



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**COMMERCIAL CASE NO. E001 OF 2021**

**EUNICE RAHEL ACHIENG.....PLAINTIFF/APPLICANT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling determines the application dated 21.9.2021 filed by the applicant EUNICE RAHEL ACHIENG seeking the following orders:

**a. Spent**

**b. That pending the hearing and determination of this application interpartes, a temporary order of injunction do issue restraining the defendant whether by itself, its employees, servants and all such persons acting on its behalf from advertising for sale, selling whether by public auction or private treaty, transferring, letting, charging, alienating or otherwise howsoever interfering with the plaintiff's land parcel known as LR NO. SOUTH SAKWA/BARKOWINO/6162 and her guarantor's land parcels known as LR NO. SOUTH SAKWA/BARKOWINO/2668, LR NO. SOUTH SAKWA/BARKOWINO/2674 and LR NO. SOUTH SAKWA/BARKOWINO/3039.**

**c. That pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the defendant whether by itself, its employees, servants and all such persons acting on its behalf from advertising for sale, selling whether by public auction or private treaty, transferring, letting, charging, alienating or otherwise howsoever interfering with the plaintiff's land parcel known as LR NO. SOUTH SAKWA/BARKOWINO/6162 and her guarantor's land parcels known as LR NO. SOUTH SAKWA/BARKOWINO/2668, LR NO. SOUTH SAKWA/BARKOWINO/2674 and LR NO. SOUTH SAKWA/BARKOWINO/3039.**

**d. That an order do issue that land parcels known as LR NO. SOUTH SAKWA/BARKOWINO/6162, LR NO. SOUTH SAKWA/BARKOWINO/2668, LR NO. SOUTH SAKWA/BARKOWINO/2674 and LR NO. SOUTH SAKWA/BARKOWINO/3039 be valued by an independent valuer to ascertain its current market value.**

**e. That an order compelling the defendant to render accounts to the plaintiff showing how the sum claimed by the defendant in respect of the plaintiff's loan at the defendant's company has been accrued.**

**f. That the costs of this application be provided for.**

2. The application is premised on the eleven grounds on the face of the Notice of motion application. It is further supported by the supporting affidavit sworn by Eunice Rahel Achieng dated 21<sup>st</sup> September 2021.

3. The defendants opposed to the application and filed a replying affidavit sworn by Lillian Owino on the 15<sup>th</sup> October 2021 and filed in court on the 18<sup>th</sup> October 2021.

**The Applicant's Case**

4. The brief facts of the applicant's case are that she is the registered owner of LR NO. SOUTH SAKWA/BARKOWINO/6162 and her guarantor one Gilbert Ndolo Owor (deceased) is the registered proprietor of LR NO. SOUTH SAKWA/BARKOWINO/2668, LR NO. SOUTH SAKWA/BARKOWINO/2674 and LR NO. SOUTH SAKWA/BARKOWINO/3039 (hereinafter known as the suit lands).

5. It is her case that sometime in October 2016, she obtained a loan of Kshs. 18,000,000 from the respondent bank which loan was secured by a charge over the suit parcels of land, which loan was to boost her business.

6. The applicant further avers that in February 2017, her distributorship contract with Equator Bottlers limited, which she relied on to service the loan, was unfairly terminated and that she had since been making payments to service the loan from her earnings as well as with the help from the guarantor which she stopped after the onset of the Covid-19 pandemic which constrained her business and as compounded by the death of her guarantor on the 17<sup>th</sup> June 2021.

7. The applicant avers that on diverse dates, she wrote to the respondent bank seeking to have the loan restructured and extended but her letters were ignored with the respondent proceeding to issue a Notification of Sale dated 27<sup>th</sup> August 2021 informing her that they intended to sell her loan guaranteed property on account of the outstanding loan balance. She further states that the Notification of Sale was also addressed to the Administrator of the Estate of the deceased guarantor, Gilbert Ndolo Owuor, though she was aware that the deceased's estate had no administrator which would be unfair, unjust and unlawful as the said notification was invalid as the respondent was not aware of who was appointed to administer the deceased's estate.

8. The applicant averred that if the respondent proceeded with the sale of the suit parcels of land, it would value the property at a lesser amount below its current market value and as such it is imperative that a valuation of the said properties be conducted to ascertain their true and current market value which she had done with the valuer Adomag Valuers & Associates valuing the suit properties at Kshs. 32,500,000.

9. The applicant further averred that the charges and interest charged by the respondent were excessively high and illegal in contravention of the law and that as a result of the fraudulent charges and interest, her account continued to soar unabated even as she tried to clear the loan which amounted to unjust enrichment on the part of the respondent.

10. The applicant further averred that the respondent had refused to furnish her with concise and detailed statements of accounts of her account so as to show how it arrived at the balance it claims.

11. The applicant further averred that she had not been served with the requisite Statutory Notice as envisaged by the Land Act, 2012 and thus any attempt to sell her property was illegal. She further averred that the suit properties were core sources of income for her family and it would only be fair and just that the orders sought are granted. She further averred that the sale of the suit parcels of land would expose her to loss that could never be adequately compensated by damages.

### **The Respondent's Case**

12. The respondent's case is that it granted the applicant a loan facility of Kshs. 18,000,000 on or about the 7th October 2016, which loan was secured by the applicant's land LR NO. SOUTH SAKWA/BARKOWINO/6162 as well as by the parcels of land owned by Gilbert Ndolo Owuor specifically LR NO. SOUTH SAKWA/BARKOWINO/2668, LR NO. SOUTH SAKWA/BARKOWINO/2674 and LR NO. SOUTH SAKWA/BARKOWINO/3039.

13. The respondent averred that Gilbert Ndolo Owuor executed an appropriate guarantee and indemnity agreement that in the event of default in the repayment of monthly instalments by the applicant, the respondent would be at liberty at any time and on notice to call for an immediate settlement of the outstanding arrears of the loan.

14. It was averred that the applicant would make a monthly payment of Kshs. 500,000 for a period of three years while the loan facility attracted an interest of 14% per annum and further that the respondent was free to vary the interest rates at its sole discretion depending on the prevailing market forces.

15. The respondent averred that after releasing the loan facility to the applicant, she made some repayments at the beginning but thereafter defaulted with irregular payments in some instances and that as at 15th September 2021, the outstanding sum inclusive of unpaid arrears was Kshs. 21,418,884.64 which prompted the respondent to initiate the process of realizing the security by following all due legal processes by issuing the statutory notices to the applicant and her guarantor.

16. The respondent further averred that indeed the applicant approached it in 2017 and 2019 to restructure the terms and the conditions of the loan facility which though done, the applicant remained in a constant state of default of repayment.

17. It was further averred that the respondent was entitled to take the steps it had taken in its recovery effort against the applicant as well as the guarantor as the applicant was the guarantor's widow who informed the respondent of the guarantor's passing and had since refused to take letters of administration to the deceased's estate despite being first in priority to the same, in an effort to frustrate the respondent in exercising its statutory power of sale to enable it recover the amounts in default.

18. The respondent denied imposing illegal, unreasonable, punitive and excessive interest rates on the loan balance contending that the rates applied were contractually agreed between the parties herein. It was further averred that a dispute as to an amount outstanding under a charge was no ground for halting the realization by a chargee of its rights under the charge.

19. The respondent further averred that the statements of loan accounts was regularly rendered to the applicant together with demand letters and statutory notices served giving a detailed statement of how the figures computed were arrived at. It was further averred that the statutory notices were personally served on the applicant who acknowledged receipt of the same by signing on the documents.

20. It was further averred that the applicant's assertion that the suit lands were her main source of income and as such she was likely to suffer loss was not a good basis for grant of the orders sought as the applicant voluntarily used the suit parcels of land as security, thus rendering

them a commercial commodity for sale and that if at all the applicant was to suffer any loss, the same is readily quantifiable or compensated as the property would be valued and its commercial value established.

21. The respondent avers that it is in the interest of both parties for the suit land to be sold so that the applicant can also recoup some money from the sale as the loan repayment period has already lapsed.

22. The application was canvassed by way of written submissions.

### **The Respondent's Submissions**

23. The applicant submitted that it has a prima facie case with a probability of success based on the following issues; Firstly that the applicant was never served with the statutory notices pursuant to section 90 of the Land Act nor was she given an opportunity to exercise her equity of redemption over the said properties and that non-service of the said statutory notices as envisioned under section 90 of the Land Act was an irregularity that was fatal to the respondent's exercise of its statutory power of sale as was held in the case of **Elizabeth Wambui Njuguna v Housing Finance Co. of Kenya Ltd [2006] eKLR** and the case of **Trust Bank Ltd v Eros Chemists Ltd & Another [2000] eKLR** where it was held that for the statutory power of sale to accrue the statute provides for a three month's period to lapse after service of the notice. Secondly, that this court needs to consider the fact that the estate of her guarantor was yet to be served with the statutory notices and as such the purported service by the respondent herein was invalid. Reliance was placed on the case of **Edward Karanja Ragui v Barclays Bank Ltd [2002] eKLR** where the chargee purported to serve the deceased's estate when it had not known that the deceased had passed on.

24. The applicant further submitted that she had demonstrated that she stands to suffer irreparable damage if the temporary injunction was not granted as she had demonstrated that the suit lands were her core source of income and that any sale of the same could expose her to loss that could not be adequately compensated by damages as the said parcels of land were of sentimental value to the applicant as she had invested money and time to build the premises.

25. The applicant further submitted that she was likely to suffer more inconvenience if the temporary injunction was not granted as she was in continuous use and possession of the suit lands and used them as a source of income and its family would not survive if the respondent proceeded with the sale as compared to the inconvenience to be suffered by the respondent.

26. The applicant further submitted that the interest charged on her account was in contravention of the law and that if the respondent intended to vary and/or adjust the same, it would have expressed this intention in writing as interest is a fundamental element in a commercial contract and cannot be assumed and thus the respondent violated section 84 of the Land Act in varying and/or adjusting interest on her account.

### **The Respondent's Submission**

27. It was submitted that no prima facie case was established by the applicant and that on the question of service, the Respondent had availed before the court evidence that the said notice was indeed given to the Plaintiff vide its letter dated 5<sup>th</sup> March 2021 addressed to the Plaintiff by the Defendant through her Postal address of **Box 56 – 40601, Bondo**, which was the same address used by the applicant in the instant Affidavit in support of the application for injunction and in the documents executed between her and the Defendant. That the said letter was accompanied by its corresponding proof of service by way of registered mail in accordance with the terms of the Legal Charge executed between the parties. The respondent relied on the case of **Patrick Njiru v Co-operative Bank of Kenya Ltd (2008) eKLR** where the court held *inter alia* that service via an address given in the charge document was satisfactory evidence of good service in terms of section 3(5) of the Interpretation and General Provisions Act and consequently the complaint by the Plaintiff that the notice required to be served under section 74 of the Registered Land Act was not so served lacked substance.

28. The respondent further submitted that having sent the statutory notice on 11<sup>th</sup> March 2021, it once again gave the applicant about thirty more days before finally serving her with the notice of sale as contemplated under **section 96 (2)** of the Act, which was served upon her vide the letter dated 27<sup>th</sup> August 2021 which letter was received by the applicant personally as indicated by her signature thereon.

29. It was the respondent's submission that considering that the applicant is the widow and/or beneficiary of her late husband and/or guarantor's estate, there would be no better placed person as the deceased's legal representative to administer the estate of the deceased. It was submitted that the applicant had not sought for grant of letters of administration but was seeking injunctive orders on the parcels of land of the deceased whereas she accepted the 40 days' statutory notice addressed to the estate of the deceased on behalf of the estate as evidenced by her signature on the letter dated 5<sup>th</sup> March 2021 addressed to the estate of Gilbert Ndolo Owuor.

30. It was submitted that the applicant's actions were obviously calculated to frustrate the bank, as the deceased died way back in June 2021 and to date she had neither applied for grant nor filed a succession cause in court and that her main objective was to obtain injunctive orders and keep the bank at ransom until such a time that she will be ready to obtain a grant to administer the estate of the deceased, knowing fully well that the bank will not be able to exercise its statutory power of sale until then.

31. The applicant submitted that an order of injunction was an equitable remedy issued to prevent the end of justice from being defeated as was held in the case of **Ochola Kamili Holding Limited v Guardian Bank Limited (2018) eKLR** and that the court should not allow its orders to be used to defeat the ends of justice.

32. On the question of whether the bank levied unlawful and excessive interest in computing the amount sought to be paid, it was submitted that the burden of proof on such an allegation rested with the applicant in accordance with the provisions of sections 107, 108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya and that the applicant had not availed any evidence of the same and thus the allegation remains unsubstantiated and without any basis at all whereas on its part, the respondent produced a chronological and comprehensive statement of

accounts, correspondence between itself and the applicant in which it constantly reminded the applicant to regularize her loan account which had fallen into arrears, and in each letter gave the applicant her state of arrears, as to the amount due, the interest thereon, and outstanding amounts over a long period of correspondence.

33. It was submitted that the Applicant on her own volition took a loan from the Respondent and agreed to the terms thereto and she cannot therefore claim that the interest rates charged by the Bank on her credit facility are exorbitant and illegal and were imposed without notice when statements of accounts were regularly supplied to her and at no time did she raise her complaint with the Bank. It was further submitted that the applicant should not be allowed to use this Court as the forum through which she can escape from obligations rising out of her own making and that the courts have a duty to interpret the contracts made by parties and give it the force of law and not rewrite them as was held in **Cyn Energy Company Limited v Synergy Industrial Credit Limited, Civil Case No. 540 of 2013** and **National Bank of Kenya Ltd v Pipeline Samkolit (K) Ltd & Prof Samson K Ongeri**.

34. The respondent submitted that the applicant's allegation that the respondent refused to supply her with a statement of account was an afterthought and the same had not been substantiated whereas it was its position that the applicant was routinely given her statements of account, and in addition, she has such access to the same at any time, online upon her request as evidenced by correspondence between itself and the applicant in which the respondent constantly reminded the Plaintiff to regularize her loan account which had fallen into arrears, and in each letter gave the Plaintiff her state of arrears, on to the amount due, the interest thereon, and outstanding amounts over a long period of correspondence.

35. The respondent further submitted that the loan facility has been overdue for almost two and half years and the applicant was precluded from seeking an injunction when she was well aware that she was in default and admitted the same. Reliance was placed on the case of **Mechanical Engineering Plant Ltd. & Others vs Standard Chartered Bank Ltd. HCCC No. 92 of 2007** where the Court stated *that when part of the amount claimed is admitted or proved to be due, a chargor cannot be restrained by an injunction.*

36. It is the respondent's submission that its statutory power of sale had thus properly arisen as default has been demonstrated and service of all the necessary statutory notices shown to have been effected and it therefore would be inequitable for the applicant to fault the respondent for the intended sale of the properties. Reliance was placed on the case of **Aberdare Investment Limited v Housing Finance Co. of Kenya and Another (1992) EA 1** where the Court held that **the choice of remedy for recovery of an unpaid loan under a mortgage is that of the mortgagee, and the mortgagor cannot tell the mortgagee to take such action as may suit the mortgagor.**

37. The respondent submitted that the conditions for grant of temporary injunction under the principles are cumulative in nature, and where a party is not able to demonstrate a prima facie case, the court does not need to consider the other ingredients. Reliance was placed on the case of **Mary Njeri Kariuki v Joyce Cheruto & Another (2017) eKLR**, where it was held that as the applicant had failed to establish a prima facie case, there was no need to consider the other limbs of the test for determining an application for interlocutory injunction.

38. Reliance was also placed on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the court stated **that:**

**“If the applicant establishes a prima facie case that alone was not sufficient basis to grant an interlocutory injunction and that 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 prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”**

39. The respondent submitted that the applicant bore the onus of demonstrating and proving to court that the disposal of her property if found to have been done wrongly or illegally by the Defendant would not be remedied by an award of monetary damages. It was submitted that the property sought to be disposed herein was not of unique or intrinsic value and was quantifiable in monetary terms and as such, whatever loss, if any that the applicant may suffer could be adequately compensated through an award of damages.

40. It was further submitted that the sentimental value attached to land has been held by the courts not to amount to sufficient proof of irreparable harm where the same property has been charged to secure the repayment of a debt as was held in the case of **Kennedy Onyango Obiero v African Banking Corporation, Kisumu Commercial Suit No. 71 of 2018** where the court after analyzing the case noted that sentimental value attached to land does not amount to sufficient proof of irreparable harm.

41. It was submitted that in terms of balance of convenience, the applicant could be adequately compensated in the unlikely event that she suffers any loss as the respondent was a very stable financial institution with sufficient capacity to compensate the applicant in the event that it is established at the trial of this suit that the Respondent was not entitled to exercise statutory power of sale.

42. The respondent further submitted that it is in both parties' best interest to allow the sale to take place, at this stage to avoid any further accumulation of interest on the principal sum and also allow the Bank to recover the outstanding debt or substantial portion thereof, and the applicant to recoup some money too from the sale as the agreed period of repayment of the loan of three years had also lapsed. Reliance was placed on the case of **Maithya v Housing Finance Co. of Kenya and another [2003] IEA 133** where court held that:

**“the balance of convenience tilts in favour of the lender since it is in a position to repay should the borrower succeed at trial whereas the borrower's security continues to be eaten away by the mounting redemption money and may prove insufficient.”**

#### **Analysis and Determination**

43. I have carefully considered the applicant's Notice of motion, grounds, supporting affidavit and submissions. I have also considered the opposing affidavit and submissions by the respondent and the statutory and case law relied on by both parties in their respective submissions.

44. The law on granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides 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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;**

**(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."**

45. The power exercised by the courts in an application seeking interlocutory injunctive orders is discretionary. The discretion is guided by the principles established in the locus classicus case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself as follows on the conditions that a party must satisfy for the court to grant an interlocutory injunction:

**"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."**

46. In the instant case, I have perused the pleadings relied on by both parties. ***On the first limb on whether the applicant has shown a prima facie case with a probability of success***, I note that the applicant bases her claim on this limb on the facts that the respondent did not comply with the statutory provisions of section 90 of the Land Act regarding service of the Statutory Notice on her person as well as on her guarantor who has since passed on. This is denied by the respondent who contends that the the notice of sale contemplated under **section 96 (2)** of the Act was served upon the applicant vide the letters dated 27<sup>th</sup> August 2021 one addressed to the applicant and the other to the administrator of the estate of Gilbert Ndolo Owuor.

47. Section 90 of the said Land Act Cap 280 (Laws of Kenya) provides that:

**"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 default for one month, the chargee 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.**

**The notice required by subsection (1) shall adequately inform the recipient of the following matters—**

**the nature and extent of the default by the chargor;**

**if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**

**if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;**

**the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies."**

48. Section 96 of the Land Act stipulates that:

**"1. Where a chargor 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 chargor under [section 90\(1\)](#), a chargee may exercise the power to sell the charged land.**

**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."**

49. I have read the statutory notices issued by the respondent on the 27<sup>th</sup> August 2021 and annexed to the replying affidavit sworn by Lillian Owino on behalf of the respondent and a cursory look reveals that the said notice did indicate the nature and extent of default, the amount the applicant was required to pay to rectify the default and also included the notification that the respondent would proceed to exercise any of the remedies referred to in the said section in accordance with the procedures provided for in that sub-part.

50. I also note that the applicant raises the issue of service of the said Notice contending that the same was not effected upon the estate of the deceased guarantor whereas the respondent annexed the notice to the administrator of the deceased guarantor's estate which they allege was received by the applicant.

51. Without delving into the merits of the issue of service, it is my opinion that this is a matter that can be settled when the court has had the opportunity to entertain both parties on what amounts to proper service upon the estate of a deceased where letters of administration have not been taken out. Further, I note that the applicant raises various issues which in my view raise a prima facie case with a chance of success specifically the issue of the specific amount that is owed to the respondent and the issue of the interest levied by the respondent.

52. To that extent, I am persuaded that the applicant has satisfied the first limb to warrant grant of temporary injunction. This is because the issues raised *cannot be settled at this interlocutory stage*. It is important to note that a prima facie case with a probability of success is not necessarily one that must succeed.

53. As to whether the applicant will suffer irreparable injury/loss that cannot be compensated by an award of damages if the application for temporary injunction is not allowed, the Respondent contend that even if an injunction is not granted, the Applicant will not suffer any substantial loss, that cannot be adequately compensated by an award of damages, the reason being that the suit property was offered as security to be sold in the event of default. It is for that reason that the Respondent is of the view that the Plaintiff cannot claim that she will suffer irreparable loss incapable of compensation by an award of damages as the property is a security which can be sold at any time upon proof of default to service the loan. The Respondent in support of the above proposition referred to the case of **Kennedy Onyango Obiero v African Banking Corporation, Kisumu Commercial Suit No. 71 of 2018** where the court after analyzing the case noted that sentimental value attached to land does not amount to sufficient proof of irreparable harm.

54. In the case of **Kitur v Standard Chartered Bank & 2 others (2002) 1KLR** the court opined as follows:

**“It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits.”**

55. The applicant contended that if the injunction orders are not granted she stands to suffer irreparable injury pending the hearing and determination of this suit as she stands to lose land that is of sentimental value to her which loss cannot be adequately compensated by way of damages. The applicant further states that the estate of the deceased guarantor will be disadvantaged.

56. From the pleadings filed herein and the supporting documents, it emerges that the deceased guarantor Gilbert Ndolo Owuor was the applicant's husband and that they both made a decision to provide the suit parcels of land as security for the loan advanced by the respondent. Further that by the time the applicant started being in default, she had made repayments of the loan of over Kshs. 2,000,000 and therefore if the injunction pending hearing and determination of this suit is denied, the applicant risks losing the suit properties as well as the monies already repaid.

57. The subject matter in this suit relates to property that is likely subject to succession proceedings and likely to benefit the issues of the union between the applicant and the deceased guarantor. Accordingly, it cannot be said that the applicant will not suffer irreparable loss or injury if the application for temporary injunction is not granted at this stage.

58. As to in whose favour the balance of convenience lies, it is the respondent's case that if the injunction is granted, it will inflict greater hardship on the Respondent because the outstanding debt shall continue to accumulate interest. On the other hand, if an injunction is refused and it is found that the applicant was entitled to an injunction, the respondent can easily compensate the applicant for any loss as it is a reputable Bank capable of doing so.

59. Taking all the above into consideration, it is my opinion that the balance of convenience tilts in favour of the applicant as she stands to lose not only her property but that property which is also subject of likely succession proceedings. Further it serves the interest of justice that this court exercises its discretion by conserving and preserving the suit property pending hearing and determination of the suit. Although the respondent contended that the applicant had refused to take out grant of letters of administration intestate to delay the process of recovery of the outstanding defaulted loan, there is no material on record to show that she was issued with a demand or citation for her to take out letters of administration in respect of her husband/guarantor's estate prior to the filing of these proceedings or prior to the Statutory Notices being issued. In any case, it is in the interest of the applicant that she takes out a grant of letters of administration to protect the estate of the deceased husband and any delay and failure to do so might be to her own detriment.

60. The applicant in her application also seeks for other orders namely:

**c) That an order do issue that land parcels known as LR NO. SOUTH SAKWA/BARKOWINO/6162, LR NO. SOUTH SAKWA/BARKOWINO/2668, LR NO. SOUTH SAKWA/BARKOWINO/2674 and LR NO. SOUTH SAKWA/BARKOWINO/3039 be valued by an independent valuer to ascertain its current market value.**

**d) That an order compelling the defendant to render accounts to the plaintiff showing how the sum claimed by the defendant in respect of the plaintiff's loan at the defendant's company has been accrued.**

61. In my humble view, these prayers can only be considered in the main suit since the respondent has maintained that it supplied to the plaintiff/ applicant herein the status of her accounts due. In any event, the parties are expected to file all documents intended to be relied on at

the hearing and nothing prevents the defendant from filing a detailed statement of accounts showing the outstanding loan. This in itself does not require an order compelling the defendant to file such documents as it would be in their interest to disclose what the plaintiff owes them.

62. On whether this court should order for valuation of the charged properties by an independent valuer, again, this is a matter that is not ripe for this court to determine at the interlocutory stage. The plaintiff having claimed that the properties of the deceased are not yet administered, the question is who would be the person legally representing the estate of the deceased for purposes of such valuation.

63. For that reason, I decline to grant the two prayers above sought by the applicant at this interlocutory stage.

64. Accordingly, I find and hold that the applicant's application dated 21<sup>st</sup> September 2021 is merited. It is hereby granted in terms of the following order:

**a. That pending the hearing and determination of this suit, a temporary order of injunction is hereby issued restraining the defendant Cooperative Bank of Kenya whether by itself, its employees, servants and all such persons acting on its behalf from advertising for sale, selling whether by public auction or private treaty, transferring, letting, charging, alienating or otherwise howsoever interfering with the plaintiff's land parcel known as LR NO. SOUTH SAKWA/BARKOWINO/6162 and her guarantor's land parcels known as LR NO. SOUTH SAKWA/BARKOWINO/2668, LR NO. SOUTH SAKWA/BARKOWINO/2674 and LR NO. SOUTH SAKWA/BARKOWINO/3039.**

**b. However, to avoid a situation where the applicant gets an injunction and goes to slumber, it is hereby ordered that the injunctive orders herein issued shall remain in force for a period not exceeding nine months from the date of this ruling. The applicant must ready this suit for hearing and determination within the said period. Costs shall be in the main suit to the successful party.**

**c. Orders Accordingly.**

**DATED, SIGNED AND DELIVERED VIRTUALLY FROM MOMBASA THIS 17<sup>TH</sup> DAY OF JANUARY, 2022**

**R.E. ABURILI**

**JUDGE**