



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

COMMERCIAL & TAX DIVISION

CASE NO. E389 OF 2020

EDWARD KANGETHE KABINGA.....1<sup>ST</sup> PLAINTIFF/APPLICANT

MARION NJERI NDICHU.....2<sup>ND</sup> PLAINTIFF/APPLICANT

BEATRICE NYAMBURA KABINGA.....3<sup>RD</sup> PLAINTIFF/APPLICANT

-VERSUS-

**KENYA WOMEN MICROFINANCE BANK PLC...DEFENDANT/RESPONDENT**

RULING

1.The Application for consideration is the Plaintiffs' Notice of Motion dated 29<sup>th</sup> September, 2020 brought under **Order 40 Rule 1 & 2** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act, Section 104 & 106** of the **Land Act No. 6** of 2012 and all other enabling provisions of the law. The Application seeks the following orders:

*i.Spent*

*ii.Spent*

*iii.THAT a temporary injunction be and is hereby issued restraining the Defendants either acting by themselves, servants and or agents from auction/ selling and /or in any way dealing with Title No. Ngong/Ngong 21322 and Title No. Ngong/Ngong 30128 pending the hearing and determination of this suit.*

*iv.Spent*

*v.THAT a temporary injunction be and is hereby issued restraining the Defendants either acting by themselves, servants and or agents from auction/ selling and /or in any way dealing with the following movable assets secured by chattel mortgages in favour of the Defendant:*

*a)Machine registration number KHMA 746B;*

*b)Machine Registration KHMA 821C and;*

*c)Machine Registration number KHMA 983B, pending the hearing and determination of this suit.*

*vi.THAT an order do issue compelling the Defendant to write-down all overcharged interest and to refund of Plaintiff's accounts in credit.*

*vii.THAT the cost of this application be provided for.*

2.The application is based on the grounds on the face of it and supported by the Affidavit of **EDWARD KANGETHE KABINGA**, the 1<sup>ST</sup> Plaintiff herein, sworn on even date. It is averred that the 3<sup>rd</sup> Plaintiff offered her **Title No. Ngong/Ngong 21322** and **Title No.**

**Ngong/Ngong 30128** as security for loan facilities advanced to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs by the Defendant on diverse dates, amounting to an aggregate sum of **Kshs. 30,000,000/=**. The Loan facilities were further secured by chattel mortgages over the movable assets of the 1<sup>st</sup> Plaintiff.

3.It is deposed that sometime in March 2020, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs who are engaged in the business of operating student hostels near the Kenyatta University suffered a serious financial setback owing to the closure of Universities and Tertiary institutions on account of the outbreak of the Covid-19 Pandemic. The students who were their tenants vacated the hostels and returned to their homes in light of the indefinite closure and as a result, they were unable to service the loan as agreed.

4.It is averred that on diverse dates, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs approached the Defendant in its offices with a payment proposal that involved restructuring their loan facilities in line with the advisory and circular by the Defendant's regulator, the Central Bank of Kenya but the said proposal was ignored. Consequently, on or about 20<sup>th</sup> June, 2020, the Defendant issued the Plaintiffs a statutory notice pursuant to **Section 90(1)** of the **Land Act, 2012** demanding that the sum of **Kshs. 2,964,075.09/=** be paid within three months from the date of service.

5.Being aggrieved by the said notice, the Plaintiffs commissioned the Interest Rates Advisory Centre (IRAC) for a review of their accounts and arrears which review revealed that the Defendant has been levying illegal interest on the loan facility contrary to the provisions of **Section 33B** of the **Banking Act**. It is contended that from the said review, it was clear that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have overpaid their loan by the sum of **Kshs. 4,716,816.32** and thus the Bank's right to exercise its statutory power of sale is yet to crystalize.

6.Further, it is contended that in any event, the Defendant has not complied with the mandatory provisions of **Section 90** of the **Land Act, 2012** as it failed to personally serve the 3<sup>rd</sup> Plaintiff with the statutory notice. In their view, this is an attempt to clog the 3<sup>rd</sup> Plaintiff's right to redeem the property contrary to the provisions of **Section 89** of the **Land Act, 2012**. In addition, it is averred that the intended issuance of a redemption notice under **Section 96** of the Act is illegal as the Defendant never sought and/or obtained the consent of the Land Control Board coupled with the lack of a fresh valuation to ascertain the current value before sale as required by law.

7.It is argued that the 3<sup>rd</sup> Plaintiff stands to suffer irreparable loss and damage should the illegal, unlawful and unprocedural sale of her charged property be allowed to proceed since it is her investment. It is averred that she is an elderly mother and a retiree currently residing on the suit property and thus the impending sale of the suit property will render her homeless and destitute. Further, that the suit property is valued at over **Kshs. 30,000,000/=** yet the same is to be sold to cover a disputed and unsustainable debt of **Kshs. 2,964,075.09/=**.

8.It is contended that if the Defendant is allowed to proceed with the intended sale, the suit herein shall be rendered nugatory and a mere academic exercise. In the Plaintiffs' view, the balance of convenience tilts in favour of the preservation of status quo until both parties are heard on merits as the Defendant will still be in a position to recover any outstanding amounts owing to it. On the other hand however, the Plaintiffs will suffer irreparable loss if the orders sought are not issued. Finally, it is the Plaintiffs' contention that the suit raises fundamental *prima facie* issues and questions of law with a high probability of success.

9.In response to the application, the Defendant filed a Replying Affidavit sworn by its legal counsel **BENARD KIPROTICH** on 7<sup>th</sup> October, 2021. It is deposed that it was both an express and implied term of the loan agreement that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs having obtained the loan facility, had an obligation to repay the same as scheduled and the Defendant would have the right to realize the security to recover any outlay in case of default. He avers that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs defaulted in the repayment of the monthly installments causing the account to go into arrears.

10.He denies the Plaintiffs' averment that they had approached the bank with a proposal to have their loan restructured and stated that annexure 'EKK-7' of the Plaintiffs' Supporting Affidavit which is a letter from the Plaintiffs' advocates to the bank, does not bear the bank's receiving stamp to confirm that it was indeed delivered to the Bank as alleged.

11.He states that on several occasions, the Defendant engaged the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to remedy the default but the same did not bear fruit. As a result, the Defendant proceeded to issue a three (3) months Statutory Notice dated 20<sup>th</sup> July, 2020 demanding that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs do regularize the account by clearing the arrears which amounted to the sum of **Kshs. 2,964,075.09** as at the date of the Notice. That despite acknowledging receipt of the Notice, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have failed to honor the demand by regularizing the arrears and the Plaintiffs' loan account continues to be in arrears with the outstanding sum as at 1<sup>st</sup> October 2020 being **Kshs 24,046,250.73**.

12.He argues that in the premises, the Defendant is now desirous of issuing the 40 days' notice as by law provided followed by the auctioneers' notice thereafter in order to progress the realization process. Further, that the Defendant indeed served the 3<sup>rd</sup> Plaintiff with the three (3) Months Statutory Notice as evidenced by the Certificate of postage marked as annexure "WBK-5". In his view therefore, for as long as there are arrears outstanding on the account, the Defendant has the right to proceed with the sale of the security to recover its outlay as per the agreement of the parties.

13.It is contended that the Plaintiffs have not established any basis for the grant of an injunction as by law required in view of the following reasons; that there is no dispute as to indebtedness arising from the breach and default and the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have not demonstrated that they have paid the loan outstanding upon demand, despite being given all opportunity to do so by the Defendant; that the parties executed an agreement as a result of which the Plaintiffs benefitted, and the same Plaintiffs now wish to have the Defendant restrained from enforcing its part of the bargain; that the loan amount continues to accrue interest which also exposes the security as the same may extend beyond its value to the detriment of both parties and particularly the Defendant who may be unable to recover the sums owed to it by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs; and that the Plaintiffs have come to court with unclean hands by peddling falsehoods and are therefore undeserving of any equitable remedy.

14.He argued that the Plaintiffs were well aware at the time of taking out the facility that in case of default, the securities would be liable for

sale to recover the amounts due and outstanding and thus, the securities became commodities for sale at that point unless they are discharged.

15. Further that the 1<sup>st</sup> Plaintiff's allegation of breach of the Central Bank of Kenya emergency measures dated 18<sup>th</sup> March, 2020 are untrue as the said measures were only applicable to borrowers whose loan repayments were up to date as at 2<sup>nd</sup> March, 2020. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had already defaulted in the repayment of the monthly installments as at 2<sup>nd</sup> March, 2020 and could not benefit from the same. He therefore urged that this application be dismissed for being an abuse of the court process.

### **Plaintiffs/Applicants' submissions**

16. The application was canvassed by way of written submissions filed by the parties respective advocates.

17. In their written submissions dated 29<sup>th</sup> October, 2020 the Plaintiffs' formulated four issues for determination namely:

#### ***(i) Whether the Plaintiffs' have met the preconditions for interlocutory relief?***

18. Relying on the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules and the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, the Plaintiffs contended that they had satisfied all the three conditions necessary for the grant of temporary injunctions as set out in the case.

19. On the first limb, the Plaintiffs submitted they have established a *prima facie* case with a probability of success since they have raised several triable issues of law and fact which the Defendant has not controverted in its Replying Affidavit.

20. On the second limb of whether the Plaintiffs will suffer irreparable harm that cannot adequately be compensated in damages, the Plaintiffs reiterated that the 3<sup>rd</sup> Plaintiff will be unfairly deprived of her home and life savings should the Defendant be allowed to proceed with its intended sale through an illegal process. To buttress this position, they relied on the case of **Manasseh Denga v Ecobank Kenya Limited [2015] eKLR** for the argument that although it is not in the purview of a court to rewrite the terms of a contract, a person's property is not a matter that can be taken casually because it violates a party's right to own property under **Article 40** of the Constitution.

21. They also relied on the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others [2008] eKLR** where it was held, *inter alia*, that damages cannot be a substitute for loss occasioned by a clear breach of the law. Further reliance was also placed on the case of **Kwanza Estates Limited v Dubai Bank Kenya Limited (2013) eKLR** where the court held that a party deprived of his property through an illegal process would suffer irreparable loss and or damage.

22. The Plaintiffs further urged that regard should not be paid to the Defendant's capacity to compensate them in damages in the event that their suit succeeds as this would occasion a great injustice to their clients. They relied on the case of **Lucy Njoki Waithaka v ICDC** where the court stated that it is not an inexorable rule that an interlocutory injunction should never be granted where damages may be an appropriate remedy.

23. In regards to the final limb of where the balance of convenience lies, the Plaintiffs submitted that this Application as well as the main suit raises weighty issues that require full interrogation and determination in a full trial. In their view therefore, the balance of convenience tilts in favour of preserving the status quo until all parties are heard on merits.

#### ***(ii) Whether the Plaintiffs are indebted to the Defendant and whether the right to exercise the statutory power of sale has crystallized.***

24. On this, the Plaintiffs reiterated that the Defendant has been levying exorbitant and illegal interest at rates over and above the interest rate ceiling set under the provisions of **Section 33B** of the Banking Act and contrary to their contractual terms. On the latter, they submitted that under **clause 2a** of the Charge, it was mutually agreed that the interest payable would not exceed the maximum amount permitted by law. It was submitted that the Defendant's discretion on applicable interests is not absolute as the same must be in line with the Law and must not be capricious.

25. Reliance was placed on the case of **James Kabathi Mwangi t/a Tangerine Auto Hardware v Kenya Commercial Bank Ltd [2020] eKLR** where the court cited the case of **Paragon Finance plc v Staunton; Paragon Finance plc v Nash [2001] EWCA Civ 1466 [2002] All ER 248** in which it was held that the power given to a lender by a mortgage agreement to set interest rates from time to time was not completely unfettered and a contrary construction of the same would mean that the lender has complete freedom to specify interest rates at the most exorbitant level.

26. Further, the Plaintiffs urged that in the absence of an alternative expert examination of the Defendant's accounts to rebut the forensic report prepared by IRAC, the court should make a finding that no default has arisen and that the Plaintiff's accounts are current with performing loans. They anchored their submission on the case of **Amalo Company Limited v Standard Chartered Bank (K) Limited Nairobi (Milimani) HCCC No. 571 of 2002** where the court held that where a party fails to give a credible response to counter statements of accounts produced by another, the court is by virtue of the provisions of **Section 176** of the **Evidence Act** obliged to accept on the figures contained in the said statement of account as correct on a *prima facie* basis.

27. They also cited the case of **Jesse Mburu Gitau & Another v Housing Finance Company of Kenya Limited [2018] eKLR** where the court, faced with a similar situation, held that the defendant therein should have contested the IRAC report by preparing and filing a report by an expert instead of challenging the same by way of submissions. The Plaintiffs also noted that in the **James Kabathi Mwangi case [supra]**, Kasango J. relied on the uncontroverted IRAC report therein to find that the Plaintiffs therein were not indebted to the Defendants.

28. In addition, the Plaintiffs contended that the Defendant's right to foreclose on the Plaintiffs' moveable and immovable property has not crystallized as they had already paid more than two-thirds of the loaned amount. They argued that under **Section 20 of the Consumer Protection Act**, the Defendant in such a scenario is required to obtain leave of the court prior to exercising the remedy of foreclosure. They relied on the case of **Shiva Carriers Ltd v NIC Bank Kenya PLC & Another [2018] eKLR** in which the court held a similar opinion.

*(iii) Whether the 3<sup>rd</sup> Plaintiff was served with a valid statutory notice?*

29. As regards this issue, it was reiterated that the 3<sup>rd</sup> Plaintiff was not served with a statutory notice and that she learnt of the same through her son and daughter in law (the 2<sup>nd</sup> and 1<sup>st</sup> Plaintiffs) who were served in person. It was contended that the posting receipt produced by the Defendant does not bare any of the Plaintiffs' addresses and that the Defendant bears the burden of proving service of the statutory notice on the Plaintiffs, but has failed to discharge that burden. The Plaintiffs argued that a file copy is not sufficient proof of service and relied on the case of **Michael Gitere & another v Kenya Commercial Bank Limited [2018] eKLR** where Odunga J. held that a copy of a notification addressed to the plaintiffs therein on the face of it, was not a conclusive proof of service in the absence of evidence of dispatch to the plaintiffs.

30. In totality, the Plaintiffs submitted that non-service of a statutory notice is an irregularity that is fatal to the Chargee's exercise of its statutory power of sale. It was argued that the Plaintiffs' equity of redemption will be jeopardized if the court countenances the omissions of the Defendant in failing to serve the notice. In support of this, they relied on the case of **Elizabeth Wambui Njuguna v Housing Finance Co. of Kenya Ltd [2006] eKLR** where the court held that the omission to serve a valid statutory notice is a fundamental breach which derogates from the Chargor's equity of redemption.

*(iv) Whether the Plaintiffs' equity of redemption has been fettered?*

31. On this, the Plaintiffs submitted that the Chargor's equity of Redemption is a cardinal right which should not be clogged arbitrarily. They argued that their request for restructuring and accommodation by the Defendant was consistent with the equity of redemption. In their view therefore, it behooved the Defendant to not only evaluate their request and enter into negotiations with them but also to recalculate the interest charged and render an accurate account of their account statements. They placed reliance on the case of **Elizabeth Wambui Njuguna [supra]**. They also relied on **Kiyaga v Segujja & Anor (Civil Appeal No. 37 of 2010) [2018] UGCA 26** where the Court of Appeal of Uganda held as follows:

*“There must be no clog or fetter on the equity of redemption. This means that, the mortgagor cannot be prevented from redeeming his property [See: MEGGARY & WADE, THE LAW OF REAL PROPERTY, 6<sup>th</sup> ED. PARA 19-129 CITED IN COMMERCIAL MICROFINANCE LTD VS DAVID EDGAR KAYONDO, HCCS NO. 0012 25 OF 2006] It is an old established rule that if money is lent on the security of land, the lender will get security and nothing more. Therefore, if the borrower wishes to redeem the land within a reasonable time he will always be allowed to do so, even though the due date is past. This rule is so strict that not even an express agreement will be allowed to exclude the borrower's right to redeem. [See: ERIEZA WAMALA vs MUSA MUSOKE (19204929)111 ULR120 at PP120' 121]”*

32. The Plaintiffs further submitted that the levying of interest contrary to the provisions of the charge and letters of offer as demonstrated above was also inimical to the equity of redemption. They buttressed their submission with the case of **Givan Okallo Ingari & Another v Housing Finance Company of Kenya Limited [2007] eKLR** where the court held that the imposition of penal interest or default charges without the permission or knowledge of a borrower greatly impedes or inhibits the redemption rights of a borrower.

**Respondent's submissions**

33. In its written submissions dated 6<sup>th</sup> November, 2020, the Defendant formulated three issues for determination namely: whether or not the Plaintiffs are indebted to the Defendant; whether or not the Plaintiffs' Application raises any viable issues; and whether or not the Plaintiffs have satisfied the conditions for granting of an order of temporary injunction.

*(i) Whether or not the Plaintiffs are indebted to the Defendant and whether the Plaintiffs' application raises any viable issues?*

34. The Defendant submitted that it was clear from the annexed copy of the Statement of Account that the Plaintiffs were perennial defaulters who were not servicing the loan as required thus causing the account to fall into substantial arrears. It was argued that the issuance of the Notice dated 20<sup>th</sup> July, 2020 to the Plaintiffs was meant to remedy the default but they have failed to comply with the demand to clear the outstanding balance.

35. Further, the Defendant contended that the Plaintiffs cannot allege that they have overpaid the loan amount by Kshs. 4, 716,816.32 yet they have already admitted that the default was caused by closure of universities and colleges which affected their business as they lost income and could not continue making any repayment as a result. As such, the Defendant dismissed the forensic report by IRAC for not capturing the true state of affairs in the Plaintiffs loan account evidenced by the annexed statement of accounts which the Plaintiffs have not disputed in any event.

36. It was also the Defendant's submission that the Plaintiffs cannot stop repaying the loan simply on the alleged grounds that its account has been levied with "illegal" interest charges. In its view, the Plaintiffs should have continued to service their loan account while prosecuting their allegations. In support of this submission, the Defendant relied on the case of **Daniel Kamua Mugambi v Housing Finance Company of Kenya Ltd [2006] eKLR** where Ochieng J. stated that a borrower cannot choose to stop making payments because he has reasons to believe that his account had been debited with unwarranted charges until the court makes an adjudication on the issue.

37. Further, the Defendant submitted that the allegation by the Plaintiff that the Bank now intends to sell their property is false because the bank is yet to issue the 40 days' notice as required under Section 96 (2) of the Land Act. It was argued that the injunctive orders sought cannot therefore be granted at this stage because there is still no intention to sell the suit property as the laid down statutory procedure on foreclosure have not been exhausted by the bank. The Defendant submitted that in the circumstances, the court cannot stop the bank from continuing with the recovery procedure laid out in the law. Further, it was the Defendant's contention that the foregoing submissions show that the Plaintiff's application does not raise any substantive issues

*(ii) Whether the Plaintiff has satisfied the conditions for granting of an order for temporary injunction*

38. According to the Defendant, the Plaintiff's application does not meet the threshold for the grant of an interlocutory injunction set out in the case of **Giella v Cassman Brown Co. Ltd [1973] EA 360**.

39. On the first limb, the Defendant submitted that the Plaintiffs' unequivocal admission of their indebtedness to the Defendant and default in servicing the loan shows that they have not laid out a prima facie case as set out in **Mrao v First American Bank of Kenya Limited & 2 Others (2003) KLR 125**.

40. On the second limb, it was contended by the Defendant that the Plaintiffs commoditized their properties when they chose to use them as security for the loan facility and the case of **Maithya v Housing Finance Co. of Kenya & another [2003] 1 EA 133** was cited in support of this.

41. As regards the balance of convenience, the Defendant submitted that the Plaintiffs are clearly trying to evade the obligations owed to the bank. It was argued that the Defendant stands to lose business as it advanced its funds to the Plaintiffs in full knowledge that in case they defaulted, it had a viable security to shoulder it from losses. In its view, it is therefore clear that the balance of convenience tilts in its favour.

42. Further, the Defendant submitted that since the injunctive orders sought by the Plaintiffs are equitable remedies, a party seeking equity must conduct himself in a manner that will meet the approval of a court of equity, which is not the case with the Plaintiffs. In this regard, it relied on similar sentiments by the court in the case of **Maithya v H F C K & Another (supra)**.

43. In totality, the court was urged to dismiss the Plaintiffs' application with costs to the Defendant.

**Analysis and Determination**

44. I have carefully considered the application and the affidavits of the respective parties. I have also considered the various submissions and authorities cited. The main issue for determination is whether the court should grant the injunctive orders sought.

45. The law on granting of interlocutory injunction is set out under **Order 40 Rule 1** of the **Civil Procedure Rules 2010** which provide as follows:-

*"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."*

46. The principles upon which the court can exercise its discretion in an application for a temporary injunction are well settled. These were set out in the celebrated case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself as follows:-

*"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."*

47. The Court of Appeal restated these principles in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** 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."*

48. What amounts to a prima facie case, was explained by the Court of Appeal in Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 as follows:

*"...In civil cases, it 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 as to call for an explanation or rebuttal from the latter."*

49. It is also important to note 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. In this regard, am guided by the Court of Appeal's sentiments in the Nguruman Case [supra] 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."*

50. In the instant case therefore, to establish a prima facie case, the Plaintiffs must demonstrate that they have rights to the suit properties which are likely to be violated by the Defendant's intended action of exercising its statutory power of sale.

51. It is not disputed that the Defendant advanced to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs loan facilities in the tune of Kshs. 30,000,000/=. It is also not disputed that the loan facilities were secured by a charge over the 3<sup>rd</sup> Plaintiff's properties namely **Title No. Ngong/Ngong 21322** and **Title No. Ngong/Ngong 30128** as well as chattel mortgages over the movable assets of the 1<sup>st</sup> Plaintiff being machines registration numbers **KHMA 746B, KHMA 821C** and **KHMA 983B**. From the Plaintiffs' own admission and the statement of accounts exhibited by the Defendant, it is evident that the Plaintiffs defaulted in repaying the loan facility as had been agreed. The Plaintiffs attributed this to financial constraints occasioned by the Covid-19 pandemic which affected their business. However, they claim that the Defendant charged exorbitant interest rates on their loan account contrary to the law and the agreement between them. The 2<sup>nd</sup> Plaintiff annexed to his supporting Affidavit a report prepared by IRAC in this respect.

52. The court takes judicial notice that the Covid-19 pandemic negatively affected several businesses. Nevertheless, the court cannot make decisions based on unsubstantiated allegations. The Plaintiffs have not exhibited anything to prove that indeed their student hostel business suffered due to the pandemic. There is also no conclusive evidence that the Plaintiffs approached the Defendant for restructuring of their loan facilities in line with the advisory issued by the Central Bank of Kenya in March 2020. What is exhibited is a letter dated 11<sup>th</sup> August, 2020 purportedly from the Plaintiffs' advocates to the Defendant written after the statutory notice had been issued to the Plaintiffs, which letter does not show whether it was served or sent to the Defendant. Further and in any event, it suffices to note that the Plaintiffs' alleged financial woes did not stop the Defendant's contractual and/or statutory rights from accruing.

53. Additionally, this court cannot make any conclusive or definitive findings on the issue of the excessive interests at this interlocutory stage since this may require a consideration of intricate and complicated points of law and fact which can only be determined after a full trial. Indeed, the IRAC report exhibited by the Plaintiffs may require the calling of its maker to expound and explain to the court how the difference in the amount of interest was calculated and reached, an exercise that can only be entertained at the hearing of the main suit. Further, I am not convinced that the Plaintiffs' conduct can receive the approval of a court of equity as the loan statement shows that they have only made sporadic payments to their loan account since March 2020 despite knowing too well that they were still indebted to the Defendant. In the circumstances, I find that it was justifiable for the Defendant to initiate the debt recovery process. The upshot therefore is that the Plaintiffs have not established a prima facie case.

54. I find guidance for the circumstances under which a mortgagee and/or chargee may be restrained from exercising its statutory power of sale set out in Halsbury's Laws of England, Vol 32 (4<sup>th</sup> Edition) paragraph 725 as follows:-

*"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. Be that as it may however, this court is prepared to do justice to the 3<sup>rd</sup> Plaintiff, the guarantor herein, whom it is contended was not served with the statutory notice. **Section 90(1)** of the **Land Act, 2012** provides that:

**“If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be 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.**

56. Where a chargor denies receipt of the statutory notice, the burden of proving that the same was duly served rests on the chargee. In **Moses Kibiego Yator v Eco Bank Kenya Limited [2014] eKLR** the court summarized this duty as follows:

***“In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargor, and that in the ordinary course of events, the notice must have reached the chargor.”***

57. I have perused the Certificate of Postage annexed to the Defendant’s Replying Affidavit as proof of service in the instant case. The certificate bears the 3<sup>rd</sup> Plaintiff’s name but does not contain her postal address. The court cannot therefore tell with certainty whether the notice was dispatched to her proper address. In **David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR** the court stated as follows when determining a guarantor’s rights:

***“There is no doubt that the Applicant is a guarantor to the borrower. The guarantee was in a form of a charge over the suit property. The law, the way I understand it, is that a guarantee is a separate and distinct contract from the borrower’s contract. The guarantee is, therefore, enforceable as such. Except, however, the guarantor who has given his land as guarantee and a charge has been registered, he also enjoys the protections offered to a chargor under the Land Act. The principal debtor should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the Land Act. The notice must be copied to the guarantor because the liability of the guarantor will arise upon default by the principal borrower.***

58. Since the issuance of a statutory notice under **Section 90(1)** of the Land Act is a mandatory step in the exercise of a chargee’s power of sale, the court finds that the Plaintiffs have established a *prima facie* case in this respect. (See **Terracraft (K) Limited & another v KCB Bank Kenya Limited [2020] eKLR**)

59. Accordingly, I shall allow prayer number (3) on the Plaintiffs’ application but the same shall only be limited to the period necessary to comply with the relevant provisions and requirements of the law before selling the properties.

### **Conclusion**

60. The upshot is that, the Plaintiffs’ application dated 29<sup>th</sup> September, 2020 partially succeeds on the following terms:

a) **The Defendant either acting by itself, servants and or agents be and is hereby restrained from auctioning selling and/or in any way dealing with Title No. Ngong/Ngong 21322 and Title No. Ngong/Ngong 30128 until it issues and serves the statutory notice under Section 90(1) of the Lands Act to the 3<sup>rd</sup> Defendant.**

b) **Each party shall bear own costs.**

61. **It is so ordered.**

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2021**

**G.W.NGENYE-MACHARIA**

**JUDGE**

In the presence of:

1. *Mr. Wachira for the Plaintiffs/ Applicants.*

2. *No appearance for Mulanya for the Defendant/Respondent.*