REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVL CASE NO. 8 OF 2019

NEST MANOR RESIDENCE & SUITES LTD.....1ST PLAINTIFF/APPLICANT

PETER MAHU MUTHEE.....2ND PLAINTIFF/APPLICANT

VERSUS

AFRICAN BANKING CORPORATION LTD.....1ST DEFENDANT/RESPONDENT

S.M. GATHOGO T/A VALLEY AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

Brief Facts

1. The applicants through a Notice of Motion dated 2nd July 2019 seek orders for a temporary injunction against the respondents from selling, offering for sale, advertising, alienating or disposing off the applicant's suit property known as Title L.R. No. 6392/124, L.R. No. 6392/125, LR. No. 6392/131 and Title No. Nyeri Municipality Block 11/53, Nyeri County.

2. The application is supported by the affidavit of Peter Mahu Muthee, the 2nd applicant and other grounds which are contained in the application and the written submissions by the applicants.

The Applicants' Case

3. The applicants contend that they came to know of the purported sale of the suit properties by an advertisement in the Daily Nation newspaper dated 4th June 2019. The respondents did not serve them with the requisite statutory notices including the three-month statutory notice under **section 56(2) of the Land Registration Act,** the three months statutory ones provided for under **section 90 of the Land Act** and the three months statutory notice under **section 96(1) of the Land Act.** The applicants further contend that the 2nd respondent did not serve them with the requisite 45-day notice provided for under **Rule 15(d) of the Auctioneers Rules.** Consequently, the 1st respondent's statutory power of sale has not arisen.

4. It is the applicants' case that Title Nyeri Municipality Block II/53 Nyeri County is matrimonial property and the 1st respondent did not obtain the informed consent of both the 2nd applicant and his wife before purporting to charge the property. Consequently, the 2nd applicant is apprehensive that the respondents will dispose his home to the detriment of his family.

5. The applicants further state that the 1st respondent is in breach of **section 6(1), (2) and (3) of the Fair Administrative Actions Act 2015,** and **Central Bank Prudential Guidelines on consumer protection 3.4.4** failed, refused and/or ignored to provide any information to the 2nd applicant as requested.

6. The applicants state that no land control board consent was obtained in respect of registration of the charge which is contrary to the law.

7. The applicants further state that the 1st respondent is levying illegal and punitive interest at rates which are contrary to **section 33B (1)** and **(2)** of the Banking Act. Further the 1st respondent is in breach of **section 52(3)** of the **Banking Act** which prohibits an institution from recovering in any court of law interest and other charges which exceed the maximum permitted under the Banking Act or the Central Bank of Kenya Act.

8. It is the applicants' case that the 1st respondent has undervalued the suit properties with the sole intention of clogging the applicants' equity of redemption.

9. The applicants further contend that the loan facility was for a period of 84 months (7 years) and is due to expire on 2nd October 2024, yet the 1st respondent is making attempts to recover its money and the date has not yet reached.

10. The applicants claim that they will suffer irreparable and substantial loss which cannot be compensated by way of damages unless an injunction is issued.

The Respondents' Case

11. The respondents state that the applicants have not denied that they are indebted to the 1st respondent and in the circumstances, the 1st respondent has a right to exercise its statutory power of sale to recover the advanced loan amounts.

12. The applicants herein guaranteed various banking facilities from the 1st respondent which include revolving short term, transit bond, overdraft facilities as well as various term loans. The drawdown, tenor, expiry dates, values and repayment terms of the facilities differed as shown in the letters of offer.

13. By letter of offer dated 5th August 2011, the 2nd applicant was advanced Asset Finance of Kshs. 6,462,086, term loan of Kshs. 17,000,000/- ad cheque discounting facility of Kshs. 20,000,000/-. He offered property Title Number NYERI/MUNICIPALITY BLOCKII/53 registered in his name to be charged in favour of the 1st respondent.

14. By a further letter of offer dated 5th September 2012, the applicants were advanced a further cheque discounting facility of Kshs. 25,000,000/-. Subsequently after, the plaintiffs were again advanced a further term loan facility of Kshs. 10,000,000 by letter of offer dated 25th July 2013.

15. By letter of offer dated 21st November 2013, the 2nd applicant was advanced an asset finance facility of Kshs. 41,100,000/- which facility was secured by a specific debenture.

16. By a further letter of offer dated 19th January 2015, the principal debtor, G.M. Kariuki Hardware Limited and New Age Developers and Construction Limited were advanced facilities as per the letter of offer dated 19th January 2015. As security, the applicants offered properties Land Reference Number 6392/124, 6392/125, 6392/131 registered in the name of the 1st applicant and NYERI MUNICIPALITY BOCK II/53 registered in the 2nd applicant's name to be charged in favour of the bank. A variation of Charge dated 12th February 2015, Variation of Charge, Further Charge dated 23rd February 2015 and Charge dated 12th February 2015 were registered. Additionally as provision for further security as required by the bank, personal guarantees were executed in favour of the bank from the 1st & 2nd applicants and Annette Edna Muthoni Mbatia.

17. Additionally, a fixed and floating Debenture over the applicants' fixed and floating assets was also registered in favour of the 1st respondent.

18. In addition to the loan facilities borrowed through the aforesaid letters of offer, the principal borrowers, G.M. Kariuki Hardware Limited and New Age Developers and Construction Co. Limited, borrowed further loan facilities.

19. Upon default of the loan facilities, the 2nd applicant, a director in both companies, approached the 1st respondent and requested for restructure of the loan facility which the bank obliged through a letter dated 2nd October 2017. At this time the outstanding loan amount was Kshs. 75,750,714/- and the existing loan overdraft facility stood at Kshs. 31,008,160/-.

20. Even after restricting the loan facility, the principal debtor and the applicants herein defaulted in repayments and the 1st respondent issued several demand letters, requests and reminders to the applicants and the principal debtor to regularize the account.

21. The respondents state that as at 23rd July 2019, the outstanding loan is Kshs. 80,423,597/- whereas the outstanding overdraft facility is Kshs. 20,550,913.76/.Thus the 1st respondent had no choice but to seek realization of the security.

22. Consequently, the 1st respondent issued a statutory notice pursuant to section 90(1), (2) and (3) of the Land Act on 19th July 2018. Despite being served with this notice, the applicants still defaulted on the loan facility prompting the 1st respondent to issue a forty day redemption notice to sale pursuant to section 96(2) and (3). The said notice was dated 14th November 2018.

23. The respondents state that an injunction ought not to issue to the applicants because they have come to court with unclean hands. Despite the applicants being indebted to the 1st respondent, they allege that they were never served with the statutory notices yet the notices have never been returned by the postal corporation for non-collection.

24. It is the respondents' case that the notice under section 56(2) of the Land Registration Act is not applicable herein as the charge instrument is specific on the repayment of the loan facilities.

25. On 28th March 2019, the 2nd respondent served upon the applicants the forty-five day notice as per the Auctioneers Rules which was also served via registered post.

26. The respondents state that the suit properties are leasehold properties and thus consent from the land control board is not necessary.

27. It is the respondents' case that they furnished the applicants with all the documents as requested by them in their letter dated 29 th August 2018 including the account statements demonstrating the then outstanding loan amounts. Thus all the information related to the loan facility was available to the applicants and any allegations that they were denied the said information is misleading.

28. It is the respondents' case that the letter of offer dated 2nd October 2017 has clearly provided the applicable interest rates over the loan facility in compliance with section 31A of the Banking (Amendment) Act No. 25 of 2016 and which interest applicable over loan facility is within the confines of the Banking (Amendment) Act No. 25 of 2016, which came into force on 14th September 2016. Thus the applicants' allegations that the interest rates are punitive lacks merit and no single evidence has been tendered by the applicants to show that the interest rates are not within the confines of the Banking Act and/or agreed parties.

29. It is the respondents' case that as per **clause 11.2.2,** the 1st respondent, upon default by the applicants, was at liberty to declare all the amounts payable immediately and subsequently to declare that the security upon default by the chargor has become enforceable. It follows therefore that since the applicants do not deny they are in arrears, the 1st respondent's right to exercise its statutory power of sale as provided under the charge instruments and the letters of offer has crystallized.

30. The respondents further state that pursuant to section 97(2) of the Land Act, they instructed Joe Musyoki Consultants to undertake the valuation which they did and filed their report dated 19th March 2019. As per the law, the 1st respondent contends that it only relies on the opinions of the registered valuers for the assessment of the value at the relevant moment and has no capacity of its own or any other basis of determining the value of land. In any event, the respondents stated that they are open to a joint valuation to be done by a reputable firm of valuers at the applicants' costs.

31. The respondents aver that they are within their right to sell the charged property and thus the applicants should not be granted injuctive.

32. It is the respondents' case that the applicants have not demonstrated they have a prima facie case with any probability of success; that they are in default and the application filed herein is an afterthought meant to frustrate and delay the 1st respondent from exercising its statutory power of sale,

33. The respondents filed a further affidavit dated 23rd September 2019 and an additional affidavit dated 20th May 2020. In the said affidavits, the 1st respondent instructed the firm of Pinnacle Valuers Limited to carry out a valuation to reflect the current market values of the suit properties. They also annexed an annual practicing certificate by one Paul Ngugi who is a licenced and registered valuer practicing in the firm of Pinnacle Valuers Limited. It is the respondents'' case that the 1st respondent instructed Mr. Ngugi on 24th July 2019, to carry out a valuation on the suit properties with a view to advising them on the property's market value, estimated value, forced sale value and insurable value. He annexed the valuation report dated 5th August 2019.

Applicants' Submissions

34. The Applicants' began their submissions by relying on the case of **Giella vs Cassman Brown Limited [1973] EA 358** which set out the principles a court ought to apply when granting an interlocutory injunction and **Order 40 (1)(a) and (b) of the Civil Procedure Rules 2010.**

35. It is the Applicants' submission that their application raises arguable issues which calls for an explanation by the 1st respondent and which issues have a high probability of success. The applicants relied on the case of **Mrao Limited vs First American Bank of Kenya and 2 Others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 Others vs Jane W. Lesaloi and 5 Others (2014) eKLR.**

36. The applicants submitted on the issue of a prima facie case under the following 7 highlighted points:-

37. The applicants contend that the 2nd respondent, never served them with the mandatory 45 days redemption notice under rule 15 (d) of the Auctioneers Rules prior to advertising the suit properties herein for sale.

38. The applicants submit that the forty five days redemption notice that the 2nd defendant purportedly served upon the applicants together with the alleged certificate of postage have not been produced to this court. This is contrary to **Section 107 and 109 of the Evidence Act** which are clear that he who alleges must prove, which position was enunciated in the case of **Evans Otieno Nyakwana vs Cleophas Bwana Ongaro [2015]eKLR .**

39. Lack of service of the redemption notice under **Rule 15(d) of the Auctioneers Rules,** suppressed the applicants efforts to try and redeem the property contrary to **Article 40 of the Constitution of Kenya.**

40. The applicants submit that the 1strespondent has been levying an interest rate which is contrary to section 33B of the Banking Act.

41. It is the applicants' submission that the 1st respondent has been charging interest on a discretionary basis thus charging interest above the contractual rate. To this regard, the 1st respondent has failed to supply the applicants with full bank statements from draw down to date,

indicating the actual sums disbursed to the applicants.

42. The applicants submit that the interest charged was as high as 28% which rate was not agreed upon and as per the letter of offer dated 25th July 2013, an agreed rate would mean that the interest rate would have stagnated at a flat rate of 23.5%.

43. Moreover, no notice was given by the 1st respondent notifying the applicants of the variation of the interest rates. Further the 1st respondent did not obtain consent of the applicants before varying the interest rates. In saying so the applicants rely on the case of **Housing Finance Co. of Kenya Limited vs Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999** and submit that the variations of the interest rates are thus unlawful and punitive.

44. **Sections 33B (2)** and **52 (3) of the Banking Act** make it very clear that any existing contractual obligation between a Bank and any other person shall not permit any institution to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of the Banking Act or the Central Bank of Kenya Act.

45. The applicants invited the court to adopt a purposive approach in considering Section 33B of the Banking Act and in the process to consider the mischief which the legislature sought to address by introducing the said section. In saying so, the applicants rely on the case of **Maunsell vs Olins [1975] AC 373**. The applicants contend that the section was meant to protect consumers of credit in a situation where credit providers dictate their line of benefit.

46. **The applicants further submit that the 1st respondent grossly undervalued the suit properties with the intention of selling the same at a throw away price to clog the applicant's right to redeem the suit properties and contrary to its duty of care under section 97(1) of the Land Act 2012.**

47. The applicants contend that the 1st respondent breached its duty of care under **section 97 of the Land Act** by engaging an unverified and unregistered individual to carry out valuation of the suit properties herein contrary to the Valuers Act.

48. According to the applicants, the valuation carried out by one M. N. Maira, B. Real Estate, G.M.I.S.K was unlawful as the said firm was not registered under **Sections 2 and 6 of the Valuers Act** to practice as a valuer in the year 2019, which is illegal pursuant to **Section 21 of the Valuers Act Cap 532.** Therefore by engaging M.N Maira B. Real Estate G.M.I.S.K who was not a registered and verified valuer in 2019 when the valuation of the suit properties was conducted, the firm of Joe Musyoki Consultants committed an illegality which is punishable under **section 22(2) of the Valuers Act Cap 532.**

49. It then follows that the court ought to disregard the said valuation reports as they do not reflect the true value of the suit properties, the valuation having being conducted by unqualified person.

50. Before a chargee purports to exercise its statutory power of sale, it ought to ensure that a forced sale valuation is undertaken by a valuer who is qualified to practice under the Valuers Act. This duty is enshrined in **section 97 (1) of the Land Act 2012.**

51. The applicants made reference to the case of **Zum Zum Investment Limited vs Habib Bank Limited [2014] eKLR** to support its submission that the allegation of undervaluation of suit properties is sufficiently established where the person who carried out the valuation is unqualified or incompetent.

52. The applicants further submit that the 1st respondent filed a further affidavit on 25th September 2019, attaching a valuation report conducted by Pinnacle Valuers Limited on 24th July 2019. It is the applicants' submission that the said valuation cannot serve as a proper valuation under section 97(2) of the Land Act because the valuation ought to have been carried out before the 1st respondent exercised its statutory power of sale.

53. That notwithstanding, the said valuation report undervalues the suit properties at Kenya Shillings seven million one hundred and twenty five thousand (7,125,000/-) each which shows the bank's efforts to clog the applicants' equity of redemption.

54. There is a discrepancy in the valuation reports as the report produced by Joe Musyoki Consultants on 19th March 2019 did not reflect the true forced value of the suit properties because the difference in prices between the two valuation reports is over Kenya Shillings three million nine hundred thousand (Kshs. 3,900,000/-) yet the valuations were done in a time span of three months apart.

55. It was further argued that the 1st respondent failed to obtain the land control board consent before purportedly charging the suit properties. The 1st applicant holds a freehold interest in respect of the suit properties known as L.R. No 6392/124, L.R No. 6392/125 and L.R. No. 6392/131 and therefore the 1st respondent ought to have obtained land control board consent before charging the same. Failure to which, all the charge instruments in relation to the said suit properties are invalid and void pursuant to **Section 6 of the Land Control Act.** The applicants relied on the cases of **Leonard Njonjo Kariuki vs Njoroge Kariuki alias Benson Njonjo, CA No. 26 of 1979 and Karuri vs Gitura [1981] KLR 247** in support of this contention.

56. It was further alleged that the 1st respondent was also in breach of **Article 3 of the Central Bank Prudential Guideline on Consumer Protection** and more specifically 3.4.1(i) and (ii) to the effect that information should be provided on material aspects of the financial product or service and that appropriate information should be provided at all stages of the relationship with the customer.

57. The applicants submit that they came to learn of the purported sale by an advertisement in the Daily Nation Newspaper of 4th June 2019 by the 2nd respondent to dispose of the applicant's suit properties on 4th July 2019 at 10.30am by way of public auction which was to be held

opposite Nyeri General Post Office.

58. According to the respondents, they served the three-month statutory notice under **Section 90(1) of the Land Act 2012**. The said notice was sent via postal address 1223-10101 Karatina. The applicants submit that the said postal address is the registered postal address of the principal debtor, G.M. Kariuki Hardware Limited and not the applicants. Further that since the 1st applicant is a separate entity from the principal debtor. The notices ought to have been properly addressed to its registered address.

59. The applicants contend that the 1st respondent's statutory power of sale has not arisen because all the requisite statutory notices were not properly issued and served on the applicants. The 1st respondent should accordingly be estopped from exercising its statutory power of sale.

60. On the issue of whether the applicants will suffer irreparable harm should an injunction be refused, It is contended that they have made substantial payments towards settlement of the outstanding loan amount. If a temporary injunction does not issue the applicants stand to risk losing the suit properties but also over half of the loan amount already paid to the 1st respondent and thus infringing on their right to property before a full hearing and determination of this suit. In saying so the applicants rely on the case of **Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another [2019]eKLR.**

61. The applicants stand to suffer greater harm if the application for injunction is dismissed. On the other hand, the 1st respondent will suffer no harm if the injunction is granted because if it is successful in the main suit, it will still have the applicants' security (the suit properties) and will be at liberty to exercise its statutory power of sale. Further since the securities are land, they will not lose value but will appreciate in value.

62. The applicants concluded their submissions by stating that they have met the basic threshold as set out in the case of **Giella vs Cassman Brown** and pray that an injunction do issue.

Respondents' Submissions

63. The respondents stated that this application does not meet the threshold required for the grant of injunctive relief. The grounds for granting orders for an injunction have been set out in **Giella vs Cassman Brown Co. Ltd 1973 EA 358** and was emphasized in the cases of **Charter House Investments Limited vs Simon K. Sang and Nguruman Ltd vs Jan Bonde Nielsen & 2 Others [2014]eKLR.**

64. The respondents further submit that the applicants have not established a prima facie case as set out in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003]eKLR .** The respondents elected to rebut the applicants' submissions on proof of a prima facie case under the following highlighted sub headings.

65. The 2nd respondent issued to the plaintiffs the 45 day redemption notice dated 28th March 2019, which was sent to the plaintiff's last registered postal address as indicated in the letters of offer and charge documents. In support of this contention, the respondents have annexed a copy of the redemption notice and a certificate of postage dated 29th March 2019 which both show that the notices were duly served upon the applicants.

66. The respondents submit that the service of notices to the plaintiffs by registered post is proper service as per **Section 3(5) of the Interpretation and General Provisions Act, Order 5 Rule 3 of the Civil Procedure Rules, 2010 and Section 1010 (1) of the Companies Act of 2015.** Further, the defendants have provided proof of service thus the onus to demonstrate absence of it falls at the plaintiffs' feet. In support of the submission, the respondents rely on the case of **Nyagilo Ochieng & Another vs Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 (1995-1998) 2 EA 260.**

67. The respondent submitted that the applicants' last known postal address as per the letters of offer advancing the credit facilities and all other securitisation documents was P.O. Box 1223-10101 Karatina. It was the same postal address that the respondent used to send the statutory notices required under the law.

68. It is the respondents' submission that on scrutiny, the 2nd applicant is the managing directors of the 1st applicant. It is therefore implausible that the 1st applicant did not have knowledge of the statutory notices issued given that it shares a postal address with the 2nd applicant who takes an active part in its daily operations.

69. Additionally**, clause 16,** common to all letters of offer, provides that "**any notice or demand for payment by the bank shall be deemed to be properly served on the borrower/guarantors if delivered by hand or sent by registered post."** It follows that since this is a contractual term expressly accepted by the applicants they cannot deny service through this mode. In that regard, the respondents effected proper service of the statutory notices dated 19th July 2018 by way of registered post being P.O. Box 1223010101 Karatina, pursuant to **Section 90 (1) (2) (3) of the Land Act, 2012** and the contractual terms in the respective letters of offer.

70. Consequently, if the applicants contend that they were not served, the burden of proof now shifts to them to show non-receipt of the notices. In saying so, the respondents rely on **Section 3(5) of the Interpretation and General Provisions Act** and in the case of **Nyagilo Ochieng & Another vs Fanuel Ochieng & 2 Others.**

71. The respondents further submit that the charge was specific on the modalities of payment of the loan facilities secured under the charge and as such **Section 56 (2) of the Land Registration Act** does not apply.

72. Notwithstanding the above submissions, the respondents submit that in the event the court finds that the notices were not properly served, any injunctive relief should be limited up until a point where a fresh statutory notice is issued. In saying so, the respondents rely on the case

of **National Bank of Kenya Limited vs Shimmers Plaza Limited [2009] eKLR.**

73. The respondents further submit that a dispute touching on the amount payable or interest chargeable is not a ground for establishing a prima facie case nor is it a ground for restraining a chargee from exercising its statutory power of sale.

74. The facilities in question were advanced before the statutory rates of interest came into effect. This is evident by the dates of the letters of offer which are as follows:- 5th August 2011, 5th September 2012, 25th July 2013, 21st November 2013, January 2015 and 25th August 2016 whereas the application of Section 33B commenced on 14th September 2016.

75. Notably, legislation is never intended to be retrospective or retroactive. This principle was exhaustively captured by the supreme court in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR.** Further, **Section 33B (repealed) of the Act** did not expressly provide that it was intended to apply retrospectively nor was the implication or judicial interpretation warranting its retrospective application. In saying so, the respondents made reference to the case of **Vehicle and Equipment Leasing Limited vs Jamii Bora Bank Limited [2017]eKLR.** That notwithstanding, **section 33B of the Banking Act** has since being repealed and cannot be relied on as authoritative law for the current application as purported by the plaintiffs.

76. The respondents submit that the interest on the credit facilities issued by the respective letters of offer was agreed upon before the capping on interest rates. Moreover, by executing the said letters of offer, the applicants gave the 1st respondent express consent to vary the interest rates.

77. With regard to the credit facility advanced vide letter of offer dated 17th January 2017, the respondents submit that the interest rates were levied in line with the requirements of **section 33B** which is captured in **Clause 4** of the said letter of offer. **Clause 4** provides that, **"the Bank may, from time to time at its sole discretion and within the limits permitted by law, vary the interest rates."** Consequently, the plaintiffs cannot now turn and rescind the express consent they gave after reading the letters of offer, understanding them and being offered independent legal advice.

78. The respondents further submit that if the court were to vary the interest levied as per the respective letters of offer, that would amount to an excessive exercise of judicial powers, which would amount to the court re-writing the terms of the contract between the parties. This is contrary to what has been set out in the case of **Webwaka Trade Ltd vs Diamond Trust Bank Ltd [2014] eKLR and National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Limited & Another, Civil Appeal No. 35 of 1999 [2001] eKLR.**

79. The respondents further submit that he who alleges must prove and the plaintiffs in this case have not shown specific evidence to support their contention that the 1st respondent was charging interest on the facilities above the statutory rate. The applicants in that regard have not raised a prima facie case especially considering that it is heavily indebted to the respondent. In saying so the respondents rely on the case of **Vehicle and Equipment Leasing Limited vs Jamii Bora Bank Limited**. It thus follows that the issue of interest levied is not a prima facie issue.

80. Additionally, the respondents contend that a dispute over the accounts and interest of the loan payments is not a relevant consideration or ground to which a court may grant an injunction. In saying so they relied on the cases of **Mrao Limited vs First American Bank of Kenya Limited, Francis J. K. Ichatha vs Housing Finance Company of Kenya Ltd [2005] eKLR and Mohammed Khaled Khashoggi vs Equity Bank Limited [2013] eKLR.**

81. The respondents submit that the suit properties were properly valued by a licenced practitioner and a report of the same was served upon the applicants. This was the firm of M/S Joe Musyoki Consultants who are duly licensed valuers and received valuation reports from them. Subsequently after, the 1st respondent instructed M/s Pinnacle Valuers to conduct a fresh valuation to reflect the current market value of the property. It is the respondents'' submission that this valuation is within the twelve month period of the date of the intended sale and is a proper valuation as per Section 97(2) of the Act.

82. The respondents submit that in line with section 97(2) of the Land Act, the valuers carried out the valuation and gave the properties' market value, the estimated forced sale value and insurable value in their reports, reflecting on the current market value of the property. The respondents rely on the cases of **Zum Zum Investment Limited vs Habib Bank Limited [2014] eKLR** and **Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR.** Presently, the applicants have not discharged the burden of proof as they have failed to demonstrate that the valuation dated 5th August 2019 does not reflect the best price obtainable.

83. The respondents herein submit that the suit properties herein are not among the properties whose dealings ought to be authorized by the Land Control Board**.** The suit properties herein are leaseholds and not agricultural land. Therefore the consent of the Land control Board was not necessary in creating charges for the suit properties.

84. The respondents further contend that they did not breach the Central Bank of Kenya guidelines on consumer protection, or Section 6 of the Fair Administrative Action Act and that no evidence has been tendered to this effect.

85. Contrary to the averments made by the applicants, the respondents submit that they served them with the valuation report on 26th September 2020 via their counsel, the 40-day statutory notice via registered post and all the documents requested by the plaintiffs in their letter dated 24th October 2018. As such, the plaintiffs' claim that they were denied fair administrative action by failure of service of documents is untrue.

86. The respondents submit that their statutory power of sale had arisen as per section 90(3)(c) of the Land Act. The fact that the applicants are indebted to the 1st respondent is not denied. Moreover, the applicants were served with the requisite notices and as such the 1st respondent should be allowed to recover the debt by way of statutory sale. The respondents state that the plaintiffs have failed to prove a

prima facie case and as such the court should not venture into other grounds as the three conditions for granting an injunction are considered sequentially,, so the second and the third grounds cannot be considered once the first condition is not established. In saying so the respondents rely on the case of **Nguruman Ltd Case, Kenya Commercial Finance Co. Ltd vs Afraha Education Society (2001) 1 EA 86** and **Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015]eKLR.**

87. The respondents further contended that the applicants have not demonstrated how they stand to suffer irreparable harm if they are not adequately remedied by an award of damages. The applicants can adequately be compensated by way of pecuniary damages given that the value of the suit properties can be sufficiently quantified through valuation. In saying so the respondents rely on the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others (supra).**

88. The respondents submitted that since the applicants have failed to meet the first two tests as set out in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others (supra)** this court ought not to consider the third test, which is a balance of convenience. The respondents submit that the applicants are not deserving of any injunctive reliefs since they are indebted to the 1st respondent (which debt is not contested) and yet they continually and deliberately refuse/neglect to make good this debt. In saying so the respondents rely on the case of **Jopan Villas LLC vs Private Investment Corp & 2 Others (2009) eKLR.**

89. The applicants herein have approached this court seeking an equitable remedy whilst having unclean hands; they have not denied being indebted to the 1st respondent and they have admitted to not making the requisite payments to the 1st defendant's prejudice and loss. As such they are not warranted to eat the fruits of equity. In saying so the respondents make reference to the cases of **Albert Mario Cordeiro & Another vs Vishram Shamji [2015]eKLR** and **Michael Gitere & Another vs Kenya Commercial Bank Limited [2018]eKLR.**

90. The respondents submit that the applicants have severely and grossly misrepresented facts before this court and are therefore undeserving of the benefits of equity. For those reasons the respondents humbly submit that the balance of convenience heavily tilts in their favour and therefore the court should rule this application in their favour.

Issues for determination

91. On perusal of the Application, the Affidavit in support thereof, the Replying Affidavit and the annextures and the submissions, the issue for determination is whether the applicants have met the requisite conditions to warrant the granting of a temporary injunction.

The Law

92. The principles of interlocutory injunction are now well settled. Those principles were set out in **East African Industries vs Trufoods [1972]EA 420 and Giella vs Cassman Brown & Co. Ltd [1973]EA 358.** Restating the said principles, Ringera J, (as he then was) in **Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002** set them out as follows:-

> **a) A prima facie case with a probability of success at trial;**
>
> **b) The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;**
>
> **c) If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;**
>
> **d) The conduct of the applicant meets the approval of the court of equity.**

93. Similarly in **Dr. Simon Waiharo Chege vs Paramount Bank of Kenya Ltd Nairobi (Milimani) HCCC No. 360 of 2001, Ringera J,** (as he then was) held:-

> **"The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity."**

A prima facie case with a probability of success at trial

94. What then constitutes a prima facie case? In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,**

> **"The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless an 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….A mere scintilla of**

evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case" but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence…The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a suitable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of prima facie case, the former being the lesser standard of the two…In civil cases a prima facie case is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently being infringed by the opposite party 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."

95. It is important to note at this juncture that it is not in dispute that the applicants take respective credit facilities with the 1st respondent. Further the applicants do not dispute that they are in arrears of the respective loan facilities.

96. That being said, I will address whether the applicants have demonstrated a prima facie case under the following sub headings:-

a) <u>Service of Statutory Notices.</u>

97. It is the applicants' submission that the respondents did not serve them with the statutory notices as provided for under **section 56(2) of the Land Registration Act, section 90 of the Land Act, section 96(1) of the Land Act and Rule 15(d) of the Auctioneer Rules.**

98. Section 90(1) of the Land act provides:-

If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the charge may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

99. Section 96(1) of the Land Act 2012, states as follows:-

(1) Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargee under section 90(1), a charger may exercise the power to sell the charged land.

100. Once the chargee has decided to exercise its statutory power of sale, section 96(2) of the Land Act puts another caveat that:

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

101. **Section 56(2) of the Land Registration Act** provides:-

A date for the repayment of the money secured by a charge may be specified in the charge instrument, and if no such date is specified or repayment is not demanded by the charge on the date specified, the money shall be deemed to be repayable three months after the service of a demand, written, by the chargee.

102. **Rule 15(d) of the Auctioneer Rules** provides:-

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property, give in writing to the owner of the property a notice of not less than forty five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.

103. On perusal of the documents, the three-month statutory notice under **Section 90(1) and (2)** dated 19th July 2018, forty days notice to sell under **Section 96(2) Land Act** dated 14th November 2018 have been addressed to both the applicants under the following postal address P.O. Box Number 1223-10101 Karatina and served upon the applicants via registered post. The 1st defendant has attached the certificates of postage as evidence of service.

104. There is also on record, the 45-day statutory notice dated 28th March 2019 with the same P.O. Box 1223-10101 Karatina and addressed to Peter Mahu Muthee t/a G. M. Kariuki Hardware and the Nest Manor Residence. Additionally there is the Notification of sale dated 28th March 2019 which has also been served upon the applicants through registered post. The respondents have also attached a certificate of postage in respect of these documents.

105. Looking to the letters of offer dated 5th August 2011, 5th September 2012, 25th July 2013, 21st November 2013 and 19th January 2015,

clause 16 provides that **"any notice or demand for payment by the Bank shall be deemed to be properly served on the borrower/guarantors if delivered by hand or sent by registered post."** Further the charge documents as well as the schedule to the letters of offer all indicate that the address of the applicants is P.O. Box 1223-10101 Karatina.

106. It follows therefore that since the respondents have shown evidence that they effected proper service upon the applicants, the burden now shifted to the applicants to show that they did not receive the said notices. It is clear vide the letters of offer and the charge instruments that the 1st respondent's obligation was to send any notices to the postal address given by the applicants in the said letters of offer and charge instruments and in the manner provided therein. The applicants cannot now turn and claim that the postal address used by the respondents is incorrect for the 1st applicant. I rely on the case of **Kamunyori & Co. Advocates vs Cannon Assurance (K) Limited [2006] eKLR** where the court placed this evidentiary burden on the chargor to show that he did not receive any notices due to some omission by the 1st defendant.

107. I rely on the case of **HCCC No. 115 of 2012 Abdulkadir atex Commercial Supplies Limited and Another vs Euro Bank Limited (In Liquidation)** where Musinga J held that:-

> **"It is not disputed that the borrower is in arrears of its loan repayment to the 1st respondent. The court has established that an appropriate statutory notice was served upon the applicant….in the circumstances, the applicant has not made out a prima facie case with a likelihood of success."**

In this regard, I convinced that the respondents effected proper service and as such the applicants have not made out a prima facie case.

108. The applicants further contend that they were not served with a notice under section 56(2) of the Land Registration Act. Looking at the said section, it is clear that it applies to instances where the charge instrument does not specify the modalities of payment. However, this is not the case herein. The charge was specific on the modalities of payment of the loan facilities secured under the charge. As such, this particular provision is inapplicable in this instance.

b) Valuation of the Properties

109. Did the 1st respondent discharge the duty under **Section 97 of the Land Act** to ensure that a forced valuation is undertaken by the valuer.

110. In the case of **Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR,** it was held that **the purpose of the valuation under section 97(2) of the Land Act is twofold:-**

> **a) to obtain the best price reasonably obtainable at the time of sale, thus protecting the right of the chargor to property. Doubtless , best or reasonable price which is comparable to interests in land of the same character and quality is part of the right to property itself; and**
>
> **b) 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.**
>
> **The duty under section 97(2) of the Land Act, is therefore, a serious legal requirement which will entitle the chargor to apply to court under section 97(3) of the Land Act to have any sale based on such breach to be declared void, and the court on the required proof, should declare such sale to be void. That is the onerous nature and duty.**

111. **Similarly, Gikonyo J in Koileken Ole Kipolonka Orumos vs Mellech Engineering & Construction Limited & 2 Others (2018) eKLR** held that:

> **"..the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers."**

112. The question then is whether the 1st respondent as the chargee satisfy the requirement of section 97(2) of the Land Act.

113. According to the 2nd applicant, the 1st respondent engaged an unverified and unregistered individual to carry out valuation of the suit properties herein. The firm of M. N. Maira B. Real Estate, G M. I. S. K was not registered under section 2 and 6 of the Valuers Act to practice in the year 2019 and thus was not a qualified valuer as at the time he valued the suit properties. The 2nd applicant further contends that the suit properties have been undervalued as follows:-

a) L.R No. 6392/124 valued on 21st September 2017 at 12M was on 19th March 2019 valued at 8.4M with a difference of 3.6M;

b) L.R No. 6392/125 valued on 21st September 2017 at 12M was on 19th March 2019 valued at 8.4M with a difference of 3.6M;

c) L.R No. 6392/131 valued on 21st September 2017 at 12M was on 19th March 2019 valued at 8.4M with a difference of 3.6M;

d) Title No. Nyeri Municipality Block 11/53 Nyeri County valued on 26th September 2017 at 46.5M was on 19th March 2019 valued at 29M with a difference of 17.5M.

114. It is the 2nd applicant's further contention that the 1st respondent ought to have done a proper valuation before exercising the statutory power of sale. Further that the valuation by Pinnacle Valuers undervalues the suit property which he applicant claims is a ploy by the 1st respondent to frustrate the applicants' equity of redemption.

115. The 1st respondent on the other hand contends that the valuations were carried out by qualified and licensed practitioners. They have annexed a valuation report by M/S Joe Musyoki Consultants and further by Pinnacle Valuers which they state they instructed on 24th July 2019, to conduct a fresh valuation to reflect the current market value of the property. The value report is annexed as FN1 to the 1st & 2nd respondent's further affidavit dated 23rd September 2019. They have indicated the values of the suit properties as follows:-

Parcel No.	**Market Value**	**Estimated Forced Value**
No. 124	9,500,000/-	7,125,000/-
No. 125	9,500,000/-	7,125,000/-
No. 131	9,500,000/-	7,125,000/-
Nyeri Municipality Block II/53	34,500,000/-	26,000,000/-

116. The 1st respondent ensured that a forced evaluation was undertaken as well as the open market value of the suit properties. The 1st respondent has filed an affidavit sworn by one Paul Ngugi who is a licensed and registered valuer practicing in the firm of Pinnacle Valuers Limited. He has annexed his annual practicing certificate for the period of 1st January to 31st December 2019.

117. The onus of establishing a prima facie case, that the applicants' right has been infringed by the 1st respondent by failing to discharge the duty of care under **section 97(1) of the Land Act** lies on the applicants. There is nothing on record to support the allegations by the applicants or discredit the valuation by Pinnacle Valuers. From the material on record, it is evident that the 1st respondent ensured that valuation of the property was undertaken in accordance with the law by a qualified valuer. The annual practicing certificate for the year of 2019 was annexed to the report.

118. In that regard, I am of the considered opinion that the 1st respondent discharged its duty under section 97(1) of the Land Act by carrying out a proper valuation of the suit properties.

c) <u>Dispute on interest charged.</u>

119. The question posed herein is whether the interest rate as varied contravened the contractual stipulations between the parties. To answer that question I will be guided by the decision of the Honourable A. Mabeya J, in the case of **<u>Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited [2013] eKLR</u>** where he stated at paragraph 10 that:-

> **"There is no dispute that there was change of the rate of interest. The issue is whether such change was lawful and in accordance with the terms of contract between the parties. In order to discern whether the changes were in terms of the contract, it is imperative to revert to the said contract for its terms and conditions. "**

120. Reverting to the letter of offer dated 5th August 2011, in **Clause 4** which provides :-

> **"The Bank's prevailing base lending rate in Kenya Shillings is currently equivalent to 15.75% per annum."**

121. **Clause 4.4** provides that:-

> **"The bank may from time to time at its sole discretion revise the applicable rate of interest and will advise the borrowers in writing and/or by a notice board at any of the bank's branches or published in a daily or weekly newspaper of any change in the applicable rate. Failure by the bank to advise the borrowers shall not prejudice the right of the bank to recover interest charged subsequent to any such change."**

122. Clause 5 Default Interest

> **123. "In the event of default as set out under the provisions of paragraph 11 of this letter, if any sum due and payable by any borrower under any judgment of any court in connection herewith is not paid on the date of such judgment, the respective borrower shall pay interest at a rate of 24% per annum."**

124. The subsequent letters of offer provided for interest at the following rates:-

> a) Letter of offer dated 5th September 2012 interest at 23.5% per annum whereas Clause 5 on default of interest charged at 40% per annum.

b) Letter of offer dated 25th July 2013 interest at 20% per annum whereas Clause 5 on default of interest charged at 36%per annum.

c) Letter of offer dated 21st November 2013 interest at 20%per annum whereas Clause 5 on default of interest charged at 36% per annum.

d) Letter of offer dated 19th January 2015 interest at 9.13% per annum.

125. **Clause 1** of the Charge stipulates as follows:-

> **"…….and other usual banking charges and together also with interest (as well after as before any judgment) at the rate of 15.5% per annum or as the bank may from time to time determine with full power and authority to the bank to charge different rates for different accounts and/or transactions such interest to be calculated on daily balances and debited monthly by way of compound interest.**
>
> **PROVIDED FURTHER THAT the bank shall not be required to advise the chargor or other such principal debtor prior to any change in the rate or rates and method of calculating the interest payable nor shall any failure of the bank to advise the chargor or other such principal debtor as aforesaid prejudice in any way howsoever the recovery by the bank of interest charged subsequent to any change AND PROVIDED FURTHER that in the cause of any such moneys being also secured to the bank under an agreement or instrument reserving a higher rate of interest than aforesaid nothing herein contained shall affect the right of the bank to recover such higher rate of interest or (as the case may be) the difference between such higher rate and the rate payable hereunder….."**

126. Clearly, from the letters of offer and respective charge instruments the 1st respondent had the authority to vary the interest rate at any time.

127. The question as to the variation of interest charged on loans has been dealt with in the case of **Christopher Ndolo Mutuku (supra)** where Honourable Mabeya J stated in paragraph 18 that:-

> **"I have endeavoured to analyse the documents placed before me to be able to decipher how the parties intended to deal with each other. They indicated in the charge document that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the defendant could change that rate of interest at its discretion from time to time but also indicated how such change would be effected. Clauses 2 and 11 of the Charge must be given effect. I cannot re-write the agreement of the contract between the parties. I have to give effect to its letter and spirit even if it causes hardship to either of them. The parties executed the same willingly and they are therefore bound by it.**

128. Similarly, in the case of **Desai & Others vs Fina Bank Ltd [2004] 2 EA 46 at 51,** Honourable Emukule J, stated as follows:-

> **"In Fina Bank Ltd vs Spares and Industries Ltd [2000] 1 EA 52, Tunoi, Shah and O'Kubasu JJA after considering the allegations of the high and onerous rates of interest by the bank and criticizing the trial judge for falling into the serious error of being a sympathizer although it is human to feel Shah said in his judgment:**
>
> **'…the function of the court is to enforce what is agreed between the parties and not what the court think ought to have been fairly agreed between the parties…."**

129. Honourable Emukule in citing with approval the decision of Ringera J, (as he then was) in the case of **Morris and Co. Ltd vs Kenya Commercial Bank Ltd & Others [2003] 2 EA 605** as follows:-

130. "And this is what Ringera J, had this to say on the subject of interest rates in the case of Morris and Co. Ltd vs Kenya Commercial Bank Ltd & Others [2003]EA 605:

> **"As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced. If the lender reserves to himself the right to charge such interest as he shall determine and to vary the same without reference to the borrower, so it shall be."**

131. The thread running through these cases is that interest is a contractual issue and court should be reluctant to interfere with the interest rate agreed by the parties unless the same is shown to be illegal, unconscionable or fraudulent as doing so would amount to re-writing the contract. The parties herein agreed on the rate of interest to be applied and the 1st defendant had authority to vary the same without reference to the plaintiff. On prima facie basis it is my opinion that the interest rate applied by the 1st defendant was in accordance with the contract between the parties herein and the court should not interfere with the same.

132. Furthermore, it is trite law that a dispute on accounts and interest charged forms no basis for grant of an injunction. This was enunciated in the Court of Appeal in the case of **Fina Bank Limited vs Ronak Limited [2001] 1 EA 54** it was held that dispute on accounts was no basis for grant of an injunction, and more specifically, the following passage at page 68 is on point in relation to disputes on interest charged that:-

> **133. "….As for the charge documents which were in evidence before the High Court expressly reserved, in favour of the**

Appellant, the right to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly, the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis."

134. It therefore follows that on this point the applicants have not established a prima facie case.

d) <u>Whether the Land Control Board consent was necessary</u>

135. Section 6 of the Land Control Board Act states:-

(1) Each of the following transactions that is to say-the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

Is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act.

136. On perusal of the titles of the suit properties, it is evident that the properties are leasehold are situated in Nyeri Municipality. Consequently, the land control board consent is not a legal requirement in creating a charge over leaseholds.

<u>Irreparable Injury</u>

137. **<u>In Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others [2016]eKLR</u>** the court considered **Halsbury's Laws of England** on what irreparable loss is and stated that:-

"First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."

138. Similarly, in **<u>Maithya vs Housing Finance Co. of Kenya & Another [2003] 1 EA 133 at 139</u>** where Honourable Nyamu J, stated as follows:-

"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities….Loss of the properties by sale is clearly contemplated by the parties even before the security is formalised. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the respondent cannot pay damages should it become necessary."

139. Therefore, has the 2nd applicant demonstrated that he will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? The applicants submit that they risk losing the suit properties and also over half the loan amount already paid to the 1st respondent.

140. Considering all the facts, the applicant has not demonstrated that they are likely to suffer irreparable injury.

<u>Balance of Convenience Test</u>

141. It is worth noting that the applicants have not met the requirement as to a prima facie case and has also failed to show how they stand to suffer irreparable harm. The 1st respondent is a reasonably sound financial institution which stands better chances to compensate the applicants should the applicants succeed in the trial. If an injunction is granted to restrain the 1st respondent from exercising its statutory power of sale, the amount of debt shall continue to rise exponentially and the security may prove to be insufficient to cover the ultimate balance. Thus, the balance of convenience tilts against granting of the interlocutory injunction.

142. Moreover, the applicants herein have not denied being indebted to the 1st respondent. As such they are not warranted to eat the fruits of equity. I make reference to the case of **<u>Daniel Kamau Mugambi vs Housing Finance Company of Kenya Ltd [2006] eKLR</u>** the court quoted with approval the Court of Appeal decision in **<u>Francis J.K Ichatha vs Housing Finance Company of Kenya, Civil Application No. 108 of 2005</u> as follows:-**

"A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity…."

143. Similarly, in **<u>Samson Aliton Okello vs Barclays Bank of Kenya Limited [2009] eKLR</u>,** Lessit J observed that **"an injunction is an equitable remedy and a party seeking such a remedy must conduct himself in relation to the suit and the matter at hand in a manner**

that will meet the approval of a court of equity.”

Conclusion

144. I find that the applicants have not met the threshold of granting an injunction as required by the law.

145. Consequently, I find no merit in this application and it is dismissed with costs to the respondents.

146. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 20TH DAY OF MAY, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 20TH DAY OF MAY 2021