Monarch Developers Limited v Bank of Baroda (K) Limited (Environment & Land Case E106 of 2022) [2023] KEELC 18245 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18245 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E106 OF 2022

OA ANGOTE, J

JUNE 22, 2023

BETWEEN

MONARCH DEVELOPERS LIMITED ..... PLAINTIFF

AND

BANK OF BARODA (K) LIMITED ..... DEFENDANT

RULING

1. The Plaintiff/Applicant has filed a Notice of Motion Application dated 21st March 2022 in which it has sought for the following orders:

    a. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary order of injunction directed at the Defendant restraining the Defendant whether by itself, its agents, servants and or employees howsoever from conducting, undertaking, or carrying out any valuation of all that property known as Land Reference Number 209/21739 (Original Number 209/17/4) Nairobi.

    b. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary order of injunction directed at the Defendant restraining the Defendant whether by itself, its agents, servants and or employees howsoever from selling, transferring ownership, alienating, trespassing onto, interfering with or otherwise dealing with all that property known as Land Reference Number 209/21739 (Original Number 209/17/4) Nairobi.

    c. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order of stay of proceedings in:

        i. Nairobi ELC No. E423 of 2021, *Dr. Adan Mohamed Adam v Monarch Developers Ltd & 2 others*

ii. Nairobi ELC No. E426 of 2021, *Dr. Mohamed Bashir Abdulaziz & another v Monarch Developers Ltd & 2 others*

iii. Nairobi ELC No. E427 of 2021, *Dr. Gaman Ali Mohamed Gaman v Monarch Developers Ltd & 2 others*

iv. Nairobi ELC No. E429 of 2021, *Dr. Adil Waris v Monarch Developers Ltd & 2 others*

v. Nairobi ELC No. 432 of 2021, *Dr. Saleem Mohamed Afzal v Monarch Developers Ltd & 2 others*

vi. Nairobi HCCC No. E005 of 2022, *Utabibu Co-operative Savings and Credit Society Limited v Monarch Developers Ltd & another*

d. That the costs of this application be provided for.

2. The application is based on the grounds set out on its face and the Supporting Affidavit sworn by Vrajbhushan Dhayalal Shah, a Director of Riser Investors Limited, which is a director/shareholder of the Plaintiff.

3. The Plaintiff's Director deponed that the Plaintiff entered into agreements with the Defendant through a Letter of Offer, Charge and Further Charge for issuance of loan facilities of Kshs. 600 million and that these facilities were for the purpose of construction and development of a project known as 'Doctor's Park' on the property known as Land Reference No. 209/21739 (Original No. 209/17/4) Nairobi.

4. The Plaintiff's Director deposed that the Plaintiff proceeded to enter into several agreements to lease with purchasers over the units in the project; that all payments received as lease premiums were channeled to the Plaintiff's account at the Defendant's branch to offset the facilities extended to the Plaintiff as per the parties' agreement and that the Project was completed in 2016 and the Plaintiff handed over possession of the units to the purchasers.

5. It was deponed that the process of consolidation of the suit property was completed in 2018 and a certificate of title was issued being Grant No. IR 194467 and that in April 2018, the Defendant informed the Plaintiff that it was in default of its repayments under the loan facility, with an outstanding amount of Kshs. 373,802.494.68 instead of Kshs. 313 million.

6. According to the Plaintiff, following negotiations between the parties, it was agreed that Kshs. 280 million would be paid as full settlement of the loan facility; that the Plaintiff would pay Kshs 100 million from the monies received from the purchasers of the units and the Bank would take up the tenth floor at the Project, which was valued at Kshs. 180 million and that the Defendant's Industrial Area Branch Manager informed the Plaintiff to make payment of the said Kshs 100 million for the Defendant to issue partial discharges over the property.

7. The Plaintiff's Director deponed that the Plaintiff made payment of Kshs 95,627,532.51; that the Defendant indicated it would only accept the offer if the sale price of the 10th floor was lowered to Kshs. 100 million and that the Plaintiff had no option but to agree and that the tenth floor was sold in September 2021 to the Defendant for Kshs. 100 million, which was credited to the Plaintiff's account and utilized to offset the outstanding balance of the loan.

8. The Plaintiff averred that it constantly communicated to the Defendant the status of sales of the project by remitting status reports every six months to the Defendant as well as the Architect's/ Construction Certificates against which drawdowns of the loan facilities were made.

9. That in 2018, it was deposed, when various purchasers had substantially complied with the payment terms under the Agreements of Lease and had taken possession of their units, the Plaintiff instructed its Advocates to prepare the respective Leases and procure partial discharges from the bank to facilitate the successful registration of the said Leases.

10. According to the Plaintiff, when their advocates forwarded to the Defendant a letter dated 6th June and several partial discharges for the Bank's execution, the Defendant declined to act on the Plaintiff's request and that the advocates wrote to the Defendant again on 22nd February, 4th March and 6th December 2019 requesting for release of the requisite partial discharges as several purchasers had fully paid their respective lease premiums.

11. It was deposed that the Defendant selectively released partial discharges and that it was irrational for the Defendant to withhold the partial discharges as it was within their knowledge that the purchasers had already taken possession of the Project's units.

12. It is the Plaintiff's case that the Defendant purported to issue a notice to all occupants of the suit property informing them that the Defendant intended to exercise its remedy of sale, as chargee of the property, and required occupants to grant access to the Bank's valuers for carrying out a valuation and that a number of purchasers sought relief against this notice and filed the following cases, Nairobi ELC No.s E423 of 2021, E426 of 2021, E427 of 2021, E429 of 2021, E432 of 2021 and Nairobi High Court Commercial Case No. E005 of 2022, in which the Plaintiff and Defendant were enjoined as Defendants.

13. According to the Plaintiff, the Defendant is purporting to exercise its remedy of sale against the entire property and development, seeking to recover amounts that exceed the total amount outstanding at the time the Plaintiff's loan facilities became non-performing and that the Defendant has overcharged the interest on the first loan facility by Kshs. 40,556,942.96 and the second loan by Kshs. 4,541,417.92.

14. The Plaintiff averred that the Defendant's actions have the effect of inhibiting, infringing and hindering the Plaintiff's equity of redemption; that the Plaintiff has demonstrated that it has a prima facie case against the Defendant and that the Plaintiff stand to suffer irreparable harm from the inhibition of its equity of redemption as well as the consequences of the suits filed against the Plaintiff.

15. The Defendant opposed the application vide a Replying Affidavit sworn by Martin Karanu, the Defendant's Legal Manager, who deposed that the Defendant had agreed to grant a demand loan of Kshs. 600 million to be secured by a charge in favor of the Defendant over the four titles of the suit land; that the sale proceeds of each unit sold by the Plaintiff was to be remitted to the Defendant to offset the loan facility and that the Plaintiff failed to seek the Defendant's consent prior to entering into any agreements with the purchasers and accordingly, the purported sale agreements are not binding to the Defendant as it is not privy or party to them.

16. According to the Defendant's Legal Manager, it only received full payment for 14 units of which it executed partial discharges and the Leases were duly registered in the mother title in favor of the Purchasers and that he was not aware that the Plaintiff had granted possession of the units to other purchasers other than the 14 who had made full payment.

17. It was deposed that the Plaintiff was in default of its payment obligations and the Defendant's advocates issued a statutory notice for the sum of Kshs. 373,802,494.68 that was due to the Plaintiff on 9th April 2018 and not Kshs. 313 million; that Kshs. 280 million was not the full and final settlement and that at no point was the 10th floor valued at Kshs. 180 million.

18. With respect to the suits filed by the purchasers, the Defendant's Legal Manager deposed that they were all dismissed with costs by Hon. Justice Ogutu Mboya on the basis that no consent was obtained from the charge; that the purchasers had no cause of action against the Defendant due to lack of privity of contract and that the balance of convenience tilts in the Defendant's favor as the holder of a legitimate right over the suit premises.

19. The Defendant's Legal Manager deposed that the sum of Kshs. 188,172,381.68 remains outstanding with respect to the first loan and Kshs. 11,690,972.00 is outstanding as at 30th September 2021, amounting to a sum of Kshs199,863,353.68 and that the issue of overcharged interest does not arise.

Submissions

20. Counsel for the Plaintiff/Applicant submitted that the Defendant as chargee issued implied consent for the transfer of the property by receipt of the status reports and proceeds of the sale of units to the Plaintiff's purchasers and is estopped from claiming otherwise.

21. It was submitted that the Defendant by its own inaction, neglect, refusal or failure, has not undertaken to register its written consent for the transfers to the purchasers yet has benefited from such sales and that by denying that it issued its consent as chargee, the Defendant is denying the Plaintiff a cause of action and is seeking to misrepresent and obfuscate true facts, and to mislead this court. Counsel relied on Sections 25(1) and 59 of the *Land Registration Act*, as well as Sections 87 and 88 of the *Land Act*.

22. It was counsel's submission that the Defendant has levied an irregular variation of the interest rates on the loan facilities without prior notice to the Plaintiff and in breach of the facility agreements entered into by the parties. Counsel relied on Section 83 of the *Land Act* on the variation of interest and Section 44A of the *Banking Act* on that limit on interest to be recovered on defaulted loan.

23. Counsel also relied on the case of *Paragon Finance plc v Staunton; Paragon Finance plc v Nash* [2001] EWCA Civ 1466 [2002] All ER 248 and the Court of Appeal decision in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR.

24. Counsel submitted that the Defendant's actions have inhibited, infringed or hindered the Plaintiff's equity of redemption hence the necessity of bringing this suit and that these actions include the incorrect calculations and consequent variation of the charge so as to increase the amounts still owing to the Defendant under the loan facility.

25. According to the Plaintiff' counsel, the Defendant used its powers to coerce and unduly influence the Plaintiff to accept terms of sale of the 10th floor of the project at a price significantly lower than the market price.

26. Counsel relied on Section 89 of the *Land Act*, which makes provision for equity of redemption and Section 96 of the *Land Act* which provides for the chargor's statutory power of sale. Counsel further relied on *Mbuthia v Jimba Credit Finance Corporation & Another* [1988] eKLR, *Standard Chartered Bank v Walker* [1982] All ER 938 and Halsbury's Laws of England 4th Ed. Vol. 32 para.276 on setting aside a sale by a mortgagor.

27. Plaintiff's Counsel submitted that the Plaintiff has demonstrated a genuine and arguable case with probability of success, supported by proof that the Defendant by implication consented to the transfer of the charge to the Plaintiff's purchasers and that the Defendant unlawfully and irregularly increased its rates of interests without prior notice, thus hindering the Plaintiff's equity of redemption.

28. Counsel relied on the description of irreparable damage in the House of Lords case of *Hoffman La Roche & Company Industry v Secretary of State for Trade and Industry* [1975] AC 295 at 355 (H.L) and submitted that if the orders sought in this application are not granted, the Plaintiff would suffer irreparable injury which cannot be adequately compensated or remedied by an award of damages.

29. It was counsel's submission that the Plaintiff's equity of redemption has been extinguished by the sale of the 10th floor of the project at significantly below market price, limiting its freedom of contract and that by instigating the Plaintiff's purchasers to institute civil and criminal investigations against them, their reputation and business relationships has been damaged.

30. It was the Plaintiff's Counsel's further submission that the balance of convenience tilts in favor of granting the Plaintiff the injunctive orders prayed herein. Counsel relied on the case of *Alice Awino Okello v Trust Bank Ltd & Another* LLR No. 625 (CCK) as quoted by the Court of Appeal in *Kisimani Holdings Ltd & Another v Fidelity Bank* [2013] eKLR.

31. Counsel further submitted that an order of stay of the six suits pending before various competent courts instituted by the Plaintiff's purchasers is prudent for the finality of judgment herein. Counsel relied on Section 6 of the *Civil Procedure Act* as well as the case of *Timothy Kisina Kithokoi v Elijah Kitele and Another* [2022] eKLR, *Global Tours & Travels Limited* H.C Cause No. 43/2000 and *Halsbury's Law of England* 4th Edition, Vol. 37 at pages 330and 332 on stay of proceedings.

32. Counsel for the Defendant/Respondent filed submissions dated 1st February 2023. He submitted that the Plaintiff has failed to demonstrate that it has a prima facie case against the Defendant, who has a legitimate charge over the suit premises and whose statutory right to sell has accrued and ripened due to nonpayment of the Plaintiff's mortgage debt.

33. According to the Defendant's Counsel, the Plaintiff has not presented evidence to show that the Defendant incited its purchasers to file criminal complaints against the Plaintiff and that the Plaintiff has not proved the allegations of unjust enrichment, rather, it is the Plaintiff which has sought to unjustly enrich itself by failing to remit sale proceeds from the purchasers to the Defendant.

34. The Defendant's counsel submitted that the Plaintiff has admitted it is indebted to the Defendant; that it received the statutory notice dated 9th April 2018 and the 45 days' notice of sale dated 16th October 2019; that it is yet to comply with the said notices and that the Plaintiff has not adduced evidence to show that the Defendant has inhibited, infringed or hindered its equity of redemption.

35. According to the Defendant's counsel, the Defendant has informed the Plaintiff that it is ready and willing to discharge all units that remain charged to it on receipt of the outstanding debt of Kshs. 199,863,353.68 as at 30th September 2021.

36. Counsel submitted that through the Charge and Further Charge, the Defendant accrued a lawful right over the suit property, which right superseded the rights of the Plaintiff; that the Plaintiff could not deal or transact over the suit land without the blessings, participation, involvement and consent of the Defendant and that the Defendant's consent in transactions affecting the suit property is statutorily prescribed under Sections 87 and 88 of the *Land Act*.

37. The Defendant's counsel denied the allegations of increase and variation of interest rates without prior notice to the Plaintiff and submitted that the Plaintiff has only raised this issue in the application. Counsel submitted that the Plaintiff was bound by the terms of the contract. Counsel relied on the Halsbury's Laws of England Vol 32 (4th Edition) paragraph 725 as cited in the case of *Palmy Company Ltd v Consolidated Bank of Kenya Ltd* [2014] eKLR and *Revital Healthcare (EPZ) Ltd v Barclays Bank of Kenya Ltd*.

38. The Defendant's Counsel submitted that the Plaintiff is in default of its loan obligations and thereby is undeserving of the injunction orders as it has come to court with unclean hands; that the right of the Bank to exercise its statutory power of sale had crystallized and is entitled to carry out a valuation to enable it to instruct an auctioneer who would subsequently issue a 40-day notice of sale.

Analysis and Determination

39. This court has considered the Plaintiff's application, the Defendant's response and the submissions filed by the parties. The issues that arise for the determination are as follows:

    a. Whether this court should issue injunction orders preventing the Defendant from transferring or otherwise dealing with the suit property and from carrying out valuation of the suit property

    b. Whether this court should stay proceedings in Nairobi ELC No.s E423 of 2021, E426 of 2021, E427 of 2021, E429 of 2021, E432 of 2021 and Nairobi High Court Commercial Case No. E005 of 2022.

40. The law on grant of interlocutory injunctions is found under Order 40 Rule 1 of the *Civil Procedure Rules*.

41. The case of *Giella v Cassman Brown* (1973) EA 358 sets out the essential conditions to be satisfied for a court to issue injunctive orders:

> " The conditions 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 not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

42. In *Mrao Ltd v First American Bank of Kenya and 2 Others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 Others v Jane W Lesaloi and 5 Others*, (2014) eKLR, the Court of Appeal defined a prima facie case as: -

> " A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".

43. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) 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 applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. 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."

44. In this application, the Plaintiff is required to satisfy three conditions: that it has a prima facie case with a likelihood of success; that if this application is not granted, it is likely to suffer irreparable injury which cannot be compensated by damages and that the balance of convenience tilts in its favour.

45. The Plaintiff has averred that it charged the suit property for the sum of Kshs 600 million issued to it by the Defendant; that it sold the units in the project to third party purchasers who were desirous to obtain Leases to their properties upon completion of the project in 2016 and the consolidation and registration of the mother title in 2018 and that the Defendant however declined to issue discharges for the charge and further charge.

46. It is the Plaintiff's case that the Defendant issued to it a notice of default of loan repayment indicating that the outstanding amount was Kshs. 373,802.494.68/- whereas it was about Kshs. 313 million and that the Defendant also issued to the Plaintiff's purchasers notices of sale in November 2021, and required occupants to grant access to the Bank's valuers for carrying out a valuation.

47. According to the Plaintiff, a number of purchasers sought relief against this notice and filed the following cases, Nairobi ELC No.s E423 of 2021, E426 of 2021, E427 of 2021, E429 of 2021, E432 of 2021 and Nairobi High Court Commercial Case No. E005 of 2022, in which suits the Plaintiff and the Defendant were enjoined as Defendants.

48. The Defendant has averred that the Plaintiff failed to seek its consent prior to entering into any agreements with the purchasers and accordingly, the purported sale agreements are not binding on it as it is not privy or party to them; that it only received full payment of 14 units for which it executed partial discharges and that the Leases were duly registered against the mother title in favor of the Purchasers.

49. It is the Defendant's case that the sum of Kshs. 188,172,381.68 remains outstanding with respect to the first loan and Kshs. 11,690,972.00 in respect to the second loan as at 30th September 2021, amounting to a sum of Kshs199,863,353.68/-.

50. The Plaintiff's case hinges on whether it sought the Defendant's consent before entering into lease agreements with purchasers; whether it is indebted to the Defendant; whether the Defendant's statutory power of sale has crystalized and whether the Defendant's actions have the effect of inhibiting, infringing and hindering its equity of redemption.

51. Section 87 of the *Land Act* provides that if a charge contains a condition, express or implied, that the chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.

52. Section 88 of the *Land Act* also implies the following covenants in a charge transaction:

> "(a) ...
>
> (f) not to lease or sublease the charged land or any part of it for any period longer than a year without the previous consent in writing of the chargee, which consent shall not be unreasonably withheld;
>
> (g) not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld;"

53. Section 59 of the *Land Registration Act* provides that if a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.

54. It is thereby necessary to consider the terms of the Charge and Further Charge between the parties herein. Clause 6 of the Charge dated 24th September 2012 ingrains into the contract the implied covenants set out in Section 88 of the *Land Act*.

55. Subclause (n) also covenants the Plaintiff to ensure that no person other than the Chargor shall, during the subsistence of the Charge and without the prior consent in writing if the Bank be registered as the proprietor of the premises or any part thereto or any interest therein. The Further Charge has an identical clause, number 6 (o).

56. With respect to the matter of privity of contract, it is evident that the Defendant is not a party to the agreements between the Plaintiff and the Purchasers, as evident from the Plaintiff's annexures. A similar finding of fact was made by this court in *Saleem Mohamed Afzal Bagha v Monarch Developers Limited & 2 Others* [2022] eKLR, in the suits filed by the purchasers against the Plaintiff and the Defendant herein.

57. While the Plaintiff has argued that acceptance of the status reports and funds constitutes the Defendant's implied consent, this court, prima facie, is not persuaded. The Plaintiff has not presented any evidence to show that it expressly sought the consent of the Defendant Bank to sell the units and that such consent was unequivocally granted.

58. The Plaintiff has claimed that it has complied with the terms of the Charge, Further Charge and all attendant interests. According to the Plaintiff, as at 2018, the outstanding loan balance stood at Kshs. 313 million; that the parties negotiated and agreed that the balance of Kshs. 280 million would be paid as full and final dues, with Kshs. 180 million being paid for the 10th floor, and that Kshs 100 million deposit was credited on the Plaintiff's account by the Defendant.

59. The Defendant however stated that as at 2018, the outstanding loan balance was Kshs. 373, 802.494.68; that the parties never agreed that Kshs. 280 million would be full and final settlement of the balance as claimed by the Plaintiff and that the purchase price of the 10th floor of the suit premises was not Kshs. 180 Million.

60. With respect to the Plaintiff's case, the Plaintiff has failed or neglected to tender into evidence the minutes of the negotiation meetings or at the least, an addendum to the Charge and the Further Charge. Further, as to the assertion that the Defendant's Industrial Area Branch manager instructed it to pay Kshs. 100 Million to obtain discharges, no evidence of this agreement was annexed to the application.

61. In any case, the Plaintiff has averred that it made a deposit of Kshs. 95,627,532.51 being payments from purchasers and that in September 2021, the tenth floor was sold for Kshs. 100 million. From the Plaintiff's own computation therefore, which the Defendant has disputed, out of the 280 million that was to be the full and final settlement, it had paid Kshs. 195,627,532.51, leaving a balance of Kshs. 84,372,467.49.

62. It is therefore evident that the Plaintiff remains indebted to the Defendant, with the exact amount of indebtedness constituting the dispute between the parties.

63. Equity of redemption has statutory expression in Sections 85 and 89 of the *Land Act*. Section 85 protects the right of the Chargor to discharge the property at any time before the charged land is sold by the chargee or receiver under the power of sale. Section 85(1) provides as follows:

> " 85(1) Subject to the provisions of this section, the chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or receiver under the power of sale."

64. Section 89 of the *Land Act* prohibits any rule of law, written or unwritten, entitling a chargee to foreclose the equity of redemption and provides that the remedies by the chargee shall be only in accordance with the *Land Act*. It provides as follows:

> " 89(1) Any law, written or unwritten, entitling a chargee to foreclose the equity of redemption in charged land is prohibited.
>
> (2) Upon commencement of this Act, a chargee shall not be entitled to enter into possession of the charged land or a charged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the charge, other than in accordance with the provisions of this Act"

65. Thus, the Plaintiff, as chargor, has a right at any time before the auction to pay the amount outstanding and redeem the property. Once the Bank exercises its statutory power of sale, the Plaintiff's right to discharge the suit property is extinguished. The finality of the sale is buttressed by section 99 of the *Land Act* which protects the purchaser from any action to set aside the sale and provides for damages as a remedy.

66. The question that arises is whether the Defendant's actions have hindered the Plaintiff's equity of redemption. These actions, according to the Plaintiff include: the incorrect calculations and consequent variation of the charge so as to increase the amounts still owing to the Defendant under the loan facility indicated in the notice of default and its use of power to coerce and unduly influence the Plaintiff to accept the terms of sale of the 10th floor of the project at a price significantly lower than the market price.

67. The Plaintiff has not annexed any evidence to substantiate the Defendant's involvement in the sale of the 10th floor and its alleged use of force and coercion in the transaction. Further, it is not disputed that the Plaintiff issued notices to the Purchasers, on the basis of the outstanding balance which it is claiming from the Defendant.

68. The Plaintiff has annexed to its application a three months' notice from the Defendant dated 9th April 2018, in which it notified the Plaintiff that it was in arrears of the sum of Kshs 373,802.494.68/- and that should it fail to pay such sum within 3 months, the Defendant would exercise its right to sale the suit property under Section 90 of the *Land Act*.

69. Also annexed is a further notice dated 19th October 2019, issuing a further 45-days' notice of the Defendant's intention to exercise its right of sale should the Plaintiff fail to pay the sums due before then. It is therefore manifest that the Defendant accorded the Plaintiff ample opportunity to exercise its equity of redemption.

70. Considering that this court has already found that the Plaintiff is indeed indebted to the Defendant, the sum of which is disputed, and the Defendant having duly issued notices to the Defendant and the purchasers under the *Land Registration Act* and the *Land Act*, this court finds that the Plaintiff has not established a prima facie case with chances of success.

71. The second condition for this court's consideration is whether the Plaintiff/ Applicant will suffer irreparable harm if this application is not granted. In Halsbury's Laws of England [Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352] it is stated that:-

> "It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"
>
> In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance,"[Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

72. It has been the position of the courts that where a party charges a property, it always knows that the same will be sold in the event it defaults. That being the case, the question of suffering irreparable injury that cannot be compensated in damages cannot arise in a situation where the chargee's statutory power of sale has crystalized.

73. The last condition is whether the balance of convenience tilts in favour of the Plaintiff. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, the court defined the concept of balance of convenience as follows:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting."

74. Defendant's Counsel has submitted that the balance of convenience tilts in the Defendant's favour as the Plaintiff has shown tendencies of failing to honour their obligations and that if the injunction is granted, the value of the property might turn out to be insufficient to satisfy the debt.

75. This court is persuaded by the case of *Maithya v Housing Co. of Kenya and Another* (2003) IEA 133 as quoted in *Peter Kamau Munene v Kenya Commercial Bank Limited* [2015] eKLR, where the Court held as follows :-

> " Should the injunction be refused, the Respondents security would continue to be eaten away by the mounting redemption money and the security might prove insufficient to satisfy the ultimate balance due whereas on the other end of the scale, the Respondents will be able to satisfy whatever decree is passed against it. I therefore hold that in the circumstances the balance of convenience does tilt very heavily in favour of the Respondent."

76. Guided by the above caselaw, the court is convinced that the balance of convenience tilts in favour of the Defendant. The upshot of the foregoing is that the Plaintiff's application seeking injunctive orders lacks merit and hereby fails.

77. On the issue of whether this court should stay proceedings in Nairobi ELC No.s E423 of 2021, E426 of 2021, E427 of 2021, E429 of 2021, E432 of 2021 and Nairobi High Court Commercial Case No. E005 of 2022, this court finds that should these matters proceed separately, there is a risk of the court embarrassing itself by making conflicting decisions as to whether the Defendant has rightfully exercised its right of sale. While the final determination may not fully deal with the legal questions in the purchasers' suit, it shall address issues that are central to these suits.

78. This court declines to stay the proceedings in Nairobi ELC No.s E423 of 2021, E426 of 2021, E427 of 2021, E429 of 2021, E432 of 2021 and Nairobi High Court Commercial Case No. E005 of 2022, but holds that the suits should be placed before one Judge, if they have not been dismissed or struck out and be heard concurrently (at the same time).

79. In conclusion, the Plaintiff's application partially succeeds and the court orders that:

    i. The following matters to be heard and determined by one court, in the event they have not been dismissed by the court:

i. Nairobi ELC No. E423 of 2021, *Dr. Adan Mohamed Adam v Monarch Developers Ltd & 2 others*;

ii. Nairobi ELC No. E426 of 2021, *Dr. Mohamed Bashir Abdulaziz & another v Monarch Developers Ltd & 2 others*;

iii. Nairobi ELC No. E427 of 2021, *Dr. Gaman Ali Mohamed Gaman v Monarch Developers Ltd & 2 others*;

iv. Nairobi ELC No. E429 of 2021, *Dr. Adil Waris v Monarch Developers Ltd & 2 others*;

v. Nairobi ELC No. 432 of 2021, *Dr. Saleem Mohamed Afzal v Monarch Developers Ltd & 2 others* and;

vi. Nairobi HCCC No. E005 of 2022, *Utabibu Co-operative Savings and Credit Society Limited v Monarch Developers Ltd & another*,

ii. The prayer for injunction is dismissed.

iii. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF JUNE, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Gathaiya for Defendant

Mr. Biwot holding brief for Busaidy for Plaintiff

Court Assistant - Tracy