Tuff Bitumen Limited v State Bank of Mauritius (Kenya) Ltd & another (Civil Case 24 of 2021) [2022] KEHC 12428 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12428 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE 24 OF 2021

GV ODUNGA, J

JULY 26, 2022

BETWEEN

TUFF BITUMEN LIMITED ..... PLAINTIFF

AND

KEYSIAN AUCTIONEERS ..... 1ST DEFENDANT

STATE BANK OF MAURITIUS (KENYA) LTD ..... 2ND DEFENDANT

RULING

1. The Plaintiff is the proprietor of all those parcels of land known as L.R No. 337/980 and 981(I.R 71733 & 71732) (hereinafter referred to as "the suit property") which it used as a loan facility in respect of an advance availed to it by the 1st Defendant based on a Conditional Letter of Offer dated 26th April, 2019 by which the Plaintiff charged the said property.

2. Following the threat to dispose of the said property by way of a public auction in order to recover an alleged debt of Kshs. 245,529,716.40 *vide* the Notice of Sale dated 4th October, 2021 in the exercise of the chargee's statutory power of sale, the Plaintiff moved this Court by way of a plaint dated 18th October, 2021 filed on 19th October, 2021. Together with the plaint the Plaintiff filed a Notice of Motion dated 18th October, 2021 in which it seeks that:-

    1. The application be certified urgent and be heard *Ex parte* in the first instance.

    2. The Honourable Court be pleased to grant a temporary order of injunction restraining the defendants whether by itself, its employees, servants, agents and/or auctioneers from evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or compelling by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over those parcels of land known as L.R No. 337/980 and 981(I.R 71733 & 71732).

3. The timelines for compliance and/or rectifying the default to redeem L.R No.337/980 and 981(I.R 71733 & 71732) be increased to a period of 24 Months or for such other period that the court may deem fit pursuant to the provision of Section 104 and 105 as read with Section 90 of the *Land Act*.

4. The Honourable Court be pleased to make such other orders as may be necessary in the circumstances.

5. Costs of this suit.

3. In support of the application, Dev Mukund Patel, the Plaintiff's Director swore a supporting affidavit dated on even date. According to the deponent, on 26th April, 2019 the Plaintiff applied for a loan facility from the 1st Defendant of Kshs. 220,000,000/- and the applicable interest was capped at 13% which was equivalent to the Central Bank Lending rate plus 4% on reducing balance. He averred that based on the offer, the Plaintiff provided security as follows;

a. First Legal charge over the properties LR No. 337/980 and 981(I.R 71733 & 71732) in the name of Tuff Bitumen Limited for Kshs. 220,000,000/- in favour of SBM (Kenya) Bank Limited.

b. Fixed and floating debenture over the entire assets of Tuff Bitumen Limited for Kshs. 220,000,000.

c. Corporate Guarantee and Indemnity from Patel Amip Rajendra for an amount of Kshs.220, 000,000/-.

4. According to the deponent, due to Covid 19 pandemic, the Plaintiff's business was negatively affected and the tenant occupancy rate at the Plaintiffs Go Downs depreciated thereby resulting into the Plaintiff experiencing financial strain and inability to meet its obligations. The Plaintiff's and its Directors plea for review and restructuring of the loan facility, it was averred, were declined and/or ignored by 1st Defendant and that the Plaintiff's email communications seeking audience with the 1st Defendant's officers to discuss the way forward were out rightly and completely refused. According to the deponent the intention of the 1st Defendant's said conduct was geared towards ensuring that the Plaintiff was unable to redeem its property thereby clogging the Plaintiff's equity of redemption.

5. It was further averred that the Plaintiff learnt about the 1st Defendant's statutory demand dated 17th May, 2021 two months later and immediately responded to the notice *vide* its letter dated 17th July, 2021 indicating the rental income receivable and requesting for loan restructuring. According to the deponent, despite the 1st Defendant's request for the supporting documents from the Plaintiff through its letter dated 14th July, 2021 which was responded to by the Plaintiff through its letter dated 2nd August, 2021 together with attached supporting documents, the 1st Defendant maintained that it would only restructure the loan upon the payment of the full loan arrears. This attitude, according to the deponent, was irrational and in bad faith, clearly intended to frustrate the Plaintiff's equity of redemption.

6. It was further averred that the Plaintiff informed the 1st Defendant that a foreign company, Northscend Energy Limited was not only interested to occupy 7 Go Downs in 1st November but also purchase 10 Go Downs at a price of Kshs. 42,000,000 per Go Down. Another entity, Finatrack Global Limited, was an interested buyer at Kshs. 420,000,000/- and a sale agreement had been drafted which was still being negotiated. Notwithstanding these developments, the 1st Defendant still went on to make a formal demand for the full amount and interest and other unspecified charges and expenses amounting to

Kshs. 240, 801, 104.15. According to the deponent, the amount claimed by the 1st Defendant is higher than the actual amount it is owed and as per the Plaintiff's accountants loan workings.

7. It was further averred that the statutory power of sale issued against Plaintiff's property on 24th August, 2021 purporting to be a notice issued under Section 96 and 108 of the *Land Act*, 2012 fell short of the mandatory provision of Section 90 thereof as it failed to advice the Plaintiff of its rights as provided for in the same Act hence prejudicing the Plaintiff's rights as it was caught unprepared. According to the deponent, the Plaintiff had a legitimate right to be notified of its rights under the said Notice.

8. According to the deponent, on or about 4th October, 2021, the 2nd Defendant under the instructions of the 1st Defendant issued notices to sell the property. It was however the deponent's contention that the intended sale of the suit property was likely to adversely affect and prejudice the Plaintiff's restructuring and any efforts it was making to meet its obligations under the charge. It was therefore the Plaintiff's case that the action by the Defendants are unconscionable in the circumstances of the current unprecedented times of economic hardship.

9. According to the deponent, the Plaintiff came to court as a last resort having not been given a chance to negotiate an amicable settlement. It was his view that the Plaintiff had made out a prima facie case and that it stood to suffer irreparable loss if the orders sought herein were not granted.

10. The deponent pleaded with this Court to exercise its discretion by enlarging the period to 24 months or for such other period that the court may deem fit pursuant to the provisions of Section 104 and 105 as read with Section 90 of the *Land Act*, 2012. He asserted that the valuation given by the Defendants gave a forced value of Kshs. 180,000,000,000/- while the anticipated sale price of the property is Kshs. 420,000,000/- hence the Plaintiff stands to suffer irreparable harm if the property is disposed of at a throw away price.

11. Lastly, the deponent averred that the Plaintiff's ready to pay the auctioneers fees as a sign of good will.

1st Defendant's case

12. In opposition to the Plaintiff's application, the 1st Defendant filed grounds of opposition dated 9th December, 2021 in which it stated that:

    1. That on a whole, and on consideration of the facts and the law, the Plaintiffs Notice of Motion Application dated 18th October, 2021 is incompetent, frivolous.

    2. That the Plaintiff/Plaintiff in in breach of terms of the loan agreements and is in astronomical arrears to the tune of Kshs. 67,838,844.50 as at 15th September,2021 and the outstanding balance of Kshs. 243,125,963.15 as at the even date which amounts to continue to accrue interests until payment in full.

    3. That the Plaintiff/Plaintiff has acknowledged and admitted to not only being indebted to the 1st Defendant but also being in receipt of the statutory notices issued by the Defendant bank and as such fails to demonstrate a *prima facie* case against the Defendant bank.

    4. That once a property is given as security, it becomes a commodity for sale in case of default, and as such there is no commodity for sale to which a value cannot be attracted. The Plaintiff having been served with the various statutory notices in accordance with the law, has moved to court at the very last days to deny the 1st Defendant an opportunity to realize its security and frustrate the banks statutory right of sale.

5. That the Plaintiff's instant application offends the ratio decidendi settled in Court of Appeal Civil Application No.315 of 2004 - *Integrated Wood Complex Ltd & Another v Kenya National Capital Corporation Ltd* [2005] eKLR as it has failed to demonstrate that it could not be compensated by way of damages

6. That it is in the interest of justice that the Plaintiff's application dated 18th October, 2021 be dismissed with costs.

13. The 1st Defendant averred through the replying affidavit of Egidia Mecha, the 1st Defendant's Debt Recovery Officer sworn on 21st December, 2021, that it was a term of the Conditional letter of offer dated 26th April, 2019 that the credit facility for the sum of Kshs. 220,000,000/- advanced to the Plaintiff be repaid within an period of Sixty (60) months with an interest of 13% per annum as follows;

a. That there would be a moratorium on the principal amount for a period of Six (6) months from the date of first disbursement interest accrued on the principal outstanding which would be payable monthly commencing after initial withdrawal; and

b. That then thereafter, 54 monthly instalments of both interest and principal.

14. He averred that it was an express term of the Conditional Offer letter under Clause 6 that the Credit Facility advanced to the Plaintiff by the 1st Defendant would be secured on the strength of the following securities;

a. First Legal Charge over properties L.R No. 337/980 and 337/981 in the name of Tuff Bitumen Limited for Kshs. 220,000,000/- in favour of SBM Bank(Kenya) Limited;

b. Fixed and Floating Debenture over the entire assets of Tuff Bitumen Limited for Kshs. 220,000,000/-.

c. A Personal Guarantee and Indemnity from Patel Amip Rajendra for an amount of Kshs. 220,000,000/-; and

d. A corporate Guarantee and Indemnity from Tuff Steel Limited for an amount of Kshs. 220,000,000/-.

15. Further, that it was a condition Precedent under Clause 9 that;

a. Three (3) months interest would be held in an Escrow Account;

b. All Rental Income receivables from 10 warehouses financed by the facility and sale proceeds receivable to be assigned to SBM Bank;

c. Sale Agreement to reflect SBM Bank as one of the receiving banks;

d. Release of title documents to the Purchasers shall be upon reduction of the loan amount using the sale proceeds ;

e. Valuation to confirm the properties do not lie on KPLC and water way leave;

f. If the valuation does not cover the facility with a loan to value of 70% based on the current valuation, client will be required to provide an additional security to meet the threshold; and

g. Sale Agreements of the 10 warehouses financed by the facility to reflect SBM Bank as the receiving bank.

16. According to the deponent, under Clause 1 of the All-Assets Debenture issued by the Plaintiff to the 1st Defendant on 1st July, 2019, the Plaintiff covenanted and agreed to pay to the 1st Defendant on demand all money and discharge all obligations and liabilities, whether actual or contingent, due, owing or accrued to the 1st Defendant by the Plaintiff in whatever currency denominated whether on any current or other account or otherwise in any manner whatsoever.

17. According to the deponent, on or about 19th July, 2019 the Plaintiff proceeded to register a Charge Instrument in favour of the 1st Defendant over all those properties known as LR No. 337/980 and 337/981, Machakos for purposes of securing the said Credit Facility for the sum of Kshs. 220,000,000/-. He averred that also the Plaintiff's Directors issued Letters of Guarantee and Indemnity to the 1st Defendant.

18. According to the deponent, on or about June, 2020, upon request by the Plaintiffs, the 1st Defendant varied the terms of the Letter of Offer dated 26th April, 2019 *vide* a Supplemental Letter of Offer dated 12th June, 2020 wherein under Clause 3 it was provided that the loan facility would have a moratorium on both the principal and interest for a period of 3 months from 20th April, 2020 and further that the final maturity date for the loan tenor would be extended by a further 3 months. According to this Supplemental Letter of Offer, the deferred interest was to be payable as a lumpsum at the end of moratorium period but the 1st Defendant reserved the sole discretion to spread the deferred interest amount over the remaining tenor of the loan and further that the Plaintiff consented to the resultant increase in the instalments amount or tenor of the loan.

19. It was however, averred that the Plaintiff's account fell into arrears necessitating the 1st Defendant to recall the total outstanding balance of Kshs. 228,665,904.55/- as at 15th February, 2021 and issue the requisite 90 days Statutory Notice *vide* its letter dated 15th February, 2021. According to the deponent, the Plaintiff also failed to adhere to the terms of the Deed of Assignment of Rental Income dated 1st July, 2019 by causing its accounts to fall into arrears to the tune of Kshs. 24, 514,223.05/- which necessitated the issuance of 7 days Demand Notice by the 1st Defendant *vide* its letter dated 15th February, 2021 requiring the Plaintiff to regularize its account whose total outstanding balance stood at Kshs. 228,665,904.55/-. That the account fell again into arrears of Kshs. 43,587,825.60/- despite the 1st Defendant varying the repayment terms causing the 1st Defendant to issue another 7 days demand notice *vide* its letter of 13th May, 2021 requiring the Plaintiff to regularize its account whose total outstanding balance stood at Kshs. 235, 575,923.35 as at 13th May, 2021.

20. According to the deponent, these demand notices did not elicit any response from the Plaintiff leading to the issuance of the 90 Days Statutory Notice to the Plaintiff on 17th May, 2021 pursuant to Section 90(1)(2)(3)(e) of the *Land Act*. It was disclosed that *vide* a letter dated 8th July, 2021, the Plaintiff acknowledged to not only being indebted to the 1st Defendant but also being in receipt of the Statutory Notices issued by the 1st Defendant and proposed to pay the monthly instalments of Kshs. 1,690,698/- but *vide* a letter dated 14th July, 2021. The 1st Defendant however, rejected the said proposal on the basis that the proposed amount was lower than the expected monthly instalment of Kshs. 6,192,841.60/-. The Plaintiff, it was averred, *vide* its letters dated 2nd August, 2021 and 9th August, 2021 did acknowledge of its indebtedness to the 1st Defendant and requested the restructuring of the loan facility on account of the effects of the prevailing Covid 19 Pandemic as well as the tough economic conditions occasioned on the Plaintiff's business.

21. According to the deponent, despite the restructuring of the loan facility done by the 1st Defendant, the Plaintiff failed, declined and/or blatantly refused to honour the terms of the Supplemental Letter of Offer as well as regularize its loan accounts thereby necessitating the 1st Defendant to issue the 40 Days

Statutory Notice pursuant to Section 96(2)(3) of the *Land Act* *vide* its letter dated 24th August, 2021 requiring the Plaintiff to regularize its loan accounts which were in massive arrears with the outstanding balance totalling to Kshs. 240, 801,104.15.

22. In response to the Plaintiff's intention to dispose the suit property by way of Private Treaty to Northscend Energy and the proceeds of the sale to be used to redeem the Plaintiff's outstanding liabilities, it was averred that the 1st Defendant *vide* its letter dated 15th September, 2021, acceded to the said proposal on condition that the Plaintiff and the Third Party executed a sale agreement and/or an acceptable undertaking within the satisfactory timelines and further informed the Plaintiff that it was willing to engage it on settlement of the outstanding amount upon clearance of the arrears before the expiry of the 40 Day's Statutory Notice. According to the deponent, the outstanding balance as at 15th September, 2021 stood at Kshs. 243, 125,963.15.

23. It was averred that the 1st Defendant *vide* its letter of 28th September, 2021 demanded formally from the Plaintiff's Directors payment of the Guaranteed Credit Facility advanced to the Plaintiff but overdue to the tune of Kshs. 74,239,175.10/- with the total debt outstanding amounting to Kshs. 245, 268,814 as at 28th September, 2021. However, the default persisted necessitating the 1st Defendant instructions to Keysian Auctioneers, 2nd Defendant herein, to issue the 45 Day's Redemption Notice together with the Notification for Sale which the 2nd Defendant did on 4th October, 2021.

24. According to the deponent, the 1st Defendant through its agent Messrs. Accurate Valuers Limited conducted a valuation over the subject property pursuant to the provisions of Section 97(2) of the *Land Act* to ascertain the current market value as well as the forced market value of the subject suit property.

25. It was the deponent's position that the Plaintiff's mala fides were evident from the following facts;

    1. The Plaintiff does not deny receipt of the loan amount disbursed.

    2. The Plaintiff does not deny that its loan accounts have long fallen into arrears.

    3. The 1st Defendant has issued all the Statutory Notices as required under the *Land Act*, 2012 and the *Auctioneer Rules*, 1997 and its right for sale has duly accrued.

    4. Despite having been served with the various statutory notices, the Plaintiff has moved to court at the very last days to deny the 1st Defendant an opportunity to realize its security.

26. It was therefore the 1st Defendant's case that the Plaintiff had not satisfied the test in *Geilla v Cassman* Brown for the grant on injunction hence its application ought to be dismissed with costs. According to it, the Plaintiff was in flagrant breach of the terms of the loan agreements and the loan accounts are in astronomical arrears to the tune of Kshs. 67,838,844.50 as at 15th September, 2021 and the outstanding balance of Kshs. 243, 125,963.15/- which is accruing interest until payment in full. Accordingly, it is in the interest of justice that the application herein be dismissed.

Plaintiff's supplementary Affidavit

27. In response to the averments made in the replying affidavit, the Plaintiff relied on a supplementary affidavit sworn by Dev Makund Patel dated 10th May, 2022 wherein he averred that this Court has discretion to prolong the period of redemption and that the Plaintiff was ready to abide by any conditions which this Court would set.

28. According to the deponent, the 1st Defendant has been computing interest on a daily basis contrary to the provisions of the charge and law. He added that the 1st Defendant has failed to render accounts

despite numerous requests from the Plaintiffs. According to the deponent, the 1st Defendant has breached its duty of care and it has acted in bad faith.

Plaintiff's submissions

29. On behalf of the Plaintiff, it was submitted that this court has power under the provisions of Section 103(1)(a) and (3), Section 104(1)(2) and (3) and Section 105 of the *Land Act* for cancelling, varying, suspending or postponing any scheduled sale or extending the period of time for compliance by the chargor or substitution of a different remedy than outright sale.

30. Regarding the principles guiding the grant of interlocutory injunction, reliance was placed on *East African Industries v Trufoods* [1972] EA 420, *Geilla v Cassman Brown & Co. Ltd* [1973] EA 358, *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani) HCCC NO. 1234 of 2002 and *Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd Nairobi*(Milimani) HCCC No. 360 of 2001.

31. According to the Plaintiff, the statutory notice issued on or about 24th August fell short of the mandatory provision of Section 90 of the *Land Act* as it failed to advise the Plaintiff of its rights. It is submitted that the failure greatly prejudiced the Plaintiff's since it was caught unprepared as it did not have sufficient time within which to redeem their charged properties. As to what constitutes a *Prima facie* case, reliance was placed on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR.

32. According to the Plaintiff, although valuation of the suit property was undertaken by the Defendant, the Defendants gave a forced value of Kshs. 180,000,000/- when the anticipated sale price of the property is Kshs. 420,000,000/- hence the Plaintiff stands to suffer irreparable harm if the property is disposed of at a throw away price. That the forced sale will not cater for the amount being claimed by the Defendant and if it is not sold as per the market price, then the proceeds will not benefit the bank and auctioneers to the Plaintiff's detriment who have incurred so much costs in payment of the loan facility and also in the preliminary payments before the loan facility.

33. The Plaintiff invited the Court to consider the fact that the Plaintiff had continued to liquidate the loan as evidenced in its loan statement before the Covid 19 pandemic which negatively affected the Plaintiff's business leading to Plaintiff's financial constraints and being unable to meet its obligation in the loan facility. The Plaintiff urged court to exercise its discretion by enlarging the time for a period of 24 months or for such other period that the court may deem fit pursuant to the provision of Section 104 and 105 as read with Section 90 of the *Land Act*.

34. According to the Plaintiff, the injury it will suffer is irreparable and cannot be adequately remedied or atoned by damages if the suit property is disposed of at a throw away price. Reliance was placed on the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR and *Muigai v Housing Finance Co. Ltd & Another* HCCC No.1678 of 2001.

35. It was therefore submitted that the Plaintiff has established the set threshold for grant of interlocutory Injunction hence its application is merited and that it would be in the interest of justice and in all fairness it be allowed with costs.

1st Defendant's submissions

36. On behalf of the 1st Defendant, it was submitted that it has at all times complied with the law and acted in good faith but the Plaintiff has failed, declined and/or blatantly refused to comply with the terms of the instrument creating the various facilities. Based on the principles upon which the court

will grant an injunction are well settled and articulated in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 it was submitted that at this stage, the Plaintiff has to demonstrate that on a balance of probabilities, it has established a case which has a probability of success. As to what constitutes a *prima facie* case, reliance was placed on *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR. Based on the two decisions, it was submitted that in determining whether the injunction orders sought are merited, the Court has to evaluate all the material placed before it so as to determine whether or not the Plaintiff has demonstrated that they have a *prima facie* case with a high probability of success.

37. According to the 1st Defendant, it is undisputed that the Plaintiff took a credit facility for the sum of Kshs. 220,000,000/- from the 1st Defendant and that the credit facility was secured by a First Legal Charge dated 1st July, 2019 and registered on 19th July, 2019 over the suit properties in favour of the 1st Defendant; a Fixed and Floating Debenture over the entire Assets of the Plaintiff; a Personal Guarantee and Indemnity from Patel Amip Rajendra as well as Corporate Guarantee and Indemnity from the Plaintiff all for the sum of Kshs. 220,000,000/-.

38. According to the 1st Defendant, based on the statement of accounts annexed to the replying affidavit, it is evident that contrary to the terms of Clause 3 of the letter of Offer dated 26th April, 2019 as read with Clause 3 of the Supplemental Letter of Offer dated 12th June, 2020, the Plaintiff deliberately failed to maintain and/or hold sufficient funds in its account and subsequently fell into arrears.

39. In response to the Plaintiff's allegations that the interest computed is erroneous, the 1st Defendant has invited the court to be guided by the case of *George Mwangi Chege & 2 Others v SBM Bank Limited (Formerly Chase Bank (Kenya) Limited (In receivership)* [2021] eKLR where the court held that the application principle is that the court will not restrain the Chargee from exercising its statutory power of sale merely on the basis of disputed accounts of interest and further reliance on the cases of *Mrao v First American Bank of Kenya Limited & 2 Others* (*supra*), *Mohammed Khaled Khashoggi v Equity Bank Limited* [2013] eKLR and *Joseph Okoth Waudi v National Bank of Kenya* CA NRB Civil Appeal No.77 of 2004 [2006] eKLR.

40. Reference was also made to Section 96 of the *Land Act* that states that the Chargee is entitled in law to exercise the right to sell any charged property once the Chargor is 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). According to the 1st Defendant, it would be unjust to stop the statutory power of sale once it has rightfully accrued hence the court ought not to sanction it. It was therefore submitted that the application herein is an abuse of the court process as the Plaintiff is only seeking to frustrate the 1st Defendant's right of sale under the *Land Act*.

41. It was submitted that a forced sale valuation was undertaken by a valuer as required under Section 97(2) of the *Land Act* before advertising the said property for sale.

42. As to whether the Plaintiff will suffer irreparable harm if the orders of injunction are not granted, it was submitted that pursuant to Section 99(4) of the *Land Act*, the Plaintiff can be adequately compensated by an award of damages in the event this Court determines that the Plaintiff has suffered loss due to an irregular exercise of statutory power of sale. Reference was also made to the *Halsbury's Laws of England*, 3rd Edition, Volume 21 paragraph 739, page 352.

43. According to the 1st Defendant, it was part of the agreement that in the event of default by the Plaintiff, the 1st Defendant would exercise its statutory power of sale over the securities offered for the credit facility. Reliance was placed on the case of Andrew M. Wanjohi v Equity Building Society & 7 Others

[2006] eKLR and it was submitted that the properties offered as security became commodities for sale and therefore subject to sale in case of default in loan repayments.

44. According to the 1st Defendant and award of damages to the Plaintiff would adequately remedy the present circumstances in the event the sale is determined to be improper and/or illegal since the value of the charged property can be ascertained. Reliance was placed on the case of *Isaac O. Litali vs. Ambrose W.Subai & 2 Others* HCCC No. 2092 of 2000(unreported), John Nduati Kariuki T/A Johester Merchants vs. National Bank of Kenya Limited (2006) 1 EA 96, *Thomas Nyakamba Okong'o vs. Co-operative Bank of Kenya Limited*(2012) eKLR and *Maithya vs. Housing Finance Co. of Kenya & Another* [2003] 1 EA 133.

45. According to the 1st Defendant, it is a reputable financial institution with sound financial base that can adequately compensate the Plaintiff in terms of damages for any loss or injury occasioned to them if the suit is determined in their favour and that no evidence has been provided by the Plaintiff that it is incapable of compensating it in case of any loss. Reliance was placed on the case of *Sammy Japheth Kavuku v Equity Bank Limited & Another* (2013) eKLR.

46. Regarding the balance of convenience, the 1st Defendant cited *Francis J.K Ichatha vs. Housing Finance Company of Kenya*, Civil Application No.108 of 2005 and *Andrew M. Wanjohi v Equity Building Society & 7 Others* [2006] eKLR.

47. It was submitted that the Plaintiff did not show any cogent evidence that the 1st Defendant was in breach of the terms of the loan agreement nor were any grounds legal grounds raised as to why the injunction should issue against the 1st Defendant from exercising its statutory right of sale on the suit properties.

48. It was noted that the Plaintiff had not made any steps to redeem the property or clear the outstanding arrears despite the Plaintiff enjoying an interim injunction order granted by this court pending the hearing and determination of the instant application. According to the 1st Defendant, the Plaintiff is largely motivated by the desire and fad for evasion of its responsibilities pursuant to the terms of the Letter of Offer.

49. According to the 1st Defendant, the Plaintiff is not entitled to the increment of time to rectify the default since it has consistently failed, refused and/or neglected to settle the debt amount that currently stands at Kshs. 274,898,655.10/- as at 12th November, 2021 despite the numerous demands and statutory notices issued to them. According to the 1st Defendant, granting the order sought by the Plaintiff to rectify its default would be akin to this Court rewriting the contract between the parties. Reliance was placed on the case of *South Nyanza Sugar Co. Ltd vs. Leonard O. Arera* [2020] eKLR.

50. The 1st Defendant asserted that it discharged its obligation as per the Letter of Offer and the Charge instrument by disbursing the loan amount to the Plaintiff but the Plaintiff has failed to honour its part of the agreement prompting the 1st Defendant to initiate the debt recovery process and cannot therefore seek to have an extension of time to rectify the default. According to the 1st Defendant, it issued the necessary demands and statutory notices as required by law.

51. The 1st Defendant urged the court to be guided by the case of *Labelle International Limited & Another vs. Fidelity Commercial Bank & Another*, Civil Case Bo. 786 of 2012 where the court held that where part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction a decision which was approved in Kajiado ELC No. 560 of 2017 - *New Age Developers & Construction Co. Ltd vs. Jamii Bora Bank Limited*.

52. The 1st Defendant asserted that it has at all material times treated its customers equally and with utmost respect in a manner that promotes cordial business relationship while upholding fair and ethical business practices. That the realization of securities held by the 1st Defendant when the same have crystalized does not in any way amount to malice or unfairness whatsoever.

53. The 1st Defendant urged the court to dismiss the Plaintiff's application since it has not presented a genuine and arguable case to warrant granting of the prayers it has sought in its application herein and the same should be dismissed with costs.

Determination

54. 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.

55. The court's discretion to grant temporary injunction is provided for under Order 40 Rule (1) and (2) of the *Civil Procedure Rules*, 2010 which provide as follows:

> 1. Where in any suit it is proved by affidavit or otherwise—
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> (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
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> (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
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> 2.
>
> (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
>
> (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

56. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co.*

Ltd [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

> " In an interlocutory injunction application, the Plaintiff 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
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> (c) ally 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 Plaintiff is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86. If the Plaintiff 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 Defendant 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 Defendant is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Plaintiff'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 Plaintiff to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the Plaintiff if interlocutory injunction is refused would be balanced and compared with that of the Defendant, if it is granted."

57. The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

> " ...these are the three pillars on which rest 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 Plaintiff is expected to surmount sequentially... if the Plaintiff 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 Defendant will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the Defendant is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Plaintiff's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration."

58. While reiterating the said principles, Ringera, J (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani) HCCC No. 1234 of 2002 stated 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. That was the same position adopted in the dicta in Nairobi High Court Civil Case No. 517

of 2014 – *Lucy Nungari Ngigi & 4 Others v National Bank of Kenya Limited & Anor* (eKLR) where it was stated:

> "....I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein....."

59. However, 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 Plaintiff 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.

60. It was therefore held by Ringera, J (as he then was) in Dr. *Simon Waiharo Chege v 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 Plaintiff 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 Plaintiff 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."

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

> "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 Plaintiff obtains judgement in his favour the Defendant 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."

62. 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 Defendant 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.

63. What then constitutes a *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 Plaintiff must show *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Plaintiff 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 Plaintiff's case upon trial. That is clearly a standard, which is higher than an arguable case."

64. While adopting the same position the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR added that:

> "The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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 Plaintiff 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 Plaintiff's case is more likely than not to ultimately succeed."

65. In determining this matter, the Court is enjoined to not only consider the contractual instruments entered into between the parties herein but also the legal regime guiding the transaction in question. That the position of the Court of Appeal in *Keziah Njambi Maingi t/a Arrivals Textile Shop v Barclays Bank of Kenya Limited* (2016) eKLR where it made the following remarks with regards the exercise of statutory power of sale:

> "A charge is not merely a contract of lending between a lender and a borrower. It is also governed by the elaborate statutory provisions in part VII of the *Land Act* and Part V of the *Land Registration Act*. By section 90 and read with section 96(1) of the *Land Act*, the chargee has power to exercise power of sale of the charged land, if, *inter alia*, the chargor defaults in payment of money due under a charge and if all, the requisite notices have been served on the chargor."

66. In this case, first, the Plaintiff assert that the statutory power of sale notice fell short of the mandatory provisions of Section 90 of the *Land Act* for failing to advice the Plaintiff of its rights as provided under the said provision hence the Plaintiff was greatly prejudiced as he was caught unprepared. Secondly, the Plaintiff assert that the property is undervalued hence it will suffer irreparable harm if the property is disposed off at a throw away price. Thirdly, that the amount demanded by the 1st Defendant is higher than the actual amount owed as per the Plaintiff's accountant's loan workings. Lastly, that the 1st Defendant failed to consider the fact that the Plaintiff's inability to comply with the contractual terms was due to the resurgence of COVID 19 Pandemic.

67. Section 90(1), (2), (3) of the *Land Act* No.6 of 2012 provides as follows: -

(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 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, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that 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.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land.

68. According to the Plaintiff, the statutory power of sale issued against Plaintiff's property on 24th August, 2021 purporting to be a notice issued under Section 96 and 108 of the *Land Act*, 2012 fell short of the mandatory provision of Section 90 thereof as it failed to advice the Plaintiff of its rights as provided for in the same Act hence prejudicing the Plaintiff's rights as it was caught unprepared. In this case, the statutory notice of 24th August,2021 sent by registered mail to the Plaintiff read as follows;

"....

Notice to sell: Issued under Section 96(2) of the *Land Act*, 2012

.....

.....

We refer to the first legal charge dated 1st July, 2019, created over property Title Number 37/980 and 337/981 that secured banking facilities advanced to you amounting to Kshs. 220,000,000/-(Kenya Shillings Two Hundred and Twenty Million only) granted vide a letter of offer 26th April, 2019, and having sighted the statutory notice dated 17th May, 2022, sent to you by registered post, still note that your banking facilties as of 24th August, 2021 are outstanding to the tune of Kshs. 240,801,104.15.

> Take Notice thereof, that unless you remit the entire sum of Kshs. 240, 801, 104.15 (Kenya Shilling Two Hundred and Forty Million, Eight Hundred and One Thousand, One Hundred and Four Cents Fifteen only) outstanding on your account as at 24th August, 2021 together with the accrued interest costs charges and other expenses that shall have accrued as at the date of payment, we as the Chargee shall sell the above referenced charged property by public auction and/or private treaty after the expiry of fourty (40) days from thye date of this notice.
>
> Please note that this notice is issued pursuant to the provisions of Section 96(2) of the *Land Act*, 2012....."

69. I believe the reference to Section 96(2) in the notice was an error since the proper subsection is (1) of the same Act, which 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."

70. As was stated in *Albert Mario Cordeiro & anor vs. Vishram Shamji* (2015) eKLR:

> "... the requirements under section 96(2) of the *Land Act* are mandatory and quite separate from the requirements under the *Auctioneers Act*. The Redemption Notice under the *Auctioneers Act* is also mandatory but it is issued separately from and after the one under section 96(2) of the *Land Act*; strictly in that sequence ..."
>
> "28... in the absence of a Notice to Sell under section 96(2) of the *Land Act*, the Statutory Power of Sale cannot be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice have been issued. This is a potent ground for an injunction."

71. In my view, the notice dated 24th August, 2021 properly informed the Plaintiff of the nature and extent of their default, there was a demand for payment of the outstanding amount due to regularize the account and the duration of three months in the notice dated 17th May, 2021 was given as the period within which the payments in default must be made. The letter also as required informed the Plaintiff of the consequences of the default if the same were not rectified within the stipulated time. It is therefore my *prima facie* view that the notice was substantially in compliance with all the requirements under section 90(2) of the Act save subsection 90(e) that requires that the notice adequately informs the recipient of the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies. Had that been the only notice, I would have had no difficulty in finding that this omission constituted a *prima facie* case for the purposes of an injunction. However, the subsequent correspondences, on their face, reveal show that the Plaintiff must have been aware of his rights for he sought *inter alia* extension of the repayment period. I therefore associate myself with the views expressed by Onguto J. in *First Choice Mega Store Limited v Ecobank Kenya Limited* [2017] eKLR where the Learned Judge stated that:-

> [37] The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start

the process of selling the same , the borrower will have both notification of such action and an opportunity to redeem his property.

(38) It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective rights of both the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in *Royal Bank of Scotland Plc v Etridge* [2002] 2 AC 733, [2], the law "must afford both parties a measure of protection". The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence reasonable confidence that it may at an appropriate time enforce the security is also protected.

(39) A purposive construction of section 90 is necessary. Section 90 must thus be read and understood with the open fact that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favored given that it is the same section that triggers the application of a chargee's rights and remedies.

[40] In ascertaining whether there was compliance with the provisions of section 90 (2) of the *Land Act*, the object and purpose of the section must thus not be gainsaid. The court must also not be simply textual.

(41) Section 90 of the *Land Act* is couched in mandatory terms in so far as the requirement of notice being given is concerned. No party can run away from that legal requirement, otherwise its absence would be a fetter to the chargor's right of redemption. Section 90(2) however dictates substance when it stipulates that the information to be availed to the chargor ought to be "adequate". This signals both routine compliance (in issuing the notice) and also substantial (not exact) compliance in providing the stipulated information. Any deviation from statutory prescription is to be deemed as countenanced by substantial compliance hence the requirement for adequate information."

72. According to the Plaintiff, due to Covid 19 pandemic, the Plaintiff's business was negatively affected and the tenant occupancy rate at the Plaintiffs Go Downs depreciated thereby resulting into the Plaintiff experiencing financial strain and inability to meet its obligations. In declining to accept the Plaintiff's plea for review and restructuring of the loan facility, the 1st Defendant was accused of behaving in a conduct geared towards ensuring that the Plaintiff was unable to redeem its property thereby clogging the Plaintiff's equity of redemption.

73. While the court may empathise with the circumstances under which the Plaintiff finds itself due to harsh economic conditions occasioned by COVID 19 pandemic, this Court cannot under the guise of exercising its discretion under the Act purport to rewrite the contract between the parties. This Court has no powers to vary the terms of the contract agreed between the parties herein as was held by the Court of Appeal in *Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others* Civil Appeal No. 330 of 2003 that:

> " 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. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

74. Pall, J (as he then was) in the case *Muhani & Another v National Bank of Kenya Ltd* [1990] KLR 73 stated as follows:

> " The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale."

75. In this case, it is worth noting that the statutory notices tendered as evidence of arrears show that arrears accrued even before the effects of covid 19 pandemic. As at 15th February, 2020, the Plaintiff was in arrears of Kshs. 228, 665,904.55. The Plaintiff cannot cling on the effects of the pandemic to assert that it was not given an opportunity to rectify the indebtedness.

76. It follows that the issue of constrained cash flows and the allegation that the Plaintiff had entered into arrangements with a third party to dispose of its interest in the charged property in order to settle its liability to the 1st Defendant does not constitute a prima facie case to warrant the orders sought herein.

77. I associate myself with the position in the case of *Kyangaro v Kenya Commercial Bank Ltd & Another* [2004]1 KLR 126 where it was held that:

> " the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this court, quite frankly, that since leaving the employment of the bank over four years ago he has never paid a cent towards redemption of the loan. He admits that he is in default and yet he is also in possession. He can't have it both ways. Either he pays the loan or allows the bank to realize its security. He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting on his rights... While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Court's must not at the same time be converted into a haven of refuge by defaulters."

78. The Plaintiff also contends that the amount claimed by the 1st Defendant is higher than the actual amount it is owed and as per the Plaintiff's accountants loan workings. However, in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 the Court of Appeal held that a mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive. In this case, the Plaintiff has not paid the amount claimed in Court in order for the Court to rely on the said allegation as a basis for granting an injunction.

79. Having considered the issues raised by the Plaintiff, I am unable to find that the Plaintiff has established a *prima facie* case for the purposes of the grant of an injunction pending the hearing and determination of the suit. That does not necessarily mean that the Plaintiff will not succeed. What it means is that there is no basis upon which this Court can restrain the 1st Defendant's statutory power of sale. Therefore, as was held in the case of *Kenya Commercial Finance Co. Ltd vs. Afraha Education Society* [2001] Vol. 1 EA (quoted in the Nguruman Limited case (*supra*), the triple requirements in

an interlocutory injunction application are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent and all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially. Therefore, 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 Plaintiff to injunction directly without crossing the other hurdles in between.

80. Regarding the second principle whether the Plaintiff has proved that that he stands to suffer irreparable injury, which would not adequately be compensated by an award of damages, the Plaintiff contended that the forced value of Kshs. 180,000,000/- is an under valuation by Accurate Valuers Limited hence the Plaintiff will suffer irreparable harm. According to the Plaintiff the anticipated sale price is Kshs. 420,000,000/- hence the property will be disposed of at a throw away price if the sold based on the forced value.

81. I associate myself with Ngaah, J. in *Brade Gate Holdings Ltd & another v Jamii Bora Bank Limited* [2018] eKLR where he stated:-

> " But the question that still lingers is this: assuming the Plaintiffs are right that the Defendant is in breach of its duty of care towards the Plaintiffs even as it seeks to exercise its statutory power of sale, what is the remedy available to the Plaintiffs? I found the answer to this question in section 99. (4) of the *Land Act*...I understand this provision to imply that if it turns out, as the Plaintiffs allege, that the Defendant has not complied with the provisions of sections 97 of the *Land Act* and disposed of the property below the prescribed lower limit to the detriment of the Plaintiffs, the latter will have their remedy in damages. I suppose that if their valuation report passes the test of time, it will be an important component in calculation of damages that the Plaintiffs may be awarded."

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

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

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

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

84. As was appreciated by Ringera, J (as he then was) in the case *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2001] eKLR:

> " ...once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages."

85. It was therefore held in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR that:

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

86. The general position is that an injunction ought not to be granted if the Plaintiffs may be compensated by an award of damages. In *John Nduati Kariuki T/A Johester Merchants v 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 Plaintiff 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 Plaintiff, if any, and that capacity has not been challenged."

87. Nevertheless, as regards the second condition, whether the Plaintiff stands to suffer irreparable loss, it was held in Nguruman Limited case (*supra*) expressed itself as hereunder:

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

88. In the case of *Elijah Kipng'eno arap Bii v Kenya Commercial Bank limited* [2001] eKLR Ringera, J. (as he then was) held that:

> "is the Plaintiff's probable injury capable of being adequately compensated in damages? I have no doubt that it is. The Plaintiff has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. ... I am on a rational consideration of the matter impelled to conclude that the Plaintiff's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award. The application fails on this ground too."

89. On the same point it was held in the case of *Anita Chelagat O'donovan & 2 others* [2017] eKLR, that:

> "it is patent that both under statute and the authorities, the sale of a charged property in exercise of a statutory power of sale is not an irreparable injury or an irredeemable loss. Should it be found upon the hearing of the case that there was irregularity or impropriety in the sale, such property is well-capable of valuation and the ensuing monetary compensation is sufficient to repair the harm or loss."

90. In light of my finding above, I agree with the 1st Defendant that in the event that the injunction sought is granted, the net effect shall be to inflict greater financial hardship on the 1st Defendant/Defendant and even the Plaintiff because the interest on the outstanding principal will continue to accumulate. That was the Court's view in the case of *Thathy v Middle East Bank (K) Ltd* [2002] 1 KLR 595, where it delivered itself thus:

> "as regards the balance of convenience, I think the same tilts in favour of refusing the injunction. The Plaintiff is not repaying his mortgage debt. From the statement of account, a lot of what is outstanding is interest. That interest continues to accumulate. At the present tempo, the charge debt will be more than the value of the security quite soon. The bank would lose (*sic*) because its security will in effect be no security at all if on sale it cannot realize the debt."

91. It is therefore my view and I hold that the Plaintiff has failed to satisfy the second condition that it will suffer irreparable harm that cannot be compensated by an award of damages if injunctive orders are not issued.

92. The Plaintiff has in the alternative requested that the court do suspend the exercise of any statutory remedy by the Defendant for a period of twenty-four months. Section 104 of the *Land Act* provides as hereunder:

(1) In considering whether to grant relief as applied for, a court—

(a) shall, have regard to whether the remedy which the chargee proposes to exercise is reasonably necessary to prevent any or any further reduction in the value of the charged land or to reverse any such reduction as has already occurred if the charged land consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of or lease the land or a part thereof;

(b) shall, where the charged land consists of or includes, a dwelling house, and the remedy proposed is to appoint a receiver, or take possession or lease the dwelling house or a part of it, have regard to the effect that the appointment of a receiver or the taking of possession or leasing the whole or a part of the dwelling house would have on the occupation of the dwelling house by the chargor and dependants and if the effect would be to impose undue disturbance on those owners, whether it is satisfied that—

(i) the chargee has made all reasonable efforts, including the use of other available remedies available, to induce the chargor to comply with the obligations under the charge; and

(ii) the chargor has persistently been in default of the obligations under the charge; and

(iii) if the sale is of land held for a customary land, the chargee has had regard to the age, means, and circumstance including the health and number of dependants of the chargor, and in particular whether—

(aa) the chargor will be rendered landless or homeless;

(bb) the chargor will have any alternative means of providing for the chargor and dependants;

(iv) it is necessary to sell the charged land in order to enable the chargee to recover the money owing under the charge;

(v) in all the circumstances, it is reasonable to approve, or as the case may be, to make the order to sell the charged land.

(2) A court may refuse to authorise an order or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may—

(a) cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;

(b) extend the period of time for compliance by the chargor with a notice served under section 90;

(c) substitute a different remedy or the one applied for or proposed by the chargee or a different time for taking or desisting form taking any action specified by the lessor in a notice served under section 90;

(d) authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that—

(i) the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and

(ii) no injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the court thinks fit.

(3) If under the terms of a charge, the chargor is entitled or is to be permitted to pay the principal sum secured by the charge by instalments or otherwise to defer payment of it in whole or in part but provision is also made in the charge instrument or any collateral agreement for earlier payment of the whole sum in the event of any default by the chargor or of a demand by the chargee or otherwise, then for purposes of this section the court may treat as due under the charge in respect of the principal sum secured and of interest on it only the amounts that the chargor would have expected to be required to pay if there had been no such provision for earlier payment.

(4) A court must refuse to authorise or approve a remedy if it appears to the court that—

(a) the default in issue has been remedied;

(b) the threat to the security has been removed;

(c) the chargor has taken the steps that the chargor was required to take by the notice served under section 90; and

(d) the chargee has taken or attempted to take some action against the chargor in contravention of section 90(4).

93. It is clear that Section 104(2)(b) of the *Land Act* has given the court wide powers to extend the period of time for compliance by the chargor with a notice served under section 90. However, in this case the Plaintiff has not presented any evidence of its ability to service the facility in the event that time is extended for him. In fact, as noted by the 1st Defendant the Plaintiff had not made any steps to redeem the property or clear the outstanding arrears despite the Plaintiff enjoying an interim injunction order granted by this court pending the hearing and determination of the instant application on 4th November, 2021. In the case of *Al-Jalal Enterprises Limited vs. Gulf African Bank Limited* [2014] eKLR cited with approval by Nyamu, J. (as he then was) in the case of *Mathya v Housing Finance Co. of Kenya Limited & another* [2003] 1 EA 133 where the Court stated that:

> " ...he who comes to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the Plaintiff outside the realm of exercise of the court's discretion."

94. In my view this is not a case which warrant the exercise of the courts discretion under Section 104(2). I associate myself with the view expressed by Onguto J. in *First Choice Mega Store Limited vs. Ecobank Kenya Limited* (*supra*) that:

61. The wide discretion under section 104(2) of the *Land Act* will only be invited when the statutory remedy has actually accrued. Effectively, it would mean that the amount under the security would be outstanding. My view is that exercise of the discretion in favour of the chargor under section 104(2) of the *Land Act* should only take place where there is established to the court's satisfaction an ability on the part of the chargee to pay the sums due within a reasonable period. Where the ability is not established or there is no prospect at all, then it would not be appropriate to exercise the power under section 104(2) of the *Land Act*.

62. The Plaintiff herein made no effort to establish the ability to (in future and within a reasonable time) settle the amounts outstanding."

95. In the premises, I find the Notice of Motion dated 18th October, 2021 lacks merit and the Plaintiff has not satisfied the test for granting the injunction sought. Consequently, I dismiss the application dated 18th October, 2021 with costs to the 1st Defendant and vacate the interim orders.

96. Orders accordingly.

RULING READ, SIGNED AND DELIVERED AT MACHAKOS THIS 26TH DAY OF JULY, 2022.

G.V. ODUNGA

JUDGE

In the presence of:

Mr Mulekyo for the Plaintiff/Applicant

Miss Odongo for Mr Akelo for the 1st Defendant/Respondent

CA Susan