.

64. 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.
65. It is trite law that service of the statutory notices on a charger is mandatory before the exercise of the power of sale. It is only upon service that a charger 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.

66. On perusal of the documents, the three-month statutory notice under Section 90(1) and (2) dated September 19, 2018 was addressed to the applicant vide a postal address reading P. O. Box 31-01100 Nairobi. The dispatch sheet has listed 37 letters to be posted, one of them being the applicant’s and the address is similar to that quoted in the notice dated September 19, 2018. The forty days’ notice to sell the property by publication under Section 96(2) of the *Land Act* dated March 27, 2019, bears the correct address of the applicant namely P.O. Box 12511-10100 Nyeri and the dispatch sheet bears a similar address. The certificate of posting does not bear any addresses but shows that letters were posted but it is not clear whether the letters were 49 or 47. On further scrutiny of the two certificates of posting one can tell that they are similar as they bear the same date stamp of September 29, 2018.
67. The 45 days redemption notice and notification of sale were addressed to the applicant with her address of Nyeri. Further, a licensed auctioneer from Mistan Auctioneers, as instructed by the 1st respondent, has sworn an affidavit stating that she personally served the applicant with the said notices and on July 18, 2019 she sent the said notice vide registered mail. To prove service she annexed a certificate of posting vide registered post. I have also perused the documents and noted that the addresses as listed by the applicant as hers in the letters of offer dated September 19, 2015 and September 30, 2016 are P. O. Box 12511-10100 Nairobi and P. O. Box 12511-10100 Nyeri.
68. The Letters of Offer dated September 19, 2015 and September 30, 2016 provide in Clause 22 and 21 respectively, that:-



1. Every notice, request or other communication shall:-
Be sent
 - a. To the borrower at the address set out above; and
 - b. To the bank at the address shown above;
 Or to such other address in Kenya as may be notified in writing by the one party to the other.

69. The Charge and Further Charge indicates in Clause 39 and 38 respectively that:-

 Any notice or demand for payment by the Bank shall be deemed to have been properly served on the charger if delivered by hand or sent by registered post, telex, or fax to the Chargor at the registered office or at any of the principal places of business in Kenya or the last known place of abode of the Chargor. 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 post, seven days after posting (notwithstanding that it be undelivered or returned undelivered) or, if sent by telex or fax, on the completion of transmission. Where a notice or demand is sent by registered post, it shall be sufficient to prove that the notice or demand was properly addressed and posted.

70. The applicant raised the issue of undervaluation of the securities that was far below the market value L.R No. Tetu/Unjiru/1457 was sold at a forced value of Kshs.3 million whereas it valued the same property at a market value of Kshs.8.5 million in 2015. 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.

71. 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 chargee and its agents especially the auctioneers.”

72. In light of the foregoing, the discrepancy in the value of the suit property between 2015 and 2019 when the property was sold was a sum of Kshs. 3,375,000/-. The applicant is apprehensive that the 1st respondent is likely to sell L.R No. Tetu/Unjiru/1456 at an undervalue price just as it did with L.R No. Tetu/Unjiru/1457 and therefore her loan account shall not be settled fairly and accurately. In view of the fact that land parcel Tetu/Unjiru/1457 has already been sold, the issues raised in that regard cannot be determined at this interlocutory stage and would require to be proved through evidence of the parties.



73. The applicant alleged that the 1st respondent was working in cahoots with the 2nd respondent in the purported sale by public auction of L.R. Tetu/Unjiru/1457. This contention was based on the fact that the applicant and the 2nd respondent had entered into an agreement for purchase of the land by the 1st respondent in order to raise funds to settle the loan account and a deposit of the consideration had been paid. These allegations can only be proved during the hearing of the case at a later stage.
74. A cursory look at the statutory notices served on the applicant reveals several errors of the applicant's address and lack of matching of the dates of the said notices and the dispatch lists as well as the certificates of posting. The charge statutory notice dated September 19, 2018 bore wrong address. The applicants address in the charge and on the letter of offer was P.O Box 31-01100 Nairobi. The dispatch list had 37 letters including that of the applicant appearing as item No. 30. The certificate of posting annexed is for September 29, 2018 as per the official stamp and was for positing 47 letters as opposed to the 37 in the dispatch list.
75. In regard to the 40 days statutory notice dated March 27, 2019, it is supported by a dispatch list of 14 letters and a certificate of positing with 47 letters dated September 29, 2019. This shows that the same certificate of posting annexed to the first statutory notice was used to support positing of the 2nd one. It is important to note that the two notices were posted six (6) months apart and could not have been supported by one certificate of posting.
76. As for the redemption notice, this one was posted using the correct address of the applicant and was fortified by physical service on the applicant by an employee of the Auctioneer firm.
77. The applicant has demonstrated that the statutory notices dated September 19, 2018 and March 29, 2019 were not served on her in that the wrong addresses were used as well as the wrong dispatch lists and certificates of posting. The 1st respondent would be said to be in contravention of Section 90(1) of the Land Act and of the contract of the parties contained in the charge. It is my considered view that the applicant has established a prima facie case herein.

Irreparable Loss

78. The applicant is required to establish that she will suffer irreparable loss should the orders refused be refused and that such loss is incapable of being remedied by way of damages. It is contended that the 1st respondent acted dishonestly in selling one of the securities to the 1st respondent and that the forced value was grossly understated. The applicant also pleaded that her residential home is situated on L.R. No. Tetu/Unjiru/1456

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.”

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. The allegations made by the applicant on the conduct of the 1st respondent in the exercise of its powers of sale require to be considered in this application. It is not in doubt that such conduct if found to have been real would carry a lot of weight. One of the securities has already been sold at a price that has aggrieved the applicant. The 2nd respondent says he has already subdivided the land into plots and sold some of them to 3rd parties. The consequences of such acts would lead to irreparable loss that may not be compensated in damages. It is born in mind that the 1st respondent is a stable commercial bank that is capable of paying damages. However, the sale of the 2nd security would greatly disadvantage the applicant unless the law is complied with in exercise of this power of sale by the 1st respondent.
80. In my view, the applicant has demonstrated that in the event that the orders sought are not granted, she will suffer irreparable loss.

Balance of Convenience

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

82. The applicant has demonstrated that the balance of convenience tilts in her favour in that the inconvenience caused to her will be much greater than that likely to be caused to the 1st respondent in that she was not served with the requisite notices as provided for by the law. The 2nd respondent has argued that he has already subdivided land parcel Tetu/Unjiru/1457 and sold some of the portions to third parties. The applicant has confirmed that he has subdivided the plots to one eighth acres. The court can only determine whether the 2nd respondent was a purchaser for value without notice only after hearing the evidence of the parties. Thus the balance of convenience in this application tilts in favour of the applicant in my considered view.

Conclusion

83. It is my considered view that the applicant has demonstrated the requirements of granting an injunction as required by the law.



84. I find this application merited and allow it in the following terms:-

- i. That an interlocutory injunction shall hereby issue against the 1st respondent, its agents or servants from exercising its statutory power of sale in respect of L.R Tetu/Unjiru/1456 pending the determination of this suit.
- ii. That the 2nd respondent, his servants, agents are hereby restrained from selling, charging, transferring or disposing of L.R Tetu/Unjiru/1457 or the resultant parcels pending the hearing and determination of the suit.
- iii. That the costs of this application shall abide in the suit.
- iv. The applicant shall continue with repayments of the outstanding loan at the rate agreed by the parties pending the hearing and determination of the suit.

85. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF JANUARY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 26th day of January, 2023.

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