



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**HCCC NO. 159 OF 2019**

**FORTUNE HOUSE LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**BUSINESS PARTNER INTERNATIONAL KENYA (II) LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KENYA SHIELD AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

By Certificate of Urgency application dated 16<sup>th</sup> July 2019 filed together with Notice of Motion and Supporting Affidavit, the Plaintiff/Applicant urged the court to be heard on priority basis for reasons;

- a) That the Plaintiff is willing and continuing to pay a loan thus the auction is uncalled for.
- b) The loan of Kenya Shilling Thirty-Six Million Four Hundred and Twenty Thousand Ksh 36,420,000/-) was secured for a period of approximately seven (7) years from 25<sup>th</sup> August 2016 to 1<sup>st</sup> January 2023.
- c) That said loan has only run for approximately two and half years (2 ½) and within that period the Plaintiff has paid the 1<sup>st</sup> Defendant Kenya Shillings Ten Million Six Hundred and Ninety-Five Thousand, Seven Hundred and seventy-six shillings and thirty cents (Ksh 10,695,776.30).
- d) The 2<sup>nd</sup> Defendant intends to proceed to sell the Plaintiffs parcel known as Kabete/Karura/3695 and Kabete/Karura/3696 Fortune House School off Gitaru Road Karura, in an auction on 19<sup>th</sup> July 2019, despite the fact that the Plaintiff is committed to paying the 1<sup>st</sup> Defendant the loan in issue.
- e) The 1<sup>st</sup> defendant asked the Plaintiff to get another financier and the Plaintiff agreeable and approached Cooperative Bank Ridgeways Branch who are willing to buying off 1<sup>st</sup> Defendant's loan.
- f) The 1<sup>st</sup> Defendant is yet to provide the final official settlement figure which will be reconciled between the parties and the new financier is willing to offset the 1<sup>st</sup> Defendant's loan, so the scheduled auction is premature.

In the Notice Motion pursuant to **Order 40 Rule 1 (a), Rule 2, Rule 10, and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A and 63(1) (e) of the Civil Procedure Act** and all other enabling provisions of the law, the Plaintiff/Applicant sought orders;

- a) That pending the inter-parties hearing of this application the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents are by an order of this court ordered to **forthwith stop an auction scheduled for 19<sup>th</sup> July 2019** with regard to the Plaintiffs parcels of land known as Kabete/Karura/3695 and Kabete/Karura 3696 Fortune House School off Gitaru Road Karura and the said auction will not be conducted during the pendency of this litigation and/or until further orders of the Court.
- b) That this order be served upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents for compliance.
- c) That the Court issues an injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents by themselves, their servants and/or agents, employees or any other person whomsoever from auctioning, repossessing, retaking, proclaiming, towing away any asset of the Plaintiff, storing, advertising, selling by private treaty or by public auction or otherwise, from transferring, disposing, charging,

mortgaging, handling over, gifting or in any manner whatsoever from dealing and/or having any dealings with the Plaintiffs parcels of land known as Kabete/Karura/3695 and Kabete/Karura/3696 Fortune House School off Gitaru Road Karura pending the hearing and determination of this application and/or this suit and/or further orders of the court.

In the supporting affidavit of Jacqueline Ogada, the Managing Director for the Plaintiff herein, averred that that Plaintiff acquired a loan of Kenya shillings Thirty-Six Million Four Hundred and Twenty Thousand (Ksh 36, 420,000) from the 1<sup>st</sup> Defendant for a period of approximately seven (7) years from 25<sup>th</sup> August 2016 to 1<sup>st</sup> January 2023. Marked as **JO1** is the loan schedule.

The Plaintiff stated that on 15<sup>th</sup> May 2019, the 2<sup>nd</sup> Defendant issued the Plaintiff with a Statutory Notice for sale by public auction scheduled on 19<sup>th</sup> July, 2019 with regard to the Plaintiff premises known as Kabete/Karura/3695 and Kabete/Karura/3696 Fortune House School off Gitaru Road Karura. The Plaintiffs Managing Director engaged the 1<sup>st</sup> Defendant personnel in charge of the loan and committed to paying the running loan account **Marked JO5 (a) (b) (c) and (d)** is a bunch of emails exchanged.

The Plaintiff deposed that the 1<sup>st</sup> Defendant asked the Plaintiff to get another financier and the Plaintiff was agreeable and approached Cooperative Bank -Ridgeways Branch who were willing to buy off the 1<sup>st</sup> Defendants loan, the 1<sup>st</sup> Defendant is yet to provide the final official settlement figure which will be reconciled between the parties and the new financier. So the scheduled auction is premature as the 1<sup>st</sup> Defendant is aware of this position. Marked **JO6 (a) (b) (c) and (d)** and **JO7 (a) (b) and (c)**.

The Plaintiff stated that the statutory Notice was legally wrong, as the loan is ongoing and the Plaintiff's Managing Director was in constant communication with the 1<sup>st</sup> Defendant personnel with regard to the same, the 1<sup>st</sup> Defendant is aware the Plaintiff is working with Cooperative Bank Ridgeways to have the loan offset by the said Bank.

### **REPLYING AFFIDAVIT**

The Application is opposed vide Replying affidavit of Sally Wanja Gitonga; the Country Manager of the 1<sup>st</sup> Defendant/ Respondent herein. She stated that the 1<sup>st</sup> Defendant Company having received the said application considered this application and in acceding to the application, offered the Plaintiff Company a loan facility for the sum of Ksh 29,250,000/- under defined terms and conditions that were set out in the loan agreement entered into on or about 2016. Marked **SWG-1** is a copy of the duly executed loan agreement produced.

The 1<sup>st</sup> Defendant stated that confirming their unequivocal acceptance of the offer made by the 1<sup>st</sup> Defendant Company, and voluntarily assuming the obligations set-out and accruing thereunder, particularly on repayment of the loan facility; the Plaintiff duly executed the Loan agreement and returned the same to the 1<sup>st</sup> Defendant for further action.

That in accordance with the agreement, between the Plaintiff and the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant duly registered a legal charge dated 13<sup>th</sup> August 2016, over the property comprised in LR title number Kabete/Karura/3695 situated in Kiambu County Nairobi for the principal sum of Ksh 12,000,000/- and land title number Kabete/Karura/3696 situated in Kiambu County for the principal sum of Ksh 27,000,000/-. Marked **SWG-3** are copies of the legal charges dated 13<sup>th</sup> August 2016.

The 1<sup>st</sup> Defendant stated that, in compliance with **section 878 as read with section 884(4), of the Companies Act, 2015** the said charges were duly lodged with the Registrar of Companies and a certificate of Registration of a mortgage issued under the Registrar's hand on 13<sup>th</sup> September 2016. Marked as **SWG-4** are copies of the certificate of Certificate of registration of Mortgage dated 13<sup>th</sup> September 2016.

On or about 15<sup>th</sup> January 2018, the Plaintiff approached the 1<sup>st</sup> Defendant for a further loan of Ksh 36,420,000/-. The 1<sup>st</sup> Defendant via a loan agreement dated 15<sup>th</sup> January 2018, advanced the Plaintiff with a loan facility of the said Ksh 36,420,000/- which was to be utilized to settle the existing loan of Ksh 29,420,000/- and finishing construction. Marked **SWG- 5** are copies of the duly executed loan Agreement dated 15<sup>th</sup> January 2018.

It was an express term under clause 6 of the loan Agreement that the facility advanced was repayable in fifty-four (54) equal monthly installments of Ksh 579,294/- and it was a further term under clause 8.1 that the facility shall be secured by the existing charges created land title number Kabete/Karura/3695 situated in Kiambu County Nairobi for the principal sum of Ksh 12,000,000/- and land title number Kabete/Karura/3696 situated in Kiambu County that was for the principal sum of Ksh 27,000,000/- which was now offset.

The 1<sup>st</sup> Defendant further stated that, pursuant to clause 8.2 of the Loan Agreement, the Plaintiff further entered into a royalty agreement with the 1st Defendant wherein the Plaintiff undertook to pay the 1st Defendant a royalty thereon amounting to 0.75% on the higher of actual monthly turnover or projected monthly turnover starting 1st August 2018 until payment in full of the loan or for full term of the loan. Marked **SWG – 6** are copies of the duly executed Royalty Agreement.

The Plaintiff had been servicing and/or made representations as to servicing of the said loan facility, up till when the account ran into arrears and the 1<sup>st</sup> Defendant Company – in accordance with the contractual documents subsisting between the parties, variously engaged the Plaintiff company formally and informally seeking to have the Plaintiff regularize the account. That as at 1<sup>st</sup> July 2019, the Plaintiff has sought indulgence from the 1<sup>st</sup> Defendant not to exercise its statutory power of sale as the Plaintiff had represented to the 1<sup>st</sup> Defendant that it had identified a bank willing to take over the entire loan facility. **Marked SWG-4** are copies of correspondences between the Plaintiff and 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant stated that the Plaintiff's Loan Accounts No. 407636, account No. 70351 and account No. 602083 held with the 1<sup>st</sup> Defendant company were in arrears totaling the sum of Ksh 41,721,423.07 as at 14<sup>th</sup> November 2019 and the same continues to accrue interest in accordance with the contractual agreements between the Plaintiff and the Defendant. Marked **SWG-5** is a copy of the statement of account for the Plaintiff's loan accounts.

### **PLAINTIFF'S SUBMISSIONS**

It was the Plaintiff's submission that the 1<sup>st</sup> Defendant has not treated the Plaintiff fairly, given that the 1<sup>st</sup> Defendant has consistently failed to be clear on the actual amounts they want the Plaintiff to offset. In regard to the 1<sup>st</sup> Defendant submissions they quote Ksh 41,721,423 as arrears as at 14<sup>th</sup> November 2019 on paragraph 2.6, and state the amount continues to accrue interest. The submissions are dated 24<sup>th</sup> February 2020, this is a clear indication that the 1<sup>st</sup> Defendant is not genuine and is in the bid to punish the Plaintiff through accruing unexplainable interests. While submitting their case, the 1<sup>st</sup> Defendants did not consider the deposits made by the Plaintiff as part payments of the loan in issue.

The Plaintiff submitted that the 1<sup>st</sup> Defendant is cunning and in bid to exploit the Plaintiff by earning colossal interest from the loan over time and that is why they have failed to state the actual balance for take over clearly. It has taken the 1<sup>st</sup> Defendant over eight months (8) to issue the loan statement which has not indicated the final amounts they wish the Plaintiff to settle. Which is the main issue that would pave way for the suit herein to be resolved.

It was the Plaintiff's submission that by now the issue herein would have been resolved if the 1<sup>st</sup> Defendant was acting in good faith and was clear on the actual amount the Plaintiff was to settle because the bank was indeed ready for a takeover. The Plaintiff has come to court with clean hands having admitted the loan that was advanced to it by the 1<sup>st</sup> Defendant and having paid substantially despite the frustrations by the Defendant.

The Plaintiff submitted that unless an injunction is issued by this Court restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents in any manner whatsoever from dealing and/or having any dealings with the Plaintiffs parcels of land Known as Kabete/Karura/3695 and Kabete/Karura/3696 Fortune House School off Gitaru Road Karura pending the hearing and determination of this suit and/or until further orders of the court. The 1<sup>st</sup> Defendant is determined to frustrate the Plaintiff so as to have an opportunity to auction the Plaintiff's assets. The Plaintiff has indeed proved it has *prima facie* case with a high probability of success given the 1<sup>st</sup> Defendant has blatantly failed to come up with, clear on the actual amounts owed to them by the Plaintiff for the Plaintiff to find a local bank which would take over the loan in issue and settle the issue herein which issue calls for explanation or rebuttal from the 1<sup>st</sup> Defendants.

On the issue whether the Plaintiff will suffer irreparable loss if the injunction is not granted, the Plaintiff submitted that it risks extreme exposure and loss of the payments it has made since the loan started running to the extent of above Ksh 11,000,000/- and may lose the school too, which was the basis of acquiring the loan, despite the fact that when the 1<sup>st</sup> Defendant came in, the plaintiff was still running the school for several years prior, hence the loss thereof would thus not be quantifiable, as the loss would run even to a period where the Plaintiff had no relation with the 1<sup>st</sup> Defendant.

The Plaintiff is paying and is willing to pay and has shown good will by the fact that despite the case being in court the Plaintiff has been making deposits towards the loan. Given the hard economic times that the country has experienced lately the Plaintiff has really shown in paying the loan the extent of above Ksh 11,000,000/-. The Plaintiff has gone ahead to negotiate loan takeover by its local financier but the same has been frustrated by the 1<sup>st</sup> Defendant failure to issue a conclusive loan statement that would allow the bank to know what is at hand.

### **1<sup>ST</sup> DEFENDANT/RESPONDENT 'S SUBMISSIONS**

It was the 1<sup>st</sup> Defendant's submission that the relief of injunction as sought, is enshrined in **Order 40 Rule 2(2) of the Civil Procedure Rules, 2010**. The grant of restrictive injunctive reliefs thereof, is preceded by an application of the well settled principles and/or the threshold set-out in ***Giella vs Cassman Brown [1978] EA 358***, and expanded by Hon. Prof. Ojwang J. B. Ag J. (as he then was) in ***Suleiman vs Amboseli Resort Limited [2004]2 KLR 589*** which expanded standards to enjoin the Court to additionally consider the lower risk of injustice in the instance of considering grant of injunctive reliefs. The Court stated;

***“...the argument that the law governing the grant of injunctive relief as cast in stone is not correct, for the law has always kept growing to greater levels of refinement as it expounds, to cover new situations not exactly, foreseen before, traditionally on the basis of the well accepted principles the court has had to consider the following questions before granting injunctive relief. (i) is there a prima facie case, with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests it is worth adopting a further albeit and more intrinsic test which is now in the nature of a general principle of the court; in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice....”***

The 1<sup>st</sup> Defendant submitted that the Plaintiff admitted that it entered into loan Agreement with 1<sup>st</sup> Defendant and consequently the 1<sup>st</sup> Defendant advanced loan facilities in the total sum of Ksh 36,420,000/- which sums were secured by registration of a charge over Land Title number Kabete/Karura/3695 and Title number Kabete/Karura/3696 to secure the sums advanced.

The 1<sup>st</sup> Defendant submitted that the Plaintiff has not refuted the amounts due and owing as indicated in the demand notices and therefore unequivocally admitted that it breached the express terms of the loan Agreements and the Charge instruments by failing to remit the installment payments as and when they fell due.

Therefore, due to the blatant breach of the terms of the loan agreements and the charge instruments by the Plaintiff, it is the unequivocal contractual and statutory right of the 1<sup>st</sup> Defendant to exercise its crystalized statutory power of sale over the said charged properties, in an attempt to recover the amounts due and owing from the Plaintiff as per the terms of the Loan Agreements and charge instruments.

The 1<sup>st</sup> Defendant submitted that the deceitful grounds brought forward by the Plaintiff cannot be a ground to grant injunctive reliefs. The 1<sup>st</sup> Defendant relied on the case of *Esther Njeri Komu vs Consolidated Bank Ltd & Another [2013] eKLR*, the Court quoted with authority the case of *Joseph Okoth Waudi vs National Bank of Kenya, Civil Appl. No. 77 of 2004*, where the Court of Appeal quoted from *Halsbury's Laws of England Vol. 32, 4<sup>th</sup> Edition page 752*, that;

***“It is trite law that court will not restrain a mortgagee from exercising its 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. It will be restrained however, if the mortgagor pays the amount claimed in court, that is the amount which the mortgagor claims to be due to it.”***

The 1<sup>st</sup> Defendant submits that the Plaintiff will not suffer irreparable injury which cannot otherwise be compensated by an award of damages. The value of the securities can be easily ascertained and compensated by way of damages. In *Al-Jalal Enterprises Limited vs Gulf African Bank Limited [2014] eKLR*, Justice E. K.O. Ogola while holding that the Plaintiff could be compensated by an award of damages stated that;

***“In the case of Bii vs Kenya Commercial Bank Ltd [2001]KLR 458, Justice Ringera on dealing with an injunction application which he dismissed held as follows:***

***a. Once property is offered as security it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages. ....once a property is given to a bank as security, the same becomes a commodity that can be sold.”***

It was 1<sup>st</sup> Defendant's submission that it is being restrained from exercising its accrued right to sell the charged properties without any colour of right and the amounts due and owing continue to accrue. The same will outstrip the values of the charged properties and the value of the properties would not be an adequate to compensate the 1<sup>st</sup> Defendant.

## **DETERMINATION**

The Court considered the evidence on record through pleadings and submissions by parties through Counsel and the issue(s) for determination are;

- a) Is the Plaintiff entitled to grant of Interlocutory injunction pending hearing and determination of the suit?
- b) Did the Defendants comply with legal requirements in granting loan/overdraft facilities to the Plaintiff and in exercise of statutory power of sale?

## **INTERLOCUTORY INJUNCTION**

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

- 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 outlined;

***“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 an arguable case.”***

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

***“The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the Trial....”***

These authorities prescribe that an Applicant has the burden of proof to establish a *prima facie* case, irreparable damage that cannot be compensated by damages and if not the case for the Court consider the grant of injunction on a balance of probabilities.

Has the Plaintiff proved a *prima facie* case?

### **LEGAL CHARGES/LOAN OVERDRAFT FACILITIES**

In 2016, the Plaintiff Company applied for loan facility from the 1<sup>st</sup> Defendant for the sum of Ksh 29,250,000/- which was granted. Marked **SWG-1** is a copy of the duly executed loan agreement produced.

In accordance with the Loan agreement, between the Plaintiff and the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant duly registered a legal charge dated 13<sup>th</sup> August 2016, over suit property comprised **LR Title number Kabete/Karura/3695** situated in Kiambu County Nairobi for the principal sum of Ksh 12,000,000/- and **LR title number Kabete/Karura/3696** situated in Kiambu County for the principal sum of Ksh 27,000,000/-. Marked **SWG-3** are copies of the Legal charges dated 13<sup>th</sup> August 2016.

The 1<sup>st</sup> Defendant lodged with the Registrar of Companies the Legal Charge and Certificate of Registration of a mortgage issued on 13<sup>th</sup> September 2016. Marked as **SWG-4** are copies of the certificate of Certificate of registration of Mortgage dated 13<sup>th</sup> September 2016.

On 15<sup>th</sup> January 2018, the Plaintiff approached the 1<sup>st</sup> Defendant for a further loan of Ksh 36,420,000/-. The 1<sup>st</sup> Defendant via a loan agreement dated 15<sup>th</sup> January 2018, advanced the Plaintiff with a loan facility of the said Ksh 36,420,000/- which was to be utilized to settle the existing loan of Ksh 29,420,000/- and finishing construction. Marked **SWG- 5** are copies of the duly executed loan Agreement dated 15<sup>th</sup> January 2018.

The facility advanced was repayable in fifty-four (54) equal monthly installments of Ksh 579,294/- and it was secured by the existing charges created land **title number Kabete/Karura/3695** situated in Kiambu County Nairobi for the principal sum of Ksh 12,000,000/- and land **title number Kabete/Karura/3696** situated in Kiambu County that was for the principal sum of Ksh 27,000,000/- which was now offset.

The 1<sup>st</sup> Defendant clause 8.2 of the Loan Agreement, the Plaintiff further entered into a royalty agreement with the 1<sup>st</sup> Defendant wherein the Plaintiff undertook to pay the 1<sup>st</sup> Defendant a royalty thereon amounting to 0.75% on the higher of actual monthly turnover or projected monthly turnover starting 1<sup>st</sup> August 2018 until payment in full of the loan or for full term of the loan. Marked **SWG – 6** are copies of the duly executed Royalty Agreement.

The Legal Charges are duly executed by parties and hence each party is bound by the terms of these charges and ought to carry out obligations as agreed in the legal charges and enforce each party's legal rights under the same charges. The Plaintiff/Applicant did not challenge validity of these charges.

### **PAYMENTS/SERVICING FACILITIES**

The plaintiff/Applicant deposed that the Loan of Ksh 36,420,000 was secured for a period of approximately 7 years from 25<sup>th</sup> August 2016 to 1<sup>st</sup> January 2023.

The Loan ran for only 21/2 years and within that period the Plaintiff/Applicant paid Ksh 10, 695,776.30/- The Plaintiff/Applicant operates a school and the proposed auction was slated for 1<sup>st</sup> July 2019 as the school was in the learning process, and the auction would affect over 100 pupils in the School.

The Court gleaned through the statements of Account annexed to the Replying Affidavit where the Statement Period reads from 2008-2019 but begins from 2016-2019 and there is reflected, are regular monthly instalment payments as credits ranging from Ksh 130,000/- - 500,000/- each month consistently until beginning of 2019 when the repayments were minimal amounts and irregular. The Plaintiff/Applicant complied with the obligation to repay the loan by monthly instalments and did so for about 2 years and fell into arrears thereafter. A schedule of payments from 2016 -2019 by the Plaintiff /Applicant is annexed to Applicant's Certificate of Urgency as Annexure **JO- 2** and payslips annexed to the application of Ksh 10,695,776.30/- and also Statement of Account.

The 1<sup>st</sup> Defendant admitted the same and deposed that, the Plaintiff had been servicing and/or made representations as to servicing of the said loan facility, up till when the account ran into arrears and the 1<sup>st</sup> Defendant Company. The 1<sup>st</sup> Defendant variously engaged the Plaintiff company formally and informally seeking to have the Plaintiff regularize the account. That as at 1<sup>st</sup> July 2019, the Plaintiff has sought indulgence from the 1<sup>st</sup> Defendant not to exercise its statutory power of sale as the Plaintiff had represented to the 1<sup>st</sup> Defendant that it had identified a bank willing to take over the entire loan facility. **Marked SWG-4** are copies of correspondences between the Plaintiff and 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant stated that the Plaintiff's Loan Accounts No. 407636, account No. 70351 and account No. 602083 held with the 1<sup>st</sup> Defendant company were in arrears totaling the sum of Ksh 41,721,423.07 as at 14<sup>th</sup> November 2019 and the same continues to accrue interest in accordance with the contractual agreements between the Plaintiff and the Defendant. Marked **SWG-5** is a copy of the statement of account for the Plaintiff's loan accounts.

### **DEFAULT/DEMAND/NOTICES**

The 1<sup>st</sup> Defendant issued the Plaintiff/Applicant with the following notices in compliance with the provisions of the Land Act 2012,

a) The 1<sup>st</sup> Defendant through their advocates, issued a 90 –day notice dated 27<sup>th</sup> August 2018 as per **Section 90 (1) & (2) Land Act**, to the Plaintiff, notifying it that the outstanding debt arose from 3 Accounts

i) Loan Account 407636- Ksh 37,613,911.74

ii) Loan Account 602083- Ksh 196,249.60

iii) Loan Account 703515- Ksh 9,950.281.27

The total being Ksh 47,760,442.61/-outstanding and to be repaid in 3 months (90 Days)

b) The 1<sup>st</sup> Defendant through their advocates by **Section 96 of the Land Act, 2012**, issued a further 40 –days’ notice dated 25th March 2019 to the Plaintiff/ Applicant for Ksh 48,097,653/- Both notices are marked **SWG-6**

c) The 1<sup>st</sup> Defendant issued instructions to Auctioneers (the 2<sup>nd</sup> Defendant”) in order for it to recover the monies owed as the Auctioneer is joined as a party to these proceedings. The Court was not furnished with the 2<sup>nd</sup> Defendant’s Notice of 45 days as required by **Rule 15 Auctioneers Rules** to the Plaintiff/Applicants to redeem the debt before the date slated for the auction.

The Plaintiff/Applicant has not challenged the issuance of the Statutory Notices and also acknowledges the outstanding debt but, indicates that it had a running Account with the 1<sup>st</sup> Defendant for a Loan Facility to be repaid after 7 years and had only done so for 21/2 years and ran into arrears. The Applicant paid close to Ksh 11,000,000/- which the 1<sup>st</sup> Defendant does not deny.

The Plaintiff/Applicant also intimated to Court that in light of the matter, it had approached Cooperative Bank to take over the loan and the bank had agreed but the 1<sup>st</sup> Defendant failed to provide certified Statements of Accounts. The Plaintiff’s assertion is borne out by correspondence annexed to its application marked as **JO-6**.

### **VALUATION**

The 1st Defendant failed to provide a recent/current Valuation of the suit properties in compliance with **Section 97 of the Land Act, Kabete/Karura/3695 & Kabete/Karura/3696** the charged suit properties to secure the loan facility. The Valuation should provide

Market Value, Value of Developments on the land and the land itself, the Mortgage/Charge Value and Forced Sale Value

**J. Gikonyo in *Olkasasi Limited -vs- Equity Bank Ltd [2015]eKLR***, cited J. Kasango in ***Zum Zum Investment Limited and Palmy Company Limited -vs- Consolidated Bank of Kenya Limited [2014] eKLR***, stated the following;

*“The purpose of valuation under section 97(2) of the Land Act is twofold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the Chargor to property ...the second one is to prevent unscrupulous chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.”*

### **CONCLUSION;**

This Court considered the evidence on record and found that it is true the Plaintiff/Applicant contracted and entered into an agreement(s)Contract duly executed by parties. Each party was to carry out its obligations under the contracts; Loan Agreements and Legal Charges registered with the Company Registry.

The Plaintiff confirms outstanding debt but admits and proves consistent remittances of monthly payments from 2016 – 2019 when the payment reduced.

The Court noted that from 2016 the Plaintiff/Applicant had a Loan Facility of Ksh 27,000,000/- and in 2018 took a loan of Ksh 36,420,000/- and offset the earlier loan and services the latter loan.

The transition from the earlier loan to the new loan is not explained and is not clear to this Court. Was it payment of the principal sum and or with the accruing interest that was deducted from the new loan to offset the old loan? What then was the balance after the 1<sup>st</sup> Defendant deducted the 1<sup>st</sup> Loan and interest remained or was remitted to the Plaintiff/Applicant?

This is important to inform the escalating figures inspite of periodic payments by the Plaintiff/Applicant that amounts to Ksh 11,000,000/-

Secondly, the Statements of Account depict various debits every entry followed by entry of VAT.Is VAT paid one off on the lumpsum or on every entry? VAT is paid on goods or services rendered. If administrative Fee is also debited and then VAT and interest at 13%, then 14% then 16%. What is the interest contracted in the Loan Agreements?

Thirdly, there the Royalty Agreement of 15<sup>th</sup> January 2018 between the Plaintiff/Applicant & The 1<sup>st</sup> Defendant which reads;

At the request of the Borrower, the 1<sup>st</sup> Defendant wishes to lend the Borrower who wishes to borrow the amount set out in Clause 2

ROYALTY-In further consideration to the 1<sup>st</sup> Defendant agreeing to advance facility to the Borrower, the Borrower shall pay to the Lender Royalty amounting to 0.75% on the higher of actual monthly turnover or of the projected Monthly turnover starting 1<sup>st</sup> August 2018 until loan amount is paid in full at quarterly (January, May & September) each year Ksh 650,000/- (excluding) VAT. This was not sought during the 1<sup>st</sup> loan of 2016 why was/is a requirement now? Is it legally required or negotiated before agreement or is it part of the standard form contracts?

This Court finds this position disturbing, that the Borrower has to pay principal amount, interest, administrative /Ledger Fees, VAT, & now Royalty. Is it really conscionable to sell one's property while they have tried their best to offset the loan but due to increased charges cannot surmount the debt? I think not.

In the case of ***Pius Kimaiyo Langat Cooperative Bank of Kenya Limited [2017] eKLR*** the C.A. referred to its earlier decision, ***Margaret Njeri Muiruri vs Bank of Baroda (Ky) Ltd [2014] eKLR***; where the issue was that interest was increased from 14% to 45%. The Court of Appeal had the following to say with regard to exercise of the Bank's sole discretion

***"We find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the Appellant in this case as to what the rate of interest would be..."***

***[Further]***

***Courts have never been shy to interfere with or refuse to enforce contracts that are unconscionable, unfair, oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favorable to one party and would preclude meaningful choice for the other party....."***

This Court associates itself fully with the sentiments in the above-cited case. The Plaintiff/Applicant has demonstrated effort to defray the loan facility and it is also clear that the Plaintiff/Applicant is assailed by various other payments heaped onto the loan facility that it is impossible to diligently defray the loan.

The Court finds that the Plaintiff/Applicant has an outstanding loan amount, it has demonstrated a prima facie case with triable issues to be determined before the 1<sup>st</sup> Defendant may exercise its statutory power of sale over the charged suit properties.

Secondly, it is deposed that the 2 suit properties house a school with attendant 100 school going children. To auction the suit properties in order to recoup the loan would cause untold suffering to the children by disruption of learning and/or replacements elsewhere. The children are innocent 3<sup>rd</sup> Parties who have paid fees for education, the same would reasonably be a last resort and during school holidays so as to alert the children and staff in good time before school term resumes. The inconvenience, hardship and loss to 3<sup>rd</sup> Parties would be irreparable and not compensatable by damages.

## **DISPOSTION**

- 1. The Notice of Motion of 16<sup>th</sup> July 2019 is granted in terms of Paragraphs 4 & 5 of the Motion; an interim injunction is granted for 120 days for the following;**
- 2. The 1<sup>st</sup> Defendant and Plaintiff/Applicant and/or advocates or representatives to meet and reconcile Accounts on actual amount owing with regard to legal charges only. Royalty will be claimed upon proof of its legal basis by the parties.**
- 3. The Plaintiff/Applicant may pursue transfer of Loan Facility to Cooperative Bank upon the 1<sup>st</sup> Defendant provision of Certified Loan Statements of Accounts within the same period.**
- 4. The Plaintiff/Applicant shall continue to pay Monthly Instalment payments to defray the principal loan amount.**
- 5. The Statutory power of Sale if effected thereafter shall be upon issuance of Auctioneer's Notice and recent/current Valuation of the suit property (properties)**
- 6. Each Party shall bear its own costs.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 31<sup>ST</sup> MAY 2021.**

**(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**CM ADVOCATES FOR THE 1<sup>ST</sup> DEFENDANT**

**NYAMBURA & MUNYUA & CO. ADVOCATES FOR THE PLAINTIFF**

**COURT ASSISTANT - TUPET**