



**Onyango v SBM (Kenya) Limited & another (Civil Case E021 of 2021)  
[2022] KEHC 13179 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13179 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E021 OF 2021  
MW MUIGAI, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**JASPER OCHIENG ONYANGO ..... APPLICANT**

**AND**

**SBM (KENYA) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PHILIPS INTERNATIONAL AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Notice of Motion Filed on September 30, 2021**

1. The plaintiff/applicant who is the registered owner of suit property known as land reference number 27409 Machakos Unit FB 369B seeks the following orders:-
  1. That this application be certified as urgent and be heard *ex parte* in the first instance.
  2. That pending the hearing and determination of this application a temporary order of injunction do issue restraining the defendants whether by themselves or their representatives, servants and/or assigns from howsoever selling or advertising for sale by way of private treaty or by public auction and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as land reference number 27409 Machakos Unit Fb 369 B (the suit property);
  3. That pending the hearing and determination of this suit an order of injunction do issue restraining the defendants whether by themselves or their representatives, servants and/or assigns from howsoever selling or advertising for sale by way of private treaty or by public auction and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as land reference number 27409 Machakos Unit Fb 369 B (the suit property);



4. That pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the 1<sup>st</sup> defendant to withdraw the statutory notice and notice to sell issued on October 2, 2018 and February 21, 2019 respectively.
  5. That pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the 2<sup>nd</sup> defendant to withdraw the 45 days redemption notice dated August 17, 2021.
  6. That pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the 1<sup>st</sup> defendant to delist or ensure the delisting of the claimant with credit reference bureau.
  7. That this Hon court be pleased to make further orders as it may consider necessary.
  8. That the costs of this application be provided for.
2. In his supporting affidavit, the plaintiff/applicant has averred that on or about February 21, 2014 a charge was registered in favour of his former employer, the 1<sup>st</sup> defendant, a successor of the defunct Chase Bank (Kenya) Limited over the suit property. According to the applicant, the 1<sup>st</sup> defendant advanced him a mortgage loan in the sum of Kshs 11,151,710/- under the staff housing scheme. According to the applicant, the loan account for the loan facility was account number 001STHLxxxxxxxx as indicated in the charge instrument.
  3. The plaintiff/applicant has averred that in 2016 he was rendered redundant and became unemployed, hence the interest payable on his loan was doubled from 6% to 14%. He has averred that it was in the same year that he was diagnosed with glaucoma and uveitis that led to loss of his eyesight on the right eye that made it extremely difficult for him to eke out a living. According to the applicant, he filed a disability claim with the 1<sup>st</sup> defendant for credit life payment but the 1<sup>st</sup> defendant ignored it.
  4. According to the plaintiff/applicant, on or about October 20, 2018, the 1<sup>st</sup> defendant issued him with a statutory notice under the provisions of section 90 of the Land Act, 2012 seeking payment of the sum of Kshs 22,126,683.03/- purportedly being the outstanding balance in respect of the loan account for the loan facility and further issued him with a notice to sell dated February 21, 2019 under section 96(2) of the Land Act, 2012 seeking immediate payment of Kshs 22,789,553/- purportedly being the outstanding balance but the notice has since expired. He has averred that the notices are defective for they have stated outstanding amounts that are grossly exaggerated and higher than the actual outstanding amount owing in the loan facility.
  5. According to the applicant, his loan was restructured and it was agreed that he would be paying monthly installments of Kshs 100,000/- and in good faith he has faithfully paid Kshs 113, 488/- and has continued to pay the amount as evidenced by the loan account statement annexed thereto. The applicant laments that the 1<sup>st</sup> defendant has revoked the agreed terms of restructuring the loan by proceeding to exercise its statutory power of sale over the suit property without informing the applicant.
  6. He has averred that Intersil Global Limited under the instruction of the 1<sup>st</sup> defendant has grossly undervalued the suit property with a market value of Kshs 18,000,000/- way below the market value of Kshs 18,500,000/- in the year 2015.
  7. According to the applicant, despite issuing the defective notices, the 1<sup>st</sup> defendant proceeded on April 1, 2021 to issue instructions to the 2<sup>nd</sup> defendant to issue a 45 days redemption notice and notification of sale to the applicant which instructions have been executed. He has averred that the advertisement of



the sale of the suit property was to appear in the local Daily Newspaper on October 11, 2021 and the 2<sup>nd</sup> defendant had advised that the public auction was set for October 26, 2021 at its offices. According to the applicant, the intended sale and disposal of the suit property is contrary to the provisions of the law.

8. He has averred that the 1<sup>st</sup> defendant has forwarded adverse credit information against him that has caused him to be listed in the credit reference bureau and as a result he has been put in financial peril as he has been barred from accessing credit from any financial institution.
9. The plaintiff/applicant is apprehensive that should the orders sought by him are not granted, the defendants will proceed with the sale of the suit property rendering the suit nugatory and mere academic exercise. According to the applicant he will suffer irreparable damage not capable of compensation by an award of damages.
10. According to the plaintiff/applicant, the balance of convenience tilts in his favour and it is fair, just, equitable and in the interest of justice that the orders sought be granted to safeguard his proprietary interest in the suit property.

### **Replying Affidavit Filed on January 11, 2022**

11. The 1<sup>st</sup> defendant has opposed the plaintiff/applicant's application through the replying affidavit of Juliet W. Mwangi, the 1<sup>st</sup> defendant's senior debt recovery officer. The officer has averred that the application is frivolous, vexatious, is an abuse of the court process, lacks merit and ought to be dismissed on the very outset.
12. According to the deponent, the mortgage loan facility advanced to the plaintiff/applicant was Kshs 11,551,710/- and the agreed terms of the letter of offer dated December 19, 2013 were that the loan would be repaid over a period of 240 months to mature on September 15, 2033 with monthly installment of Kshs 76,237/- and that loan would be secured with a first legal charge over residential property situated on the suit property. She has further averred that *vide* the letter of offer dated January 28, 2015, Chase Bank advanced the plaintiff/applicant a further sum of Kshs 6,948,290/- which was secured by a further legal charge over the 4 bedroom bungalow hence the total amount advanced to the plaintiff/applicant stood at Kshs 18,500,000/-.
13. The 1<sup>st</sup> defendant averred that the plaintiff/applicant severally defaulted in the repayment of the mortgage loan facility from August, 2017 onwards which led to recalling the entire debt and immediate repayment of the sum of Kshs 21,329,739 as at June 13, 2018 *vide* a recall of loan letter dated June 13, 2018 and thereafter issuance of the statutory notice dated October 2, 2018 under section 90 of the [Land Act](#) seeking the payment of the sum of Kshs 22,126,668.03/- being the balance of the principal sum together with the interest and monies outstanding. She has averred that upon the expiry of the notice and the failure by the plaintiff/applicant to honor its obligation in the mortgage loan facility, the 1<sup>st</sup> defendant issued the notice to sell dated February 21, 2019 pursuant to section 96(2) of the [Land Act](#).
14. According to the deponent, despite the 1<sup>st</sup> defendant agreeing to restructure the loan to repayment of Kshs 100,000/- per month, the plaintiff/applicant further defaulted in repayment of the agreed equated monthly installment (EMI) in December, 2020. She has averred that intersil global limited undertook a valuation of the suit property as required under section 97(2) of the [Land Act](#). She has attached a copy of the instruction letter dated March 25, 2021 and the valuation report dated March 26, 2021 as 'JWM-10a' and 'JWM-10b' respectively which indicate the current market value of Kshs 18,000,000/-, a forced value of Kshs 13,500,000/- and an insurance value of Kshs 18,000,000/-.



15. According to the deponent, the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to issue the 45 days redemption notice dated August 17, 2021 and the notification of sale to the plaintiff/applicant which instruction was executed. She has averred that the 1<sup>st</sup> defendant acted honestly by issuing all the requisite notices and abiding by the terms and conditions of the mortgage facility. According to the deponent, even before and after restructuring the loan repayment, the plaintiff/applicant had and defaulted on repayment hence the 1<sup>st</sup> defendant's right to exercise its statutory power of sale under the charge instrument had already arisen.
16. The 1<sup>st</sup> defendant disputed that the plaintiff/applicant has been and is still repaying the loan since the only repayment made was from June, 2020 to November, 2020. According to the deponent, since November, 2020, the plaintiff has to date repaid the sum of Kshs 13,488/-.
17. According to the deponent, granting the orders sought will be tantamount to legalizing the plaintiff/applicant's breach of mortgage loan agreement. The deponent urged the court to dismiss the application with costs as it is an abuse of the court process.

### **Applicant's Supplementary Affidavit Filed on February 25, 2022**

18. The plaintiff/applicant has averred that the only charge registered against the suit property in favor of the 1<sup>st</sup> defendant is the one dated December 19, 2013 and registered on February 21, 2014 securing an amount of Kshs 11,151,170/-. According to the plaintiff/applicant, he is a stranger to the averment by the 1<sup>st</sup> defendant of a further charge against the suit property to secure a further sum of Kshs 6,948,920/-. He has averred that an offer letter cannot be equated to a registered charge. According to the plaintiff/applicant, there is discrepancy between the balance indicated on the statutory demand and that on the loan account statement.

### **Plaintiff/applicant's Submissions**

19. On behalf of the applicant, it has been submitted that the only charge registered over the suit property was the one dated December 19, 2013 and registered on February 21, 2014 securing an amount of Kshs 11,151,170/-. According to the plaintiff/applicant, the further charge claimed by the 1<sup>st</sup> defendant to secure the sum of Kshs 6,948,290 that is said to have been advanced to the plaintiff/applicant has not been proved as no charge or an official search of the suit property indicating the entries on registration were tendered in court. It has been submitted that if at all there is default in servicing the loan by him, the loan account to be referenced by the chargee in exercising its statutory power of sale when issuing the provided notices under the law should be the loan account number 001STHLxxxxxxxx.
20. Reliance was placed on the case of *Professional Consultant Ltd v SBM Bank (Kenya) Ltd* [2021] eKLR where the court issued injunctive orders restraining the chargee from exercising its statutory power of sale on the ground that it had issued a defective statutory notice having included an amount that is not supported by the letter of offer and the subject charge. It has been submitted that the 1<sup>st</sup> defendant has acted illegally by issuing defective notices not supported by the balances in the bank statements of the loan account subject to the charge. According to the plaintiff/applicant the 1<sup>st</sup> defendant's statutory power of sale is null and void *ab initio*.
21. According to the plaintiff/applicant he stares a real and imminent risk that his interest in the suit property will be absolutely extinguished exposing him to irreparable loss not capable of being compensated by way of damages. It has been submitted that the plaintiff/applicant has been put in financial peril since the 1<sup>st</sup> defendant has forwarded adverse credit information to credit reference bureau causing the plaintiff/applicant to be barred from accessing credit from any financial institution.



- The plaintiff/applicant cannot access any credit to undertake any financial ventures that would enable him pay off the purported outstanding debt owing to the 1<sup>st</sup> defendant. It has been submitted that the plaintiff/applicant has diminished capability in engaging in economic enterprise given that he is a person with disability hence by not granting him the orders he has sought will be tantamount to banishing him to a life of hardship and squalor.
22. According to the plaintiff/applicant, the 1<sup>st</sup> defendant actions are unlawful hence the court should not consider the issue of damages being adequate to compensate the plaintiff/applicant. Reliance was placed on the case of *Said Almed v Mannasseh Benga & another* [2019] eKLR and in *Joseph Siro Mosioma v HFCK Limited & 3 others* [2008] eKLR.
  23. Regarding which party the balance of convenience tilts in favour of, it has been submitted that the defendants will proceed on the premises of an illegality to the sell the suit property and the plaintiff/applicant's proprietary interest will be extinguished. According to the plaintiff/applicant, he will suffer great prejudice during that the suit is pending since he will be barred from accessing credit from financial institutions.
  24. On the mandatory injunction sought by the plaintiff/applicant, reliance was placed on the case of *Kenya Breweries Ltd & another v Washington O Okeyo*[2002]eKLR and in *Locabail International Finance Ltd v Agro export and others*[1986]1ALLER 901 on the proposition that the injunction can be granted at an interlocutory stage on special circumstances. According to the plaintiff/applicant, the 1<sup>st</sup> defendant issued defective statutory notices based on the loan accounts that are not subject of the charge registered against the suit property in its favour. It has been submitted that the plaintiff/applicant's case has exceptional circumstances.
  25. The plaintiff/applicant has urged the court to find that he has satisfied the threshold to grant injunctive orders and allow his application with costs.

### **1<sup>ST</sup> Defendant/respondent's Submissions**

26. On behalf of the 1<sup>st</sup> defendant, it has been submitted that the plaintiff/applicant was advanced a personal loan of Kshs 1,603,819/- on October 11, 2013, a mortgage loan of Kshs 11,551,710 on December 18, 2013, a further personal loan of Kshs 1,300,000/- on April 17, 2014, a further mortgage loan of Kshs 6,948,290/- on February 4, 2015, a final personal loan of Kshs 2,900,000/- on June 17, 2015 and a final mortgage loan of Kshs 10,592,472.85/- disbursed to the applicant on December 22, 2015.
27. It has been submitted that the plaintiff/applicant has not established a *prima facie* case since he breached the terms of the charge instrument and the 1<sup>st</sup> defendant has a legitimate and lawful exercise of its statutory power of sale. According to the 1<sup>st</sup> defendant, its relationship with the plaintiff is contractual and by exercising its statutory power of sale, the 1<sup>st</sup> defendant is only protecting its interest under the contract. It has been submitted that what the plaintiff/applicant has disputed is the amount owing indicated in the notices and not his indebtedness to the 1<sup>st</sup> defendant.
28. In opposition to the plaintiff's assertions, the 1<sup>st</sup> defendant has placed reliance on the case of *Mwangangi Mutula Mutua v Equity Bank Limited & 2 others* [2019] eKLR where Odunga J cited the case of *KCB Ltd v Pamela Akinyi Ochieng's* Civil Appeal No 114 of 1991 on the proposition that the mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute. According to the 1<sup>st</sup> defendant, the plaintiff/applicant has not established a *prima facie* case with probability of success.



29. Regarding whether the plaintiff/applicant will suffer irreparable loss which cannot be compensated by way of damages, it has been submitted that the plaintiff/applicant does not dispute the fact that he has defaulted in repaying the loan monies advanced to him by the 1<sup>st</sup> defendant and has not disputed that the 1<sup>st</sup> defendant's right to exercise its statutory power of sale has accrued under section 96 of the [Land Act](#).
30. According to the 1<sup>st</sup> defendant, the plaintiff will not suffer any loss that cannot be compensated by an award of damages. Reliance has been placed on the Court of Appeal decision of [Humphrey Kilambo Mcharo v Kenya Commercial Bank Ltd & another](#) [2005]eKLR on the proposition that the 1<sup>st</sup> defendant herein is a reputable bank with a huge asset base hence in a position to pay damages to the plaintiff/applicant. It has been submitted that as a matter of fact it is the 1<sup>st</sup> defendant who continues to suffer irreparably due to the plaintiff/applicant failure to clear and/or service the loan advanced to him by the 1<sup>st</sup> defendant. According to the 1<sup>st</sup> defendant, it has demonstrated that the plaintiff/applicant will not suffer any irreparable loss and/or damage if the orders sought are not granted.
31. On whose the balance of convenience tilts in favour of, it has been submitted that no doubt has been left for the court to determine the application on a balance of convenience. It has been submitted that the 1<sup>st</sup> defendant has demonstrated that the plaintiff/applicant has failed on all the three tests with regard to the grant of the orders sought. According to the 1<sup>st</sup> defendant, the application ought to be dismissed.
32. Regarding the costs of the application, it has been submitted that the 1<sup>st</sup> defendant has demonstrated that the plaintiff/applicant has failed on the three tests for grant of the injunctive orders hence the plaintiff/applicant should bear the costs of the application. The 1<sup>st</sup> defendant has urged the court to exercise its discretion and award the 1<sup>st</sup> defendant the costs of the application.

### **Determination**

33. I have considered the application, affidavit in support and in opposition and the submissions as well as the authorities relied upon. The issue for determination is whether the plaintiff/applicant has met the threshold for the grant of an order of injunction.
34. Order 40 rule (1) of the [Civil Procedure Rules, 2010](#) provides:
  1. Where in any suit it is proved by affidavit or otherwise—
    - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
    - (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.
  2. Injunction to restrain breach of contract or other injury
    - (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.

35. In *Mureithi v City Council of Nairobi* [1976-1985] EA 331 Madan JJA referred to L Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] 1All ER 504 as follows;

“The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial...if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.”

36. According to the court in *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others* (2014) eKLR the power of the court in an application for an interlocutory injunction is discretionary. While deciding whether or not to grant an injunction, the court should be guided by the well-established principles enunciated in the *locus classicus* case of *Giella v Cassman Brown & Co Ltd* [1973] EA at Page 358 whose holding is as follows:-

“The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a *prima facie* case with a probability of success.

Secondly, an interlocutory injunction will be normally 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”. See Mustafa JA in *Abdul Salim and Others v Okong’o and others* Civil Appeal No 44 of 1975 (unreported).

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

“...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgment in his favor the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgment nugatory...”

38. While reiterating how the principles are to be applied while dealing with interlocutory injunction, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR (Nguruman case) had this to say:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraba Education Society*



[2001] Vol 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between..."

39. It follows therefore that the court must separately look at the three conditions to establish whether it warrants granting the injunction.

Whether the plaintiff/applicant has made *prima facie* case with probability of success

40. As to what constitutes a *prima facie* case, the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125(Mrao case), held as follows:

"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. It is trite that the court will not venture into considering the merits of the case when considering whether or not a *prima facie* case has been established by the applicant. In *Nguruman case*(supra) the Court of Appeal held that:

"We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed." See Ringera, J (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani) HCCC No 1234 of 2002.

42. The plaintiff/applicant has not denied the fact that he received the notices pursuant to section 90 and 96(1) of the *Land Act* No 6 of 2012 but contends that the said notices are defective for they have stated outstanding amounts that are grossly exaggerated and higher than the actual outstanding amount owing in the loan facility. The plaintiff/applicant admitted as owner of the suit property LR 27409 Machakos Unit Fb 369 B on or about February 21, 2014 a charge marked JWM-2 (annexed to replying affidavit of January 11, 2022) was registered over the said property in favour of Chase Bank, the predecessor of SBM Bank securing an advanced facility of Ksh 11,151,710/-.



43. The letter of offer, marked JWM-1 dated October 7, 2013 confirms the mortgage loan of Ksh 11,151,710 and interest at 5% subject to the borrower's employment at the Bank.

44. The plaintiff/applicant disputed the sum of Kshs 6,948,290/- as further loan on the basis that there is no evidence of a registered further charge. The court has seen annexed 2<sup>nd</sup> letter of offer duly executed by the plaintiff and the predecessor bank representative dated January 28, 2015.

The 1<sup>st</sup> defendant deposed that *vide* the letter of offer dated January 28, 2015, Chase Bank advanced the plaintiff/applicant a further sum of Kshs 6, 948,290/- which was secured by a further legal charge over the 4 bedroom bungalow hence the total amount advanced to the plaintiff/applicant stood at Kshs 18,500,000/-.

45. The letter of January 28, 2015 reads in part as follows;

Further to your request, we Chase Bank Ky Ltd confirm our willingness to make available and/or make available to you credit facility subject to your acceptance of terms and conditions hereunder;

Mortgage loan - Ksh 18,500,000

Existing Liability- the borrower hereby acknowledges that he is indebted to the bank in the sums of Ksh 13,405,584.70 as at the January 28, 2015 as detailed below;

Type of facility amount outstanding

Staff mortgage loan 11,056,188.65 DR

Staff personal loan 1 1,218,776.30 DR

Staff personal loan 2 1,130,619.75 DR

Total 13,405,584.70 DR

Purpose – the mortgage loan facility will be an equity release on property 4 bedroom bungalow(unit No 3698) on LR 27409 Machakos unit Fb 369 B

Interest-interest on the mortgage loan facility shall be charged at a rate set and advised periodically by management currently at 6.0% subject to borrower's employment at the bank.

46. The 2<sup>nd</sup> letter of offer as partly outlined above does not reflect or refer to a further advance facility by the Predecessor Bank to the plaintiff of Kshs 6, 948,290/- except for the figure of Ksh 18,500,000/-

47. From the above outline it is not clear to this court apart from the original mortgage loan advanced to the plaintiff of Ksh11,056,188.65/- and was/is secured by a registered charge of December 19, 2013 where are the legal documents that confirm advanced loans of Kshs 6, 948,290/-, Ksh 1,218,776.30 & Ksh 1,130,619.75 to the plaintiff and/or show that were secured by the same suit property or were advanced and remain outstanding?

48. In the absence of separate and distinct legal documents and/or reasonable explanation of the total amount claimed under the recall letter of June 13, 2018 marked JWM-4 from the plaintiff, the total sum of Ksh 22,126,668.03 remains questionable. Whereas the plaintiff is indebted to the 1<sup>st</sup> defendant as shown by annexed statement of accounts, that the mortgage loan was serviced upto 2017, still the extent of outstanding debt requires clarification



49. According to the plaintiff/applicant, the outstanding amount stated in the notices are not supported by the balances in the bank statement of the loan account subject of the charge hence the right to exercise its statutory power of sale is null and void *ab initio*. The plaintiff/applicant is therefore disputing the outstanding amount in the notices.
50. In the converse, the 1<sup>st</sup> defendant has submitted that the plaintiff/applicant has not disputed that it is indebted to the 1<sup>st</sup> defendant. According to the 1<sup>st</sup> defendant, as a result of the default in repayment of the loan, its right to exercise its statutory power of sale arose under section 90(1) of the [Land Act](#).
51. Kwach JA. had this to say in *Mrao case* (supra)

“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellants were not entitled to an injunction upon any one of the grounds urged on their behalf.”

52. In [Al-Jalal Enterprises Limited v 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 applicant outside the realm of exercise of the court’s discretion.”

53. In the same vein, in *Bharmal Kanji Shah and another v Shah Depar Devji* [1965 EA] quoted in the case of [James Otiang Okoth & another v Nic Bank Limited](#) [2017] eKLR the court held that:

“the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage. Consequently, we implore this court to be guided by the aforementioned judicial pronouncements and find the application for injunction lacking.”

54. However there are circumstances in which a mortgagee or chargee may be restrained from exercising his/its statutory power of sale as stated in [Halsbury’s Laws of England](#), Vol 32 (4th Edition) paragraph 725 thus:-

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”



55. It was stated in the case of Nairobi HCCC No 527 of 2013 *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR, that;

“Unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction against a chargee who is exercising the statutory power of sale of the charged property...”

56. It follows from the cited authority, therefore that disputes on the amount payable or interest chargeable is not a ground for the court to exercise its discretion to grant an injunction unless there are other cogent grounds.

57. It is trite that the court cannot rewrite the contract between the parties unless coercion, fraud or undue influence are pleaded and proved. The Court of Appeal in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* (2014) eKLR stated:-

“It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd v Pipe Plastic Sankolit (K) Ltd* Civil Appeal No 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.”

58. The plaintiff/applicant has also alluded to the fact that he was an employee of Chase Bank which was taken over by SBM bank and he among other employees were rendered redundant and consequently, loan terms changed and had to service these loans on unemployment basis. The plaintiff also referred to his eyesight disability. To these unfortunate circumstances, the court empathizes with the plaintiff/applicant.

59. Once the relevant legal documents of the subsequent loans advanced are availed and the interest rates confirmed as at the time he was an employee of Chase Bank and thereafter the parties are bound by their contracts the court cannot rewrite the terms of these contracts. This point was amplified by Ringera J (as he then was) in *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2001] eKLR where the judge held as follows:

“In my opinion, justice must always be dispensed in accordance with well-established legal principles and not in accordance with judicial idiosyncrasy or whim. And of course it is trite learning that equity follows the law. Being of that persuasion I cannot see that a lender who happens to be the employer of the borrower can be restrained from exercising his contractual or statutory powers merely because the borrower has brought into question the lawfulness of his dismissal from the lender's service. And even if it may be the case that in common parlance the dismissal of an employee and the recalling of his loans thereafter may be called double jeopardy, such action cannot be conceived to be double jeopardy within the meaning of the law.

Enforcement of contractual rights cannot be regarded as punishment. The bottom line is that all applications for injunction irrespective of the contractual or other relationships



between the parties are to be decided on the basis of the settled principles for the grant of such relief..”

60. Notwithstanding the above position taken by court, the court notes that no further legal charge to secure the sum of Kshs 6, 948,290/- has been tendered in court. At paragraph 7 of the 1<sup>st</sup> defendant’s letter of offer dated January 28, 2015 it is indicated that the security for the facility was a further legal charge over the suit property. At paragraph 8(l) of the said letter of offer, it is indicated that it was a condition precedent for the 1<sup>st</sup> defendant to receive a duly executed further legal charge over the suit property.
61. According to Ms Juliet W Mwangi in replying affidavit filed on January 11, 2022 at paragraph 10, she averred that they served the plaintiff/applicant with a recall of loan letter dated June 13, 2018 recalling the entire debt and demanding repayment of the sum of Kshs 21, 329,739/- as at June 13, 2018. It is not in dispute that the suit property indicated in the letter was registered in the name of the plaintiff/applicant but the court notes that there are several loan accounts indicated in the letter which are 001STHLxxxxxxxx, 001STHLxxxxxxxx and 001STPLxxxxxx.
62. It is noted that none of the accounts were indicated in the two letter of offers and the first legal charge. The plaintiff/applicant has only acknowledged loan account number 001STHLxxxxxxxx.
63. According to the aforementioned recall of loan letter, the facility had been secured by a charge dated July 12, 2013 over the suit property herein securing Kshs 11,580,000/- plus interest costs charges and expenses. The court notes that the only charge executed by both the plaintiff/applicant is the first legal charge executed on December 19, 2013 and registered on January 21, 2014 and a copy of the charge dated July 12, 2013 indicated in the letter securing the sum of Kshs 11, 580,000/- has not been tendered in court. The court notes that the same charge and the secured sum appear in the statutory notice dated October 2, 2018 and the notice to sell dated February 21, 2019.
64. On record, the first letter of offer is dated October 7, 2013 and the charge executed in respect of the letters of offer is dated December 19, 2013. Why then does the recall letter of loan as well as the statutory notice and the notice to sell are premised on a charge dated July 12, 2013 with a different amount? The 1<sup>st</sup> defendant has not tendered in court a further legal charge and charge as well as the amount differ with the two letters of offer and the registered first legal charge.
65. Section 2 of the *Land Act* defines a ‘charge’-
- “charge” means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge..”
66. The court’s view is that lack of a charge, the court confirm the terms of the secured loan(s) .The letter of offer does not spell out the terms and conditions. In *Spare & Services & 2 others v Trans-National Bank* Kisumu HCCC No 439 of 1994, the court pronounced itself as follows:
- “Having considered the documents filed, the court is of the firm view that the contract between the parties is the charge: It is the one which spelled out the terms and conditions which the parties were obliged to adhere to during the existence of their relationship...”
67. Section 90 of the *Land Act* provides as follows:-
- “ 90. Remedies of a chargee



- (1) If a chargor is in default of an obligation, fails to pay interests or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice in writing to pay the money owing or to perform and observe the agreement as the case may be.
- (2) The notice required by sub-section (1) shall adequately inform the recipient of the following matters:-
  - a) The nature and extent of 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 payments 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 consequences 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.

68. Section 96(1) and (2) of the same Act provides;

“Chargee’s power of sale.

1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.
2. Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell”.

69. The above provisions refer to a charge. The court has observed that the charge and the secured amount indicated in the notices issued in the exercise of statutory power of sale are not supported by the two



letters of offer and the charge hence the court's view is that the notice are defective. This was the position taken by Majanja J in *Professional Professional Consultants Limited v SBM Bank (Kenya) Limited* [2020] eKLR where the judge held;

“ 12. I agree with the plaintiff, the statutory notice dated March 4, 2020 is defective as it includes an amount not secured by the charge. In other words, it impedes the plaintiff's right to redeem the suit property by including an amount that is outside the confines of the charge. The charge only secured the overdraft and term loan granted by Fidelity Bank.”

70. In *First Choice Mega Store Limited v Ecobank Kenya Limited* [2017]eKLR Onguto J. held:-

“ [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.”

71. The court therefore finds that the plaintiff/applicant has established a *prima facie* case with probability of success. The statutory notices bear a charge that has not been tendered in court and include an amount not secured by the first legal charge or an amount indicated in the two letters of offer. It therefore raises doubts as to the outstanding amounts claimed by the 1<sup>st</sup> defendant.

72. The statutory notices issued to the plaintiff are as follows;

- a. Notice to exercise statutory power of sale of October 2, 2018 for 90 days to recover Ksh 22,126,668.03/- marked JWM-5
  - b. Notice of 40 days of February 21, 2019 to conduct sale and recover Ksh 22,879,553/- -marked JWM-6
  - c. 45 days redemption notice of August 17, 2021 for Ksh26,477,134.73 marked JWM-11
- This court finds anomalies in the total figures claimed for the following reasons;
- a. Do the figures originate from letters of offer of mortgage loan & legal charge(s) advanced to the plaintiff and the total amounts therefrom outstanding from plaintiff's default in servicing the advanced facilities?
  - b. Are the interest rates applicable even if determined by management from time to time in terms of the plaintiff's employment in Chase Bank at the time and thereafter being made redundant or only the rates applicable are as at the time of employment only and thereafter at commercial rates inspite of the terms of the contracts?
  - c. Are the figures only the outstanding debt taking into account what the plaintiff paid while he serviced the loans right upto 2017?



- d. Are figures inclusive of staff loans whose documents have not been availed to court and were not subject to the terms of the mortgage loan(s) contracted in letters of offer and legal charges but lumped together?
73. Whereas the plaintiff is under legal obligation to perform obligations under the terms of contract, these anomalies are pending clarification before enforcement of the defendant's right of sale to recover outstanding debt by the plaintiff through issuance of statutory notices with correct figures regarding the legal charge(s).

**Whether The Plaintiff/applicant Will Suffer Irreparable Loss Which Would Not Be Adequately Compensated By An Award Of Damages**

74. As regards the second condition, whether the plaintiff/applicant stands to suffer irreparable loss, it was held in *Nguruman Limited case* (supra) where the Court of Appeal expressed itself as hereunder:

“On the second factor, that the applicant 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 applicant 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 applicant. 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.”

75. The court notes that the plaintiff/applicant has only stated that he faces a real and imminent risk of losing his proprietary interest over the suit property hence he will suffer irreparable damage that cannot be compensated by an award of damages. According to the plaintiff/applicant, the court should not allow the statutory power of sale to be exercised since it is tainted with bad faith, malice and illegality. The court is of the view that by only stating that he will suffer a real and imminent risk the plaintiff/applicant has not discharged that burden.
76. The 1<sup>st</sup> defendant has denied that the plaintiff/applicant has continued to repay the loan balance. The plaintiff/applicant has not tendered any documents in court to show that it was the 1<sup>st</sup> defendant who has caused him to be listed as defaulter by the credit reference bureau. Despite the 1<sup>st</sup> defendant silence on whether its forwarded negative information about the plaintiff/applicant credit worthiness to the credit reference bureau, the burden of proof lay on the plaintiff/applicant. Section 107 of the *Evidence Act* is to the effect that he who alleges a fact must prove and again this is an issue that would fairly be canvassed in a trial when at this stage the court is not supposed to engage itself in a trial. The credit reference bureau which is not a party to this suit and has the mandate to do the listing and delisting and not the defendant/respondent.
77. At paragraph 16 of his supporting affidavit, the plaintiff/applicant has averred that his suit property was grossly undervalued using a market value of Kshs 18, 000,000/- yet the suit property had a market value of Kshs 18,500,000/-. The valuation report on record was prepared by Intersil Global Limited under the instructions of the 1<sup>st</sup> defendant. The plaintiff/applicant has not tendered in court an alternative report to counter the findings in the Intersil Global Limited valuation report as provided for by the *Auctioneers Rules*.



78. The Chargee has the duty to obtain the best price reasonably obtainable at the time of sale pursuant to section 97(2) of the Land Act. In *First Choice Mega Store Limited v Ecobank Kenya Limited*(supra), Onguto J. held:-

“ 52. It is common ground that a chargee who exercises or seeks to exercise his power of sale owes a duty to take reasonable precautions to obtain the true market value or a proper price for the property at the time when he comes to sell : see *Cuckmere Brick Co Limited v Mutual Finance Ltd* [1971] 2 All E R 633, *Yorkshire Bank plc v Hall* [1999] 1 All E R 879 and *Madhupaper International Ltd v Paddy Kerr and others* [1985] LLR 2396 (CAK). The chargee is expected to act honestly and without reckless disregard for the chargor’s interests. This duty, which had its genesis in equity, like much of the solicitous concern of equity for the interests of chargors, is now enshrined in statute. Inscrutably, section 97 of the Land Act imposes the duty to obtain the best possible price reasonably obtainable at the time of sale. The chargee is then under a duty, in the circumstances, to cause a forced sale value to be ascertained by the valuer.

79. 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 applicant’s right has been infringed by the respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the applicant. 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 respondent as to entitle the court to call for an explanation or rebuttal from the respondent”.

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

“ 33. 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.”

81. The court finds that the plaintiff/applicant has not discharged the burden to prove that he will suffer irreparable damage that cannot be compensated by way of damages. He has not shown whether he resides in the property such that if the sale by public auction is conducted that he will be rendered homeless. See *JM v SMK & 4 others* [2022] eKLR. However this does not mean that the court will not grant the injunction since this condition has not been satisfied as the plaintiff/applicant has succeeded in establishing a *prima facie* case.

### **In Whose Favour Does The Balance Of Convenience Tilt In?**

82. The plaintiff/applicant has established a *prima facie* case with probability of success despite not being able to show the irreparable damage that he would suffer in the event that the injunctive relief is not granted by court.



83. In *Nguruman case*(supra) the Court of Appeal held:

“..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 applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

84. It is now trite that the court in responding to prayers for injunction should always opt for the lower rather than the higher risk of injustice. See Ojwang Ag J(as he then was) in *Suleiman v Amboseli Resort Ltd* (2004) 2 KLR 589 and Justice Hoffman in the English case of *Films Rover International v Cannon Films Sales Ltd* (1986) 3 All ER 772.

85. The court’s view is that the notices issued upon the plaintiff/applicant create doubt as to the outstanding amount that is claimed by the 1<sup>st</sup> defendant. The notices are premised on a legal charge not tendered in court and include a secured amount different from the amount stated in the two letters of offer and the first legal charge. It creates doubt as to the outstanding amount hence prejudicial to the plaintiff/applicant. The court is of the view that it would be lower risk to grant the injunction against the statutory power of sale to be exercised by the defendants. The balance of convenience tilts in favor of the plaintiff/applicant.

### **Whether To Issue A Mandatory Injunction Against The Defendants**

86. The plaintiff/applicant has sought for a mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> defendant to withdraw their notices. The test for the grant of mandatory injunctions was restated in the case of *Rift Valley Agricultural Contractors Ltd v Githae & Co Accountants & another* (HCCC No 334 of 2004) where the judge cited the Court of Appeal in the case of *Kenya Breweries Ltd v Washington Okeyo* (civil appeal No 332 of 2000) where the court said:-

“The test to grant a mandatory injunction or not is correctly stated in Vol 24 *Halsbury’s Laws of England*, 4th Edition, para. 948 which reads:-

‘A mandatory injunction can be granted on an interlocutory application as well as the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the defendant attempts to steal a march on the plaintiff . . . a mandatory injunction will be granted on an interlocutory application.’

87. According to the plaintiff/applicant, the statutory power of sale is premised on a defective statutory notice and notice to sell based on loan accounts that are not subject to the charge registered over the suit property. The court’s view is that omission by the 1<sup>st</sup> defendant in the notices are not simple defects that can be remedied in damages.

88. I associate myself with Sewe J *Isabella Nyambura Gitau v Consolidated Bank of Kenya Limited & another* [2017] e KLR where the judge held:

“The court is therefore satisfied that the plaintiff has made out a *prima facie* case in respect of service of the notices, in that she has made out a case that requires rebuttal by the defendant. Granted that this omission pertains to compliance with the law, I would entirely agree with



the position taken in the case of *Elizabeth Wambui Njunguna v Housing Finance Co. of Kenya Ltd* [2006] eKLR that:

" ...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption."

(19) In such a situation, the anomaly can only be cured by full and strict compliance in the form of fresh service of all the requisite notices. This pronouncement was expressed by the Court of Appeal in Civil Appeal No 26 of 2002 *National Bank of Kenya Ltd v Shimmers Plaza Ltd*; (2009) eKLR as follows;

"... An injunction is an equitable and discretionary remedy. The duration of an order for injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory injunction order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.

89. Having considered the facts of this case and the law, the court is satisfied that the case is clear that there are special circumstances, that although the plaintiff is indebted to the 1<sup>st</sup> defendant the amounts stated are colossal and at variance with the legal charge the subject contract of the parties. Therefore, mandatory orders sought at the interlocutory stage are granted at this stage only in respect of the withdrawal of the statutory notice and notice to sell issued on October 2, 2018 and February 21, 2019 respectively as well as the 45 days redemption notice dated August 17, 2021.
90. The body mandated to list and delist the plaintiff/applicant is with the credit reference bureau and it is not the 1<sup>st</sup> defendant under the *Banking Act* (Credit Reference Bureau Regulations, 2008). The court notes that the plaintiff/applicant has sought a prayer in the plaint to be delisted with the credit reference bureau hence an issue that would necessitate factual finding as to whether the 1<sup>st</sup> defendant maliciously forwarded information to the credit reference bureau. The court at this stage will not delve into the matter, as the plaintiff is indebted to the defendant bank and the matter remains outstanding for now. Secondly, the court cannot with certainty confirm that the plaintiff/applicant has been listed by the credit reference bureau since no report or any document has been tendered in court on the issue.
91. It is not in dispute that the suit property LR 27409, Greenpark estate, Athi River, Machakos county HSE 39 was given as the security for the loan advanced to the plaintiff/applicant under the staff housing scheme Chase Bank predecessor to SBM Bank. The letter of offer and legal charge presented/annexed portray different figures from the figures in the statutory notices served to the plaintiff. The charge and the amount stated in the statutory notice and the notice to sell differ with the amount stated in the letters of offer.



## Disposition

92. In the premises the court grants the following orders;

- a. That pending the hearing and determination of this suit an order of injunction issued on October 1, 2021 remains in force restraining the defendants whether by themselves or their representatives, servants and/or assigns from howsoever selling or advertising for sale by way of private treaty or by public auction and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as land reference number 27409 Machakos Unit Fb 369 B;
- b. That pending the hearing and determination of this suit a mandatory order of injunction issues compelling the 1<sup>st</sup> defendant to withdraw the statutory notice and notice to sell issued on October 2, 2018 and February 21, 2019 respectively and redemption notice of August 17, 2021.
- c. That the 1<sup>st</sup> defendant shall issues fresh statutory notices under section 90 of the Land Act, 2012, section 96 (1) & (2) Land Act 2012 & redemption notice rule 15 Auctioneers Rules with correct outstanding debt arising from the legal charges and letters of offer.
- d. That the 1<sup>st</sup> defendant shall provide the plaintiff with statement of account in respect of each facility granted by the defendant (and its predecessor) to the plaintiff prior to issuing a fresh statutory notice(s)
- e. That the plaintiff/applicant is at liberty to obtain alternative valuation report of the suit property and exchanged with the 1<sup>st</sup> defendant's who are also at liberty to conduct another valuation.
- f. That the temporary injunction shall be for the period that allows the 1<sup>st</sup> defendant reconciles accounts with or to the plaintiff of what is due and owing under the legal charge(s) and thereafter serves the statutory notices and the injunction shall abate after 90 days.
- g. That costs of the application is awarded to the plaintiff/applicant.

Orders accordingly.

**RULING READ, SIGNED AND DELIVERED AT MACHAKOS THIS 26th DAY OF SEPTEMBER, 2022.**

**M.W. MUIGAI**

**JUDGE**

