



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL, COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. E101 OF 2021**

**BEAKIM LIMITED.....1<sup>ST</sup> PLAINTIFF**

**THERESIA KALONDU MUNGUTI.....2<sup>ND</sup> PLAINTIFF**

**PETER GITAHU KOMBANIRA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**KENYA WOMEN MICROFINANCE BANK PLC.....1<sup>ST</sup> DEFENDANT**

**KEYSIAN AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

[1] The plaintiff's Notice of Motion dated 27 September 2021 was filed pursuant to **Article 40** of the **Constitution** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, for orders that:

[a] That the application be certified urgent and service dispensed with the first instance; (spent)

[b] That there be an order of temporary injunction against the 1st and 2nd defendants, either by themselves, agents, servants and/or employees and/or any person acting under their instructions from selling by public auction or by any other manner whatsoever and/or otherwise interfering with the plaintiff's movable properties herein referred to as wrongfully proclaimed along with the plaintiff's parcel of land herein referred to as Plot No. L.R. No. KWALE/DIANI BEACH BLOCK/593 pending the hearing and determination of the application,

[c] That there be an order of temporary injunction against the 1st and 2nd defendants, either by themselves, agents, servants and/or employees and/or any person acting under their instructions from selling by public auction or by any other manner whatsoever and/or otherwise interfering with the plaintiff's movable properties herein referred to as wrongfully proclaimed along with the plaintiff's parcel of land herein referred to as Plot No. L.R. No. KWALE/DIANI BEACH BLOCK/593 pending the hearing and determination of the suit.

[2] The application is premised on the grounds that the 1st plaintiff is the lawfully registered and rightful owner of **Plot No. L.R. NO. KWALE/DIANI BEACH BLOCK/593** (hereinafter, "the suit property"), while the 2nd plaintiff is the beneficial owner of the property. It was their contention that, on **14th September 2021**, the 2nd defendant, without any colour of right, unlawfully and wrongfully proclaimed the suit property with the intention of selling the same by way of public auction, based on false and erroneous instructions by the 1st defendant for recovery of **Kshs. 23,501,400/47**; yet the plaintiffs do not owe the 1st defendant any such amount of money. According to them, the only sum due and payable to the 1st defendant is **Kshs. 4,000,000/=**, which they have been diligently repaying.

[3] It was further the contention of the plaintiffs that none of the statutory notices, including the redemption notice, was ever served before the defendants commenced the process of realizing the security; and therefore that they will be greatly prejudiced if the defendants are allowed to proceed with the intended auction. These grounds were explicated in the Supporting Affidavit sworn by the 2nd plaintiff, **Theresia Kalondu Munguti**, on **24th September 2021**, to which were annexed copies of the facility letters, among other documents, to support the prayer for temporary injunction pending the hearing and determination of this suit.

[4] The respondent opposed the application vide the Replying Affidavit, sworn on **6th October 2021** by its General Manager, **Mr. Norman Ondego**. He explained that the 2nd and 3rd defendants secured facilities from the 1st defendant in the total sum of **Kshs. 22,000,000/=**; and

that the facilities were secured by a Charge over all that piece of land known as **L.R No. KWALE/DIANI BEACH BLOCK/593**, registered in the name of the 1st plaintiff, **Beakim Limited**. He averred that it was both an express and implied term of the agreement that the plaintiffs would repay the loan amounts as scheduled; failing which the Bank would have the right to realize the security to recover any outlay due to it.

[5] Thus, the 1st defendant asserted that its intention to realize the security was lawful and proper in every respect; the plaintiffs having defaulted in their obligation to repay the debt. Copies of bank statements were annexed to the Replying Affidavit, marked **Annexure “NO-3”** to demonstrate that, as of **27th September 2021**, the total amount due and outstanding on the plaintiff’s loan account was **Kshs. 23,662,282/83**. Hence, the 1st respondent refuted the averment that only **Kshs. 4,000,000/=** is due.

[6] It was further averred on behalf of the defendants that all the requisite notices as stipulated by **Sections 90 and 96** of the **Land Act** were duly served on the plaintiffs; and that they chose to ignore the said notices. Copies thereof were, likewise, annexed to the Replying Affidavit in proof of compliance. **Mr. Ondego** further deposed that, in the course of realizing its statutory power of sale, the 1st defendant’s agents discovered, to its dismay, that the Green Card for the charged property was missing at the Lands Registry. He was consequently instructed by the Bank to report the matter to the Police for investigations. He accordingly lodged a complaint at DCI Kwale under OB No. 30/12/04/2021; and added that the Green Card was only traced thereafter. **Mr. Ondego** mentioned this aspect of their case to show that a sinister scheme was afoot to defeat the legal Charge over the suit property.

[7] **Mr. Ondego** further averred that, before the property was advertised for sale, the defendants ensured compliance, not only with **Section 97** of the **Land Act**, but also with **Rule 15** of the **Auctioneers Rules**. Copies of the valuation report and notices issued in compliance with the aforementioned provisions were also annexed to the Replying Affidavit as **Annexures “NO-8”, “NO-9” and “NO-10”**. He pointed out that, since the latest valuation shows that the debt has outstripped the value of the charged property, any further delay in the realization of the 1st defendant’s statutory power of sale would occasion it irreparable loss; as it may never recover the full amount due from the plaintiffs. Thus, **Mr. Ondego** urged for the dismissal of the application.

[8] In a Supplementary Affidavit filed on **18th October 2021**, the 2nd plaintiff reacted to the defendant’s averments in their Replying Affidavit. She conceded that they took a loan from the 1st defendant in the sum of **Kshs. 12,000,000/=** as well as a top up of **Kshs. 10,000,000/=** vide the Letters of Offer dated **13th May 2014** and **4th September 2014**, respectively; and that the facilities were secured by a Charge over the suit property for the cumulative sum of **Kshs. 22,000,000/=**. She however refuted the assertion by the defendants that the outstanding sums have outstripped the value of the suit property. According to her, even back in **2014**, the suit property was worth well over **Kshs. 22,000,000/=**; and that was why the Bank accepted it as sufficient security for the facilities.

[9] While conceding their indebtedness to the 1st defendant, the 2nd plaintiff, at paragraph 8 of the Supplementary Affidavit, averred that they have to date made repayments in the total sum of **Kshs. 19,692,293/33**. She relied on a Loan Repayment Schedule and a Loan Analysis Summary Report annexed to the Supplementary Affidavit, marked **Annexures TKM-4 and TKM-5**, to buttress this assertion and to demonstrate that the repayments were not truthfully accounted for by the 1st defendant. She added that a request by the plaintiffs to be provided with the statements of account has elicited no response from the 1st defendant.

[10] The 2nd plaintiff reiterated her assertion that due process was not followed by the defendants before they put up the charged property for sale. At paragraphs 12 – 15 of the Supplementary Affidavit, the 1st plaintiff set out the particulars of breach alleged. She urged the Court to disregard the allegations made in Paragraphs 11 and 12 of the defendant’s Replying Affidavit, to the effect that the Green Card for the suit property went missing. According to her, that cannot be a valid excuse to not follow the laid down legal requirements. She added that a valuation can be done without a Certificate of Search. She denied allegations that they interfered with the records at the Lands Office with a view of defeating the Charge.

[11] In a bid to show that the defendants intend to sell the suit property at an undervalue, the 2nd plaintiff annexed to her Supplementary Affidavit a separate valuation by **Regent Valuers International (K) Limited**; who returned a market value of **Kshs. 26,000,000/=** for the property, as contrasted with the defendant’s valuation of **Kshs. 15,000,000/=**. She consequently averred that the plaintiffs stand to suffer irreparable loss if the 2nd respondent is allowed to proceed with the auction as proposed. Thus, the 2nd plaintiff reiterated her averment that it is in the interest of justice that the orders sought be granted pending the hearing and determination of the suit.

[12] The defendants also filed a Supplementary Affidavit on **26th October 2021** for the specific purpose of responding to the issue of service of notice. Thus, the 1st defendant thereby exhibited copies of the Notice dated **3rd February 2017** together with 3 Certificates of Postage to prove that the statutory notices were duly served.

[13] Pursuant to the directions given herein on **12th October 2021**, the application was canvassed by way of written submissions. To this end, **Mr. Nduati**, learned counsel for the plaintiffs relied on his written submissions dated **19th September 2021**. He cited **Giella v Cassman Brown & Co. Ltd** [1973] EA 358 in proposing the following issues for determination:

- [a] whether the plaintiffs have established a prima facie case with a probability of success;
- [b] Whether the plaintiffs stand to suffer irreparable loss which cannot be compensated by an award of damages;
- [c] In whose favour does the balance of convenience tilt?
- [d] Who should bear the costs of the application?

[14] In developing his arguments in respect of the foregoing issues, **Mr. Nduati** endeavoured to convince the Court that the defendant’s attempt to realize the security was not only illegal but also unprocedural for want of due process. He was of the view that the requisite notices as required by law were not issued; that the auctioneers notices were a nullity; that the suit property was being disposed of at a gross

undervalue; and that the plaintiffs' indebtedness had been highly inflated by default interest and penalties. He pointed out that, although the defendants exhibited copies of notices allegedly served on the plaintiffs, there was no proof that the said notices were indeed served. He relied on **Terracraft (K) Limited & Another v KCB Bank Kenya Limited** [2020] eKLR and **TSS Salt Manufacturers Limited v NIC Bank Limited** [2018] eKLR. Counsel further urged the Court to note that the notices were allegedly served in **September 2016** and **February 2017**; about four years ago. In his view there existed an obligation on the part of the defendants to serve fresh notices, granted the substantial payments totaling **Kshs. 19,692,293/33** made by the plaintiffs towards reducing their indebtedness in the intervening period.

[15] **Mr. Nduati** further argued that it was improper for the defendants to initiate the sale process before obtaining a current valuation of the suit property. He made reference to the Notification of Sale dated **27th July 2020** and drew the attention of the Court to the indication therein that the property would be valued before the auction. This, he submitted, was in breach of **Rule 11(1)(b)(x)** of the **Auctioneers Rules**, which require that a valuation of not more than 12 months be carried out. Only then could the auctioneer be in a position to comply with **Rule 15(b)** of the **Auctioneers Rules** by indicating the fair value of the property in the Redemption Notice. Counsel also posited that the valuation of **Kshs. 15,000,000/=** was a gross undervalue; and therefore a clear indication of recklessness and negligence on the part of the defendants, looked at in the light of the plaintiffs' own valuation report.

[16] In terms of interest and penalties, counsel made reference to the plaintiffs' Further Affidavit and the documents annexed thereto in urging the Court to find that the sum demanded by the 1st defendant is grossly exaggerated. He pointed out that, whereas the loan amount is **Kshs. 22,000,000/=**, the statements indicate that only **Kshs. 20,779,661/02** was disbursed on **21st September 2015**; and that the principal loan was inexplicably inflated by some **Kshs. 2,932,964/84**; which sums require justification.

[17] On whether the plaintiffs stand to suffer irreparable loss, counsel pointed out that the issue here entails infractions of the law; and therefore amount to infringement of the plaintiffs' rights. Citing **Joseph Siro Musioma v Housing Finance Company of Kenya & 3 Others** [2008] eKLR and **Said Almed v Mannasseh Denga & Another** [2019] eKLR, among other authorities, counsel submitted that damages cannot be a substitute for loss occasioned by a clear breach of the law.

[18] Lastly, **Mr. Nduati** urged the Court to consider that the 1st defendant still has the security provided by the applicants. He relied on **Stars & Garters Restaurant & Another v National Bank of Kenya Limited** [2012] eKLR for the proposition that the fear that the interest on the loan may outstrip the value of the suit property can be assuaged by appropriate orders of the Court. In his submission, therefore, this is a case in which the balance of convenience tilts in favour of the plaintiffs. He consequently prayed that the application dated **27th September 2021** be allowed with costs.

[19] On behalf of the defendants, **Mr. Maondo** filed written submissions on **26th October 2021** wherein he proposed the following issues for determination:

- [a] Whether the parties are bound by the terms of the Offer Letters, the Guarantee & Indemnity, Charge and Further Charge;
- [b] Whether the 1st defendant is entitled to exercise its statutory power of sale;
- [c] Whether the plaintiffs are entitled to temporary injunction as prayed.

[20] **Mr. Maondo** submitted that this was a contractual arrangement between the plaintiffs and the 1st defendant; and that their relationship was governed by the terms set out therein. In particular, he made reference to the Letters of Offer dated **13th May 2014** and **4th September 2014**; the Guarantee and Indemnity dated **20th June 2014**, the Charge dated **20th June 2014** and the Further Charge dated **16th September 2014**. He underscored the principle that parties are bound by contracts; and that, as a general rule, courts will refrain from making any orders that would be tantamount to rewriting a contract for the parties. He relied on **Kundan Singh Construction Co. International Ltd vs. Bank of Africa**, HCCC No. 71 of 2015 and **National bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another**, Civil Appeal No. 95 of 1999 in support of this argument.

[21] Counsel urged the Court to take into account that the plaintiffs themselves conceded that they were in default; and that the facility had fallen into arrears. He therefore submitted that the 1st defendant's statutory power of sale having accrued, it should be allowed to realize its security as it is the only legitimate course of action available to it. On whether the defendants complied with the law, counsel reiterated the defendants' stance that all the requisite notices were duly served. He submitted that the burden of proof was on the plaintiffs to show otherwise. He relied on **Act Fast Security Limited v Equity Bank Ltd**, Mombasa HCCC No. 76 of 2013, to support this assertion.

[22] In response to the plaintiffs' contention that the sums due are exaggerated, **Mr. Maondo** faulted the documents annexed to the 2nd plaintiff's Further Affidavit, pointing that they were neither prepared by a qualified auditor/accountant, nor is there an explanation of how the figures enumerated therein were arrived at. He further urged the Court to disregard the plaintiffs' valuation report, on the ground that leave of the Court was not sought or obtained before **Regent Valuers International (K) Ltd** was commissioned to undertake the valuation. Counsel relied on **Rule 10** of the **Auctioneers Rules** in support of this argument.

[23] On whether a good case has been made for the grant of a temporary injunction, **Mr. Maondo** relied on **Giella v Cassman Brown & Co. Ltd** (supra), **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**, Civil Appeal No. 39 of 2002 and **Nguruman Limited v Jan Bonde Nielsen & 2 Others**, Civil Appeal No. 77 of 2012, as to the applicable prerequisites. In his view the plaintiffs have not met the laid down threshold. He submitted that, far from establishing a *prima facie* case, the plaintiffs merely made bare and unsubstantiated claims. In particular, he pointed out that the plaintiffs have not, in any way, disputed the following:

- [a] that they benefitted as borrowers from the loan facilities advanced by the 1st defendant;
- [b] that the loan facility remains unsettled despite service of notices to regularize the loan account;

[c] that they breached the terms of the Offer Letters, the Charge and Further Charge; and,

[d] that they were not subjected to coercion, inducement, undue influence or any form of misrepresentation at the time of executing the Facility Letters.

[24] In the same vein, **Mr. Maondo** submitted that, having failed to make out a *prima facie* case, it cannot be said that the plaintiffs stand to suffer irreparable loss. He cited **Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd** [2001] eKLR and **Nguruman Ltd v Jan Bonde Nielsen & 2 Others** (supra) to augment his assertion. He was consequently of the view that even the balance of convenience is in favour of the 1st respondent; and therefore that the plaintiffs are not deserving of the orders sought. On a without prejudice basis, **Mr. Maondo** stated that, should the Court be inclined to grant the orders sought, then it should consider limiting the duration of the injunction to enable compliance by the 1st defendant.

[25] I have given due consideration to the application in the light of the averments set out in the parties' respective affidavits. I have likewise looked at the pleadings filed thus far for purposes of making a determination on the application dated **24th September 2021**. There appears to be no dispute that the 2nd and 3rd plaintiffs obtained financial facilities from the 1st defendant in the total sum of **Kshs. 22,000,000/=** vide the Offer Letters dated **13th May 2014** and **4th September 2014**. Thereafter, the parties agreed to a variation of terms as set out in the Facility Letter dated **26th May 2014**.

[26] There is further no dispute that the facilities were secured by a Charge and a Further Charge created over the suit property, registered in the name of the 1st plaintiff. Thus, the 1st plaintiff also signed a Guarantee & Indemnity in favour of the 1st defendant as an additional security. The plaintiffs admitted, at paragraph 4 of the Supporting Affidavit and Paragraphs 8 and 9 of the Supplementary Affidavit, that they fell into default in servicing the facility and thereby suffered the account to go into arrears. What is disputed is the amount due, and whether the 1st defendant's power of sale had crystallized as at **September 2021** when the defendants commenced the process of realizing the security by way of public auction.

[27] In my considered view, the questions as to whether or not the 1st defendant's statutory power of sale had ripened; and whether or not due process was followed are not up for determination at this stage. Accordingly, most of the issues proposed for determination by **Mr. Maondo**, namely, whether the parties are bound by the terms of the Offer Letters, the Guarantee & Indemnity, Charge and Further Charge; and whether the 1st defendant is entitled to exercise its statutory power of sale, do not fall for determination in the application. Likewise, the questions as to what is the outstanding balance; and whether the suit property has been undervalued as alleged by the plaintiffs have to await the hearing for determination on the basis of evidence. The issue for my determination in this application is whether the plaintiffs are entitled to temporary injunction pending the hearing and determination of this suit.

[28] Thus, the first question to pose is whether the conditions for the issuance of a temporary injunction have been met. The prerequisites laid down in **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358, are, that a *prima facie* case with probability of success be made out; that there be a demonstration that the applicant stands to suffer irreparable harm unless the orders sought are issued; and finally, the balance of convenience; particularly where the Court is in doubt as to the first two requirements.

[29] On what amounts to a *prima facie* case **Bosire, JA** proffered the following definition in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others** [2003] KLR 125:

"... I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

[30] It is also instructive to bear in mind that at this stage, the merits of the applicant's case need not be examined too closely. The expressions of the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others** [2014] eKLR are apt in this regard, namely, 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."

[31] In their bid to demonstrate a *prima facie* case, the plaintiffs relied on the following four lines of argument; namely:

[a] that the requisite statutory notices were not served

[b] that the auctioneer's notices issued by the 2nd respondent were a nullity;

[c] that the suit property was being disposed of at an undervalue;

[d] that the plaintiffs' indebtedness has been highly inflated by default interest and penalties.

[32] The plaintiff's application was premised on the assertion that that the 1st defendant did not serve them with the **requisite statutory notices** before commencing the process of realizing the security. They, in effect, posited that neither the **Sections 90** notice nor the notice envisaged under **Section 96** of the **Land Act** were served. **Section 90** of the **Land Act** provides that:

**(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the 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.**

**(2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters –**

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

**b) 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;**

**c) 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;**

**d) 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**

**e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies**

[33] The defendants exhibited a copy of the notice dated **9th September 2016** addressed to the plaintiffs pursuant to the above provision and it is marked **Annexure "NO-4"** to the Replying Affidavit. It confirms that the notices were issued and sent via registered mail; that the plaintiffs were given 3 months within which to rectify their default. The amount due at the time was also specified. Indeed, notice was further given to the plaintiffs that:

**"...pursuant of the provisions of section 103 of the Land Act, 2012, you are at liberty to apply to the court for any relief that the court may deem fit against the bank's remedy."**

[34] Likewise, the defendants exhibited a copy of the **Section 96** notice as an annexure to the Replying Affidavit. It is dated **3rd February 2017**. It makes reference to the **Section 90** notice aforementioned and further indicates that the plaintiffs were thereby granted 40 days to rectify their default; failing which the charged property would be put up for auction. [35] Thus, *prima facie*, the plaintiffs were in compliance with **Section 96**, which states that:

**(1) Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under Section 90(1), a chargee may exercise the power to sell the charged land.**

**(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.**

**(3) A copy of the notice to sell served in accordance with Subsection (2) shall be served on-**

**(a) the Commission, if the charged land is public land;**

**(b) the holder of the land out which the lease has been granted, if the charged land is a lease;**

**(c) a spouse of the chargor who had given the consent;**

**(d) any lessee and sublessee of the charged land or of any building on the charged land;**

**(e) any person who is a co-owner with the charger;**

**(f) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;**

**(g) any guarantor of the money advanced under the charge;**

**(h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and**

(i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

[36] Although the plaintiffs denied service, the defendants presented proof, by way of the Supplementary Affidavit sworn by **Naaman Ondego on 25th October 2021** to show that the documents were served on the plaintiffs by registered post through the addresses given in the contractual documents. Copies of the Certificates of Posting were annexed to the Supplementary Affidavit in proof of service. Although the receipt marked **Annexure "NO-1"** to the Supplementary Affidavit is faint, there is a Schedule filed therewith which was duly stamped by the post office concerned to demonstrate that the letter was duly posted. It is therefore apparent, albeit on a *prima facie basis*, that service of the notices was effected in compliance with **Sections 90 and 96** of the **Land Act**.

[37] In **Nyagilo Ochieng & Another vs. Phaniel B. Ochieng & 2 Others [1996] eKLR**, the Court of Appeal made it clear that:

**Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.**

[38] Section 3(5) of the **Interpretation and General Provisions Act**, provides that:

**"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."**

[39] In the premises, the burden of proof will be on the plaintiffs to prove the contrary at the hearing; and there being no indication to the contrary, Thus, for the limited purposes of the instant application, service herein is deemed to have been properly made of the **Section 90** and **Section 96** Notices.

[40] In addition to the two notices aforementioned, the 2nd defendant was under duty to serve the auctioneer's redemption notice upon receiving instructions from the 2nd defendant to sell the charged property. In this regard, **Rule 15** of the Auctioneers Rules states that:

**Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—**

- (a) record the court warrant or letter of instruction in the register;**
- (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;**
- (c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;**
- (d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;**
- (e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.**

[41] The parties are in agreement that the redemption notice was duly issued by the 2nd defendants on the **27th July, 2020**. However, the plaintiffs urged that the same be ignored because valuation had not been done; and therefore that the notice was issued in breach of **rule 11(1)(b)(x)** of the **Auctioneers Rules**. According to counsel, the valuation report must be in place before an auctioneer can purport to issue the 45 days' redemption notice.

[42] What **Section 97(2) of the Land Act** requires is that: -

- (1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**
- (2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.**
- (3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-**
  - (a) There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and**
  - (b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared**

*void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).*

[43] There is no denying therefore that there was indeed a valid valuation report prepared and that it was prepared before the sale; and therefore appears to have conformed with the strictures of **Section 97(2)** of the **Land Act**. Moreover, **Rule 11** aforementioned makes specific reference to the contents of a letter of instructions to an auctioneer as opposed to the redemption notice. And, as has been pointed out herein above, whether or not the valuation is at an undervalue is a matter that is outside the bounds of the instant application; and therefore does not fall for determination at this point.

[44] The last issue raised by counsel is the dispute about the amount owing. The plaintiffs complained about unwarranted penalty interest being loaded on their account by the 1st defendant. Their concern may be a valid one. It is however trite that neither a dispute on the value of the charged property nor on the sums due would warrant the issuance of a temporary injunction to restrain a chargee whose statutory power of sale has crystallized. Hence, in **Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725** it is opined that:

**"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 mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."**

[45] Similarly, in **Bharmal Kanji Shah And Another V Shah Depar Devji (Supra)** it was observed 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..."**

[46] The plaintiffs borrowed money from the 1<sup>st</sup> defendant and undertook to repay the same; failing which the charged property would be sold. It is therefore of paramount importance that the parties stick to their bargain. Indeed, in **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another** [2001] KLR 112 the Court of Appeal expressed itself thus on the matter:

**"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."**

[47] It is also of concern that even as the plaintiffs seeks stay, no payments are forthcoming from them towards the reduction of the admitted portion of the outstanding sums. Thus, the 1<sup>st</sup> defendant's concern that the loan may outstrip the value of the subject matter is not far-fetched.

[48] The foregoing being my view of the matter, I am not satisfied that a *prima facie* case has been made out herein by the Plaintiffs to warrant the issuance of the injunctive order sought. In the premises, there would be no need to consider the question as to whether the Plaintiff stands to suffer irreparable harm, or in whose favour the balance of convenience tilts. In **Nguruman Limited v Jan Bonde Nielsen & 2 Others (supra)** the Court of Appeal held that:

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

**(a) establish his case only at a prima facie level,**

**(b) demonstrate irreparable injury if a temporary injunction is not granted, and**

**(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.**

**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 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."**

[49] In the premises, the Plaintiff's Notice of Motion dated 27<sup>th</sup> September 2021 fails and is hereby dismissed with an order that the costs thereof be costs in the cause. The 1<sup>st</sup> defendant is at liberty to proceed and exercise its statutory power of sale upon issuing fresh notices, granted the time lapse since the statutory notices were issued.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2022.

**OLGA SEWE**

**JUDGE**