



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION-MILIMANI**

**HIGH COURT CASE NUMBER E 431 OF 2019**

**WILSON KIRUNGIE GACHANJA.....1<sup>ST</sup> PLAINTIFF**

**JOSEPHINE WANJIRU GACHANJA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HOUSING FINANCE**

**CORPORATION OF KENYA (HFCK).....1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

**APPLICATION**

By certificate of urgency filed on 22<sup>nd</sup> January 2020, the Plaintiff /Applicant amended the application filed on 9<sup>th</sup> December 2019 on the following grounds;

**CONSENT**

The Plaintiff's application of 28<sup>th</sup> November 2019 was compromised by the Consent recorded by parties through their respective Counsel on 3<sup>rd</sup> December 2019 as follows;

- 1) The Plaintiff was to pay Ksh 2.5 million within 7 days from the day.
- 2) The Plaintiff was to pay Auctioneer charges within 14 days from the day.
- 3) In default of the above the Defendant would be at liberty to exercise the statutory power of sale.
- 4) The Defendant was to file and serve Replying affidavit to the instant application within 21 days.
- 5) The Plaintiff had corresponding leave to file Supplementary Affidavit within 14 days.
- 6) The Plaintiff was granted leave to amend the instant application.
- 7) The Court was to give mention date for directions.

The Plaintiff deposed that Ksh 2.5 million was paid pursuant to the Consent Order.

The Plaintiff deposed that all claimed arrears in respect of loan secured over the charge over **Apartment A3 and B1** by payment of Ksh 2.0 million.

The Defendant failed to file Replying Affidavit and the Plaintiff is of the view that the delay by the Defendant to file the Affidavit is intentional so as not to have the instant Application disposed of.

The Plaintiff deposed that the Defendant insisted on proceeding with foreclosure/forced sale of **Apartments A3 & B1 Gables Park** as a reserve price at a gross undervalue, without proper service of the mandatory 90 statutory notice.

The Plaintiff sought reconciliation of Accounts on both loans and interest computed as per the law to enable the Plaintiff to settle the outstanding debt.

The Application was scheduled for a mention on 4<sup>th</sup> February 2019 whilst the sale was scheduled on 28<sup>th</sup> January 2019.

### **REPLYING AFFIDAVIT**

The Respondent filed Replying Affidavit to the Application and deposed as follows;

The Applicant's application was/is based on material non-disclosure and admission of the Applicant's indebtedness. The Plaintiffs admitted obtaining loan facilities from the 1<sup>st</sup> defendant bank and charged suit properties Apartments B1 & A3 respectively. They admitted default and that they were in arrears.

The 1<sup>st</sup> defendant issued Plaintiffs with statutory notices under **Sections 90 (90 days) & 96 of Land Act (40 days)** respectively through registered post vide the postal addresses provided as shown by copies attached.

The Plaintiffs were issued with 45 days redemption and notification of sale by the 2<sup>nd</sup> Defendant; Auctioneers as per the copies annexed to the Affidavit under Rule 15 Auctioneers Rules.

The suit properties were valued as shown by the Valuation reports annexed to the Affidavit.

The 1<sup>st</sup> Defendant annexed copies of the statutory notices to the Affidavit as follows;

a) Statutory Notice of 21<sup>st</sup> February 2019 to Plaintiffs at P.O. Box 46901- 00100 Nairobi; under **Section 90 of Land Act** in relation to **Apartment A3** for outstanding arrears of Ksh 307,298/- and loan balance of Ksh 5,983, 687 as at 28<sup>th</sup> February 2019 and continue to accrue interest at 13% per annum.

b) Statutory Notice of 19<sup>th</sup> July 2019 to Plaintiffs by registered Post

P.O. Box 46901- 00100 Nairobi; under **Section 96(2) of Land Act** in relation to **Apartment A3** for outstanding loan balance of Ksh 6,330,996/- as at 31<sup>st</sup> July 2019.

c) Statutory Notice of 18<sup>th</sup> February 2019 to Plaintiffs at P.O. Box 46901-00100 Nairobi; under **Section 90 of Land Act** in relation to **Apartment B1** for outstanding arrears of Ksh 593,043 and loan balance Ksh 5,125,296 as at 28<sup>th</sup> February 2019 and continue to accrue interest at 13% per annum.

d) Statutory Notice of 19<sup>th</sup> July 2019 to Plaintiffs by registered Post

P.O. Box 46901- 00100 Nairobi; under **Section 96(2) of Land Act** in relation to **Apartment B1** for outstanding loan balance of Ksh 5,435,659/- as at 31<sup>st</sup> July 2019.

e) Certificate under **Rule 15 C of Auctioneers Rules 1997** served by the 2<sup>nd</sup> Defendant to 1<sup>st</sup> Plaintiff.

f) Notification of sale of Apartment B1

g) Statement of Account 1/1/2016 – 17/12/2019

h) Loan/Charge Documents for Apartment B1 & A3

As at 30<sup>th</sup> November 2019, the balance outstanding as regards Apartment A3 Account 6000011519-0 was Ksh 5,171,482.93.

As at 17<sup>th</sup> December 2019 as regards Apartment B1 Account 6000009769-0 was Ksh 5,822,332.47 as shown by annexed statements of Accounts.

The Plaintiffs failed to settle the amounts in the 2 facilities and 1<sup>st</sup> Defendant advertised the suit properties for sale.

On 9<sup>th</sup> December 2019, the Plaintiffs pursuant to the Consent of 3<sup>rd</sup> December 2019 paid Ksh 2.5 million for the facility secured by Apartment A3 and suspended the impending Auction.

The 1<sup>st</sup> Defendant complied with all legal requirements that regulate Chargee's statutory power of sale.

## **FURTHER AFFIDAVIT**

The Plaintiff reiterated that they cleared the arrears pursuant to the Consent of 3<sup>rd</sup> December 2019 through payment of Ksh 2.5 million and Ksh 2 million respectively as shown by letter dated 8<sup>th</sup> December 2019 annexed to the Affidavit.

## **INTEREST**

The 1<sup>st</sup> defendant continued to claim alleged arrears in respect of the loan secured by Apartment No B1 and continued to charge penalty interest at punitive rate of 26% per annum whereas the performing loan attracts interest at the rate of 13% per annum.

The Loan Accounts of loans granted, the Loan Amortization Schedule that considered claim in arrears, considering initial letter of offer of 27<sup>th</sup> December 2011 over Apartment A3 which granted Loan Facility of Ksh 9,100,000 payable in instalments of Ksh 183,985 /- per month all show different rates of interest.

The letter of offer dated 12<sup>th</sup> April 2010 over Apartment B1 granted a loan facility for the sum of Ksh 12,000,000/- payable in instalments of Ksh 180,332/- per month for 12 years.

The Loan Amortization Schedule and Bank Statements issued by 1<sup>st</sup> Defendant on loan balance as at February 2019 ought to be Ksh 7,972,281.38 & Ksh 6,351,003.63 for Apartments A3 & B1 whereas the actual loan balance as per bank statement the sum is Ksh 5,857,438.49 & Ksh 5,069,363.75 respectively signaling that the loan repayment was ahead of Schedule and not in arrears as claimed.

## **PAYMENTS**

The annexed Schedule depicts payments by the Applicant as follows;

	Apartment A3	Apartment B1
March 2011-July 2012	-	31,000,000.00
October 2012	800,000.00	800,000.00
November 2012	800,000.00	900,000.00
April 2013 – October 2013	300,000.00 x 6=	300,000.00 x 6 = 18,000,000.00 18,000,000.00
May 2014	300,000.00	300,000.00
January 2015	-	507,041.65
May 2015	300,000.00	-
July 2015	-	488,000.00
April 2016	464,166.10	-
April 2017	388,388.40	-
July 2017	600,000.00	-
May 2018	395,000.00	500,000.00
June 2018	-	400,340.00
July 2018	500,000.00	-
October 2018	-	408,568.86

## **STATUTORY NOTICES**

The Applicant /Plaintiffs did not receive the Statutory Notice of 21<sup>st</sup> February 2019 in respect of Apartment No A3 and Statutory Notice of 18<sup>th</sup> February 2019 in respect of Apartment No B1.

## **VALUATION**

The Plaintiffs/Applicants also took issue with marked difference between Valuation by Njihia Muoka Rashid Co Ltd appointed by 1<sup>st</sup> Defendant at Ksh 15,000,000/- for Apartment A3 & Ksh 16,000,000/-for Apartment B1 Knight Frank Valuers Ltd for NCBA at Ksh 18,000,000/-.

The monthly rental income of each Apartment is Ksh 155,000/- & Ksh 160,000/- per month which is relevant to the valuation of the Apartments. The 1<sup>st</sup> Defendant's Valuers pegged rent at Ksh 80,000/-

### **TRANSFER OF FACILITIES**

The Plaintiffs/Applicants approached NCBA Bank to secure facility earmarked to settle both Loan Facility Accounts with the 1<sup>st</sup> Defendant. This is evidenced by annexure **WKG** letter of 8<sup>th</sup> December 2019. NCBA issued instructions to its advocates to prepare the requisite security documents, including a 1<sup>st</sup> Legal charge over Apartment A3 in preparation of settling the Loan with the 1<sup>st</sup> Defendant. It therefore unnecessary for the 1<sup>st</sup> Defendant to continue with the process of recovery.

### **1<sup>st</sup> DEFENDANT'S FURTHER REPLYING AFFIDAVIT**

The 1<sup>st</sup> Defendant contested the Plaintiffs assertion that it stopped/delayed the takeover of the loan facility process and relied on emails/correspondence between the banks of 23<sup>rd</sup> April 2020, 28<sup>th</sup> April 2020, 11<sup>th</sup> May 2020 & 12<sup>th</sup> May 2020. The 1<sup>st</sup> Defendant is waiting for response on takeover in the absence of which the recovery process shall continue.

As of 30<sup>th</sup> June 2020; the Plaintiffs jointly owed Ksh 9,514,170.30/- and arrears of Ksh 3,610,851/- and the pending instalments for June 2020 at Ksh 186,180.80/-.

### **PLAINTIFF'S 2<sup>ND</sup> FURTHER AFFIDAVIT**

The principal borrower of the new take over facilities, Keziah Gachanja who is 1<sup>st</sup> Plaintiff's mother passed on 24<sup>th</sup> March 2020 and further complicated the proposed total takeover of all the facilities held by the plaintiffs and the late Keziah Gachanja.

The Plaintiffs intention was to clear the loan accounts in full and had put in place measures aimed at settling the loan accounts which efforts continue to be frustrated and unreasonably delayed by 1<sup>st</sup> Defendant.

### **DETERMINATION**

After consideration of parties' pleadings and oral highlights of submissions;

The issues for determination are;

- a) Whether the statutory notice(s) are valid
- b) Whether temporary injunction shall be granted.

### **PLAINTIFF'S SUBMISSIONS**

The Plaintiff submitted as follows on grant of injunction;

#### **High Court Civil Case 520 of 2011 Malezi Preparatory Schools Ltd vs Eco Bank Ky Ltd [2013] eKLR;**

***"I think the rights of the Plaintiff herein may have been infringed by the Defendant and that it established a prima facie case with probability of success in relation to the validity of the Statutory Notice, on grounds not of invalidity of service thereof but that , as at the date thereof, its loan and other accounts were not in arrears..... As regards the 2<sup>nd</sup> Limb of Giella/Mrao authorities... I agree with the Plaintiff that the damage which will inevitably result from the sale of suit premises would not be easy to assess the damages as the spin off would be immeasurable in money terms.....In the meanwhile the Defendant still has the security of its charge over the suit property to fall back on.***

See also **ELC 559 of 2017 Thika – Geoffrey Kinuthia Mungai & Anor vs Progressive Credit Ltd** where the Court relied on **Nguruman Ltd vs Jan Bonde Nielson & 2 Others C.A.77of 2012;**

***"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 violated 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 in on a balance or, otherwise put, on a preponderance of probabilities."***

The Plaintiff submitted as follows on service of statutory notice

*“It must be understood in the face of denial of receipt of statutory notice(s) it is incumbent upon the Chargee to prove posting. It would have been a very simple exercise for the bank to produce slip(s) or letters containing statutory notice(s) The bank did not do so. Instead an Officer from the Bank simply produced file copies of the notices to prove the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non receipt of such notice (s) shifts to the addressee.....”*

The Plaintiffs/Applicants relied on Sections 84 & 104 of Land Act Section 84 Land Act provides;

*“(1) Where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee-*

- (a) giving the chargor at least thirty days notice of the reduction or increase in the rate of interest; and*
  - (b) stating clearly and in a manner that can be readily understood, the new rate of interest to be paid in respect of the charge.*
- (2) The amount secured by a charge may be reduced or increased by a memorandum which shall-*
- (a) comply with subsection (5); and*
  - (b) be signed-*
    - (i) in the case of a memorandum of reduction by the chargee; or*
    - (ii) by the chargor; and*
  - (c) state that the principal funds intended to be secured by the charge are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.*
- (3) The term of a charge may be reduced, extended or renewed by a memorandum which-*
- (a) complies with subsection (5);*
  - (b) is signed by the chargor and the chargee; and*
  - (c) states that the term of the charge has been reduced, extended or renewed, as the case may be, to the date or in the manner specified in the memorandum.*
- (4) The covenants, conditions and powers expressed or implied in a charge are varied in the manner specified in the memorandum.*
- (5) A memorandum for the purposes of subsections (2), (3) and (4) shall-*
- (a) be endorsed on the register or annexed to the charge instrument; and*
  - (b) upon endorsement or being annexed to the charge instrument, vary the charge in accordance with the terms of the memorandum.”*

Section 104 Land Act provides;

*“(2) A court may refuse to grant an order under subsection (1) or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may-*

- (a) cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;*
- (b) extend the period of time for compliance by the chargor with a notice served under section 90;”*

#### **DEFENDANT’S SUBMISSIONS**

The Defendant’s relied on the following authorities;

*Daniel Ndege Ndirangu vs Barclays Bank of Kenya Limited & Anor High Court Civil Suit 8 of 2012;* the Court observed;

*“Those who fail to service and persist in such failure, do no equity. An injunction is an equitable remedy. Those who see equity must therefore do equity. Failure to service a loan or to pay the lender or to pay into Court what has been admitted takes the Applicant outside the realm of exercise of the Court’s discretion.....An injunction will not be granted because the amount is disputed, or interest has been piled. Those are matters of inquiry at trial and should the lender be found to blame, it will be condemned in damages to the borrower.”*

Jopa Villas LLC vs Private Investment Corp & 2 Others [2009] eKLR,

*“I am clear in my mind that the Applicant is running away from obligations lawfully imposed and with its full knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1<sup>st</sup> Defendant to recover monies lawfully advanced. That is the tradition that I cannot depart from and as was advised in Aiman vs Muchoki (1984) KLR 353. Our Courts must uphold the sanctity of lawful commercial transactions.”*

## ANALYSIS

In the celebrated case of Giella –vs- Cassman Brown and Co. Ltd [1973] [EA 358] the court set out the principles for Interlocutory Injunctions; these principles are:-

- i) *The plaintiff must establish that he has a prima facie case with high chances of success;*
- ii) *That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;*
- iii) *If the court is in doubt, it will decide on a balance of convenience.*

In the case of Mrao Limited –vs- First American Bank of Kenya Limited [2003] KLR 125, the court stated as follows;

*“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than that of an arguable case.”*

*Have the Plaintiffs established a prima facie case?*

The Plaintiffs entered into contracts with the 1<sup>st</sup> Defendant and obtained loan facilities and charges the suit property LR No.1/1307. The Gables Kilimani Nairobi County Apartments A3 & B1 of Ksh 12 million & Ksh 9,100,000/- respectively. The Charges/Loan Facilities documents were duly executed by the Plaintiffs. They have not contested validity of the Loan Facilities’ and/or Charges Agreements. Hence, parties are bound by the bargain they made and executed as contracts.

In evaluating evidence presented by the Plaintiffs/Applicants, they serviced the loan facilities as outlined in the Schedule of Payment. The Plaintiffs made payments almost twice the monthly payments periodically with regard to Apartment A3 from 2011 – 2014 whereas with regard to Apartment B1 for 1 ½ years March 2011- July 2012 the Applicants/Plaintiffs made no payments in servicing the loan. Even after the Plaintiffs resumed normal servicing of loans, the 1<sup>st</sup> Defendant added the default interest on unpaid monthly payments as contracted in the loan facility documents thus escalating the outstanding debt.

From 2015 -2018 the Plaintiffs made lumpsum payments intermittently and not regularly. Again, the default interest as per the loan facility contract escalated outstanding debt. This Court finds that Plaintiffs made payments to service loan facilities but seem to have run into challenges in 2018.

At that point, the Plaintiffs ought to have approached the 1<sup>st</sup> Defendant for restructuring of the repayments or amicable resolution of the matter, instead they waited until the statutory power of sale was imminent and filed the matter in Court.

The Plaintiffs claim that they were not served with statutory notices under **Section 90 of Land Act**. The Plaintiffs submitted that in line with High Court Civil Case 12 of 2018 Michael Gitere & Anor vs Kenya Commercial Bank Ltd [2018] eKLR supra, the 1<sup>st</sup> Defendant ought to prove that the notices were sent by registered post by proof of the registered post slips. In this case, the statutory notices of 18<sup>th</sup> February 2019 & 21<sup>st</sup> February 2019 under **Section 90 of Land Act** were not sent by Registered Post as it is only the statutory Notices under **Section 96 of Land Act** of 19<sup>th</sup> July 2019 that are both inscribed registered post and are not contested as not received by the Plaintiffs.

This is because the Statutory notices under **Section 90 of Land Act** were posted but not through registered post. On the issue of proof of postage, the 1<sup>st</sup> Defendant cannot produce registered post slips if the notices were sent by ordinary mail. Secondly, postage of demand notices ought in this Court’s view to be proved on a balance of probability and not beyond reasonable doubt.

Therefore, if the statutory notices under **Section 96 of Land Act** posted by registered post were received and the registered post slips are availed and hence there is no contest as to receipt how is it possible that the notices under **Section 90 of Land Act** with the same names of the Plaintiffs and Postal address P.O. Box 46901-00100 as in the statutory notices sent by registered post were not received? If so, that the Plaintiffs did not receive notices under **Section 90 of Land Act**, why did the Plaintiffs after receipt of statutory notices under **Section 96 of Land Act** sent by registered post not raise any query, seek legal advice or take any other action until the final notice by Auctioneer, 2<sup>nd</sup> Defendant was sent? From the totality of the above circumstances, the service of the statutory notices under **Section 90 of Land Act** was

valid as the Plaintiffs were sent the same by ordinary post through the same address and names as the notices sent by registered post.

The 1<sup>st</sup> defendant attached to its Replying Affidavit; offer to advance contracts forms duly executed between the Plaintiffs and Defendant. At **Clause 2.4.1 & 2 on Demand or Notice** it provides;

***“Any demand or notice on the Applicant shall be made in writing signed by an Officer of HFCK and served either by personal delivery on the Applicant at any place or by post or by hand delivery addressed to the Applicant’s last known address known to Housing Finance Service by post to the applicant shall be deemed to be effective 2 business days after date of posting....”***

In *Elizabeth Wanjiku Kariungi vs Equity Bank (KY) Ltd [2017] eKLR in reference to HCCC 457 of 2006, Peter Kuria Munyira vs HFCK & Anor* the Court observed;

***“When the Court imposes upon the Chargee the obligation of knowledge of demonstrating when the Chargor received or collected the notice which had been dispatched by registered post, that constitutes an extra burden, which is not anchored in statute. The charger has an obligation to dispatch the notice to the correct postal address. The Chargor’s duty is to ensure that the contents of the notice meet the requirements set out in the Land Act.”***

This Court is satisfied from the evidence on record, that the 1<sup>st</sup> Defendant dispatched the statutory notices under **Section 90 of Land Act** by ordinary post to the same Plaintiffs and at the last known address by the 1<sup>st</sup> Defendant which was the same as that used to dispatch the statutory notices under **Section 96 of Land Act** and were received by the Plaintiffs.

The Plaintiffs contested the imposition of interest contrary to the law and consent of CBK and relied on **Section 33 of the Banking Amendment Act 2016 (repealed in December 2019)** that provided that interest would be at 4% base rate and published by Central Bank of Kenya. That contrary to contractual and legal requirements the 1<sup>st</sup> Defendant imposed interest at 26% per annum which is punitive and results in a clog against the Plaintiffs equity of redemption.

The contracts executed by the Plaintiffs with the 1<sup>st</sup> defendant indicate that interest was as follows;

a) Mortgage Loan Facility of Ksh 9,100,000/- of 7<sup>th</sup> November 2011

For apartment A3 Interest is at 14% and Default Interest 14% plus 4.25%. In the Statutory Notice it is at 13% per annum. The Charge Contract it is 23% per annum

b) Mortgage Loan Facility of Ksh 12,000,000/- of 12<sup>th</sup> April 2010

For apartment A3 Interest is at 14% and Default Interest 14% plus 4.25%. In the Statutory Notice it is at 13% per annum. The Charge Contract it is 23% per annum

Therefore, although the 1<sup>st</sup> Defendant contracted the right to vary interest rates but it was with written notification to the Applicants as provided by **section 104 Land Act**, such notice was not presented as evidence in court. The various interest rates in different documents executed by the Plaintiffs makes it difficult to tell what is outstanding as debt even after the Applicants made lumpsum payments from time to time in various accounts. There is dire need for confirmation of applicable interest rates and notices to the Plaintiffs if and when the rates of interest were varied with approval from Central Bank of Kenya as applicable rates.

The Plaintiffs sought to reconcile accounts with the 1<sup>st</sup> Defendant so as to settle the outstanding loan by transferring the debt to NCBA bank which had approved and was in the process of effecting transfer but the process halted due to the demise of Keziah Gachanja, mother to the 1<sup>st</sup> Plaintiff.

This Court after consideration of pleadings and evidence on record, confirms that the 2 Mortgage /Loan Facilities the Plaintiffs undertook from 2010/2011 respectively were serviced intermittently with lumpsums until 2018. There was outstanding principal debt and accumulated arrears out of penalties and interest for missed monthly payments culminating to the statutory notices and the instant application.

By Consent by parties of 3<sup>rd</sup> December 2019, the plaintiffs agreed and paid Ksh 2.5 m and Ksh 2m and Auctioneers Fees to stop the statutory power of sale on suit properties. From these facts, the Court finds that the Plaintiffs are willing to redeem the outstanding debt by servicing the loan facilities as per contracts or by payment of the lumpsum.

The plaintiffs have established a *prima facie* to warrant grant of temporary injunction as elucidated in *Nguruman Ltd vs Jan Bonde Nielson & 2 Others, C.A. 77 of 2012* where the Court of appeal observed;

***“We reiterate that in considering whether or not a prima facie is established, the Court does not hold mini trial, it must not examine merits of the case closely. All the Court is to see is that on the face of it, the person applying for an injunction has a right which has been violated or is threatened with violation.”***

The Plaintiffs have made efforts to defray the outstanding loan as demonstrated by the lumpsum payments made from 2010//2011- 2018 when the accumulated arrears were due and owing. The Plaintiffs have paid Ksh 4.5million after the consent of 3<sup>rd</sup> December 2019 to avert

the sale which should go along way to defray arrears and/or principal debt.

Due to the outstanding amount of the loan facility which remains due and owing to date as tabulated by the 1<sup>st</sup> defendant, and the statutory notices under **Section 90 & 96 of Land Act and Section 15 of Auctioneers Rules** are valid legal and regular as they were duly served to the Plaintiffs.

The issue that remains to be resolved is the one regarding interest. Whereas the Plaintiffs contracted to pay interest the rates differ from the various documents as demonstrated above and there is no evidence of notice of increase or decrease in interest on the outstanding sum. The issue of interest is central and critical to the outstanding debt.

The Plaintiffs have established a *prima facie* case that warrants the equitable remedy of temporary injunction. The sale of the subject matter without confirming the actual amount outstanding and giving the Applicants a chance to redeem the debt, the Plaintiffs would suffer irreparable loss that cannot be compensated by an award of damages.

#### **DISPOSITION**

- 1. The Court grants temporary injunction to the Plaintiffs restraining the 1<sup>st</sup> & 2<sup>nd</sup> Defendants themselves, their agents and/or servants from selling, dealing, interfering, alienating or disposing Apartment A3 & B1 for 90 days from today on condition;**
- 2. The Parties/Plaintiffs & 1<sup>st</sup> Defendant to amicably resolve applicable legal interest on the 2 Loan Facilities and if not engage Accountant(s)/Auditor(s) individually or as a team and share expenses with a view to resolving the interest applicable and hence the amount due and owing as arrears.**
- 3. The statutory notices issued by the 1<sup>st</sup> Defendant are valid and were duly served to the Plaintiffs and shall be suspended for 90 days to allow resolution of the outstanding debt after reconciliation of Accounts.**
- 4. The Plaintiffs are at liberty to continue with the transfer of facilities to KCBA within the 90 days or any other financial institution.**
- 5. Plaintiffs to continue servicing the loan under the contract.**
- 6. Each party to bear its own costs.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 15<sup>TH</sup> FEBRUARY 2021 (VIDEO CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**MR. KIMANI FOR THE DEFENDANT**

**MUEMA KITUKU & CO. ADVOCATES FOR PLAINTIFF – N/A**

**COURT ASSISTANT - TUPET**