



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. E 070 OF 2020

RIENY DISTRIBUTORS OF KENYA LIMITED.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD.....1ST DEFENDANT

REGENT AUCTIONEERS.....2ND DEFENDANT

RULING

1. By Certificate of Urgency Application dated 4th March 2020, the Applicant/Plaintiff urged the Court to be heard on priority basis for reasons;

a) That at the behest of the 1st Defendant, and without just cause, the 2nd Defendant had vide a newspaper advertisement of 2nd March 2020 placed the property known as **L.R. No. Thika/Municipality/ Block 12/286 MKU area, Thika Town, Kiambu County** measuring 1.737 Hectares or 4.2921 Acres (“the suit property”) which belongs to a Third Party, Frank Logistics Limited, up for sale by public Auction, which disposal was set to take place on 19th March 2020 at 11.00am within the 2nd Defendant’s auction mart.

b) That there is a clear and distinct discrepancy of more than Ksh 137,500,000/- between the inaccurate and grossly overstated amounts allegedly sought by the Defendants (Ksh 190,986,059.37), the amount advertised by the Defendants as due and owing (Ksh 56,583,585.46), and the amount which the Plaintiff considers as the true debt (Ksh 53,386,901.89).

c) That if the proposed auction proceeds on the basis of defective notices and an uncertain balance, the 1st Defendant will be unable to comply with their mandatory legal obligation and duty of care which it owes to the Plaintiff to obtain the best price reasonably obtained at the time of sale; the property in question, used to guarantee advances and facilities from the 1st Defendant, is likely to be sold at a throwaway price.

d) That the Defendants are intending to dispose of the suit property without proper notice, without providing a proper account of the actual sums in arrears and without reconciling their books; the purported sale is illegal, null and void *ab initio*.

e) That if not restrained by a suitable relief from this Court, the Defendants will not only disenfranchise the Plaintiff, but also gain an unconscionable benefit and unjustly enrich themselves.

f) That if the proposed auction is allowed to proceed, the Plaintiff will suffer irreparable loss and damage not repairable in damages as the suit property is not only registered in the name of a third party (who is now likely to seek indemnity from the Plaintiff), but it has also been leveraged to secure bid bonds and guarantees for ongoing Government tenders as well the financing of working capital for several going concerns including the Plaintiff itself.

2. In the Notice of motion brought under **section 1, 1A, 1B, 3, 3A, 63(c) & (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 20, Order 40, Rules 1, 2, 4 & 8 and Order 51, Rule 1 of the Civil Procedure Rules of 2010, Section 103 of the Land Act, 2012, Section 44A of the Banking Act Chapter 488 Laws of Kenya**; the Plaintiff/Applicant sought orders;

a) That the Defendants whether by themselves, agents, servants, employees or otherwise howsoever be restrained from advertising, offering for sale, auctioning either by private treaty or public auction, transferring, alienating, leasing, offering as security, entering upon, taking possession of or otherwise dealing with property known as **L.R. No. Thika/Municipality/Block 12/286** pending the

inter-parties hearing of this Application and/or hearing and determination of this suit.

- b) That the 1st Defendant be directed to render and deliver to the Plaintiff true and correct accounts and the entire statements of accounts of the Plaintiff's accounts operated by them in respect of the loan account.
- c) That the costs of this application be provided for.
- d) That the Court be pleased to issue such other or further order and directions as may appear to it just and convenient.

3. In the supporting affidavit sworn by Francis Nyaga Njeru, a Director of the Plaintiff/Applicant Company. He averred that on 21st December 2017 the 1st Defendant offered the Plaintiff several bank facilities including letters of credit and overdrafts which were to be secured variously by fixed properties and company member guarantees amongst other collateral. Marked "FNN 1" is a copy of the facility letter.

4. The Applicant stated that following the said facilities, a third party guaranteed the Plaintiff to the tune of approximately Ksh 75,000,000 or thereabouts and executed deed of guarantee where a charge was registered on the property known as L.R. No. Thika/Municipality/Block 12/286 ("the suit property").

5. The Applicant averred that the Plaintiff has to the best of its ability been complying with its obligation to repay the loan facility as and when required and said third party has not interfered with any of the Guarantees issued by her to the 1st Defendant as security for the said facilities. However, and despite the Plaintiff's continued repayment of the installments for the loan, the 1st Defendant has failed to render true and accurate statements of the loan account of the loan account on a regular basis.

6. The Applicant stated that vide a newspaper advertisement in the Daily Nation Edition of Monday, 2nd March 2020 at page 21, without any justification whatsoever, the Defendants advertised the suit property for sale by public auction on 19th March 2020. Marked "FNN 2" is a copy of the said advertisement.

7. The Applicant stated that the Defendants have completely failed to furnish the Plaintiff with Proper, adequate or sufficient notice of rectification and/or default Notices as is required under **sections 90 through 97 of the Land Act, 2012**, which action is illegal. Further that, the 1st Defendant Bank did not issue the mandatory 90- day statutory notice required by law so as to enable the Plaintiff make good the purported debt, which debt is in any event denied.

8. The Applicant averred that on 10th January 2020 the 2nd Defendant on instructions from the 1st Defendant issued a 45-day redemption notice requiring the Plaintiff to pay the Defendants Ksh 190,986,059.37. Marked "FNN 3" is a true copy of the offending notice in that regard.

9. In response to the said notice, the Plaintiff wrote to the 1st Defendant clarifying an inaccuracy and over-statement by some Ksh 137,599,157.48 in the requested amount, clarifying that the Plaintiff records reflected a balance of Ksh 53,386,901.89 as per bank statements provided to the Plaintiff by the 1st Defendant and finally requesting for an explanation as to the exaggerated variance. Marked "FNN 4" is a true copy of the Plaintiff correspondence dated 11th January 2020 in that regard.

10. The Applicant stated that subsequently and in an inexplicable turn of events, the 2nd Defendant, again on instructions from its principal, the 1st Defendant, issued a 2nd 45-day redemption notice on 13th January 2020, this time demanding that the Plaintiff pay the Defendants Ksh 56,583,585.46. Marked "FNN 5" is a true copy of this 2nd notice in that regard.

11. That in pursuit of their malicious campaign to harass, intimidate and frustrate the Plaintiff, the Defendants have entered upon the said third party's property and thereon placed a bold advertisement of their intention to auction off the same. Marked "FNN 6" is a true copy of the offensive notice in that regard.

REPLYING AFFIDAVIT

12. The Application is opposed vide an affidavit dated 11th March 2020, sworn by Billy Ubundi, a Debt Recovery Officer at the 1st Defendant herein, on the following grounds;

- a) It is not in dispute that the 1st Respondent advanced various credit facilities to the Plaintiff and that the Plaintiff has defaulted on payment of the facilities.
- b) The facilities that were advanced at the Plaintiff's request were secured by a Legal Charge over L. R. No. Thika/Municipality/Block 12/286.
- c) The 1st Respondent has a legal right to realize the security and has issued all the requisite notices.
- d) The Plaintiff is underserving of the equitable remedy which it now seeks in the form of an interim injunction because;
 - i) Despite being issued with the required notices, the Plaintiff has done nothing to redeem the property and has waited until

the last minute to come to Court to impede the 1st Respondent's legal rights. The inordinate delay is unexplained and inexcusable.

ii) The Plaintiff has come to court with unclean hands since it has not disclosed the nature of the facilities. It indicates that the loan has not matured knowing well that the nature of the facility was for local Purchase Order ("**LPO**") financing payable strictly on demand for a period not exceeding 3 months. The Plaintiff has been accommodated for more than a year and has failed to demonstrate any commitment to settle the outstanding amounts.

e) The Plaintiff has not established a *prima-facie* case since it has admitted its indebtedness to the 1st Respondent. It is indeed the Bank that continues to suffer loss because of non-repayment of the facilities. The realization of the property is only to service the facilities, any additional amounts realized belong to the Plaintiff.

13. The 1st Defendant stated that the facilities to the Plaintiff were disbursed to different accounts, with varying amounts and at different times. The 1st Defendant disbursed the loan facilities to the following accounts;

10011905000590, 10011905000508, 10011905000513, 10011905000517, 10011905000521, 10011905000523, 10011905000524, 10011905000531, 10011905000533, 10011905000534, 10011905000541, 10011905000543, 10011905000551, 10011905000552, 10011905000583, 10011905000588, 10011905000590, 10011905000487, 10011905000506 and 10011202002000.

14. The 1st Defendant stated that the credit advanced to the Plaintiff was primarily for LPO financing and are described as 'overdraft', solid loop line', a letter of credit', and a guarantee line'. The monies advanced are paid strictly on demand with interest in line with clause 6 in the letter of offer because these are short term facilities payable within a period not exceeding 3 months.

15. The 1st Defendant averred that the Plaintiff has not serviced the loan as required of it. In fact, some facilities have not been serviced at all and the facilities have accrued and continue to accrue interest. The statement of accounts printed as of 9th March 2020 confirms the poor record of the Plaintiff in repaying the loan owed to the 1st Defendant. Marked as **BU-2 (a) –(u)** are a statement of accounts showing the record of the Plaintiff.

16. The 1st Defendant confirms that it had indulged the Plaintiff to enable it to restructure its affairs and continue paying up the loan. Despite the indulgence, the Plaintiff remained indolent and did not attempt to repay the loan as a show of good faith. Marked as **BU-3** is correspondence showing accommodation by the Bank.

17. In compliance with the provisions of the Land Act, the 1st Defendant issued a 90 –day notice dated 20th March 2019, to the Plaintiff, notifying it that among other things; it is in default of the loan, the loan must be repaid and that by the end of three months it should have made good the default together with the interests that have accrued. Marked **BU-4** is a copy of the 90 –days' notice to the Plaintiff and the certificate of postage.

18. The 1st Defendant stated that more than three months later, the Plaintiff continued to ignore the repayment of the loan whilst aware that the 1st Defendant had commenced exercising its power of sale. Owing to the Plaintiff's unresponsiveness and failure to remedy the default, the Defendant issued a further 40 –days' notice dated 25th June 2019, in accordance with **Section 96 of the Land Act, 2012**. Marked as **BU-5** is a copy of the 40 days' notice and Certificate of postage.

19. The 1st Defendant further went ahead to issue instructions to Auctioneers (the 2nd Defendant") in order for it to recover the monies owed. The 2nd Defendant issued a 45 days Redemption notice dated 10th January 2020, to the Plaintiff as required by the law. Marked **BU-6** is a copy of the 1st 45 days Redemption notice. Following receipt of the Auctioneers Notice, the Plaintiff wrote to the 1st Defendant complaining of the variance in the demanded amounts which was a result of typographical error on the part of Auctioneers.

20. The 1st Defendant through the 2nd Defendant followed up immediately by revoking the 1st Redemption Notice and issuing a Redemption Notice with the correct amount of Ksh 56,583,585.46 balance inclusive of interest. A copy of the 2nd 45 days Redemption Notice is marked as **BU-7**. It is therefore not in dispute that the Plaintiff owes the 1st Defendant and there is no issue as to the amounts owed.

21. In addition to complying with **Section 97 of the Land Act**, the 1st Defendant procured a Valuation Report of the suit property. The Valuation Report was prepared in early March following the Advertisement of the property for Auction. Marked as **BU-9** is a copy of the Valuation report.

PLAINTIFF'S SUBMISSIONS

ISSUES

Whether the Plaintiff is in default to a facility granted by the 1st Defendant

22. The Plaintiff submitted that it did not default in paying the facility that was advanced by the 1st Defendant as it was discharging all liabilities to the Bank when on 10th January 2020 the "45 days Redemption Notice" was issued to it by the 2nd Defendant requiring the Plaintiff to pay the 1st Defendant Ksh 190,986,059.37.

23. The Plaintiff in its submission contended that the amount alleged to be due and owing was coupled with unwarranted interest. The interest exceeded the principal ten times over. The Defendants were levying all illegal and exorbitant interest at the rate of Ksh 10 million each month.

24. In response to the said Notice, the Plaintiff deponed in the affidavit sworn on 4th March 2020, that they wrote to the 1st Defendant clarifying an inaccuracy and over statement by some Ksh 137,599,157.48 in the requested amount, clarifying that the Plaintiffs' records reflected a balance of Ksh 53,386,900.89 as per bank statements provided to the Plaintiff by the 1st Defendant itself and finally requesting for an explanation as to the exaggerated variance.

25. The Plaintiff submitted that in turn of events, the 2nd Defendant again on instructions from the 1st Defendant issued a 2nd "45 days redemption Notice on 13th January 2020" time demanding that the Plaintiffs pay the Defendants Ksh 56,583,585.46.

26. The Plaintiff submits that the even if the Plaintiff and the Guarantor had failed to make good the alleged debt, which non-compliance is denied, the 1st Defendant's statutory power of sale had not accrued because of the following reasons;

- a) The Plaintiff is not in default on the bank facilities as its obligations are continuing and the Plaintiff has been servicing the same.
- b) The Defendants have issued two very contradicting "45 days redemption Notice with one alleging loan arrears in the staggering amount of Ksh 190,986,059.37 and the subsequent one alleging loan arrears in the amount of Ksh 56,583,585.46, and as such, the principal debt as well as the Guarantor's liability cannot be ascertained.
- c) The Defendants failed to furnish accurate accounts and statements of any sums they may be claiming against the Plaintiff at any given time.
- d) The Defendants have not demonstrated how they arrived at the impugned sum of Ksh 190,986,059.37.
- e) The Defendants have completely failed to furnish the Plaintiffs with proper, adequate or sufficient notice of rectification and/or default as is required under **section 90 to 97 of the Land Act 2012**, which action is illegal.
- f) The 1st Defendant Bank has not issued the mandatory 90-day statutory notice required by law so as to enable the 1st Plaintiff make good the purported debt; which debt is in any event denied.

Whether the advertisement of the suit property L.R. NO. Thika/Municipality/Block 12/286 was lawful

27. The Plaintiff submitted that the said advertisement was illegal, immoral, unconscionable, unfair and totally punitive as against the Plaintiff.

The Plaintiff submitted that the advertisement was illegal because of the following reasons;

- a) The law on exercising statutory power of sale was not complied with. The Plaintiff was never served with the three months' notice as by law hence the right of sale has not accrued.
- b) The 2nd Defendant did not serve the Plaintiff with a valid Redemption Notice and as a result the Plaintiff was not given an opportunity and/or notice to redeem the alleged loan if any.
- c) No forced sale valuation of the suit property has been conducted by the 1st Defendant as is required by law. In the circumstances the conduct of the Defendants is seriously oppressive and is not in accordance with recognized principles of law and of commercial practice of law and of commercial practice and the same ought to be restrained.

28. It was the Plaintiffs submission that the principles on which interlocutory injunctions are granted are now settled. The Court of Appeal laid down the test to be applied in the seminal case of ***Giella vs Cassman Brown (1973) EA 358***. At page 360 the Court of Appeal stated;

"The conditions for the grant of an interlocutory injunction are now, I think, well stated in East Africa. First, an applicant must show a prima facie 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."

29. The Plaintiff submitted that had notice of whatever nature furnished by the Defendant of its unwarranted decision, the Plaintiff would have been easily able to demonstrate, with the aid of the Defendants own documentation that there were no pending fiduciary obligations on its part with respect to the facility for the suit property.

30. The Plaintiff submitted that for the sake of good order, and to avoid an unjust outcome, it is imperative that the intended sale is halted pending a forensic audit and reconciliation of the 1st Defendant's loan account in respect of the facility issued to the Plaintiff.

1st DEFENDANT /RESPONDENT SUBMISSIONS

31. The 1st Defendant submitted that the condition necessary for grant of an interlocutory injunction were emphasized by the Court of Appeal sitting in Malindi in Civil Appeal No. 4 of 2015 Lucy Wangui Gachara versus Minundi Okemba Lore [2015]eKLR, where it was stated;

“The principles on which the courts will grant an injunction are well known. This court restated those principles in Nguruman Limited vs Jan Bonde Nielsen & 2 Others, C. A. No. 77 of 2012, together with the mode of their applications as follows;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirement 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 rest 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.”

32. In Mombasa Court of Appeal C. A No. 39 of 2002 Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003]eKLR, a prima facie case was thus defined as;

“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... 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 success of the applicant’s case upon trial.”

33. The 1st Defendant submitted that the Plaintiff has not denied owing the it. It is on record that the Plaintiff admitted its indebtedness to the 1st Defendant vide a letter dated 11th January 2020 annexed to the Affidavit of Francis Nyaga Njeru as “FNN4” in support of the application, to the tune of Ksh 53,386,901.89 as at 31st December 2019. This admission negates any possibility of the Plaintiff successfully proving a prima facie case for the grant of injunctive orders as sought in the application.

34. The 1st Defendant submitted that ever since the institution of this suit on 5th March 2020 to date the Plaintiff has not shown any intention to make good its default as at 17th June 2020, the total debt owing is at Sixty Three Million, Five Hundred and Sixty Nine thousand, Two hundred and Forty Seven (Ksh 63,569,247.00) which amounts continue to accrue interest.

35. It was the 1st Defendant submission that if it is restrained from exercising its statutory power of sale against the charged property and the Plaintiff continues to default, there exists a real risk that the outstanding loan amount may outstrip the value of the charged property.

36. It was 1st Defendants submission that even if there existed any dispute and disparity as regards the amounts owing and outstanding, the position of the law does not put the Plaintiff in any better place than it is. This is because the 1st Defendant’s right to exercise its statutory power of sale crystalized upon the Plaintiff’s default as the Court observed in Nairobi HCCC No. 436 of 2013 Amicabre Travel Services Ltd vs Alios Kenya Finance Ltd [2014] eKLR, Stating thus;

“The Plaintiff and the Defendant voluntarily entered into a contract which regulated and continues to regulate their relationship. Restraining the Defendant from exercising its right under the Agreement would be tantamount to the court infringing on the Defendant’s right to repossession of the vehicles when the Plaintiff and Defendant in the payment of the installments as and when the same became due. The Plaintiff cannot fail to meet its financial obligations to the Defendant and still expect to retain the said vehicles. It must either pay the monies as it still has the right of redemption or return the same. It cannot have its cake and eat it too.”

37. The 1st Defendant relied on the Court of Appeal case, Fina Bank Ltd vs Ronak Ltd [2001] 1 EA 54, where the court stated that “...a dispute on accounts was not a basis for a grant of an injunction” as was held in Civil Case 553 of 2004 Isaack Kinyanjui Njoroge vs Savings & Loan (K) Ltd (2005)eKLR.

DETERMINATION

38. After consideration of the pleadings and submissions by parties through respective Counsel, the following issues emerge for determination;

- 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

39. 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.*

40. 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.”

41. 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...”

42. The High Court in *Alwalaa Construction Company Limited -vs- Synergy Industrial Credit Limited & Another [2014] eKLR*, held that an application for interlocutory reliefs must be based on tangible evidence. At page 36 of his ruling, Kamau L J. stated as follows;

“The court requires tangible evidence when considering an application for an interlocutory injunction pending the hearing and determination of the suit. It is therefore incumbent upon an applicant to submit a cogent case during the interlocutory stage to show that it has an arguable case. This is important because, at his juncture, the court would not have had an opportunity to listen to the evidence in support of each party’s case. This is a burden that lies on the applicant.” [emphasis added]

43. The above cited cases outline the law on grant of Interlocutory Injunction. The Plaintiff has the burden to establish a *prima facie* case; an arguable case that discloses infringement of the Plaintiff’s right(s).

44. Secondly, that there would be irreparable damage if the Interlocutory injunction is not granted that the damage could not be compensated by damages. If the Court cannot at the Interlocutory stage determine either of the 2 requirements stated above, then an Interlocutory Injunction order maintaining the *status quo* and preserving the subject matter is granted on a balance of convenience.

Has the Applicant proved a *prima facie* case?

LEGAL CHARGES/LOAN OVERDRAFT FACILITIES

45. The Plaintiff /Applicant as borrower, obtained loan/overdraft facilities amounting to Ksh 24 million from 1st Defendant as contracted and executed by parties in the 1st Legal Charge of 31st October 2017. The 3rd Party, Frank Logistics Limited charged and guaranteed the facilities as Chargor of L. R Thika Municipality Block 12/286. The Legal Charge was registered with the Companies Registry on 24th November 2017.

46. On 26th January 2018, the Plaintiff/Applicant as Borrower contracted and executed a Further Charge with the 1st Defendant for loan/overdraft facilities of Ksh 51million now totaling to Ksh 75 million and charged the same suit property as security and guarantee by the 3rd Party.

47. The 1st Defendant vide Replying Affidavit filed on 12th March 2020 that the Plaintiff /Applicant defaulted on payment of facilities. The 1st Defendant averred that despite being issued with the required notices, the Plaintiff has done nothing to redeem the property and has waited until the last minute to come to Court to impede the 1st Respondent’s legal rights. The inordinate delay is unexplained and inexcusable.

48. The 1st Defendant deposed that the Plaintiff came to court with unclean hands since it did not disclose the nature of the facilities. It indicates that the loan had not matured knowing well that the nature of the facility was for Local Purchase Order (“LPO”) financing payable strictly on demand for a period not exceeding 3 months. The Plaintiff was accommodated for more than a year and failed to demonstrate any commitment to settle the outstanding amounts.

49. 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

50. By Application of 4th March 2020 and particularly the Applicant’s Supporting Affidavit, the Plaintiff/Applicant admits the

loan/overdrafts advanced by 1st Defendant.

The Plaintiff/Applicant deposed that it complied with the obligation to repay the loan facility and instalments but the 1st Defendant failed to render true and accurate statements of Accounts of the loan on a regular basis. The 1st Defendant claims Ksh 56,583,585.46 as outstanding debt but the Plaintiff disputes the figure which ought to be at Ksh 53,386,900.89/- as outstanding debt.

51. The 1st Defendant averred by Replying Affidavit of 12th March 2020 & Further Affidavit of 23rd June 2020, that the Plaintiff did not service the loan as required of it. In fact, some facilities were not serviced at all and the facilities accrued and continue to accrue interest.

52. The statement of accounts printed as of 9th March 2020 confirms the poor record of the Plaintiff in repaying the loan owed to the 1st Defendant. Marked as **BU-2 (a) –(u)** are a statement of accounts showing the record of the Plaintiff.

53. The 1st Defendant confirm that it had indulged the Plaintiff to enable it to restructure its affairs and continue paying up the loan. Despite the indulgence, the Plaintiff remained indolent and did not attempt to repay the loan as a show of good faith. Marked as **BU-3** is correspondence showing accommodation by the Bank.

54. The 1st Defendant deposed that it had not declined to issue statements of Account of the facilities if and when requested to do so. At no point did the Plaintiff/Applicant apply and/or seek the same and was denied the statements by 1st Defendant. In fact the Plaintiff/Applicant is indeed aware of the debt outstanding vide annexure **FNN-4** annexed in support of the Application which is the loan balance as at 31/12/2019 as tabulated by the Plaintiff/Applicant at Ksh 56,583,579.46/-

55. Whereas there are contested issues and/or facts with regard to the actual amount outstanding debt by the Plaintiff/Applicant to the 1st Defendant, there is evidence on record as shown by the statements of Accounts, that there were various facilities advanced to the Plaintiff/Applicant on specific terms and timelines. The 1st Defendant's Replying Affidavit depicts 20 bank accounts that the Plaintiff/Applicant serviced primarily for LPO financing variously labelled as overdraft, solid loop line, letter of credit and guarantee line.

56. A cursory gleaning of the Statements of Account confirm very few monthly repayments made as credits to the Accounts but once in a while huge deposits of between Ksh 800,000/- 2 million were paid by the Applicants at one go. So that even if repayments were made to the facilities they were few and far between and the debt continued to escalate due to increase in interest. At this stage what emerges from the contested issue of servicing the loan/overdraft facilities advanced by the 1st Defendant is that at least Ksh 56,583,579.46/- remains outstanding as the Plaintiff/ Applicant did not depose how much of the facilities has been repaid.

57. In the case of *Nairobi HCCC No. 577 of 2015 John Karanja Njenga & Another -vs Bank of Africa* quoted in *Nyeri HCCC No. 10 of 2016 Brade Gate Holding Limited & Another -vs- Jamii Bora Bank Limited [2016] ECLR* Ogolla J stated;

“However, for this court, the Defendant's right to exercise its power to sell the charged property arises the moment there is a debt which remains outstanding despite demand. It is therefore upon the Plaintiffs to prove that there is in fact no debt due to the Defendant”.

DEFAULT/DEMAND/NOTICES

58. The 1st Defendant contends that the Plaintiff/Applicant failed to regularly service the loan/overdraft facilities and issued the following;

In compliance with the provisions of the Land Act 2012,

a) The 1st Defendant issued a 90 –day notice dated 20th March 2019 as per **Section 90 (1) & (2) Land Act**, to the Plaintiff, notifying it that among other things; it is in default of the loan, the loan must be repaid and that by the end of three months (90 Days) it should have made good the default together with the interests that have accrued. Marked **BU-4** is a copy of the 90 –days' notice to the Plaintiff. The statutory notice is addressed to Frank Logistics Ltd P.O.Box 20131-00100 Nairobi & to Rieny Distributors Ltd P.O.Box 30144-00100 Nairobi by Registered Post. There is also annexed the certificate of postage from Postal Corporation of Kenya with a list of Registered Mail for Postage from Consolidated Bank that included the Plaintiff/Applicant & Guarantor.

b) The 1st Defendant in accordance with **Section 96 of the Land Act**, 2012, after more than three months later while the Plaintiff continued to ignore the repayment of the loan and due to the Plaintiff's unresponsiveness and failure to remedy the default, the Defendant issued a further 40 –days' notice dated 25th June 2019, Marked as **BU-5**. The statutory notice is addressed to Frank Logistics Ltd P.O.Box 20131-00100 Nairobi & to Rieny Distributors Ltd P.O.Box 30144-00100 Nairobi and also to each Director individually of the above Companies by Registered Post .There is also annexed the certificate of postage from Postal Corporation of Kenya with a list of Registered Mail for Postage from Consolidated Bank that included the Plaintiff/Applicant & Guarantor.

c) The 1st Defendant issued instructions to Auctioneers (the 2nd Defendant”) in order for it to recover the monies owed. The 2nd Defendant issued a 45 days Redemption Notice dated 10th January 2020, to the Plaintiff as required by **Rule 15 Auctioneers Rules**. Marked **BU-6** is a copy of the 1st 45 days Redemption notice. Following receipt of the Auctioneers Notice, the Plaintiff wrote to the 1st Defendant on 11th January 2020 complained of the variance, inaccuracy and overstatement in the demanded amounts of Ksh 190,986,059.37 which was a result of typographical error on the part of Auctioneers.

d) The 1st Defendant through the 2nd Defendant followed up immediately and revoked the 1st Redemption Notice and issued a

Redemption Notice with the correct amount of Ksh 56,583,585.46 balance inclusive of interest. A copy of the 2nd 45 days Redemption Notice is marked as **BU-7**. It is therefore not in dispute that the Plaintiff owes the 1st Defendant Ksh 56,583,585.46/- and there was no issue as to the amounts owed.

59. In **High Court Civil Case 12 of 2018 Michael Gitere & Anor vs Kenya Commercial Bank Ltd [2018] eKLR** the Court observed;

“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.....”

60. In the instant case, against the Plaintiff/Applicant’s denial of receipt of statutory Notices, the 1st Defendant has proved on a balance of probabilities that it duly posted the mandatory statutory notices under **Section 90 & 96 of Land Act 2012** at the last known Postal addresses provided by the Plaintiff/Applicant and Chargee as shown in the executed Legal Charges. Secondly, copies of the Postal Corporation Receipts are annexed and confirm postage and payment of Ksh 100/- for each letter/Notice. Thirdly, the 2nd Statutory Notice was sent to both Companies and each of the Directors of both Companies to the address given by the Applicant in the Legal Charges. Fourthly, there are copies of 1st Defendant’s Register showing all registered mail for postage at the relevant date and include the Borrower and Chargor Companies and/or Directors. Fifthly, are the copies of the Statutory Notices that were sent. This Court is satisfied from the evidence on record that the 1st Defendant duly complied with postage of the requisite statutory Notices to the Plaintiff /Applicant. To demand the 1st Defendant proves postage and receipt of statutory notices by the Plaintiff/Applicant without pinpointing any anomaly on their part is going over the top, it is not possible or realistic in the circumstance.

VALUATION

61. In compliance with **Section 97 of the Land Act**, the 1st Defendant procured a Valuation Report by Legend Valuers Ltd of the suit property **Thika Municipality Block 12/286 off General Kago Road, along Garissa Road, Thika Area, Kiambu County**. The Valuation Report was prepared in early March 2020 following the Advertisement of the property for Auction.

- 1) Market Value is at Ksh 145,000/-
- 2) Value of Perimeter Wall Ksh 500,000/-
- 3) Mortgage Value Ksh 116,400,000/-
- 4) Forced Sale Value Ksh 109,125,000/-

The Valuation Report was annexed to Replying Affidavit and marked as **BU-9**.

62. The Plaintiff/Applicant by the Supporting Affidavit deposed the Defendants advertised the suit property charged to the Bank as security for the facilities without any justification. The Defendants failed to serve the statutory notices for 90 days and 40 days respectively, so as to allow them make good the debt outstanding, which debt is denied and it was illegal. The Plaintiff/Applicant averred that they were aware of the notice for the 1st Time from the 2nd Defendant’s 45 days’ notice for a whopping Ksh 190,986.059.37 an amount that was exaggerated and not accurate.

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.”

63. From the Valuation Report annexed to 1st Defendant’s Replying Affidavit, the Court finds it complied with **Section 97(2) of Land Act 2012**, it was a current Valuation Report, March 2020 and the scheduled sale was on 19th March 2020. The Plaintiff/Applicant ought to have requested for Copy of Valuation Report from 1st Defendant before the scheduled sale.

3rd PARTY CLAIM/RIGHTS

64. The Plaintiff/Applicant Rieny Distributors Ltd was/is borrower of 1st Defendant’s Loan/Overdraft facilities which were secured by the suit property **LR Thika Municipality Block 12/286** owned by Frank Logistics Ltd as Chargee as per the annexed Legal Charges annexed to 1st Defendant’s Replying Affidavit.

65. The Plaintiff/Applicant deposes in the Supporting Affidavit & Annexed Plaintiff, that at all times, a 3rd party, Frank Logistics Ltd agreed to guarantee the Plaintiff/Applicant the Loan Facility of Ksh 75,000,000/- vide the Legal Charge **LR Thika Municipality Block 12/286**. The

Applicant deposed that the 3rd party Guarantors liability cannot arise if the principal debtor is not ascertained and default not established.

66. The Applicant reiterated that the conflicting amounts were contrary to public policy and grave injustice would occasioned to an innocent 3rd Party if its property is sold on account of spurious and unsupported claims.

67. This Court perused the Legal Charges and found that the Deponent of the instant application on behalf of the Plaintiff company as Director is also one of the Directors of the 3rd Party Company that owns the suit property presented as security to the 1st Defendant bank. If the Court lifts the Corporate veil, the Director of the Plaintiff Company is the same person as the Guaranty Company. The suit property belongs to the Applicant Company Director and has the opportunity too redeem the outstanding loan /overdraft facilities and reclaim ownership of the suit property.

CONCLUSION

68. This Court perused the Statements of Accounts 2017-2019, and the Plaintiff/Applicant made repayments once in a while in huge amounts. The Plaintiff/Applicant did not outline any/all payments made to 1st Defendant to defray the debt and since he who alleges must prove, the 1st Defendant's Statement of Accounts content are not controverted.

69. The correspondence demonstrates that the 1st Defendant availed the Plaintiff/Applicant an opportunity to regularize the facilities' accounts vide letter dated 16th August 2019. The 1st Defendant fully disclosed service of statutory notices and valuation of the suit property was conducted. The Respondent complied with **Section 90, 96 & 97 of Land Act**.

70. The Plaintiff/Applicant admits obtaining loan/overdraft facilities from the Respondent, there is security of the charged property in lieu of the facilities. In the absence of the Plaintiff/Applicants exercise of right of redemption, this Court finds that the *prima facie* case is not established to warrant grant of injunction.

ii) The Plaintiff/Applicant shall suffer irreparable loss that cannot be compensated by an award of damages;

71. The Plaintiff/Applicant submitted that they stand to suffer irreparable loss and damage not compensatable in damages should the Defendants who are eager to illegally, unlawful and unprocedurally sell the suit property.

72. The Plaintiff/Applicant obtained loan and overdraft facilities and defaulted in servicing the facilities. The Plaintiff/Applicant claims to have carried out its obligations under the Agreements, although the Statements of Account confirm few but huge payments overtime, the Applicant failed to show or prove actual payments to 1st Defendant. The Plaintiff/Applicant raised issue with inaccurate, uncertain and conflicting figures as shown by the Auctioneers Redemption Notices, where the 1st claim was Ksh 190,986,059.37/- later rectified by 2nd redemption notice of Ksh 56,583, 585/-. This time the Applicant did not contest the amount in the 2nd Notice or no such evidence was shown to the Court. The Applicant annexed-FNN4 depicting the same amount. However, in its Pleadings the Plaintiff/Applicant claims the amount due and owing is Ksh 53,386,901/= as per FNN4 which includes an overdraft of Ksh 3,196,977.57/- and totals to Ksh 56,583,579.46/-. In the Absence of any tabulation by the Applicant of what has been paid to defray the outstanding debt to 1st Defendant it remains at Ksh 56,583,579.46/-.

73. The Legal Charges provided as security to the 1st Defendant are duly executed and registered as is annexed to the 1st Defendant's Replying Affidavit. The Plaintiffs/Applicants have not contested validity of the charge that gives rise to right of the 1st Defendant to exercise statutory power of sale. The parties are bound the terms of the Loan/Overdraft Facilities and the Legal Charges, specifically Paragraphs 2 - Interest, Paragraph 5 – Payment of all Charges & Expenses, Paragraph 7- Events of Default, Paragraph 8- Bank's Remedies, Paragraph 9- Statutory Power of Sale.

74. In *David Mburu Githere vs Jamii Bora Bank Limited [2017] eKLR* it was held;

“The Plaintiffs herein, as submitted by the Defendant wilfully gave the suit property as security and as such it became a commodity for sale and it is therefore subject of sale in case of default. Further, even if the Court was to find in favour of the Plaintiffs at the final determination of the suit, damages would be an adequate remedy. The Plaintiffs thus can find recourse in Section 99(4) of the Land Act which provides that;

A person prejudiced by an unauthorised improper exercise of the power of sale shall have a remedy in damages against the person exercising the power.”

75. In the case of *Nairobi HCCC No. 527 of 2013 Palmy Company Limited -vs- Consolidated Bank of Kenya Limited [2014] EKL*R, the Court stated;

“Unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction...”

See also; *Desai & Others vs Fina Bank Ltd [2004] 2 EA 46*

iii) If the court is in doubt, it will decide on a balance of convenience.

76. The Court is not in doubt that a *prima facie* case is not made out. From the evidence on record and submissions by parties through Counsel, the Plaintiff/Applicant owes a debt outstanding at Ksh 56,583,579.46/- from 2019 (before onset of Corvid 19 pandemic and lockdowns that adversely affected the economy and more particularly businesses). The 1st Defendant complied with the law and issued the statutory notices. The 1st Defendant issued through the 2nd Defendant redemption notice of a colossal amount Ksh190,986,059.37/- which when the Applicant contested the figure, the 1st Defendant promptly rectified by 2nd Defendant issuing a 2nd Redemption notice of Ksh 56,583,579.46/-which was not defrayed hence the scheduled sale of the charge suit property. The Applicant has not established a *prima facie* case, the issue of reconciling accounts, contesting outstanding debt and interest is not a legal bar to the 1st Defendant exercising its statutory power of sale because, the principal amount remains outstanding.

DISPOSITION

77. **The Application filed on 4th March 2020 for temporary injunction pending hearing of the suit is dismissed with costs.**

78. **The 1st Defendant bank served the Applicant the mandatory statutory notices and conducted valuation of the charged suit property.**

79. **The Plaintiff/Applicant is granted 30 days to exercise redemption in default the 1st Defendant to execute the statutory power of sale.**

80. **The Plaintiff/Applicant to be provided with statements of Accounts by the 1st Defendant Bank over the various Loan/Overdraft Accounts and both parties reconcile the said accounts within the 30 days.**

81. **The main suit/application may proceed for hearing and determination after parties' close pleadings and carry out case management and thereafter a date to be taken.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 31ST MAY 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS NASIMIYU H/B MR OSUNDWA FOR THE PLAINTIFF

MR. OCHOLLA FOR THE 1ST DEFENDANT

COURT ASSISTANT - TUPET