



REPUBLIC OF KENYA



Ndambuki v Sumac Microfinance Bank Limited & another (Commercial Civil Case 4 of 2022) [2023] KEHC 23064 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
COMMERCIAL CIVIL CASE 4 OF 2022
MW MUIGAI, J
SEPTEMBER 28, 2023**

BETWEEN

COSMAS KIVUVA NDAMBUKI PLAINTIFF

AND

SUMAC MICROFINANCE BANK LIMITED 1ST DEFENDANT

BEYOND VISION AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant who is the registered owner of suit properties known as parcel No. Mbooni/Mutitu/2963, Parcel No. Mbooni/Mutitu/2964 and Mitaboni/Ngelani 1385 sought the following orders: -
 1. That this application be certified as urgent and be heard ex parte in the first instance.
 2. That temporary injunction to issue restraining the defendants/respondents by themselves, their agents, employees, servants and or any other person acting on their behalf from alienating, putting up for sale, disposing off and or disposition of the plaintiff's properties Parcel No: Mbooni/Mutitu/2963, Mbooni/Mutitu/2964 & Mitaboni/Ngelani/1385 by way of public auction or otherwise pending the hearing and determination of this application;
 3. That the cost of the application be provided for.
2. In his supporting affidavit, the Plaintiff/Applicant has averred That on 28.10.2016, he sought and procured a loan for a combined amount of kshs 6,000,000 payable by way of monthly installments of Kshs.235, 397.
3. The Plaintiff/Applicant has averred That the said facilities were secured vide a legal charge over the suit properties and That he has been paying the loan amount and has repaid a substantial amount of the loan and interest due to the 1st defendant.



4. According to the plaintiff/applicant, he experienced financial difficulties in the year 2019 and during the Covid -19 period and wrote to the 1st defendant to restructure his credit facilities but did not get a response to enable him know how to manage the said credit facilities.
5. According to the Applicant, the 1st defendant despite being aware of the repayments, instructed the 2nd defendant to sell by way of public auction the plaintiff/ applicant's properties.
6. He has averred That he sought to be furnished with the contractual documents but he has never been supplied him and in fact discovered That the 1st defendant had applied contractual penalties to the account and debited the plaintiff's account with daily interest which was against the terms and conditions of the loan agreement.
7. According to the Applicant, despite issuing the defective notices, the 1st Defendant proceeded on to issue instructions to the 2nd Defendant to issue a 45 days Redemption Notice and Notification of sale to the Applicant which instructions have been executed. According to the Applicant, the intended sale and disposal of the suit property was contrary to the provisions of the law.
8. He averred That the 1st Defendant applied unconscionable interest rates and charges in bid to ensure it is impossible for him to redeem his security.
9. He averred That the properties' market value had not been established by way of a recent valuation report and That it was clear That the 1st defendant was determined to sell the suit properties at a throw away price in order to meet their purported balance to the disadvantage of the plaintiff.
10. The Plaintiff/Applicant was apprehensive That if the orders sought by him were not granted, the Defendants would proceed with the sale of the suit property rendering the suit nugatory and mere academic exercise. According to the Applicant he would suffer irreparable damage not capable of compensation by an award of damages.
11. According to the Plaintiff/Applicant, the balance of convenience tilts in his favour and it is fair, just, equitable and in the interest of justice That the orders sought be granted to safeguard his proprietary interest in the suit property.

Replying Affidavit Filed On 11/01/22

12. The 1st Defendant has opposed the Plaintiff/Applicant's application through the replying affidavit of Jeremy Mutugi, the 1st Defendant's Collections and Recoveries Officer. The Officer has averred That the application is misleading and lacks merit and ought to be dismissed on the very outset.
13. According to the deponent, he clarified That the 1st defendant had not sought to exercise a statutory power of sale over Land Reference Number Mitaboni/Ngelani/1385 and That it has a contractual and statutory power of sale over titles numbers Mbooni/Mutitu 2963 and Mbooni/Mutitu /2964
14. The 1st Defendant averred That the Plaintiff/Applicant approached the 1st defendant seeking the grant of a loan facility of Kshs. 6,000,000 and as a condition for disbursement, the 1st defendant requested the plaintiff to offer a security interest That would cover the sought sum in the event That he defaults.
15. According to the deponent, the plaintiff in compliance offered the 1st defendant a legal charge over title numbers Mbooni/Mutitu/2963 and Mbooni/Mutitu/2964 in which were thus registered in favor of the 1st defendant.
16. According to the deponent, the 1st Defendant then issued the plaintiff with a letter of offer dated 13.05.2018 under the terms That he would repay the loan facility in forty eight monthly instalments



by consistently remitting the sum of Kshs 178,650 to the 1st defendant one month from the date of its drawdown until payment in full, That the plaintiff would pay the contractual interest rate of 24% per annum on a reducing balance basis and That in the event of a default, he would pay the accruing penalty interest of 6% per annum over and above the contractual interest rate.

17. The 1st Defendant averred That the plaintiff consistently defaulted on its contractual obligations and particularly the repayment of the loan facility in the manner agreed, as a result the plaintiff has accumulated substantial contractual and default arrears on the facility whose value continued to inflate threatening to outstrip the 1st defendant's security rights.
18. The 1st Defendant averred That the plaintiff's undisputed default on the loan facility was intentional and therefore should not rely on the Covid pandemic for the breach as the default evidently began in June 2018 before the advent of the pandemic.
19. According to the deponent, as a result of the plaintiff's undisputed loan default, the 1st defendant issued him with a ninety days' statutory notice on 22.07/2019 in order to regularize his default and consequences of his failure to abide. Thereafter the 1st defendant issued the plaintiff with a forty day notice of intention of sale. Despite affording the plaintiff one and half years to regularize the default, the plaintiff failed to apply his equity of redemption prompting the 1st defendant to engage its agents to value the suit properties
20. The 1st defendant deponed That despite the lapse of the statutory notice period, the plaintiff continued to dishonor his contractual obligation thereby compelling the 1st defendant to engage the services of the 2nd defendant, Beyond Vision auctioneers to issue a forty-five-day redemption notice and a notification of sale which were duly served to the plaintiff.
21. According to the deponent, granting the orders sought would be tantamount to legalizing the Plaintiff/Applicant's breach of Loan facility agreement. The deponent urged the court to dismiss the application with costs as it is an abuse of the court process.

1st Defendant's Supplementary Affidavit Filed On 14/11/22

22. The 1st Defendant reiterated the contents of the their 1st replying affidavit.

Plaintiff/Applicant's Submissions

23. On behalf of the Applicant, it was submitted That the applicant suffered financial constraints on account of unforeseen circumstances and That the doctrine of frustration ought to be invoked and applied in the circumstances.
24. Reliance was placed on the case of Davis Contractors Ltd-versus-Fareham U.D.C{1956}A.C 696 where Lord Radcliffe at page 729 held That frustration occurs whenever the law recognizes That, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from That which was undertaken by the contract..
25. According to the Plaintiff/APplicant he stared at a real and imminent risk That his interest in the suit property would be absolutely extinguished exposing him to irreparable loss not capable of being compensated by way of damages. It was submitted That if the power of sale would be actualized, it would serve as a detriment to the plaintiff.



26. According to the Plaintiff/Applicant, the 1st Defendant actions were unlawful and would cause irreparable loss. Reliance was placed on the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* {2014} eKLR.
27. Regarding whether a prima facie case had been met by the plaintiff, reliance was placed on the case of *Mrao Ltd vs First American Bank of Kenya and 2 others* {2003} KLR, prima facie case in a civil application was defined to include but not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.
28. On the issue of the Chargor's equity of Redemption, it was submitted That the plaintiff's request for restructuring his loan facility was in line with the equity of redemption and That the 1st defendant ought to have evaluated his request and also recalculated the interest charged reliance was placed on the case of *Kiyaga v Segujja & Anor* {Civil Appeal No.37 of 2010} (2018)UGCA 26 .
29. The Plaintiff/Applicant urged the court to find That he had satisfied the threshold to grant injunctive orders and allow his application with costs.

1st Defendant/Respondent's Submissions

30. On behalf of the 1st Defendant, it was submitted That the Plaintiff/Applicant was advanced a personal loan of Kshs. 6,000,000 and provided the suit properties as security, That owing to the plaintiff's default, the 1st Defendant sought to exercise the remedy of statutory power of sale and the plaintiff unjustly forestall the 1st defendant's right to exercise That remedy through false representations.
31. It was submitted That the Plaintiff/Applicant had not established a prima facie case since he breached the terms of the Charge instrument and the 1st Defendant has a legitimate and lawful exercise of its statutory power of sale. According to the 1st Defendant, its relationship with the Plaintiff is contractual and by exercising its statutory power of sale, the 1st Defendant is only protecting its interest under the contract. It has been submitted That what the Plaintiff/Applicant has disputed is the amount owing indicated in the notices and not his indebtedness to the 1st Defendant. Reliance was placed on the case of *Mrao Limited-v- First American Bank of Kenya Ltd & 2 Others*{2003} eKLR which defined a prima facie case in a civil application. It was submitted That the court cannot interfere with the contractual terms between the two parties and therefore the Plaintiff/Applicant has not established a Prima facie case with probability of success.
32. Regarding whether the Plaintiff/Applicant will suffer irreparable loss which cannot be compensated by way of damages, it has been submitted That the Plaintiff/Applicant does not dispute the fact That he has defaulted in repaying the loan monies advanced to him by the 1st Defendant.
33. According to the 1st Defendant, the Plaintiff will not suffer any loss That cannot be compensated by an award of damages. Reliance has been placed on the Court decision of *Elite Intelligent Transport Systems Limited vs. Gulf Africa Bank Limited & Another* [2020] eKLR where it was observed That with respect to charged properties, parties always contemplate That suit properties will be sold in the event of default hence damages are adequate remedy. It was submitted That as a matter of fact it is the 1st Defendant who continues to suffer irreparably due to the Plaintiff/Applicant failure to clear and/or service the loan advanced to him by the 1st Defendant. According to the 1st Defendant, it has demonstrated That the Plaintiff/Applicant will not suffer any irreparable loss and/or damage if the orders sought are not granted.



34. On whose the balance of convenience tilts in favour of, it was submitted That it was up to the court to balance the scales of justice and abide to higher standards of fairness. Reliance was placed on the case of Pius Kipchirchir Kogo –v- Frank Kimeli Tenai{2018} eKLR it was stated That it was for the plaintiff to show That the inconvenience caused to them would be greater than That caused to the defendant. According to the 1st Respondent, it would be subjected to a financial inconvenience as the outstanding amount continued to accrue a contractual and default interest which threatened to outstrip the value of the security. It was submitted That the 1st Defendant has demonstrated That the Plaintiff/Applicant has failed on all the three tests with regard to the grant of the orders sought. According to the 1st Defendant, the application ought to be dismissed.
35. Regarding the costs of the application, it was submitted That the 1st Defendant had demonstrated That the Plaintiff/Applicant has failed on the three tests for grant of the injunctive orders hence the Plaintiff/Applicant should bear the costs of the application. The 1st Defendant urged the court to exercise its discretion and award it with the costs of the application.

Determination

36. I have considered the application, affidavit in support and in opposition and the submissions as well as the authorities relied upon. The issue for determination is whether the Plaintiff/Applicant has met the threshold for the grant of an order of injunction.
37. Order 40 Rule (1) of the Civil Procedure Rules, 2010 provides:
1. 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.
 2. Injunction to restrain breach of contract or other injury
 - (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit. In Mureithi vs. City Council of Nairobi [1976-1985]



EA 331 Madan JJA referred to L. Diplock in *American Cyanamid Co. vs. Ethicon Ltd* [1975] 1 All ER 504 as follows;

“The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial...if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at That stage.”

38. According to the court in *Board of Trustees of African Independent Pentecostal Church of Africa Church vs. Peter Mungai Kimani & 12 others* (2014) eKLR the power of the court in an application for an interlocutory injunction is discretionary. While deciding whether or not to grant an injunction, the court should be guided by the well-established principles enunciated in the locus classicus case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA at Page. 358 whose holding is as follows:-

“The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.

Secondly, an interlocutory injunction will be normally granted unless the 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”. See *Mustafa JA in Abdul Salim and Others v Okong’o and Others Civil Appeal No 44 of 1975* (unreported).

39. According to the Court of Appeal in *Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991*:

“...The principle underlying injunctions is That the status quo should be maintained so That if at the hearing the applicant obtains judgment in his favor the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgment nugatory...”

40. While reiterating how the principles are to be applied while dealing with interlocutory injunction, the Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR (Nguruman case) had this to say:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established That all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case That alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied That the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be



granted, however strong the applicant's claim may appear at That stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between..."

41. It follows therefore That the court must separately look at the three conditions to establish whether it warrants granting the injunction.

Whether The Plaintiff/applicant Has Made Prima Facie Case With Probability Of Success

42. As to what constitutes a prima facie case, the Court of Appeal in the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125(Mrao case), held as follows:

"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 been 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."

43. It is trite That the court will not venture into considering the merits of the case when considering whether or not a prima facie case has been established by the Applicant. In Nguruman case(supra) the Court of Appeal held That:

"We reiterate That in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All That the court is to see is That on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title, it is enough if he can show That he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of That prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than That the Court takes the view That on the face of it the applicant's case is more likely than not to ultimately succeed." See Ringera, J (as he then was) in Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002.

44. The Plaintiff/Applicant denied the fact That he received the notices pursuant to Section 90 and 96(1) of the Land Act No. 6 of 2012. The plaintiff submitted That the 1st Defendant levied penalty interest, interest on arrears, default charges and other charges which were oppressive.

45. The 1st Defendant submitted That a three month statutory notice was served to the plaintiff expressly highlighting the nature and extent of the plaintiff's default, the arrears, the three months' statutory period and the consequences if the default persisted. It was submitted That in doing so, the 1st Defendant had discharged its duty of care to the plaintiff. The 1st defendant issued the plaintiff with an extended forty-five days' notice of intention to sell and having failed to rectify his default, the 1st defendant instructed the 2nd defendant who issued the plaintiff with a forty-five days' redemption notice and notification of sale in which he confirmed receipt.



46. According to the 1st defendant, upon expiration of the requisite notices, through the 2nd defendant, proceeded to advertise the suit properties thus the plaintiff cannot claim failure to be served despite acknowledgement of the same.
47. According to the Plaintiff/Applicant, the outstanding amount stated in the notices are not supported by the balances in the bank statement of the loan account subject of the Charge hence the right to exercise its statutory power of sale is null and void ab initio. The Plaintiff/Applicant is therefore disputing the outstanding amount in the notices.
48. In the converse, the 1st Defendant has submitted That the Plaintiff/Applicant has not disputed That it is indebted to the 1st Defendant. According to the 1st Defendant, as a result of the default in repayment of the loan, it has the right to exercise its statutory power of sale arose under Section 90(1) of the Land Act.
49. Kwach JA. had this to say in Mrao case (supra);
- “I have always understood That it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so That he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah That the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.”
50. In Al-Jalal Enterprises Limited vs. Gulf African Bank Limited [2014] eKLR cited with approval by Nyamu, J. (as he then was) in the case of Mathya vs. Housing Finance Co. of Kenya Limited & another [2003] 1 EA 133 where the Court stated That:
- “...he who comes to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the Applicant outside the realm of exercise of the court’s discretion.”
51. In the same vein, in Bharmal Kanji Shah and Another vs. Shah Devar Devji [1965 EA] quoted in the case of James Otiang Okoth & Another vs. Nic Bank Limited [2017] eKLR the Court held That:
- “the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground That there is a dispute as to the amount due under a mortgage. Consequently, we implore this Court to be guided by the aforementioned judicial pronouncements and find the application for injunction lacking.”
52. However there are circumstances in which a mortgagee or chargee may be restrained from exercising his/its statutory power of sale as stated in Halsbury’s Laws of England, Vol. 32 (4th Edition) paragraph 725 thus:-
- “The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, That is, the amount which



the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

53. It was stated in the case of Nairobi HCCC No. 527 of 2013 Palmy Company Limited vs. Consolidated Bank of Kenya Limited [2014] eKLR, That;

“Unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction against a chargee who is exercising the statutory power of sale of the charged property...”

54. It follows from the cited authority, therefore That disputes on the amount payable or interest chargeable is not a ground for the court to exercise its discretion to grant an injunction unless there are other cogent grounds.

55. It is trite That the Court cannot rewrite the contract between the parties unless coercion, fraud or undue influence are pleaded and proved. The Court of Appeal in Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited (2014) eKLR stated:-

“It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipe Plastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one That is extremely unfair. Substantive unconscionability is That which results from actual contract terms That are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.”

56. The Plaintiff/Applicant has also alluded to the fact That he suffered financial constraints and which were further prolonged by the unforeseen circumstances of the Covid 19 pandemic. That he even communicated the same to the 1st respondent with the view That they restructure his loan but got no response with regard to That. In light of this, the court empathizes with the plaintiff.

57. Once the relevant legal documents of the loan advanced are availed and the interest rates confirmed as at the time the loan was advanced and thereafter the parties are bound by their contracts the court cannot rewrite the terms of these contracts. This point was amplified by Ringera J.(as he then was) in Elijah Kipng’eno Arap Bii vs. Kenya Commercial Bank Limited [2001] eKLR where the Judge held as follows:

“In my opinion, justice must always be dispensed in accordance with well-established legal principles and not in accordance with judicial idiosyncrasy or whim. And of course it is trite learning That equity follows the law. Being of That persuasion I cannot see That a lender who happens to be the employer of the borrower can be restrained from exercising his contractual or statutory powers merely because the borrower has brought into question the lawfulness of his dismissal from the lender’s service. And even if it may be the case That in common parlance the dismissal of an employee and the recalling of his loans thereafter may be called double jeopardy, such action cannot be conceived to be double jeopardy within the meaning of the law.



Enforcement of contractual rights cannot be regarded as punishment. The bottom line is That all applications for injunction irrespective of the contractual or other relationships between the parties are to be decided on the basis of the settled principles for the grant of such.”

58. The Court therefore finds That the Plaintiff/Applicant has established a prima facie case with probability of success.
59. Whereas the Plaintiff is under legal obligation to perform obligations under the terms of contract, he has disputed the interest rates and charges levied and it is the view of the court That there need to be clarifications as to the disputed figures.

Whether The Plaintiff/applicant Will Suffer Irreparable Loss Which Would Not Be Adequately Compensated By An Award Of Damages

60. As regards the second condition, whether the Plaintiff/Applicant stands to suffer irreparable loss, it was held in Nguruman Limited case (supra) where the Court of Appeal expressed itself as hereunder:

“On the second factor, That the applicant must establish That he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; That is injury That is actual, substantial and demonstrable; injury That cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature That monetary compensation, of whatever amount, will never be adequate remedy.”

61. The Court notes That the Plaintiff/Applicant has only stated That he stands to loose irreparably his proprietary interest over the suit property hence he will suffer irreparable damage That cannot be compensated by an award of damages. According to the Plaintiff/Applicant, the court should not allow the statutory power of sale to be exercised since it is tainted with bad faith, malice and illegality. The court is of the view That by only stating That he will suffer a real and imminent risk the Plaintiff/Applicant has not discharged That burden.
62. The Plaintiff stated That he experienced financial difficulties in the year 2019 and wrote to the 1st Defendant to restructure his credit facilities but did not provide any proof on record as to such communication. The Plaintiff/Applicant has not tendered any documents in court to show That. The burden of proof lay on the Plaintiff/Applicant. Section 107 of the *Evidence Act* is to the effect That he who alleges a fact must prove and again this is an issue That would fairly be canvassed in a trial when at this stage the court is not supposed to engage itself in a trial.
63. At paragraph 4(J) of his supporting affidavit, the Plaintiff/Applicant has averred That his suit property was grossly undervalued. The valuation report on record was prepared by Accurate Valuers Limited under the instructions of the 1st Defendant. The Plaintiff/Applicant has not tendered in court an alternative report to counter the findings in the Accurate Valuers Limited valuation report as provided for by the Auctioneers Rules.



64. The Chargee has the duty to obtain the best price reasonably obtainable at the time of sale pursuant to Section 97(2) of the Land Act. In *First Choice Mega Store Limited v Ecobank Kenya Limited*(supra), Onguto J. held:-

“ 52. It is common ground That a chargee who exercises or seeks to exercise his power of sale owes a duty to take reasonable precautions to obtain the true market value or a proper price for the property at the time when he comes to sell: see *Cuckmere Brick Co Limited vs. Mutual Finance Ltd* [1971] 2 All E R 633, *Yorkshire Bank plc vs. Hall* [1999] 1 All E R 879 and *Madhupaper International Ltd vs. Paddy Kerr and others* [1985] LLR 2396 (CAK). The chargee is expected to act honestly and without reckless disregard for the chargor’s interests. This duty, which had its genesis in equity, like much of the solicitous concern of equity for the interests of chargors, is now enshrined in statute. Inscrutably, Section 97 of the Land Act imposes the duty to obtain the best possible price reasonably obtainable at the time of sale. The chargee is then under a duty, in the circumstances, to cause a forced sale value to be ascertained by the valuer.

65. In *Palmy Company Ltd vs. Consolidated Bank of Kenya Ltd* [2014] eKLR (as adopted in *Olkasasi Limited vs. Equity Bank Limited* [2015] eKLR) the court stated:-

“ The onus of establishing on prima facie basis, That the applicant’s right has been infringed by the respondent by failing to discharge the duty of care under Section 97(1) of the Land Act lies on the applicant. The court needs cogent evidence and material in order to say That prima facie, there has been an undervaluation of the suit property which is an infringement of Section 97 (2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the respondent”.

66. In *Isaiah Nyabuti Onchonga v Housing Finance Company of Kenya Ltd & another* [2020] eKLR) the court held That:

“ 33. One issue raised is That the sale was below the market value. This however remained a mere allegation as the Customer did not provide proof of any valuation to demonstrate That alleged sale was at an under value. In the absence of such proof, the Bank was under no obligation to defend the consideration yielded in the sale.”

67. The Court finds That the Plaintiff/Applicant has not discharged the burden to prove That he will suffer irreparable damage That cannot be compensated by way of damages. He has not shown whether he resides in the property such That if the sale by public auction is conducted That he will be rendered homeless. See *JM vs. SMK & 4 others* [2022] eKLR. However, this does not mean That the court will not grant the injunction since this condition has not been satisfied as the Plaintiff/Applicant has succeeded in establishing a prima facie case.

In whose favour does the balance of convenience tilt in?

68. The Plaintiff/Applicant has established a prima facie case with probability of success despite not being able to show the irreparable damage That he would suffer in the event That the injunctive relief is not granted by court.



69. In Nguruman case(supra) the Court of Appeal held:

“..It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both That the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with That of the respondent, if it is granted.”

70. It is now trite That the Court in responding to prayers for injunction should always opt for the lower rather than the higher risk of injustice. See Ojwang Ag. J(as he then was) in Suleiman vs. Amboseli Resort Ltd (2004) 2 KLR 589 and Justice Hoffman in the English case of Films Rover International vs. Cannon Films Sales Ltd (1986) 3 All ER 772.

71. The court’s view is That the notices issued upon the Plaintiff/Applicant create doubt as to the outstanding amount That is claimed by the 1st Defendant. It creates doubt as to the outstanding amount hence prejudicial to the Plaintiff/Applicant. The court is of the view That it would be lower risk to grant the injunction against the statutory power of sale to be exercised by the 1st Defendant. The balance of convenience tilts in favor of the Plaintiff/Applicant.

72. According to the Plaintiff/Applicant, the statutory power of sale is premised on a defective Statutory Notice and Notice to Sell based on the fact That the plaintiff alleges That the 1st defendant applied contractual penalties and daily interests. The court’s view is That the disputed amounts by plaintiff the in the notices are not simple defects That can be remedied in damages.

73. I associate myself with Sewe J. Isabella Nyambura Gitau vs. Consolidated Bank Of Kenya Limited & another [2017] e KLR where the Judge held:

“ The Court is therefore satisfied That the Plaintiff has made out a prima facie case in respect of service of the Notices, in That she has made out a case That requires rebuttal by the Defendant. Granted That this omission pertains to compliance with the law, I would entirely agree with the position taken in the case of Elizabeth Wambui Njuguna vs. Housing Finance Co. of Kenya Ltd [2006] eKLR That:

“ ...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor’s equity of redemption.”

(19) In such a situation, the anomaly can only be cured by full and strict compliance in the form of fresh service of all the requisite notices. This pronouncement was expressed by the Court of Appeal in Civil Appeal No 26 of 2002 National Bank of Kenya Ltd vs. Shimmers Plaza Ltd; (2009) eKLR as follows;

... An injunction is an equitable and discretionary remedy. The duration of an order for injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say That where the Court is inclined to grant an interlocutory injunction order restraining a mortgagee from exercising its statutory power of sale solely on the ground That the mortgagee has not issued a valid notice, then in our view, the order of injunction



should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

74. Having considered the facts of this case and the law, the court is satisfied That the case is clear That there are special circumstances That although the Plaintiff is indebted to the 1st Defendant there should be clarity between both parties as to the amount to be repaid. While the plaintiff alleges That the 1st defendant applied contractual penalties and daily interest which were contrary to the terms and conditions of the contract, the 1st Defendant alleges That those were the terms of the agreement which the plaintiff is well aware of. It is the Court’s view That it cannot re write the contract and thus both parties must go back to the contract and agree on the amount That is repayable.
75. It is not in dispute That the suit properties LR NO. Mbooni/Mutitu 2963 and Mbooni/Mutitu 2964 were given as the security for the loan advanced to the Plaintiff. The Court finds That it should however be clear as to the amount That is to be repaid back by the plaintiff as the same is disputed.

Disposition

76. In the premises the Court grants the following orders;
- a. That pending the hearing and determination of this suit an order of injunction issued on remains in force restraining the Defendants whether by themselves or their representatives, servants and/or assigns from howsoever selling or advertising for sale by way of private treaty or by public auction and/or in any other manner whatsoever interfering with or otherwise dealing with the property LR No. Mbooni/Mutitu/2963 & Mbooni/Mutitu/2963;
 - b. That pending the hearing and determination of this suit a mandatory order of injunction issues compelling the 1st Defendant to withdraw the Statutory Notice and Notice to sell issued.
 - c. That the 1st Defendant shall issues fresh Statutory Notices under Section 90 of the Land Act, 2012, Section 96 (1) & (2) Land Act 2012 & Redemption Notice Rule 15 Auctioneers Rules after settling the dispute on the outstanding debt with reference to the contract.
 - d. That the 1st Defendant shall provide the Plaintiff with statement of account with respect to the facility granted by the 1st Defendant to the Plaintiff prior to issuing a fresh statutory notice(s) and reconciliation of accounts to be carried out.
 - e. That the Plaintiff/Applicant is at liberty to obtain alternative Valuation Report of the suit property and exchange with the 1st Defendant’s who is also at liberty to conduct another valuation for purposes of the sale in default of settling the outstanding debt.
 - f. That the temporary injunction shall be for the period That allows the 1st Defendant reconciles accounts with or to the Plaintiff of what is due and owing and thereafter serves the statutory notices and the injunction shall abate after 90 days.
 - g. That Costs of the application is awarded to the Plaintiff/Applicant.

Orders accordingly.

RULING READ, SIGNED AND DELIVERED AT MACHAKOS THIS 28th DAY OF SEPTEMBER, 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

