



**Kinjunje Gardens Limited v NCBA Bank (K) PLC & 2 others (Civil Case E653 of 2021)
[2022] KEHC 131 (KLR) (Commercial and Tax) (23 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E653 OF 2021
DAS MAJANJA, J
FEBRUARY 23, 2022**

BETWEEN

KINJUNJE GARDENS LIMITED PLAINTIFF

AND

NCBA BANK (K) PLC 1ST DEFENDANT

B. GATHIRU T/A REGENT AUCTIONEERS 2ND DEFENDANT

EQUITY BANK(KENYA) LIMITED 3RD DEFENDANT

RULING

1. There are two applications before the court for determination; The Plaintiff's ("the Company") Notice of Motion dated 23rd June 2021 and the 3rd Defendant's ("Equity") Notice of Motion dated 6th July 2021. The Company's application is filed, inter alia, under Order 40 Rule 1 of the Civil Procedure Rules and seeks the following orders:

- 1) Spent*
- 2) Spent*
- 3) THAT this Honourable Court be pleased to issue a temporary Injunction Order restraining the Defendant, whether by themselves, agents, or servants from doing any of the following acts, that is to say, advertising, offering for sale, disposing off, alienating, transferring, causing to be transferred, altering, registering or in any other manner whatsoever interfering with the Plaintiff's quiet possession use and enjoyment of that piece of land known as LAND REFERENCE NUMBER 209/1817 (I.R NO. 2630), situated in Nairobi Central Business District pending hearing and determination of this suit.



- 4) THAT the Honourable Court be pleased to issue an Order compelling the 1st Defendant to provide, avail, produce for Inspection and/or File the Charge Instrument that was so registered against the Parcel of Land Known as LANDREFERENCE NUMBER 209/1817 (I.R NO. 2630), situated in Nairobi Central Business District, and all the attendant registration documents, to wit, Application Form, Day Book Number, Valuation Form and Stamp Duty Payment Forms for scrutiny.
 - 5) THAT costs of the application be borne by the 1st Defendant/Respondent.
2. This application is supported by the affidavit and further affidavit of George Kang'ethe, the Company's Chief Executive Officer sworn on 23rd June 2021 and 7th July 2021. It is opposed by the 1st Defendant ("NCBA") through the replying affidavit and further affidavit of Jackson Nyaga, the Bank's Legal Counsel, sworn on 29th June 2021 and 1st July 2021 respectively. It is also opposed by Equity through the supporting affidavit of Kariuki Kin'gori, its Manager, Legal Services, sworn on 6th July 2021.
 3. Equity's application is also made, inter alia, under Order 40 Rule 1 and 2 of the Civil Procedure Rules seeking the following orders:
 - 1) Spent*
 - 2) Spent*
 - 3) Spent*
 - 4) Spent*
 - 5) THAT a temporary injunction be issued restraining the Plaintiff and the Defendants whether by themselves, agents, servants or anyone acting at their behest or otherwise howsoever from in any way disposing, selling, alienating, transferring or otherwise dealing in any manner with the Suit property known as L.R. No. 209/1817 (I.R. No. 2630) and registered in the name of the Plaintiff/Respondent pending hearing and determination of the suit.
 - 6) THAT a temporary injunction be issued restraining the 1st and 2nd Defendants whether by themselves, agents, servants or anyone acting at their behest or otherwise howsoever from advertising and/or proceeding with the public auction scheduled for the 9th of July, 2021 or offering for sale by private treaty or in any other manner the Suit property known as L.R. No. 209/1817 (I.R. No. 2630) pending hearing and determination of the suit.
 - 7) THAT this Honourable Court be pleased to issue any other orders it deems fit
 - 8) THAT costs of this Application awarded to the Applicant.
 4. The application is supported by the affidavit of Kariuki King'ori sworn on 6th July 2021 and opposed by NCBA through the further affidavit of Joseph Nyaga sworn on 13th July 2021. The applications were disposed of by way of written submissions filed by the parties.
 5. Even though there are some disputed facts, there are some common and undisputed facts that make it possible for the court to understand the dispute between the parties. Sometime in 2014, the Company approached NCBA for a loan facility through the Offer Letter dated 16th June 2014. NCBA agreed to advance the Company KES 160,000,000.00, "to finance the purchase of a commercial building in Nairobi City" that was to be secured by inter alia a charge over the property LR No. 209/1817, Nairobi ("the suit property"). Sometime in 2015, the Company defaulted in its repayment obligations and



NCBA initiated the process of exercising its statutory power of sale by selling the suit property by instructing the 2nd Defendant (“the Auctioneer”) to advertise the suit property for sale. This action by the 1st and 2nd Defendants led the Company to file this suit and application.

6. Equity was joined to this suit as the 3rd Defendant on 8th July 2021. It lays claim to the suit property. It states that by the Letter of Offer dated 7th August 2014, it also agreed to finance the Company by advancing KES 160,000,000.00 to it for the acquisition of the suit property from Henkam Limited. As a result, a transfer was effected in the Company’s name and a First Legal Charge was registered in its favour over the suit property on 9th October 2014 to secure the facility.
7. With the above facts in mind, I now turn to the parties’ positions in both applications

The Company’s Application

8. From the Plaintiff, the Company states that even though it approached NCBA for a facility of KES. 160,000,000.00, no charge was ever created and registered over the Suit property in favour of NCBA and no money was disbursed to it but to a law firm, Khaemba & Associates Advocates. The Company impugns the intended sale on the ground that NCBA intends to exercise a non-existent statutory power in realization of a security it does not hold and which is void in law as the Company and its sister companies have had differences with NCBA over management of their accounts and their businesses in general as NCBA has been their bankers for a long time and the intended sale is an effort to exert pressure on the Company to honour other unsecured obligations.
9. The Company depones that the differences between NCBA and its directors escalated investigations by the Directorate of Criminal Investigation (“DCI”) which concluded that that no charge was ever registered against the title to the Suit property and could therefore not form the basis of exercise of the statutory power of sale. The Company adds that this position was reiterated by the Registrar of Titles.
10. The Company contends that the Suit property comprises a hotel and attendant facilities and any disruption of the business as a result of NCBA’s action would be disastrous to the sustainability of the business hence the court should intervene by issuing the injunction.
11. The Company further states that since the suit property was advertised for sale, the Company directors tried to seek audience with NCBA to obtain Statements of Account to ascertain what was owed but this was in vain. The Company states that it has not been served with any Statutory Notice as required in law or a Notice of Intention to sell calling upon the Company to redeem the suit property and this is presumably because the Charge is nonexistent. The Company proffers that the said intended auction would be unlawful and has no basis in law or in contract since NCBA has failed to comply with the mandatory provisions of the law before exercising its purported statutory power of sale, which never was in any event and thus, the Company urges the court to allow its application.

NCBA’s Reply

12. NCBA opposes the application on the ground that the Company’s application and depositions contain material falsehoods. NCBA produced Certificates of Search in its depositions insisting that the suit property is charged to it as it was formerly known as Commercial Bank of Africa Limited. It asserts that these certificates are prima facie proof of the state of affairs in respect of the suit property.
13. NCBA avers that following the Letter of Offer dated 16th June 2014, it advanced Term Loan Facility for KES 160,000,000 to finance the purchase of the Suit property secured by a First Legal Charge registered simultaneously with a Transfer in favour of the Company on 18th July 2014. It points out that the Company does not deny the Transfer.



14. NCBA states that sometime in 2015, the Company failed to service the facility causing it commence the process of exercising its statutory power of sale. It states that it issued Statutory Notices to the chargor and the guarantors by email and registered mail to their last known addresses. NCBA denies the averment that it never issued the relevant notices and/or followed the lawful procedure in exercising its right to sell the suit property. It has included the 30 days' notice dated 11th December 2015, the 90 days' notice dated 13th January 2016, the 40 days' redemption notice dated 25th April 2016 and the 2nd Defendant's 45 days' notification of sale dated 8th July, 2016 where the auction was slated for 20th September 2016, in its deposition.
15. NCBA further states that while it was issuing the various notices, the Company made several proposals to make good their default. However, it did not honour the proposals or deny the existence of the security or its indebtedness and the indebtedness of its related companies in various correspondences and court cases.
16. NCBA states that in one of the cases filed by the Company, ELCC No. 107 of 2016, an injunction was issued on 5th September 2016 stopping the sale of the Suit property scheduled for 20th September 2016 but it was discharged on 12th March 2020 paving way for the sale. Thereafter, NCBA procured a fresh valuation on the suit property as a precursor for sale and a report was issued on 28th May 2021 and that on or about 4th June 2021, NCBA, through its Advocates on record proceeded to issue instructions to the Auctioneer to re-advertise the suit property for sale which was done on 4th June 2021 and the auction slated for 9th July 2021. NCBA states that having issued the statutory notices before, it was not necessary to re-issue them.
17. In response to the issue of the DCI investigations, NCBA avers that the court, in NRB JR Application No. 429 of 2016 (formerly MSA JR. No. 54 of 2016) only stayed further investigations and arrest of the Company's directors pending determination of the suits in the Environment and Land Court and that therefore no conclusive investigations have been made. In any event, the Official Search issued by the Lands Office rebut the misplaced presumption that the Charge was never registered as alleged.
18. NCBA stresses that the Company had defaulted in payment of the loan facilities which prompted the security realization process by NCBA and therefore it should be allowed to proceed with the sale. It therefore urges that the Company should not be allowed to approbate and reprobate in the same breath by disputing and confirming the Charge. Further, that the registration of the charge as confirmed by the Official Search attests to the fact that the registration process was undertaken to conclusion unless otherwise stated by the Chief Lands Registrar, therefore, the request for verification of the transaction documents is ill-advised, unmerited and spurious.
19. NCBA avers and maintains that the Company is still indebted to it to the tune of KES 286,568,061.92 as at 4th June, 2021 and it is only fair and just that NCBA be allowed to exercise its right to sell and proceed with the auction as scheduled. NCBA depones that the Plaintiff has failed to establish a prima facie case and the application should be dismissed with costs.

Equity's Case

20. Equity contends that it is the holder of a First Legal Charge over the suit property and is currently in the process of applying for its provisional title having been lost in mysterious circumstances. It adds that the loss is the subject of criminal investigations. Equity asserts that it financed the Company to purchase the suit property from Henkam Limited and caused a transfer to be effected in the Company's name and a First Legal Charge registered in its favour over the suit property on the 9th October 2014.



21. Equity impugns the intended sale by NCBA as a first chargee noting that under the principle of “the first in time prevails”, Equity ranks higher than NCBA in the recovery of dues owed by the Company from the sale of the suit property. Equity alleges that the charge document produced by NCBA is a fake because the same could not have been created before the transfer of the suit property from Henkam Limited to the Company which was registered on 9th October 2014 as aforesaid. It adds that it is a forgery because the entry on the charge has been entered in the Encumbrance section as opposed to registration against the Grant as is the case in the Central Registry. Equity further impugns the system generated search from the e-Citizen Platform dated the 15th June 2021 generated at 15:31:20 annexed in NCBA’s deposition which shows NCBA as the only Chargee and claims that the same is a forgery because the e-Citizen Platform for the Ministry of Lands and Physical Planning was closed on the 28th May 2021 and as such it is impossible to procure an Official Search using the system. Equity further impugns the searches annexed by stating that the different acreages of the suit property therein shows that the charge and search are fake. For these reasons, Equity urges the court to allow its application as no prejudice will be suffered by the Plaintiffs and the 1st and 2nd Defendants.

The Company’s Response

22. The Company responds that the averments by NCBA consist of acts of fraud perpetuated and initiated by NCBA in attempt to claim an interest in the suit property. It impugns the searches produced by NCBA and states that they clear evidence that the Charge by NCBA is fraudulent since the details contained in both documents are glaringly different. It contends that a search on the E-citizen Portal is a computer generated document and the details therein are not amendable unless through an elaborate process and which process would involve the registered owner swearing affidavits to rectify the acreage or other personal details.
23. The Company avers that the suit property is situated along Tom Mboya Street in the CBD of Nairobi and after the first Search by NCBA indicated that it measured 19.18 acres, a second search purports to show its size as 0.07714 acres. It alleges that the second search did not cover the trail of fraud as the Deed Plan Number on it is shown as NIL, but in the affidavit attaching the search, a Deed Plan Number 26470 has been attached which clearly points to an attempt to sanitize the documents. The Company further demonstrates that a genuine search generated from the E-system shows the amount secured by a charge. The Company denies that the Transfer and Charge were registered as Entries Number 28 and 29 on 18th July 2014 respectively and that the Registrar of Lands has denounced the entries hence it is critical for the court to interrogate and investigate the issues raised on the authenticity of the documents and thus issue an injunction to preserve the subject matter.
24. The Company denies that it admitted indebtedness at any time. It maintains that there is no correspondence where it has admitted that the Charge is valid. It asserts that its correspondence only addressed general indebtedness to NCBA and in that regard sought to restructure various facilities. It submits that those requests cannot be used to sanitize an invalid Charge.
25. To buttress its case, the Company states that in accordance with practice, a borrower like the Company does not get involved in the registration process of a Charge instrument as this is the responsibility of the lender, in this case the Bank. It admits that it filed the case in Malindi where it pleaded there was a Charge at which point in time, there was legitimate belief that a Charge was properly registered which was in fact not the case and that the suit cannot act as an estoppel to restrain the Company upon discovery that no Charge was so registered to raise the issue. It states that the previous suit filed in Malindi did not concern the validity of the Charge but the alleged amounts as disbursed as it has always been an issue that no loan was advanced to the Company but that the money was released to Khaemba & Associates Advocates.



26. The Company avers that the criminal proceedings halted by the court in NRB JR Application No. 429 of 2016 emanated from a complaint laid by NCBA itself where NCBA was alleging fraud and cannot now turn around and purport to attach a search to show that the charge was registered when on the other hand it complained about it. The Company urges the court to take Judicial Notice that the online search system is currently not operational and which the Cabinet Secretary did confirm in an interview she did on Citizen TV on the 29th June 2021, and that the results of any attempted search on the system return a message to the effect that; “Please note that IR and LR titles are undergoing conversion, therefore please carry our manual search at the Central Registry”.
27. In the foregoing, the Company urges that it has established a prima facie case that there is no Charge registered in favour of the NCBA hence the court should issue an injunction.

NCBA’s Response to Equity

28. In response to Equity’s application, NCBA states that it is intended to frustrate its legitimate exercise of its statutory power of sale on the ground that positions taken by the Company and Equity are contrary to sections 57 and 59 of the Land Registration Act, No. 3 of 2016 as well as section 81 of the Land Act, 2012.
29. NCBA avers that it is Equity that is in possession of fake documents. It reiterates that the purpose of the facility was to finance the purchase of the suit property pursuant to which the Company provided an Agreement for Sale between itself and Henkam Limited dated 20th January 2014 (“the Agreement”) and that pursuant thereto, the firm of Khaemba & Associates Advocates were to act for both the Vendor and the Purchaser (the Company) in the transaction and pursuant to clause 3 (3.2), the balance of the purchase price was to be remitted to the said firm of Advocates. Further and as stated in clause 6 of the Agreement, the suit property was at the time sold to the Company “free from encumbrances”.
30. NCBA insists its First Legal Charge is first in time having been registered on 18th July 2014 simultaneously with the Transfer to the Company and the Transfer is not disputed by the Company. NCBA contends that it undertook all the due diligence as required and Equity’s alleged Charge was not in existence. It adds that its Charge was registered at the Lands Office on 18th July 2014 while the one presented by Equity is stated to have been registered on 9th October 2014 and that NCBA was issued with a Certificate of Mortgage in respect of the Charge dated 18th July 2014 which was issued before the one presented by Equity which reads 12th September, 2014.
31. NCBA further states that as at 9th October 2014 when Equity alleges to have registered its Charge, the suit property was already charged to NCBA and the suit property already transferred from Henkan Limited to the Company. It points out that as per the copies of pleadings filed by the Company in various Courts which were filed together with NCBA’s deposition, the existence of the NCBA’s Charge over the suit property is acknowledged by the Company. NCBA points out that a glance at the Title allegedly held by Equity as security will show that the transfer of the suit property to the Company was purportedly registered long after the Title had already been issued and registered in the name of the Company and charged to NCBA and that there can never be two titles over the same property and the first in time prevails.
32. It is NCBA’s position that the suit property has been subject of other proceedings being ML HCCOMM 037 OF 2021 (Formerly MKS HELC No. 107 of 2016) (Formerly MLND ELCC No. 228 of 2016) as well as MLND ELCC No. 226 of 2016 in which Equity opted not participate and wherein the Charge held by NCBA was not disputed. That therefore, it is inequitable for the Company and Equity to belatedly attempt to frustrate NCBA’s exercise of its statutory power of sale without proving that NCBA’s Charge, registered first in time, was illegally and fraudulently registered.



33. NCBA holds that Equity failed to conduct due diligence to ascertain the position in respect of the title to the suit property and that by virtue of section 59 of the Land Registration Act, 2012, no transfer or any other disposition could be made from the Company to Equity after 18th July 2014 without written consent from NCBA. NCBA states that it has never consented to the transfer and subsequent charge of the suit property to Equity and/or any other person or entity and that any such transfer and Charge can only have been done fraudulently and illegally to defeat NCBA's statutory rights as a holder of a First Legal Charge registered first in time and Equity's Charge is therefore void ab initio.
34. NCBA reiterates that a Certificate of Official Search issued by the Registrar of Lands certifying the entries or records in respect of any landed property is prima facie proof of the said entries and shall be received in Court as conclusive evidence of the matters it records and can only be rebutted by contrary evidence from the Registrar of Lands. Further, that any document purporting to have been signed by the Registrar of Lands shall, in all proceedings, be deemed to have been so signed unless the contrary is proved and that no process for compelling the production of the register, or of the cadastral map, or of any filed instrument or plan, shall issue from any court except with the leave of that court, which leave shall not be granted if a certified copy or extract will suffice.
35. NCBA contends that it is its valuer who obtained the Official Search filed in Court by NCBA and that the said search was duly issued by the Registrar of Lands and certifies the status of all entries in respect of the title to the suit property and the allegations that the same is a forgery are unfounded and libelous. NCBA urges the court to dismiss the application in the interest of justice and fairness and in upholding the principle of priority of Charges predestined by the law.

Analysis and Determination

36. The applications before the court mainly seek injunctive orders in respect of the suit property with the Company's application seeking an additional prayer for production and inspection of the charge instrument that was registered against the suit property title in favour of NCBA and all the attendant registration documents, that is, the Application Form, Day Book Number, Valuation Form and Stamp Duty Payment Forms for scrutiny.
37. It is common ground that for a party to succeed it must meet the conditions for grant of an interlocutory injunction set out in *Giella v Cassman Brown* [1973] EA 348; It must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (Supra) and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
38. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained what amounts to a prima facie case. It stated that 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 to call for an explanation or rebuttal from the latter." A prima facie case with a probability of success proceeds from the case pleaded in the plaint. In this case, the Company must thus demonstrate that the Defendants have conducted themselves unlawfully and wrongfully in the exercise of the statutory power of sale. For Equity, it must demonstrate that it has a right over the suit property which is at risk of being violated.



39. The court in Nguruman (Supra) also held that in an application for injunction, the court is not supposed to make a final determination of the dispute and that this can only be done after hearing evidence, which is tested by cross-examination. The Court stated 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.

40. The Company accuses the Bank of purporting to issue instructions to the Auctioneer to realize a security it does not hold, failing to provide the Company's directors with an alternative mode of settlement of the monies advanced, failing to serve the mandatory Statutory Notices, laying a false claim to a non-existent Charge proving that the actions of the Bank are actuated by malice and not been done in good faith but as a way of coercing the Company, failing to act honestly and with due regard to the Company's interests as required by law and simply failing to accept a mistake that was their own making. Equity also claims that NCBA holds an invalid security as the same was created and registered before the transfer of the suit property from Henkam Limited to the Company.
41. From the facts and arguments, I have set out above, the parties have exchanged accusations of fraud, forgery and illegalities against each other in respect of the title and securities held in respect of the suit property. These allegations cannot be determined at this juncture and would require calling evidence at the main trial. The court can only make a prima facie findings whose conclusiveness will be determined at trial. This position was restated by the Court of Appeal in *Patrick Okuku & 7 others v James Kutsushi Atindo & 8 others KSM CA Civil Appeal No. 242 of 2011 [2016] eKLR* where it was held that serious allegations of fraud and other wrong doing can only be decided during a proper trial and not on the basis of conflicting affidavit evidence. This however, does not mean that the court should shirk from its responsibility determining whether a prima facie case with a probability of success has been established as a basis for grant of an injunction.
42. In their depositions, both NCBA and Equity have annexed Letters of Offer, Transfers, Charges, Certificates of Mortgages which indicate that they both hold securities in respect of the suit property. The face of the charge annexed by NCBA shows that it was executed by the Company's directors and that the same was registered on 18th July 2014 as entry number 29 by the Land Registrar. The face of the charge and suit property title annexed by Equity indicate that the charge was registered on 9th October 2014. It is therefore evident, at least on a prima facie basis, that NCBA's security is first in time as it was registered before that of Equity and as such, NCBA's charge must prevail against Equity's charge and any other subsequent charges registered against the title of the suit property. Section 57(1) of the *Land Registration Act, 2012* provides that a sale under a second or subsequent charge shall be expressed to be subject to all prior charges unless those charges have been discharged. Further, section 57(2) as amended, provides that where a second or subsequent charge is to be created the consent for the first chargee should be obtained before the second or subsequent charge is created (see *Commercial Bank of Africa v Wardpa Holdings Limited & 7 others NRB CA Civil Appeal No. 244 of 2018 [2019] eKLR*)



43. It is because of this prima facie finding of the existence and priority of NCBA's charge that Equity's own prima facie case collapses and thus an injunction cannot issue in favour of Equity. Further, I would only state at this stage that Equity has not filed a counterclaim against NCBA to assert its claim. Essentially, the Company is using the claim by the Equity as a shield against NCBA exercising its statutory power of sale. Since there is no claim by Equity against NCBA, I have exercised great restraint in going through the minutiae of allegations and resolving the dispute save to state on a prima facie basis that the security by NCBA takes priority over that of Equity.
44. The Company claims that it was not served with statutory notices but NCBA countered by producing the notices duly served on the Company and the guarantors by email and registered post. NCBA has also produced correspondence between NCBA and the Company's advocates subsequent to the dates of the said notices. In one of the letters dated 25th February 2016, the Company's advocates acknowledge issuance of the statutory notices, admits the Company's indebtedness to NCBA and propose a payment plan in respect of the debt. Therefore, I find that the 90 days' statutory notice dated 13th January 2016 was issued and served upon the Company. This also puts to sleep the Company's contention that the advances to it were not secured by a charge otherwise on what basis would it have been advanced the money it sought to settle.
45. The Company further laments that NCBA is not acquiescing to its alternative proposals for payment of the outstanding debt. This court has held that it is not within its jurisdiction to vary the terms of payment of the debt due under a facility. In short, the court cannot compel the Bank to accept the Company's proposals to restructure the facility by restraining it from exercising its legal remedies as this would amount to re-writing the parties' bargain (see *Kenlink Global Limited & 2 others v Paramount Universal Bank Limited ML HCCC No. E260 OF 2020 [2021] eKLR* and *Elite Intelligent Transport Systems Limited v Gulf Africa Bank Limited & another ML Civil Case No. E240 of 2020 [2020] eKLR*).
46. Up to this point, I also find that the Company has not demonstrated a prima facie case against NCBA, neither has it given the court reasons to restrain NCBA from exercising its statutory right of sale over the suit property. What is clear is that NCBA advanced the Company KES 160,000,000.00 to purchase the suit property which amount was secured by, inter alia, a First Legal Charge over the suit property that was created by the Company and registered in favour of NCBA and that the Company has since defaulted in repaying the facility and this fact of indebtedness is expressly admitted. Following the dicta in *Nguruman (Supra)*, once an applicant fails to establish a prima facie case with a probability of success, the inquiry comes to an end. I therefore reject the Company's application for injunction.
47. Even if I was to determine the other factors for the grant of an injunction, the outcome would still be in favour of NCBA as the debt continues to accrue by way of interest and penalties and would in due course outstrip the value of the security. Conversely, it has not been shown that in the event the Company is successful, the Bank would not be in a position to compensate the Bank. In any case, damages are a statutory remedy provided for under section 99(4) of the *Land Act* for a person prejudiced by an unauthorised, improper or irregular exercise of the power of sale. I would also add that as regards to Equity, any loss of the suit property would also be compensated by an award of damages which NCBA would be in a position to pay in the event its claim was successful.
48. Turning to the prayer for production of the charge and all attendant registration documents, I find that this prayer is unnecessary as copies of the charge document together with the attendant registration documents have already been provided herein by NCBA as part of its deposition. In due course, the parties shall also complete discovery and inspection before proceeding to hearing.

Disposition



49. I am satisfied that the Plaintiff and the 3rd Defendant have failed to establish a basis for a grant of the orders sought in their respective applications. The Plaintiff's application dated 23rd June 2021 and the 3rd Defendant's application dated 7th July 2021 are now dismissed with costs to the 1st and 2nd Defendants.

50. The interim orders in place are hereby discharged forthwith.

DATED and DELIVERED at NAIROBI this 23rd day of FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Mr Omondi instructed by Gachie Mwanza and Company Advocates for the Plaintiff.

Mr Kabaiku instructed by Wainaina Ileri Advocates LLP for the 1st Defendant.

Mr Mbaji instructed by Igeria Ngugi Advocates for the 3rd Defendant.

