



REPUBLIC OF KENYA



**Nguuni v Equity Bank Limited & another (Commercial Case E116 of 2023)
[2023] KEHC 24554 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 24554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E116 OF 2023**

MN MWANGI, J

JULY 28, 2023

BETWEEN

MICHAEL KARIUKI NGUUNI PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

PHILIP INTERNATIONAL AUCTIONEERS 2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 15th March, 2023 brought under the provisions of Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and all enabling provisions of the law. The plaintiff/applicant seeks the following orders -
 - i. Spent;
 - ii. Spent;
 - iii. That pending the hearing and determination of this suit, a temporary injunction be issued restraining the defendants/respondents whether by themselves, servants, agents, employees, assigns or any other person acting on their behalf from selling, dealing, disposing (sic), alienating, or in any other way interfering with the plaintiff's charged property being all that parcel of land known as L.R No. Ruiru/West Block 1/2874-Gitambaya Area; and
 - iv. Costs of this application be provided for.
2. The application is brought on the grounds on the face of it and is supported by affidavits sworn by Michael Kariuki Nguuni the plaintiff herein, on 15th March, 2023 and 26th April, 2023. In opposition



thereto, the 1st defendant filed a replying affidavit sworn on 12th April, 2023, by Nicholas Mwichigi, the Credit Manager of the 1st defendant's Kasarani branch.

3. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed on 27th April, 2023 by the law firm of Kogai and Company Advocates, whereas the 1st defendant's submissions were filed by the law firm of Kiarie Kariuki & Associates Advocates on 2nd May, 2023.
4. Ms. Kogai, learned Counsel for the plaintiff indicated that the outstanding loan balance is disputed. She cited the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 and submitted that the applicant must satisfy the conditions laid down in the said case for the Court to grant an order of a temporary injunction. She relied on the definition of the term *prima facie* case as pronounced in the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR. She also relied on the provisions of Section 96(2) of the *Land Act* and stated that the 1st defendant never issued the plaintiff with the mandatory notice provided for in the said provisions thus rendering the entire process null and void.
5. In submitting that the burden of proving that the mandatory 40 days' notice was issued lies with the 1st defendant, who had failed to discharge the said burden, thus rendering the intended sale a nullity, Ms. Kogai referred to the holding of the Court of Appeal in the case of *Nyangilo Ochieng & another v Kenya Commercial Bank* [1996] eKLR and the case of *Act Fast Security Limited v Equity Bank* [2014] eKLR. She stated that the plaintiff's right of redemption had not been extinguished and as submitted hereinabove, the 1st defendant had not issued the plaintiff with the mandatory 40 days' notice of sale before putting up the suit property for sale, which means that the 1st defendant's statutory power of sale had not accrued. She cited the decisions in *Manasseh Denga v Eco Bank Limited & another* [2015] eKLR and *Florence Njeri Karanja v Moly Credit Limited* [2014] eKLR to support her argument.
6. Counsel submitted that that sometime in November 2021, the plaintiff approached his Loan Officer at Kasarani Equity Bank Branch to restructure his loans in a way that they would be payable by him making one monthly installment for a period of 10 years, with the aim of reducing his loan installments to an affordable amount, as the monthly instalment of Kshs.872,517.00 was unsustainable at the time due to the extreme effects of the Covid-19 Pandemic. She stated that subsequently, the plaintiff's Loan Officer advised him that this could only be possible once the he cleared the outstanding loan balances in two of the said loan accounts whose repayment period was for less than ten (10) years. Counsel stated that the said advice informed the plaintiff's decision to sell his property known as Land Reference No. 6585/980 (IR No. 51729) so as to enable him meet the 1st defendant's demands.
7. Ms. Kogai submitted that the plaintiff approached the 1st defendant before selling the said parcel of land and the 1st defendant approved his plan on condition that it was involved in the sale and that the proceeds of the sale would be deposited with it. Counsel stated that later, the plaintiff's parcel of land known as Land Reference No. 6585/980 (IR No. 51729) was sold and the proceeds thereof, being Kshs. 6,500,000/= was deposited with the 1st defendant on 31st January, 2022. She stated that the plaintiff instructed the 1st defendant to use the said amount to clear the two loan amounts whose repayment period was for less than ten (10) years and if there was any balance, the same was to be deposited in the remaining two loan accounts which had longer payment periods.
8. Counsel stated that the 1st defendant failed to restructure the said loans as agreed without the plaintiff's knowledge, but asked the plaintiff to deposit a further Kshs.500,000/= in order for the restructuring to be done, and the plaintiff complied with the said demand but the 1st defendant still failed to restructure the loans as agreed. Ms. Kogai cited Section 120 of the *Evidence Act* and the case of *Pickard v Sears* [1837] 6 A & E 469 and argued that since the plaintiff relied on the 1st defendant's promises to his detriment, the 1st defendant is estopped from selling the plaintiff's property on allegations of default



since any default was solely caused by the 1st defendant's failure to restructure the loans as agreed, and failing to inform the plaintiff that it had not done so. To this end, Counsel relied on the Court of Appeal decision in *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, and the case of *Central London Property Trust Ltd v High Trees House Ltd* [1947] K-B. 130 [1946] where Lord Denning outlined the conditions that apply in a defence of estoppel.

9. Ms. Kogai stated that the plaintiff was served with a notification of sale of immovable property by the 2nd defendant on 23rd January, 2023, which indicated that the suit property would be sold at a public auction at an open market value of Kshs. 35,000,000/=, replacement value of Kshs.26,500,000/= and a forced sale value at Kshs. 26,250,000/=. She submitted that the said values are similar to the ones that appear on the Valuation Report by Acumen Valuers Limited dated 24th May, 2018 annexed to the notification of sale, meaning that the 1st defendant did not carry out a fresh valuation before instructing the Auctioneers to sell the suit property. She referred to Section 97(1) and (2) of the [Land Act](#) and asserted that based on the foregoing, the 1st defendant breached its duty to the plaintiff by failing to carry out a valuation of the suit property before putting it up for sale by public auction.
10. Counsel for the plaintiff stated that the Valuation Report dated 16th March, 2023 annexed to the 1st defendant's replying affidavit was not only a forgery but also an afterthought since it was done after the suit property was advertised for sale by public auction. She urged the Court not to consider it and submitted that the plaintiff had established a prima facie case with high chances of success.
11. On whether the plaintiff stands to suffer irreparable damage in the event that the instant application is disallowed, Ms. Kogai cited the provisions of Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 and submitted that the plaintiff had demonstrated that the 2nd defendant advertised the sale of the suit property by public auction on 30th March, 2023. She stated that if the orders sought herein are not granted, the plaintiff will suffer irreparable damage since he will have lost his property, which is also his main source of livelihood. She cited the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR and submitted that the balance of convenience tilts in favour of the plaintiff, since the main suit will be rendered nugatory in the event the application herein is disallowed.
12. Ms. Njenga, learned Counsel for the 1st defendant submitted that the plaintiff had not challenged the validity of the security by way of guarantee and the legal charges that are in place, and he had not disputed being indebted to the 1st defendant, but only disputed the amount demanded in the statutory notice. She further submitted that no demand letter on the aforesaid dispute was issued by the plaintiff before the institution of the main suit or any request for reconciliation of accounts made prior to the commencement of the 1st defendant's exercise of its statutory power of sale. Counsel contended that the 1st defendant had demonstrated that it served the plaintiff and the guarantors with the requisite 90 and 40 days' notices.
13. She stated that the plaintiff had not produced any agreement between them to show that the Kshs.6,500,000/= deposited by the plaintiff would only be used to clear two loan accounts as he wished, instead of reducing his total indebtedness to the 1st defendant as was the case herein. She contended that the plaintiff had not proved promissory estoppel which ought not be canvassed at the interlocutory stage as this would call for evidence to be adduced. She stated that the said Kshs. 6,500,000/= paid was not enough to clear the plaintiff's outstanding balances and that he continued defaulting despite the 1st defendant's issuance of the 90 days' notice. In submitting that casting aspersions on the 1st defendant's Valuation Report did not elevate the suit to a prima facie case, Ms. Njenga relied on the case of *Simba Fresh Produce Limited & 2 others v Equity Bank (Kenya) Limited* [2023] KEHC 3325 (KLR).



14. Ms. Njenga cited Section 90(1) of the *Land Act*, 2012 and asserted that the 1st defendant has every right to exercise its statutory power of sale in light of the plaintiff's undisputed default. She relied on the case of Lucy Kina Munyi & another v Agricultural Finance Corporation and another [2021] eKLR and submitted that a dispute as to the amount due is not a ground for injunction the 1st defendant from exercising its statutory power of sale. Counsel additionally submitted that the plaintiff had not met the test set out in the case of Giella v Cassman Brown Company Limited (supra) to warrant grant of the orders sought herein. She reiterated that it is not disputed that the plaintiff owes the 1st defendant several loan facilities secured by the suit property. Further, that the 1st defendant had demonstrated that the whole process of realizing the charged property was done in good faith and in accordance with the law.
15. In submitting that the plaintiff had not established a prima facie case with a probability of success, Counsel referred to the definition by the Court of Appeal of what constitutes a prima facie case in the case of Mrao v First American Bank of Kenya Limited & 2 others (supra). She stated that the plaintiff was seeking to claim his right of redemption through non-disclosure of material facts such as the fact that he was issued with all the requisite notices prior to the 1st defendant's attempt at exercising its statutory power of sale, and he had not established a prima facie case thus he was not entitled to the orders sought. To this end, Ms. Njenga relied on the finding by the Court of Appeal in the case of Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR.
16. The 1st defendant's Counsel contended that the plaintiff would not suffer irreparable injury that cannot be compensated by an award of damages in the event the instant application was not allowed, for the reasons that the loans and security offered are not in dispute and even if a recalculation was done and it revealed an overcharge in interest and penalties charged, the same can always be repaid to the plaintiff. Ms. Njenga stated that as such, the balance of convenience tilts in favour of the 1st defendant to regularize and re-issue any notices that this Court would find wanting. She relied on the Court of Appeal case of East African Development Bank v Hyundai Motor Kenya Limited [2006] eKLR and submitted that if the first two tests are not found in favour of an applicant as is the case herein, the Court may not apply the third test since the said test is applied when the Court is in doubt if the first two tests have been met.

ANALYSIS AND DETERMINATION.

17. I have considered the application filed herein, the grounds on the face of it and the affidavits in support thereof, the replying affidavit by the 1st defendant and the written submissions by Counsel for the parties. The issue that arises for determination is whether the applicant has made out a case that calls for an order of an interim injunction.
18. In the affidavit filed by the plaintiff, he deposed that on diverse dates, he accepted several loan offers from the 1st defendant and he used his property known as L.R No. Ruiru/West Block 1/2874-Gitambaya Area to secure the said loans. That he diligently paid the loan installments as agreed until September, 2020 owing to the negative effects of the Covid-19 Pandemic on his business.
19. The plaintiff averred that on realizing that he may default in paying the agreed installments, he approached the 1st defendant for a 12 months' moratorium on the loan accounts. That the 1st defendant agreed and they signed a variation of terms dated 11th September, 2020 to that effect. He also averred that at the end of the 12 months' period, his business was still struggling hence he was unable to repay the total installments of Kshs.872,517.00 for the four loan accounts and that around November 2021, he approached his Loan Officer at the 1st defendant's Kasarani Branch to restructure the loans to one monthly installment for a period of ten (10) years.



20. It was stated by the plaintiff that he was advised by the Loan Officer that his request would only be approved if he cleared the outstanding loan balances in the two loan accounts whose repayment period was for less than ten (10) years, which prompted him to sell his parcel of land known as L.R No. 6585/980 (IR No. 51729) for Kshs. 6,500,000/= so as to meet the 1st defendant's demands. He deposed that the said sale was endorsed by the 1st defendant and the proceeds therefrom were deposited with the 1st defendant by the purchaser on 31st January, 2022.
21. He further stated that immediately after the said money was deposited with the 1st defendant, he instructed it to use it to clear the two loan accounts whose repayment period was for less than ten (10) years and in the event there was any balance, the same was to be deposited in the other two loan accounts with longer repayment periods. The plaintiff contended that the 1st defendant did not object to the said instructions and his Loan Officer asked him to sign a loan application form so as to formalize the agreement, which he did.
22. The plaintiff averred that he waited for communication from the 1st defendant on the restructuring of the remaining loan accounts but none was forthcoming but he got a call from the 1st defendant's head office informing him that they first have to inspect the suit property and they did so. That during this time, he continued making monthly deposits of Kshs.312,000/= towards settling the outstanding loan amount, being the amount he was able to raise. He deposed that on 13th June, 2022, the 1st defendant sent him via WhatsApp a 90 days' notice to sell the suit property for failing to repay the loan amounts, which came as a surprise to him because at no point was he informed by his Loan Officer that the 1st defendant had declined his request.
23. He further deposed that immediately thereafter, he went to the bank to express his dissatisfaction with the turn of events and wrote another letter repeating his earlier request and a few days later, his Loan Officer called him and invited him for a meeting at the head office. That at the said meeting, he was asked to deposit a further Kshs.500,000/= as a pre-condition for his request to be granted. The plaintiff stated that he complied with the said demand by making a deposit of Kshs.500,000/= on 29th and 30th August, 2022.
24. The plaintiff stated that in an unfortunate turn of events, the 2nd defendant acting on the 1st defendant's instructions unlawfully and unprocedurally issued him with a 45 days' redemption notice and a notification of sale of the suit property on 23rd January, 2023. He deposed that the Valuation Report relied on by the 2nd defendant in the 45 days' redemption notice was carried out in the year 2018 hence it was not reflective of the current market value of the suit property.
25. The 1st defendant in its replying affidavit deposed that the plaintiff defaulted on his loan repayment installments and requested for a restructuring of the loans upon which he was advised to clear the loan balances in some of the loan accounts. That the parties then agreed on the sale of the plaintiff's property being L.R No. 6585/980 (IR No. 51729), whose proceeds of Kshs. 6,500,000/= was applied to pay part of the outstanding debt, but the defaulting persisted.
26. The 1st defendant averred that sometime in May 2022, the plaintiff completely failed to meet his loan repayment obligations thus the 1st defendant issued him with both the 90 and 40 days' notices, and a demand for arrears via his phone and WhatsApp messages, while still engaging the plaintiff. That the plaintiff confirmed receipt of the said notices and indicated that he was looking for money to clear the said arrears.
27. It further averred that when the period indicated in the aforementioned notices had almost elapsed and the plaintiff was yet to regularize his loan accounts, it instructed Prestige Management Valuers



Limited to value the charged properties in readiness to instruct Auctioneers to commence the recovery process, whereby the requisite statutory redemption notice and notification of sale were issued. The 1st defendant contended that the said Valuers then provided comprehensive and detailed Valuation Reports dated 16th March, 2023.

28. It was stated by the 1st defendant that as at 6th January, 2023, the total outstanding amount due to the 1st defendant was Kshs.33,472,801.99 which amount continued to accrue interest and was likely to exceed the value of the collateral offered. It further stated that the plaintiff did not deny being indebted to the 1st defendant but he had not made any efforts to try and repay the outstanding balance. It averred that it had used its depositors' money to advance the loan facilities herein to the plaintiff and the instant application was prejudicial to it. The 1st defendant urged this Court to dismiss the application filed by the plaintiff.
29. It stated that in the event this Court is inclined to grant the plaintiff the orders sought, he should be compelled to substantial and regular repayments of the acknowledged debt as a condition for the issuance of any injunctive orders.
30. In a rejoinder, the plaintiff deposed that at the time he approached the 1st defendant with a request to restructure his loan accounts, he had not defaulted in any of his loan repayments. He averred that had the bank informed him that the restructure was not possible, he would have looked for money from other sources so as to enable him continue paying the monthly installments he was paying.
31. The plaintiff further averred that annexure NM-3 attached to the 1st defendant's replying affidavit is not a schedule on how the loan amounts were distributed but it was an outsourcing report. He stated that his loan was only varied once as per the variation of terms dated 11th September, 2020. He indicated that annexure NM-8a is a loan application form for Kshs. 10,000,000/= and not a variation of terms as alleged by the respondent.
32. The plaintiff disputed owing the 1st defendant Kshs. 33,472,801.00 and called for reconciliation of accounts on the ground that he had paid more than what was indicated in the statement of accounts. He contended that the defendants do no stand to suffer any prejudice in the event the orders sought are granted.

Whether the applicant has made out a case that calls for an order of an interim injunction.

33. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure, 2010 which states that -

“Where in any suit it is proved by affidavit or otherwise-

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



34. In an application for an interlocutory injunction, the onus is on the applicant to satisfy the Court that it should grant an injunction. Being a discretionary remedy, it is granted on the basis of evidence and sound legal principles. The Court in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR when dealing with a similar application held as follows-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.”

35. The Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR considered what constitutes a prima case and stated the following -

“So what is a prima facie case” I would say that in civil cases it 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 been infringed by the opposite party as 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.”

36. Based on the averments made by the plaintiff and submissions made by his Counsel, it is evident that the plaintiff seeks to rely on the doctrine of estoppel in stopping the 1st defendant from exercising its statutory power of sale over the suit property. The plaintiff stated that as soon as he realized that he might default in paying the agreed installments, he approached the 1st defendant for a 12 months’ moratorium on the loan accounts and the 1st defendant agreed as can be seen from the duly executed variation of terms agreement dated 11th September, 2020. It was stated by the plaintiff that by the elapse of the said 12 months’ period, he was still unable to repay the total installments of Kshs.872,517.00 for the four loan accounts thus around November 2021, he approached his Loan Officer to restructure the loans to one monthly instalment for a period of 10 years.

37. He was informed that his request could only be approved if he cleared the outstanding loan balances in the two loan accounts whose repayment period was for less than ten (10) years. On perusal of the plaintiff’s affidavit in support of the application herein, I note that this communication is not annexed thereto. However, vide a letter dated 31st August, 2021 addressed to the 1st defendant by the plaintiff and a letter dated 2nd September, 2021 from the 1st defendant addressed to the plaintiff, it is evident that the plaintiff sought the bank’s approval to sell his parcel of land known as L.R No. 6585/980 (IR No. 51729) for Kshs. 6,500,000/= and the proceeds from the said sale were to be deposited with the 1st defendant.

38. It is not disputed by the 1st defendant that it received the said Kshs.6,500,000/= but it averred that the said money was used to pay part of the outstanding debt, yet he had instructed the bank to use the said money to offset the two loan accounts whose repayment period was for less than ten (10) years and in the event there was any balance, the same was to be deposited in the other two loan accounts with longer repayment periods but the 1st defendant ignored his instructions. This Court is of the finding



that the said assertion by the plaintiff is plausible since from the screenshot of the communication between the plaintiff and his Loan Officer after the plaintiff was served with a 90 day's statutory notice, it is discernible that the plaintiff told his Loan Officer that if he had done as they had agreed in February when he paid the Kshs. 6,500,000/=, they could not have gotten to that point.

39. It was stated by the plaintiff that after he was served with the 90 days' notice to sell the suit property for failing to repay the loan amounts, he went to the 1st defendant to express his dissatisfaction with the turn of events and wrote another letter repeating his earlier request. A few days later, in a meeting held at the 1st defendant's head office, he was asked to deposit a further Kshs.500,000/= as a pre-condition for his request to be granted. Inasmuch as there is no evidence of this communication that has been tendered by the plaintiff, it is evident from the plaintiff's account statement that he indeed made deposits totaling to Kshs.500,000/= on 29th and 30th August, 2022.
40. Based on the foregoing, Counsel for the plaintiff submitted that since the plaintiff relied on the 1st defendant's promises to his detriment, the 1st defendant is estopped from selling his property on allegation of default since any default was solely caused by its failure to restructure the loans as agreed, and failing to inform the plaintiff that they had not done so.
41. In response to the plaintiff's allegations, the 1st defendant submitted that the plaintiff has not proved promissory estoppel which ought not to be canvassed at the interlocutory stage as this would call for evidence to be adduced. In the case of *Carol Construction Engineers Limited & another v National Bank of Kenya* [2020] eKLR, the Court in allowing an application for injunction stated as follows on the doctrine of promissory estoppel-

“From a scan of our decisional law, one must show the following five elements in order to establish estoppel by representation or promissory estoppel:

- a. Representation: There must be a representation by the representor in words or by acts or conduct;
- b. Reasonableness: The person relying must satisfy the Court that it was reasonable for them to rely on the representation;
- c. Reliance: the victim must demonstrate that he was induced by the representation and in such reliance acted on it;
- d. Detriment: the victim must show that in acting in reliance of the representation he suffered some detriment or changed his position; and
- e. Unconscionability: the victim must demonstrate that it would be unconscionable to permit the representor to resile from the representation.

Where each of these elements is demonstrated, a party will be permitted to raise an estoppel to prevent the opposite side from going back on their word and establishing by evidence any averment which is substantially at variance with his former representation.”

42. The 1st defendant submitted that the plaintiff did not exhibit any agreement between the parties herein to demonstrate that the Kshs.6,500,000/= deposited by the purchaser of all that parcel of land known as L.R No. 6585/980 (IR No. 51729) would only be utilized to clear two loan accounts as he wished. It is my finding that from the evidence placed before me at this point, the plaintiff has established on a prima facie basis that the 1st defendant agreed to restructure his loan accounts, firstly, upon payment of Kshs.6,500,000/= proceeds from the sale of all that parcel of land known as L.R No. 6585/980 (IR No. 51729) belonging to the plaintiff, which money would be used to settle the outstanding loan



balances in the two loan accounts with repayment periods of less than ten (10) years. Secondly, he made payment of Kshs.500,000/=, after the meeting held at the 1st defendant's head office after he was served with a 90 days' statutory notice by the 1st defendant, a fact which was not denied by the 1st defendant.

43. In submitting that the plaintiff has established a prima facie case with a probability of success, the plaintiff contended that the 1st defendant did not serve him with the statutory 40 days' notice before exercising its statutory power of sale over the suit property. The 1st defendant on the other hand contended that the plaintiff was duly served with the statutory 90 and 40 days' notice via his WhatsApp, he confirmed receipt and indicated that he was looking for money to settle the outstanding arrears. Section 96(2) of the Land Act No. 6 of 2012 states that –

“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.”

44. I agree with Counsel for the plaintiff that the 1st defendant has the duty of proving that he was served with the mandatory 40 days' statutory notice under the provisions of Section 107 of the Evidence Act, Cap 80 Laws of Kenya, Annexed to the 1st defendant's replying affidavit are copies of the 90 days' statutory notice dated 6th June, 2022 and the 40 days' statutory notice dated 2nd November, 2022. Although the 1st defendant avers that the said notices were served on the plaintiff via his phone and WhatsApp messages, there is no evidence tendered by the 1st defendant in support of the said allegation.

45. It is noteworthy that the only evidence of service of the said notices on record is the screen shot of the plaintiff's WhatsApp annexed as MKN-6 to the plaintiff's affidavit in support of the instant application, which shows service of the 90 days' statutory notice only. For this reason, I find that since the 1st defendant failed to adhere to the provisions of Section 96(2) of the Land Act No. 6 of 2012, its rights of statutory power of sale had not accrued at the time it instructed the 2nd defendant to put up the suit property for sale by public auction. Based on the foregoing, this Court finds that the plaintiff has established a prima facie case with a probability of success.

46. On whether the plaintiff stands to suffer irreparable damage that cannot be adequately, compensated by an award in damages, I am bound by the Court of Appeal holding in the case of Muiruri v Bank of Baroda (Kenya) LTD [2000] KLR 183 cited by the Court in the case of Peter Kimani Nene v Kenya Commercial Bank Limited [2016] eKLR where it was held that-

“...disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”

47. Allowing sale of the plaintiff's property especially when he has made concerted efforts towards paying off part of the loan and restructuring the balance of the loans would be an infringement of his right to own property as enshrined under Article 40 of the Constitution of Kenya, 2010, and particularly so, as the plaintiff has established a prima facie case with a probability of success. Consequently, I find that the plaintiff has demonstrated that in the event the order sought herein is not granted, he will suffer loss that cannot be adequately compensated by an award of damages, as he will have lost his property to a public auction that should have not have taken place at all.

48. The issue of balance of convenience does not arise since this Court is not in doubt.

49. The upshot is that the application dated 15th March, 2023 is merited and it is allowed in the following terms -



- i. That pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the defendants whether by themselves, servants, agents, employees, assigns or any other person acting on their behalf from selling, dealing, disposing of, alienating, or in any other way interfering with the plaintiff's charged property being all that parcel of land known as L.R No. Ruiru/West Block 1/2874-Gitambaya Area;
- ii. In view of the fact that the plaintiff does not dispute being indebted to the 1st defendant, he is hereby directed to continue making monthly deposits of Kshs.312,000/= towards offsetting of the outstanding loan balances;
- iii. In default of clause (ii) herein above, the 1st defendant shall be at liberty to exercise its statutory power of sale over the suit property upon issuance of all the requisite statutory notices; and
- iv. Costs shall abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Kogai for the plaintiff/applicant

No appearance for the defendants/respondents

