



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 39 OF 2019

EASY PROPERTIES LIMITED.....1ST PLAINTIFF/ APPLICANT

BROWSE INTERNET ACCESS LIMITED.....2ND PLAINTIFF/ APPLICANT

VERSUS

DIAMOND TRUST BANK.....DEFENDANT/ RESPONDENT

RULING

Background

1. This ruling is in respect of the Plaintiffs' Notice of Motion application brought under *Section 1A, 3 & 3A of the Civil Procedure Act, Order 40 Rules 1(2) and 4 of the Civil Procedure Rules 2010, the Land Act, No. 6 of 2012 and the Land Registration Act No. 3 of 2012*, dated 30th January, 2019, seeking the following orders: -

a. Spent

b. Spent

c. That this Honourable Court be pleased to issue temporary injunction restraining the Defendant whether by themselves, their servants or agents, acting jointly and or severally from advertising, selling by public auction, private treaty and or otherwise dealing or interfering with properties known as LR No. 12715/522 Northwest Athi River Township Machakos and LR No. 209/10964 Nairobi or in any manner whatsoever interfering with ownership and quiet possession and enjoyment of the Plaintiff/ Applicants properties pending the hearing and determination of this suit.

d. That costs of this Application be provided for.

2. The application is premised on the grounds that the Plaintiffs are the registered owners of the all those properties known as **LR No. 12715/522 Northwest Athi River Township Machakos** and **LR No. 209/10964 Nairobi** that were charged to the Defendant; that the Defendant has unlawfully issued statutory notices to remedy under Section 90 of the Land Act 2012; that the Plaintiffs have fully repaid the loan facilities advanced to them by the Defendant; that the Defendant has ignored and/or refused to comply with the provisions of Sections 56 of the Land Registration Act No. 3 of 2012; that the Defendant purports to overcharge interest contrary to the Central Bank of Kenya Regulations; that the Defendant failed to notify the Plaintiffs of the changes of rates of interests applicable to their accounts from time to time; that the Defendant has threatened to exercise statutory power of sale against charged properties for some units named in the notice which do not belong to any of the Plaintiffs or do not exist; and that the units on the Plaintiffs suit properties have long been sold to 3rd parties and discharged by the Defendant.

3. The application is supported by the affidavit of **Stephen Onyambu**, a director of the Plaintiffs. He deposed that the Plaintiffs are the registered owners of all those properties known as LR No. 12715/522 Northwest Athi River Township Machakos and LR No. 209/10964 Nairobi (Hereinafter referred to as the '**Machakos**' and '**Nairobi properties**' respectively); that the Plaintiffs executed loan facility from the Defendant of Kenya Shillings Two Hundred Million (Kshs. 200,000,000/-) each for purposes of constructing housing units on the suit properties; that the said loan facility was later enhanced up to Kenya Shillings Two Hundred and Fifty Five Million (Kshs. 255,000,000/-) each to be utilized for the same purpose; that the said charges dated 10th May, 2010 and 10th July, 2013 were then registered as securities in favour of the Defendant.

4. In addition, it was averred that the Plaintiffs thereafter fully repaid the loans in satisfaction of the terms and conditions of the letters of offer/ charge to the Defendant; that the Defendant has unlawfully issued statutory notices to remedy under Section 90 of the Land Act 2012; that the Plaintiffs were surprised with the aforesaid move only to discover that the Defendant applied various rates of interest to the accounts contrary to Central Bank of Kenya Rules and Regulations; that the Defendant failed to notify the Plaintiff to the changes of rates of interest applicable to the accounts from time to time.

5. Moreover, it was deposed that that the Defendant has threatened to exercise statutory power of sale against the charged properties for some named units in the notice which do not belong to the Plaintiffs; that the units on the Plaintiffs suit properties have been sold to 3rd parties and discharged by the Defendant; that the Defendant is likely to issue a notice of sale under the provisions of Section 96 of the Land Act No. 6 of 2012 anytime; that the Defendant has not issued any notice to the guarantors for notice of sale under the provisions of the Land Act; and that unless the restraining orders are issued against the Defendant, the Plaintiffs will be subjected to huge loss and damage. Annexed to the affidavit were copies of the letters of offer, charges dated 10th May, 2010 and 10th July, 2013 and statutory notices.

6. In response, the Defendant filed a Replying Affidavit sworn by **Lwanga Mwangi**, its Debt Collection Officer, on 11th February, 2019.

7. He deposed, among others, that:-

(a) pursuant to a Letter of Offer dated 16th November, 2007, the Bank extended to the 2nd Plaintiff a continuation of construction loan with an outstanding amount of Kshs 13,000,000/- and a further construction loan of Kshs. 7,000,000/-;

(b) the said facility was secured by charge dated 10th December, 2007 over the **Nairobi property** registered in the name of the 2nd Plaintiff;

(c) pursuant to a Letter of Offer dated 1st September, 2008, the Bank extended the earlier facilities disbursed and further advanced another construction loan of Kshs. 17,000,000/- to the 2nd Plaintiff;

(d) the said facility was secured by a further charge dated 22nd September, 2008 over the Nairobi Property;

(e) pursuant to a Letter of Offer dated 6th March, 2009, the Bank extended the earlier facilities disbursed and enhanced a further Kshs. 45,000,000/- to the 2nd Plaintiff making the total aggregate to Kshs. 65,000,000/-;

(f) the said facility was secured by a Second Further Charge over the Property; that pursuant to a Letter of Offer dated 28th April, 2010, the Bank extended to the 1st Plaintiff a Construction Loan of Kshs 30,000,000/-;

(g) the said facility was secured by a Second Charge over the Nairobi Property and a First Legal Charge over the Machakos Property both dated 10th May, 2010;

(h) pursuant to a Letter of Offer dated 19th June, 2010, the Bank extended earlier facilities to the 1st Plaintiff and also granted an additional Construction Loan of Kshs. 67,234,000/-;

(i) the said facility was secured by a Further Second Charge over the Nairobi Property and a Further Charge over the Machakos Property both dated 7th September, 2010;

(j) pursuant to a Letter of Offer dated 7th September, 2010, the Bank extended the earlier facilities to the 1st Plaintiff and also granted additional facilities aggregating to Kshs. 128,751,000/-;

(k) the said facilities were secured by a Second Further Charge over the Nairobi property and a Second Further Charge over the Machakos property;

(l) pursuant to a Letter of Offer dated 4th March, 2011, the Bank extended the earlier facilities to the 1st Plaintiff and also granted additional facilities aggregating to Kshs. 346,800,000/-;

(m) the said facilities were secured by a Third Further Second Charge over the Nairobi property and a Third Further Charge over the Machakos property both dated 16th May, 2011;

(n) pursuant to a Letter of Offer dated 9th February, 2012, the Bank extended the earlier facilities to the 1st Plaintiff and also granted additional facilities aggregating to Kshs. 324,623,000/-;

(o) the said facilities were secured by a Fourth Further Second Charge over the Nairobi Property and a Fourth Further Charge over the Machakos property both dated 30th April 2012;

(p) pursuant to a Letter of Offer dated 31st May, 2013, the Bank extended the earlier facilities to the 1st Plaintiff and also granted additional facilities aggregating to Kshs. 373,700,000/-;

(q) the said facilities were secured by a Fifth Further Charge over the Machakos property both dated 10th July 2013; and

(r) on 19th August, 2013, pursuant to a request by the 1st Plaintiff, the Bank released the title for the Machakos property, Grant Number I. R. 45452 to the 1st Plaintiff solely for the purpose of registering various leases on the said Title.

8. He further deposed that pursuant to a Letter of Offer dated 25th September, 2017, the Bank extended the earlier facilities to the 1st Plaintiff which were aggregating to Kshs. 200,000,000/- and enhanced the same to a Construction Loan of Kshs. 255,000,000/-; that it was expressly provided for in the aforementioned Letter of Offer that the facility was repayable within a maximum period of six (6) months by equal monthly instalments beginning twelve months after disbursement; that interest on the facility was payable at 14% being the Central Bank Rate (10% p.a.) plus 4%; that in the event of default in payment the facilities would attract an additional default interest rate at 10% per annum and in the event of default on the facilities, the total outstanding amounts would be due and payable immediately.

9. He also deposed that in order to secure the additional sum of Kshs. 55,000,000/- the Plaintiffs agreed to utilize the Machakos property and they were to grant a Fifth Further Second Legal Charge over the Machakos property; that through a Letter dated 2nd October, 2017, the Bank's advocates requested for the Original Title Grant Number IR 45452 to be furnished in order to perfect the securities but the Plaintiffs have not adhered to the request to date in complete breach of the undertaking; that the Plaintiffs in breach of the Letters of Offer and the Charges failed to make the scheduled monthly payments punctually as and when the same fell due thus falling into arrears; that the Bank was therefore constrained to issue Statutory Notices over the properties on 26th October, 2018 to the Plaintiffs and to the Guarantors; that the said Statutory Notices lapsed on 27th January, 2019, however within that time the Plaintiffs failed to remedy their default which occasioned the Bank's Advocates to thereafter issue 40 day Notifications of Sale dated 8th February, 2019 to the Plaintiffs pursuant to Section 96 of the Land Act; that the Plaintiffs have not fully repaid the facilities and it is well and truly clear that as at 7th February, 2019, the Plaintiffs were indebted to the Bank in the aggregate sum of Kshs. 294,313,141.66 which amount continues to accrue interest at the rate of 13% p.a. which is the current lending rate.

10. Additionally, he deposed that the Bank has not overcharged interest, and in particular the Bank has calculated the interest in line with the Banking Act as is evident from the statement of account; there is no *prima facie case* and that this case is only meant to prevent the Bank from enforcing its legal right to call in its security; that there is no evidence that the Plaintiffs will suffer irreparable harm and loss should the prayers sought be denied; that the sale of the properties by way of public auction is governed by statute and the Bank is aware that it is obligated to obtain the market value of the properties into commercial commodities by charging the same; that it is evident that the Bank has followed all steps as required by law and when the Properties are set to be auctioned, the Bank will obtain a forced valuation report; that a dispute as to accounts is not a *prima facie* ground for granting an injunction; that the Bank is a financial institution capable of meeting an award for damages should this Honourable Court deem it proper to order and will undertake to expeditiously comply with the same; that the Plaintiffs' application is an abuse of the court process in view of the fact that the Plaintiffs failed to disclose its default as well as their conduct herein as unconscionable and undeserving of the equitable reliefs being sought; and that the Plaintiffs application is not meritorious and is only meant to prevent the Bank from enforcing its legal right to call in its security. Consequently, the Defendant prays that the Plaintiffs application should therefore be dismissed with costs.

Submissions

11. The application was canvassed by way of written submissions which were duly filed by the advocates for the Plaintiffs, **Charles Nyakwana & Co. Advocates**, and the advocates for the Defendant, **Mohamed Madhani & Company Advocates**, on 18th June, 2019 and 5th July, 2019 respectively.

12. The Plaintiffs' advocates submitted that the principles of granting the injunction as set in **Giella v Cassman Brown & Co. Limited [1973] EA 38** have been satisfied; that the Plaintiffs will suffer irreparable loss if the injunction sought is not granted which loss cannot be compensated by an award of damages because the housing units for which the loan were secured have been since sold to 3rd parties who are not parties to the suit and discharged by the defendant; that further, given that the housing units for which the loans were secured have since been sold to 3rd parties who are not parties to the suit, and discharged by the defendant, the third parties rights to the same stand to be prejudiced if the orders sought are not granted; and that the balance of convenience tilts towards allowing the Plaintiff's application before court. They relied on the cases of **Santowels Limited v Stanbic Bank Kenya Limited [2018] eKLR**, **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014]** and **Scholastica Nyaguthii Muturi v Housing Finance Co. of Kenya Ltd & another [2017] eKLR**.

13. On the other hand, the Defendant's advocates submitted that the suit relates to a charge instrument entered into between the Plaintiffs and the Defendant and that the terms in the Letters of Offer and Charge are contractually binding on the Plaintiffs which cannot be re-written by the Court. The Defendant relied on the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112** in this regard.

14. The Defendant also submitted that the Plaintiffs have not established a *prima facie* case with a probability of success as defined in **Mrao Ltd v First American Bank of Kenya Ltd (2003) eKLR**. It was also submitted that the Plaintiffs have been duly served with the requisite statutory notices. In this respect, the Defendant cited the case of **Cooperative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 Others [2017] eKLR** for the proposition that in considering whether to grant an interlocutory injunction, the court must look at the strength of the defence as well as the strength of the claim. Also cited was the case of **Orion East Africa Ltd v. Ecobank Kenya Ltd & Another [2015] eKLR**.

15. The Defendant further submitted that its right to exercise its statutory power of sale had arisen in that the Plaintiffs failed to make their loan repayments. Therefore, the Defendant contended that the Plaintiffs are trying to run away from their lawfully imposed obligations which the Court should not aid as per the holding in **Jopa Villas LLC v Private Investment Corp & 2 others [2009] eKLR**. The **Mrao Limited case (supra)** was also relied on for the proposition that there exists no basis for granting an injunction to prevent a bank from exercising its

statutory power of sale where there is clear default unless the sum due is paid in court or in a dispute as to accounts.

16. Citing the cases of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** and **Andrew Muriuki Wanjohi v Equity Building Society & Another [2006] eKLR**, the Defendant submitted that the Plaintiffs have not established that they would suffer irreparable injury that cannot be compensated by an award of damages. For this, the Defendant relied on **Section 99 (4) of the Land Act 2012** which provides that a person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

17. As to the balance of convenience, the Defendant submitted that it tilts in its favour because the Plaintiffs are still in default and that as at 7th April 2012, the Plaintiffs were indebted to the Defendant to the sum of Kshs. 294,313,141.66/-. Further, relying on the **Andrew Muriuki case (supra)** it was submitted that the outstanding amount continues to accrue interest and that if the injunctive orders are granted, the Defendant will be prevented from fully recovering the debt because it will surpass the value of the charged properties.

18. Finally, the Defendant contended that the Plaintiffs are undeserving of this Court's equitable relief because they have not approached this Court with clean hands in that they did not disclose that they were in default of the facility extended to them by the Respondent. In this respect, the case of **King v. The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington (1917) 1 KB 486**.

Analysis and determination

19. I have considered the application, the grounds in support thereof, the rival affidavits, the submissions and the law. The principles on which a court will grant an injunction were well enunciated in the renowned case of **Giella v. Cassman Brown & Co. Ltd [1973] 358** at 360, where the **Hon. Spry V.P.** held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award in damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

20. Expounding on the application of the conditions for the grant of an interlocutory injunction, the Court of Appeal in **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012** had this to say:-

“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 tests are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd versus Afraha Education Society [2001] Vol. 1EA.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 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 considerations. 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.”

21. Therefore, the issues for determination in the matter are whether the Plaintiffs have established that they have a *prima facie* case with high chances of success; whether the Plaintiffs will suffer irreparable loss that cannot be compensated by an award of damages if the injunction is not granted and whether the balance of convenience tilts in favour of granting or refusing the application.

Whether a prima facie case with high chances of success has been established

22. First, on whether the Plaintiffs have established a *prima facie* case with high chances of success, discussing what constitutes a *prima facie* case the Court of Appeal in the case of **Mrao Limited v. First American Bank of Kenya and 2 Others [supra]** aptly stated as follows;

“A prima facie case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

23. In this case, the Plaintiffs' position is that their debt with the Defendant has been cleared. The Plaintiffs' claim is that the Defendant overcharged interest by **Kshs. 10,790,638.04/-** for the period between June 2017 and December 2018 contrary to Section 33b (1) (a) of the Banking Act; that the Defendant varied interest contrary to Section 44 of the Banking Act, Cap 488; that the Defendant unlawfully withheld loan statements; and that the statutory notices issued by the Defendant are unlawful and contrary to Section 90 of the Land Act on the basis that the alleged amount owing and interest charged is in dispute. The Plaintiffs also claims that the Defendant discharged property grant number IR 45452 and handed the title back to the 1st Plaintiff after it had satisfied that the loan was fully paid.

24. On the other hand, the Defendant contends that the Plaintiffs' debt is outstanding and continues to accrue interest at the rate of 13% p.a.; that it calculated interest in line with the Banking Act; that on 19th August, 2013, it released the title for the Machakos property to the 1st

Plaintiff solely for the purpose of registering various leases on the said Title; (**Refer to page 307 of the Replying Affidavit for a copy of a letter dated 19th August, 2013**); that on 2nd October, 2017, the Defendant's advocates requested for the said Title in order to perfect securities to secure the additional sum of Kshs. 55,000,000/- but the Plaintiffs have not complied in breach of the undertaking; (**Refer to page 334 of the Replying Affidavit**) that for these reasons, the Defendant issued Statutory Notices over the properties on 26th October, 2018 (**Refer to page 335-338 of the Replying Affidavit**) and subsequently on the Plaintiffs failure to remedy the default, it issued a 40-day Notification of Sale dated 8th February, 2019.

25. It is undisputed that the Plaintiffs and the Defendant entered into an agreement which was secured by several charges over the suit properties. However, from the above, it emerges that the Plaintiffs' dispute concerns the allegation that the Defendant overcharged interest and/or varied interest unlawfully. The Defendant has produced copies of the Plaintiffs' loan statement indicating that the account is in arrears.

26. Although the Plaintiffs in their submissions contend that they engaged the professional services of IRAC who established from studying the Applicants' accounts that the Applicants had been overcharged Kshs. 10,790,638.04/- on account of illegal evidence, there was no evidence tendered to support this. Accordingly, having considered the evidence on record, I am not satisfied, on *prima facie* basis that the Plaintiffs have established that the Defendant overcharged interest and/or varied the interest rates unlawfully.

27. Faced with similar circumstances, **Hon. Onguto, J**, as he then was, in **Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited [2017] eKLR** observed as follows:-

"56. It was also the Plaintiffs' submission that the Defendants had unilaterally charged illegal and unconscionable interest, which equated usury and thus simply clogged the right of redemption. Interest is ordinarily levied and charged in commercial lending transactions as a mode of compensation for the money being kept away from the lender. There is however an equitable jurisdiction with the court to relieve parties from any penal interest. This jurisdiction exists where it is shown that the amount charged or to be charged as interest does not constitute a genuine compensatory relief but actually vitiates the original bargain by for example prohibiting redemption of any security: see Samaki Industries (K) Limited v Bullion Bank Limited & Another HCCC 485 of 1999 (unreported).: It is a generally acceptable principle that for this jurisdiction of the court to be invoked it must be shown that the interest levied was exorbitant, extravagant and unconscionable."

57. In the instant case, the Plaintiffs have not shown on a prima facie basis how the rate charged was exorbitant or extravagant. The Plaintiffs appear to have adopted a rather abstract approach and ignored to show or attempt to show that the rate and amount charged was imposed in terrorem or as punishment for wrongdoing. To the contrary what has emerged from the affidavit evidence tendered is that the parties agreed to the rates to be charged.

58. I would in the circumstances and at this stage be reluctant to start setting standards for the parties by holding that the Defendant had adopted a usurious approach. My view for now is that the parties ought to be held to their bargain. Needless to add, claims of unlawful interest being levied form part of dispute on accounts and amount due and should not be reason to interfere with a chargee's rights to realize any security where money is still due." (Emphasis added).

28. Therefore, applying the above to the instant matter, I find that the Plaintiffs' claims of unlawful interest being charged which forms part of a dispute on accounts and amount due, cannot be reason to interfere with the Defendant Bank's right to realize its security.. See also the Court of Appeal's holding in **J. L. Lavuna and Others v Civil Servants Housing Co. Ltd. & Another [1995] eKLR** to the effect that a dispute in the amount owed is not enough to grant an order of injunction.

28. As to the Plaintiffs' claim that the statutory notices issued by the Defendant were unlawful because the alleged amount owing and interest charged is in dispute, I have perused the relevant documents and ascertained that the notices were not defective. Moreover, the Defendant has also produced copies of the Plaintiffs' loan account statements to demonstrate that there is accrued interest. That ground therefore fails.

Whether the Plaintiffs will suffer Irreparable loss

29. As to whether the Plaintiffs will suffer irreparable loss that cannot be compensated by an award of damages if the injunction is not granted, the Plaintiffs submit that they will suffer irreparable loss if the injunction sought is not granted which loss cannot be compensated by an award of damages because the housing units for which the loan were secured have been since sold to 3rd parties who are not parties to the suit and discharged by the defendant. They further contend that given that the housing units for which the loans were secured have since been sold to 3rd parties who are not parties to the suit, and discharged by the defendant, the third parties rights to the same stand to be prejudiced if the orders sought are not granted.

30. In the case of **Andrew Mwanjohi v Equity Building Society & 7 Others [2006] eKLR**, it was held that:-

"Whenever the Applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it

By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon.

Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property.

In a nutshell, sentimental attachment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great sentimental value to any property, he should never offer it as security.

Therefore, on the basis of the material presented by the plaintiff, I find that he has not persuaded the court that if the court declined to grant an injunction to stop the sale of the suit property, he would suffer irreparable loss.” [Emphasis added]

31. It is clear from the record that the Plaintiffs agreed to charge its properties, hence when the suit properties were charged to the Defendant, they became commodities for sale in case of default in the loan repayment. There is nothing on the record to show that the Defendant cannot pay. Therefore, I find that the Plaintiffs have not demonstrated that if the application is not granted, they would suffer irreparable loss.

32. Further, although the Plaintiffs' claim that the purchasers of the housing units for which the loans were secured stand to be prejudiced, in a matter such as this, the Chargee's interest would be paramount. In this respect, the court in the case of **Monica Waruguru Kamau & Anor vs. Innerscity Properties Ltd. (HCCC No. E035 of 2020)** stated as follows: *“even if the third parties were to obtain a beneficial interest in the suit property, the said interest would be subordinate to the 1st Defendant's interest as Chargee.”*

Where does the balance of convenience lie?

33. Lastly, I have considered whether the balance of convenience tilts in favour of granting or refusing the application. To my mind, the Plaintiffs have not demonstrated that the Defendant would be unable to compensate them in damages should the Plaintiffs succeed in trial. To my mind, the Defendant is a sound financial institution which stands better chances to compensate the Plaintiffs. On the other hand, the Plaintiffs are not repaying the outstanding debt and the accumulation of debt exposes the Defendant to potentially substantial irrecoverable losses. In the end, it is my considered view that the balance of convenience tilts against granting the interlocutory injunction.

Conclusion

34. The upshot is that the Plaintiffs' Notice of Motion application dated 30th January, 2019 is hereby dismissed for lack of merit. The costs of the Application are awarded to the Defendant Bank (the Respondent). It is so ordered.

DATED AND DELIVERED THIS 27TH DAY OF MAY, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Mabeya for the Plaintiffs/Applicants.
2. Mr. Shah for the Defendant/Respondent.