REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. E028 OF 2021

MUEMA NDUNGI T/A MIANGENI HARDWARE & CONTRACTORS.....PLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT

RULING

1. The application that gave rise to this ruling is dated 25th November, 2021. By that Motion, the applicant seeks substantially an order for injunction restraining the Respondent from disposing off, auctioning, repossessing, selling, commencing the sale of or otherwise interfering with the Applicant's ownership and possession of the suit property being LR No. 27253/71, Athi River (hereinafter referred to as "the suit property").

2. According to the Applicant, he is the registered owner of the suit property and that on 31st March, 2020 he entered into a loan agreement with the Respondent by which the Respondent advanced to him a loan facility in the sum of Kshs 51,660,291.06 which facility was to be applied towards financing his business' working capital requirements. The said facility was secured in among other ways, by a charge over the suit property.

3. It was averred that the Applicant inadvertently did not retain copies of the loan agreement and the charge instruments executed between the Respondent and himself and that despite numerous requests, the Respondent has refused and/or delayed in furnishing him with the said copies.

4. It was however admitted that the Respondent duly disbursed the loaned sum through the Applicant's bank account with the Respondent which loan was repayable in 48 monthly instalments. Consequently, the Applicant commenced and continued servicing the said facility as agreed but on 13th September, 2021 he received a letter from the Respondent's auctioneers purporting to give him a 45 days' notice of intended sale of the suit property allegedly for failure to service the facility to the tune of Kshs 52,507,692.83. Prior to this notification, the Applicant had not received a notice of intended exercise of statutory power of sale or a notice to rectify. It was however his position that the loan had not fallen into arrears as alleged and that the Respondent's actions were just a scheme to sell off his property after he had substantially serviced the facility by deliberately inflating the figures.

5. The Applicant lamented that despite numerous requests, the Respondent had adamantly refused to reconcile his account with a view to establishing whether or not there are any arrears and if so to what extent. It was his case that his inability to annex documentary evidence was due to the denial by the Respondent to furnish him with copies of the loan agreement, charge instrument as well as statements of accounts.

6. The Applicant believed that the Respondent was arbitrarily applying funds for purposes other than the intended purpose of the loan repayment and that the Respondent had unjustifiably loaded his loan with arbitrary figures in interest and penalties which calls for scrutiny by the parties and the Court to ascertain their veracity. It was therefore his position that the Respondent's actions were unwarranted.

7. The Applicant was of the view that since the tenure of the loan facility was far from over, it was unfair for the Respondent to rush into realising security totally oblivious of his efforts to keep the loan serviced. It was therefore his plea that the Respondent should not be allowed to benefit from such actions as its actions are illegal and shrouded in malice and ill will. The Applicant averred that he stood to suffer irreparable loss incapable of being remedied by way of damages if the orders sought are not granted as he stands to lose his investments. It was his view that the orders sought if granted will not occasion the Respondent any prejudiced which cannot be remedied by way of damages but the said orders will serve the interest of justice.

8. In response to the application the Respondent relied on the following grounds of opposition:

1) The Plaintiff misled the court in obtaining the ex parte orders since he is in default of the loan facility.

2) The Defendant has followed the due process by sending the respective notices prior to the issuance of the redemption notice which the Plaintiff has admitted receipt.

3) The Plaintiff is guilty of material non-disclosure that he had not received any of the notices.

4) The Plaintiff is guilty of laches and the application is a scheme by the Plaintiff to delay the Defendant's right which has accrued.

5) The Plaintiff's allegations in the Supporting Affidavit are baseless as they are not supported by any iota of evidence.

6) The Plaintiff has not established any of the grounds of injunction as set out in Giella v Cassman Brown.

7) The application is otherwise an abuse of process which should be dismissed with costs.

9. The Respondent also filed a replying affidavit sworn by **Jackline Ndung'u**, its Legal Officer in which it was clarified that the property in question is L.R No. 27253/72 Mavoko and not L.R No. 27253/71 Athi River. According to the Respondent, the Suit Property was used by the Plaintiff to secure a facility of Kes 25,000,000/= among other properties including motor vehicles and various plots in his name. The loan was also secured using a third-party charge against the property known as Dagoretti/Thogoto/1022 in the name of **Michael Ngumo Mureithi**. Thereafter, the Plaintiff approached the Bank for numerous other facilities but fell in arrears and his loan was restructured over time with the last restructuring being pursuant to the supplemental letter of offer dated 17th March 2020. However, all the terms and conditions of the letter of offer including the events of default remained the same.

10. According to the deponent, all the documents were duly provided to the Applicant upon execution. It was averred that by not producing any demand for the documents (even after receipt of the notice from the auctioneers on 13th September 2021 as he alleges in his affidavit) the Applicant's intention is to paint the Bank in bad light and a failure on his part considering that the bank statements are available upon request and the charge was signed in 2015.

11. It was averred that the Plaintiff did not service the loan as and when the same fell due which granted the Bank a legal and contractual right to realize the collaterals since the Bank had in 2019 tried to realize the motor vehicles provided but the Plaintiff obtained an injunction in Makindu SPMCC 107 of 2019 which was settled after the restructuring of the loan. Following further defaults by the Plaintiff, it was deposed that the Bank commenced the process of realizing the securities since the default was an event of default under the letter of offer, the law and the charge.

12. It was averred that from the annexed bank statements, the Plaintiff was in arrears in the sum of Kes. 54, 896, 909 as at 3rd December 2021 while his current account was overdrawn in the sum of Kes. 181, 746.96, information which he did not disclose to the court. It was averred that the Plaintiff was notorious for falling into arrears and running to court to stop the Bank once it commences the process of realizing the securities.

13. It was deposed that prior to the issuance of the redemption notice, the Plaintiff had been served with the 90 days' notice dated 21st February 2021 and the 40 days' notice dated 22nd June 2021 through the same postal address as the redemption notice being P.O Box 205 – 90138 Kibwezi and copies of the notices and the certificate of postage confirming receipt were produced which notices were not returned undelivered.

14. It was reiterated that from the statement, it is evident that the Plaintiff did not service the loan as per the contractual obligations and his last payment was on 10th December 2020. It was contended that the amounts are based on the contractual terms and conditions including the rate of interest charged and that all the transactions into his bank account are evidenced in the statement of account and loan statement which contains the true position. The deponent averred that upon default, the Bank's right of sale (recover the outstanding debt of the accrued interest and whole amount) accrues without the need to await the expiry of the loan repayment period.

15. It was explained that due notices having been issued, the Bank instructed auctioneers after the Plaintiff defaulted and that the Plaintiff confirmed receipt of the redemption notice. The valuation was also conducted and the newspaper advertisement was done on 8th November 2021.

16. Based on legal advice, it was deposed that the Plaintiff does not stand to suffer any loss since the proceeds of sale will go towards redeeming his loan which is in default. On the contrary, the Bank is prejudiced since the money loaned to customers, such as the Plaintiff, is an investment of shareholders which would be lost. In addition, its statutory right will have been defeated.

17. The Court was therefore urged to dismiss the application with costs.

18. On behalf of the Applicant, it was submitted that the Applicant had met the threshold for grant of an order of injunction. In this regard, reliance was placed on **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, Mrao Ltd vs. First American Bank of Kenya Ltd& 2 Others [2003] eKLR** as well as sections 90 and 96 of the ***Land Act.*** The Applicant also relied on the decision of this Court in **Michael Gitere & Another vs. Kenya Commercial Bank Limited [2018] eKLR** in which the Court cited **Kenya Commercial Bank Ltd vs. Pamela Akinyi Ochieng Civil Appeal No. 114 of 1991** and submitted that there was non-compliance with section 90 of the ***Land Act.***

19. It was noted that whereas under the charge instrument annexed to the replying affidavit, the box number is indicated as Makindu, the notices were sent to Kibwezi which was a wrong address. It was further submitted that no proof of postage of the notices by registered mail was exhibited as the Applicant had categorically denied being served with the same. According to the Applicant, the Respondent, being the custodian of the Applicant's loan statements ought to have produced the same in order to refute the claims.

20. In the absence of compliance with the requirements for the two notices, it was submitted that the Applicant had established a prima facie case. As regards the second condition for grant of injunction it was submitted that the property in question is one whose value is immense and it is debatable whether the loan is in arrears. According to the Applicant, if the same is sold in the manner contemplated by the Respondent, the Applicant stands to lose its property despite servicing the loan and would suffer irreparable harm. According to the Applicant, in the event there are any doubts about the two considerations, the balance of convenience tilts in favour of granting the injunction in order to maintain status quo pending the determination of the suit.

21. On behalf of the Respondent it was noted that Plaintiff did not file a further affidavit to controvert the Defendants' averments in the Replying Affidavit, despite being granted leave to do so.

22. According to the Respondent, the Application does not meet the threshold for the grant of an injunction, it is not merited and is an abuse of court process. This is considering that the Plaintiff is in default and the Defendant has followed all the statutory and contractual processes in the intended sale. To the Respondent, the suit is meant to unjustly delay the Defendant from exercising its statutory power of sale.

23. After setting out the background of the matter, it was submitted that despite the allegation that the Plaintiff made payments to service the loan as and when required, the Applicant produced no deposit slip, swift confirmations etc. in proof of payments that he has made. Based on the loan statement it was submitted that the Plaintiff misled the court that he is not in default. He cannot feign being unaware that he was in arrears considering he last made a payment towards the repayment of the loan on 10th November 2021 just before filing the suit. From the loan statement, there are no payment records of the amounts he indicates that he has faithfully paid. He has not produced any evidence in proof of the deposits.

24. It was submitted that vide the instant application, the Plaintiff is attempting to benefit from the facility advanced by the Defendant without fulfilling his contractual obligations. Reliance was sought from the case of **Jane Wambui weru vs. Overseas Private Inv. Corp & 3 others [2012] eKLR** and **Alghussein Establishment vs. Eton College (1991) ALL ER 267**

25. It was submitted that with the loan being in arrears and having called for the same, the Defendant's right to exercise its statutory right of sale under section 90 (1) of the ***Land Act*** had accrued and it was well within the Respondent's rights to commence the process of realizing the security. Accordingly, reliance was placed on the case of **Edward Kangethe Kabinga & 2 Others vs. Kenya Women Microfinance Bank PLC [2021] eKLR.**

26. It was submitted that the Defendant followed all due process as evidenced by the sequence of events as follows; -

a. When the Plaintiff fell into arrears, the Defendant sent him the demand notices informing them of the default and calling for the arrears.

b. The Plaintiff failed to regularize his account and the Defendant invoked section 90 of the ***Land Act*** and sent the Plaintiff the 90 days' Notice and thereafter issued him with the chargee's notice to sell.

c. Upon the expiry of the notice to sell, the Defendant instructed Watts Auction to commence the process of the sale of the property which in turn issued the Plaintiff with the redemption Notice.

d. The presale valuation was also conducted on 6th September 2021 by Zenith (Management) Valuers Ltd. The valuation report is valid as it is not more than 12 months.

27. Whereas the Plaintiff has alleged that it was not served with the requisite notices save for the 45 days' notice, the court was urged to hold that all the notices were duly served at the Plaintiff's postal address and as confirmed by the respective certificate of postage. According to the Respondent, as per the letters of offer, the postal address is confirmed to be P.O Box 205 – 908138 Kibwezi which is the same postal address in the 45 days' notice and in the 90 days' notice and the 40 days' notice and in the demand letters issued before the 40 days' notice. According to the Respondent, it is an outright lie for the Plaintiff to state that the Defendant did not follow the process of issuance of notices. In support of the submissions, the Respondent relied on the case of **Pine Court Malindi Limited & another vs. Imperial Bank of Kenya (Under Receivership) & 2 others [2019] eKLR**.

28. Regarding the claim that the Defendant unjustifiable loaded the Plaintiff's loan with arbitrary figures, it was submitted that the Plaintiff did not present any evidence in support of the claims and that in any case, it is trite law that a dispute on the loan amount or interest charged is not sufficient for the grant of an injunction and neither is it a ground to stop a bank from exercising its statutory power of sale. Notably, the Plaintiff has not stated which figures have been added to his loan statement or which payments have been deposited in the wrong accounts, etc. Reliance was placed on the case of **Air Travel & Related Studies Ltd vs. Equity Bank (Kenya) Ltd Civil Application Nai 272 of 2017 [2017] eKLR**.

29. On the claim that the Plaintiff was not supplied with the loan statement and the charge instrument, it was submitted that that is not sufficient to grant an injunction since the Plaintiff is in default. It does not depart from the fact that he defaulted in the loan repayment and the Defendants statutory right of sale had accrued. In any case, the Plaintiff has not produced any evidence of demand of the documents. To the Respondent, this claim is overtaken by events as the Defendant has produced the same in the replying affidavit.

30. It was therefore submitted that having established the lack of a prima facie, the court ought not consider the second limb for the grant of

injunction. It was however submitted that courts have held over time that once a property is offered as a security for a loan, it is a commodity which can be sold. In this case it was submitted that the suit property is quantifiable at a liquidated value and the Plaintiff can be paid damages. Further, any sale would be subject to the minimum 75% of the market value set out in Section 97 of the ***Land Act*** which protects the Plaintiff and that any proceeds from the sale of the property would go towards offsetting the Plaintiff's loan which would be for his benefit since his arrears would be reduced. It was further submitted that Section 99(4) of the ***Land Act*** provides a remedy in the form of damages in the instance that the Defendant irregularly exercises its' power of sale and under Section 26 of the ***Auctioneers Act*** where the Plaintiff can equally recover damages where an Auctioneer improperly or unlawfully exercises their duties.

31. Regarding the balance of convenience, it was submitted that the same tilts in favor of the Defendant considering that; it awarded the Plaintiff with a facility; the Plaintiff fell into arrears and continues to be in arrears despite being accorded multiple chances to regularize; the Plaintiff benefitted from the loan granted and has however not repaid the loan and the arrears. He cannot have its cake and eat it.

32. According to the Respondent, if the court stops the Defendant from exercising its statutory power of sale, it will continue incurring losses as the loan arrears will continue to accrue indefinitely. It will also lose its right to realize the security as it will not be able exercise its statutory power of sale and recover the Plaintiffs' debt yet the Plaintiff already benefited from the loan. In this regard the Respondent relied on the case of **Thathy vs. Middle East Bank (K) Ltd & Another [2002] eKLR.**

33. It was therefore submitted that the Plaintiff has not satisfied the conditions for the grant of an injunction set out in the celebrated case of ***Giella v Cassman Brown*** and that the application is thus an abuse of the court process and should be dismissed with costs to the Defendant.

Determination

34. I have considered the application, the affidavits both in support of the application and in opposition thereto, the submissions both written and oral made on behalf of the parties herein and the authorities relied upon and this is the view I form of the matter.

35. The principles guiding the grant of interlocutory application are now well settled. Those principles were set out in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.** Restating the said principles, **Ringera, J** (as he then was) in **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC NO. 1234 of 2002** set them out as follows:

> **(i) a prima facie case with a probability of success at the trial;**
>
> **(ii) if the Court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;**
>
> **(iii) the applicant is likely to suffer an injury, which cannot be adequately compensated in damages;**
>
> **(iv) the conduct of the applicant meets the approval of the Court of equity.**

36. The learned Judge went ahead to state that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition that she did not appear before an advocate to execute the charge and have the effects of the pertinent provisions of law explained to her.

37. It was therefore held by **Ringera, J** (as he then was) in **Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001**:

> **"The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."**

38. In **Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991,** the Court of Appeal stated as follows:

> **"The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting**

for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory…As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

39. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the ***Civil Procedure Act***, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

40. What then constitutes prima facie case? In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,** the Court of Appeal held as follows:

"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

41. In this case, the Applicant contends that he was never supplied with the charge documents after execution and that the Respondent has never supplied him with the statements of accounts. He therefore suspected that the Respondent must have loaded his account with unlawful amounts. With due respect mere suspicions and speculations will not do when one seeks an order of injunction. However, even if that contention was true, that may not necessarily warrant the grant of the injunction sought. In **Kenya Commercial Bank Ltd. vs. Pamela Akinyi Ochien'g Civil Appeal No. 114 of 1991,** the Court of Appeal held that:

"Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered Land Act Cap 300. For instance they must serve on the chargee three months' written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family…The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out. 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; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim…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 mortgage."

42. It was therefore held that:

"If the relief claimed in the counterclaim in this case had been sought by substantive suit, the Bank would have been bound to prove and plead that the statutory notice had been served, whether the respondent admitted indebtedness or not. It follows that the counterclaim, though wrongly dismissed, cannot proceed it its present form, until the statute has been complied with. The court therefore considers that the counterclaim should be stayed on the lines of the second proviso to

subsection (3)(c) until the counterclaim is regularised, the statutory notice has been served, and the period stated in subsection (2), namely three months, has expired."

See also **Joseph Okoth Waudi vs. National Bank of Kenya Civil Appeal No. 77 of 2004.**

43. Whereas the fact that the amount is disputed is not a ground for restraining a mortgagee from exercising its power of sale, the Court appreciated that it may be restrained if on the terms of the mortgage, the claim is excessive. In this case, there is no concrete evidence on the basis of which this Court can make a finding that the amount due was inflated by the Respondent.

44. It was further contended that the applicants were never served with any notice prior to the notification of sale which was only served upon the 1st plaintiff. Section 90(1) of the ***Land Act, 2012*** 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.***

45. On the other hand, section 96(1) of the same Act provides that:

> ***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.***

46. According to the Plaintiff, no statutory notice was served on him. It was noted that whereas under the charge instrument annexed to the replying affidavit, the box number is indicated as Makindu, the notices were sent to Kibwezi which was a wrong address. It was further submitted that no proof of postage of the notices by registered mail was exhibited as the Applicant had categorically denied being served with the same.

47. The Respondent however took the position that prior to the issuance of the redemption notice, the Plaintiff had been served with the 90 days' notice dated 21st February 2021 and the 40 days' notice dated 22nd June 2021 through the same postal address as the redemption notice being P.O Box 205 – 90138 Kibwezi and copies of the notices and the certificate of postage confirming receipt were produced which notices were not returned undelivered. According to the Respondent, as per the letters of offer, the postal address is confirmed to be P.O Box 205 – 908138 Kibwezi which is the same postal address in the 45 days' notice and in the 90 days' notice and the 40 days' notice and in the demand letters issued before the 40 days' notice. According to the Respondent, it is an outright lie for the Plaintiff to state that the Defendant did not follow the process of issuance of notices.

48. It is true that in the letters of offer, the postal address was indicated as P.O Box 205 – 908138 Kibwezi. However, the address in the charge is P. O. Box 102-90138, Makindu. The question that will have to be determined is between the letter of offer and the charge, which document supersedes the other. According to the charge, at clause 38 thereof, notices were to be sent *inter alia* to the address set out in the charge or to the last known address. On the face of the documents on record, it seems that the address to which the statutory notice was allegedly sent was not the address in the charge. Nor has it been alleged that it was the Applicant's last known address.

49. In **Nyagilo Ochieng & Another Vs. Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260** the Court of Appeal while dealing with section 74(1) of the repealed ***Registered Land Act*** held that:

> **"It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with section 74(1) of the Registered Land Act (Cap 300 Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargor's receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale. The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. 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. It is quite possible that such notices were sent but that fact, in the face of the denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the "villain in the matter". In the absence of proof of such posting the Court is constrained to hold that the sale by auction was void. The learned Judge fell into error and misdirected himself when he held that the notices were sent to their correct address on the supposition alone that the postal address of the appellants was P. O. Box 120, SARE…In coming to the conclusion, the Court has reached, it cannot but entertain the view that the bank ought to have been more careful in proving service of the statutory notices. Failure of such proof has resulted in an innocent purchaser for value being deprived of the title to the suit properties."**

50. On the basis that there was no evidence that the statutory notice was dispatched to the address indicated in the charge, I find that the Applicant has established a prima facie case with probability of success.

51. The next issue is whether he has proved that he stands to suffer irreparable injury, which would not adequately be compensated by an award of damages. The general position is that an injunction ought not to be granted if the applicants may be compensated by an award of damages and in **John Nduati Kariuki T/A Johester Merchants vs. National Bank of Kenya Ltd Civil Application No. Nai. 306 of 2005 [2006] 1 EA 96** the Court of Appeal held as follows:

"A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged."

52. It was however held in by **Ringera, J** (as he then was) in **Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540** that:

"A statutory notice which does not give the plaintiff a period of three months from the date of service to redeem the charged property as required by Section 74(2) of the RLA is defective…The chargee has no lawful power to sell the charged property for default in payment of charge debt unless and until the chargor has been served with a notice in writing demanding such payment and the chargor has failed to comply within three months of the date of service of such notice…The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice… Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the R.L.A and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly contended that the chargor's remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor…Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantums of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils".

53. Therefore, as was held in **Muigai vs. Housing Finance Co. Ltd & Another HCCC No. 1678 of 2001**, it is not an inexorable rule of law that where damages may be an appropriate remedy, an interlocutory injunction should never issue. That was the position adopted in **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** in which the Court considered the ***Halsbury's laws of England*** on what irreparable loss is and stated that:

> ***"first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."***

54. The exercise of statutory power of sale invariably leads to deprivation of the Chargee's interest in the charged property. It is therefore an act that takes away one's rights under Article 40 of the Constitution. To deprive a person of that right the person doing so must satisfy the Court that such action is being undertaken lawfully and where the same is being undertaken pursuant to legal provisions, the same must be strictly adhered to. Where there is evidence that the law has been breached in the process, it is not an answer to say that the person affected may be compensated in damages. While the Applicant is still obliged to prove that the loss he stands to suffer is not capable of being compensated by an award of damages, the law does not encourage impunity among the rich simply because they can pay for the damages they cause to others. Where it is shown that they have not complied with the law, they ought to be stopped in their tracks rather than to allow them to proceed. That is what justice is about.

55. I must however point out that the requirement of the service of statutory notice was not meant to enable borrowers escape from their obligations but was meant to enable the borrowers have sufficient time within which to redeem their charged properties.

56. In the premises I grant an order of injunction restraining the defendant, its agents and/or servants from disposing off, auctioning, repossessing, selling, commencing the sale of or otherwise interfering with the Applicant's ownership and possession of the suit property being LR No. 27253/71, Athi River or LR No. 27253/72, Mavoko, the suit property herein, pending the hearing and determination of this suit.

57. As the Plaintiff failed to furnish the court with soft copies of his documents in word format as directed, there will be no order as to the costs of this application.

58. Since this dispute, in my view, is one where the Court ought to promote the use of alternative dispute resolution mechanisms as required under Article 159(2)(c) of the Constitution it is my view that the parties ought to attempt the same before moving forward with litigation. Accordingly, it is my view and I direct that this matter be referred to mediation for purposes of settlement in the meanwhile.

RULING READ, SIGNED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF MARCH, 2022.

G.V. ODUNGA

JUDGE

IN THE PRESENCE OF:

MR MWANGO FOR MR MUUMBI FOR THE PLAINTIFF

MR MUREITHI FOR THE DEFENDANT

CA SUSAN