REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. E204 OF 2020

PAUL NGEI WOLILE.....1ST APPLICANT

EMILY MUENI MUNG'ALA.....2ND APPLICANT

PAEM AGENCIES LIMITED.....3RD APPLICANT

-VERSUS-

DALALI TRADERS AUCTIONEERS.....1ST RESPONDENT

DIAMOND TRUST BANK LIMITED.....2ND RESPONDENT

RULING

1. The live prayers in the motion dated 30th November 2020 seek that:

> **"3. That pending hearing and determination of this suit an order of injunction do issue restraining the Respondents /defendants by themselves, their agents and or representatives or persons acting under their instructions from effecting the transfer of property Titles No. Dagoretti/Riruta/1265, Ngando Estate Dagoretti to any other party…**
>
> **5. That pending hearing and determination of this suit an order of injunction do issue prohibiting the Respondents /defendants by themselves, their agents and or representatives or persons acting under their instructions from evicting the Applicants /plaintiffs from property Title No. Dagoretti/Riruta/1265, Ngando Estate Dagoretti….**
>
> **7. That in the alternative and pending the hearing and determination of this suit the honorable court be pleased to issue an order staying all actions relating to the transfer of property for the Titles No. Dagoretti/Riruta/1265, Ngando Estate Dagoretti, if the property has passed as a result of auction sale."**(sic).

2. The motion is expressed to be brought under Article 40 & 50(1) of the Constitution of Kenya 2010, Orders 51(1) & 40(1) of the Civil Procedure Rules and Section 97 of the Land Act *inter alia*. On grounds, among others, that **Paul Ngei Wolile**, **Emily Mueni Mung'ala** (hereafter the Applicants) are the proprietors of land parcel **LR No. Dagoretti/Riruta/1265 (hereafter the suit property),** located in Ngando Estate Dagoretti; and that they are aggrieved that **Dalali Traders Auctioneers** and **Diamond Trust Bank Limited** in exercise of the statutory power of sale carried out the sale of the suit property by public auction, in contravention of statutory requirements.

3. The affidavit in support of the motion and further affidavit were sworn by **Emily Mueni Mung'ala**, (2nd Applicant) in her own behalf and on behalf of her two co- Applicants. The deponent asserts that the suit property that was the subject of a charge to the 2nd Respondent bank and was sold by public auction on 13th November 2020 ; that the property is yet to be transferred to the purchaser and will be if this court does not intervene; that the suit property was sold by public auction without regard to the provisions of the Land Act and the Auctioneer Rules in that the Applicants were not served with statutory notices to enable them exercise their equitable right of redemption; that the suit property was sold at undervalue and any transfer will give effect to an irregular sale; and that it is in the interest of justice that an injunctive order issues to restrain the Respondents from effecting transfer of the suit property to the undisclosed purchaser who may evict the Applicants .

4. The motion was opposed by way of a replying affidavit dated sworn by **Amaan Kassam**, who described himself as a Debt Recovery Officer with the 2nd Respondent Bank. The replying affidavit takes issue with the motion and suit by the Applicants , pointing out that in the Applicants had earlier filed a similar suit and motion in **Nairobi HCCC No. 195 of 2010 Paul Ngei Wolile & 2 Others v Diamond Trust Bank Kenya Limited** , seeking to restrain the bank from exercising its statutory power of sale; that the motion was heard and determined

while the suit was subsequently dismissed for want of prosecution. The deponent asserts that bank had in exercising its statutory power of sale duly complied with provisions of statute by issuing requisite notices to the Applicants, and had given several indulgencies to the Applicants on their request by agreeing to restructure payments but that the Applicants had failed to regularize the accounts on several occasions and remained in default; that the suit property was eventually sold at a sum of Shs.12,000,000/- whereas the accrued debt stood at Shs.19,000,000/- odd and that the suit property having been sold, the Applicants' right of redemption had become extinguished. The deponent swore that the Applicants have no prima facie case and that any claims of irregularity concerning the sale would be remedied through damages.

5. In her further affidavit, the 2nd Applicant admitted the filing of the earlier suit by the Applicants and service upon the Applicants of a 45-day notice by **Garam Auctioneers** in 2017 but reiterated claims that the eventual public auction in November 2020 was irregular as the the 1st Respondent did not comply with Rule 15 of the Auctioneers' Rules.

6. The motion was canvassed by way of skeleton written submissions and oral highlighting. For the Applicants**,** counsel submitted that the Respondents failed to issue notice under Rule 15 of the Auctioneers Act, 1997 and proceeded to auction the suit property at an undervalue. It was further submitted that by dint of Article 40 of the Constitution and the Land Act, the Applicants' equitable right of redemption had not been extinguished as asserted by the Respondents. It was the Applicants' contention that the motion meets the test as set out in **Giella v Cassman Brown & Co Ltd (1973) EA 358, Mrao Ltd v First American Bank of Kenya & 2 Others** and **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR**. The Applicants relying on the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** emphasized that they have established a prima facie case and will suffer irreparable loss that cannot be remedied by damages. Finally, counsel submitted that the balance of convenience tilts in favour of the Applicants as they are likely to suffer greater harm if the court does not intervene by granting the orders sought.

7. The Respondents' submissions open with the preliminary point that the application and suit were caught up by the *res judicata* principle as the same issues raised herein had already been determined in Nairobi **HCCC No. 195 of 2010.** Counsel cited the Court of Appeal decision in **George Kihara Mbiyu v Margaret Njeri & 15 Others [2018] eKLR** in this regard. He argued that the Applicants had not established a *prima facie* case as defined in **Mrao's** case and other decisions including, **Harish Chandra Bhovanbhai Jobanputra & Another v Paramaount Universal Bank Limited & 3 Others [2019] eKLR** and **Geoffrey Wahome Muotia v National Bank Kenya [2019] eKLR**. It was contended that the Applicants had failed to establish any irreparable damage that could not be adequately compensated by way of damages. The Respondents asserted that the charged suit property became a chattel liable for sale in the event of default by the Applicants and any irregularity in the conduct of the sale could be remedied by damages. Finally, counsel stated that the debt had outstripped the value of the property because the Applicants been in default since 2009 and hence the balance of convenience tilted in favour of the Respondent bank.

8. The court has considered the material canvassed in respect of the motion dated 30/11/2020. The undisputed background to the motion can be stated briefly as follows. The Applicants were the registered owners of the suit property. Through a first and further charge created between 2007 and 2009, over the suit property, the Applicants obtained financing facilities amounting to Kshs. 6,000,000/= from the Respondent Bank. The facilities comprised an overdraft facility in the sum of Kshs. 3,000,000/= and a term loan of equal amount, the latter which was payable by 60 equal monthly instalments. The overdraft facility was payable on demand. There is no dispute that as of August, 2009, the Applicants had defaulted on payments, leading to several demands by the bank for the Applicants to regularize the loan/overdraft accounts and that due to failure on the part of the Applicants to comply, the 2nd Respondent elected to exercise its statutory power of sale as communicated *via* the statutory notice dated 6th October, 2009.The notice evinced a request by the Applicants to reschedule the repayments which request the bank agreed to.

9. However, there followed further default and in January 2010 a 45-day redemption notice was served upon the Applicants by **Messrs**. **Dalali Auctioneers** (1st Respondent) who had been instructed by the bank. The suit property was advertised for sale by public auction on 31/03/2010. This prompted the filing of a suit, namely, **Nairobi HCCC. No. 195 of 2010 Paul Ngei Wolile & 2 others V. Diamond Trust Bank**, and a contemporaneous motion to stop the sale. The motion was heard and subsequently dismissed by the court. Thereafter, it appears that the said suit lay dormant until 2014 when it was dismissed for want of prosecution. The 1st Respondent re-commenced the process of realization of the security as the debt remained unpaid, and in 2017 the Applicants received a notification of sale from auctioneers appointed by the bank. Eventually, the suit property was sold for Kshs. 12,000,000/= at a public auction conducted by the 1st Respondent on 13th November 2020. The Applicants subsequently filed the instant suit *vide* a plaint dated 30/11/2020. They contemporaneously filed was the instant motion. Before considering the merits thereof it is pertinent to state that the three live prayers in the motion are of similar purport, as they seek to bar the Respondents from perfecting the sale of the suit property to the successful purchaser at the auction. In the Court's view, prayer 3 on its own captures the essence of the prayers 5 and 7 and the court will deem the latter prayers as subsumed under prayer 3.

10. The court's duty is to determine whether the Applicants have established a case for the grant of an interlocutory injunction. But first, the court needs to address the plea of *res judicata* raised by the Respondents' submissions.

11. In the case of **John Florence Maritime Services Ltd and Another v Cabinet Secretary for Transport and Infrastructure and 3 Others [2015] e KLR,** the Court of Appeal considered at some length the application of the doctrine of res judicata generally, and to constitutional petitions specifically. The Court had this to say:

> **"The doctrine of res judicata in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act. It is in these terms: -**
>
> **"7. Res judicata**
>
> **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised,**

and has been heard and finally decided by such court."

From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see Karia & Another v the Attorney General and Others [2005] 1 EA 83).

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

"….where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time…."

See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application, and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked, and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions….

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality. If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit….

We are also not aware of any legal edict that an objection to a suit taken on the basis of res judicata must be so taken on a formal application. The appellants did not cite to us any such authority….

The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

See also **Gurbacham V. Yowani Ekori [1958] EA 450; George Kihara Mbiyu V. Margaret Njeri & 15 Others [2018] eKLR.**

12. In light of the foregoing the court has looked at pleadings in the previous matter and the instant cause as well as undisputed pertinent facts. While it is true that the Applicants' earlier suit sought to restrain the Respondents from selling the suit property in realization of the security, in this instance, the sale has already happened. The reliefs sought in the instant suit relate to the sale in November, 2020 of the suit

property primarily to bar the perfection thereof, and/or damages. The Applicants claim inter alia that the sale was irregular for want of notice and under valuation and seek that the sale be declared null and void, and in the alternative, damages be awarded.

13. The present motion is an attempt to restrain the Applicants from perfecting the alleged irregular sale in November 2020 of the suit property. And although the fundamental facts in both causes appear similar, it is undisputed that the former suit was not determined on merits but dismissed for want of prosecution. It seems to me that the causes of action in the two suits are different and that the present suit relates to the cause of action arising out of the alleged irregular sale in 2020 of the suit properties, at a price deemed as an undervalue by the Applicants who also claim failure by the Respondents to serve requisite notices. Besides, sections 99(4) of the Land Act and Section 69B (2) (c) of the Indian Transfer of Property Act (ITPA) envisage the filing of a suit for damages for the alleged irregular sale of charged property, as an independent cause of action. In the circumstances, the court is not persuaded that the instant suit and motion run afoul of the res judicata rule as the foundational facts are different.

14. Now to the merits of the motion. Although the Applicants had asserted in their grounds and affidavit in support of their instant motion that they were not served with statutory notices prior to the sale on 13/11/2020, this claim was apparently abandoned in the further affidavit and submissions. Advisedly, as the matter of statutory notices would have been *res judicata* having been canvassed in the earlier application, and indeed, there is material in the Respondents' replying affidavit thereto (affidavit of **Elizabeth Hinga dated 16th April 2020** annexed to the replying affidavit herein) that statutory notices had been served upon the Applicants by the time of the first scheduled auction on 31/03/2010.Therefore two grievances remain standing, as disclosed in the submissions by the Applicants to this motion. These are that:

a) The Applicants were not served with the notification of sale by the 1st Respondent as required under Rule 15(b) of the Auctioneers Rules.

b) That the suit property was sold at undervalue,

The Applicants therefore contend that the sale on 13/11/2020 by public auction was irregular.

15. The principles governing the grant of an interlocutory injunction as enunciated in **Giella v Cassman Brown & Co. Ltd [1973] EA 358** are settled. Similarly, as to what constitutes a prima facie case, this is settled too since the decision in **Mrao v First American Bank of Kenya Ltd & 2 Others C. A. No. 39 of 2002; (2003) eKLR**. Both decisions have been reaffirmed and applied by superior courts in countless subsequent decisions including some recent decisions cited in this case by the parties.

16. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** restated the principles governing the grant of interlocutory injunctions enunciated in **Giella's** case and observed that the role of the Judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principle. The Court cautioned that such a court ought to exercise care not to determine with finality any issues arising

17. The Court expressed itself as follows:

"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

a) establish his case only at a *prima facie* level

b) demonstrated irreparable injury if a temporary injunction is not granted.

c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."

18. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established, the court need not look into the question of irreparable loss or balance of convenience.

19. As to what constitutes a *prima facie* case, the Court of Appeal delivered itself as follows: -

"**Recently, this Court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for** *"prima facie case"* **in civil cases in the following words**:

"**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 been 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."**

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The Applicant need not establish title, it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed." (emphasis added)

20. Rule 15 of the Auctioneers Rules, 1997 is in the following terms:

"Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property-

a) ….

b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the second schedule indicating the value of each property to be sold;

c) locate the property and serve the notification of sale on the registered owner….;

d) 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.

e) On expiry of the period of notice without payment arrange sale of the property---"

21. It is pertinent that the sale on 13/11/2020 was the culmination of the realization process which began in 2010 and that there is no evidence whatsoever that the chargee's exercise of the statutory power of sale commenced in 2010 or thereabouts was unlawful as evidenced by the dismissal of the Applicants' earlier motion in the 2010 suit. At paragraph 16 of the replying affidavit, the deponent states that:

"That I am aware the bank since 2018 has been making several attempts to sell the property through public auction however the bids for the property have been lower than the reserve price that was set therefore the property was not sold during those previous attempts. Annexed hereto and marked as "AK7" are copies of the advertisement of 5th November 2018, 8th April 2018 and 13th July, 2020."

22. The court has studied the above stated annexures. The advertisement dated 13th July, 2020 is in respect of a public auction scheduled for 6/08/2020 by **Dalali Traders**, the 2nd Respondent. Similarly, the advertisement on 8th April, 2019 is for the public auction scheduled on 17th April, 2019 by the 2nd Respondent. Ditto for the advertisement dated 5th November 2018 in respect of the public auction scheduled for 21st November, 2018. The advertisement in respect of the sale on 13/11/2020 is by the 2nd Respondent and carried in the paper of 29th October, 2020.It appears from a perusal of the Applicants' annexures **EM 1, 2** and **3** that in 2017, **Garam Investments**, an auctioneer's firm had also served a notification of sale upon the Applicants in respect of the auction scheduled on 27th June 2017.These annexures demonstrate various attempts by the bank to realize the security by public auction.

23. The primary purpose of the notification of sale under Rule 15 (b) or (d) of the Auctioneers Rules is among others to afford an opportunity to the debtor to pay the debt in exercise of their equity of redemption in the case of a charge property, in default of which a sale would be carried out. It is not disputed that the 2nd respondent had on 20th January 2010 served a notification of sale upon the Applicants giving them 45 days to pay the debt owed to the 1st Respondent, in default of which a public auction of the suit property would be conducted. This notification is marked EMM 13 and annexed to the affidavit of **Emily Mueni Mungala** (2nd Applicant) in support of the motion dated 22/10/2010 in HCCC No. 195 of 2010. Additionally, the Applicants were admittedly served with notifications by **Garam Investments** (auctioneers) in 2017 and were aware of the sale scheduled for 13th November 2020 by the 1st Respondent and indeed were in attendance, having earlier engaged the bank in an unsuccessful bid to forestall the said auction.

24. There is no evidence that pursuant to the various notifications of sale and especially that by the 2nd Respondent in 2010 (annexure "**EMM13"** in replying affidavit) that the Applicants exercised their equity of redemption by tendering the sums claimed by the bank. There is no requirement in this case that prior to the public auction of 13th November 2020, **Dalali Traders** ought to have served a fresh and second notification of sale upon the Applicants, even though that would have been desirable as a courtesy to the Applicants. No authority has been cited by the Applicants to urge that the failure by an auctioneer to comply with Rule 15 of the Auctioneers Rules automatically vitiates a sale by public auction where a chargee's statutory power of sale has properly arisen as in this case. The Court is of the view that in the circumstances of this case, nothing turns on the Applicant's complaint with regard to non-compliance with Rule 15 of the Auctioneer's Rules by the auctioneer.

25. As regards the alleged sale of the suit property at undervalue, the Respondents tendered by their replying affidavit as annexure "**AK 8"**, the valuation report by **Chrisca Real Estates**, dated 3/11/2020. The values assigned to the suit property are as follows:

a. Current open market value

Value (total) Kshs. 15,000,000/-

Break down

Land – Kshs. 8,000,000/=

Building – Kshs. 7,000,000/=

b. Mortgage value

Kshs. 12,000,000/=

c. Forced sale value

Kshs. 11,250,000/=

d. Insurance value

Kshs. 7,500,000/=

26. The valuation reports tendered by the Applicants and annexed to their supporting affidavit as annexures "**EMM7"** and **"EMM8"**, prepared by Inter Urban Valuers and Property Consultants Ltd and Verity Management Ltd respectively, contain different valuation figures that are markedly higher than the Respondents'. **EMM7** dated 25/11/2020 reflects the following values:

a) Current open market value

Value (total) Kshs. 21,200,000/=

Land Kshs. 14,000,000/=

Developments Kshs. 7,200,000/=

b) Forced sale value

Kshs. 15,900,000/=

EMM8 dated 24/11/2020 contains the following values:

a) Open market value

Land Kshs. 15,000,000/=

Improvement Kshs. 7,500,000/=

Total Kshs. 22,500,000/=

b) Mortgage value

Total Kshs. 20,250,000/=

c) Forced sale value

Land Kshs. 11,250,000/=

Improvements Kshs. 5,625,000/=

Total Kshs. 16, 875,000/=

27. Evidently, there is a difference amounting to several million shillings between the Applicants' valuation and that by the Respondents. Bare differences in figures however do not tell the entire story, and in order to properly compare the reports and judge their respective weight, the makers would have to give evidence, and shed light on factors determining the valuations. What the reports and reliefs sought herein allude to however is that any damage to be suffered by the Applicants can be assessed in and compensated through damages. The duty

imposed on the lender under section 97 (1) of the Land Act (if applicable) is to obtain a forced sale valuation prior to the sale in order to obtain the best price reasonably obtainable at the time of sale. There is no dispute that at the time of the sale on 13/11/2020, the Applicants' accounts were in arrears, the debt grossing about Kshs. 19,000,000/=. Is it plausible that the bank could have deliberately sold the charged property at a undervalue price that left over Kshs 7 million of the debt unpaid and with no realistic hope of recovery? I doubt such a possibility. Therefore, the complaint regarding the price at which the suit property was sold does not give any impetus to the Applicants' case.

28. It has been stated time without number that once a property is pledged as security for a loan facility, such property becomes a commodity liable for sale in the event of default by the borrower. See **Andrew Muriuki Wanjohi v Equity Building Society and Another [2016] eKLR**. The suit property has been sold to a third party. The principle contained in Section 99(4) of the Land Act as to the remedy available to a person who asserts that a lender has improperly or irregularly exercised its power of sale was previously captured in section 69B of the Indian transfer of Property Act repealed by the Land Act in 2012. The section provided as follows:

> **"1. A mortgagee exercising the mortgagee's statutory power of sale shall have power to transfer the property sold, for such estate and interest therein as may be subject of the mortgage, freed from all estates, interests, rights and encumbrances to which the mortgage has priority….**
>
> **2. Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the grounds -**
>
> **a) That no case has arisen to authorize sale; or**
>
> **b) That due notice was not given; or**
>
> c) **That the power was otherwise improperly or irregularly exercised and the purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given , or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."** (Emphasis added).

29. Section 99 of the Land Act contains similar provisions in protection of purchasers from a chargee and states that ***"A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."*** The suit property herein has already been sold to a third party as per the memorandum of sale exhibited as annexure **"AK9"** to the replying affidavit. The said purchaser is not a party to these proceedings.

> 30. **.** In **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] e KLR Havelock J** (as he then was) while considering the provisions of Section 99 of the Land Act cited with approval the statement made in **Bomet Beer Distributors Limited and Another v Kenya Commercial Bank Limited and 4 Others [2005] e KLR** to the effect that:
>
> **"What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages."**

31. The learned judge proceeded to observe in the case before him that:

> **"As I have detailed above, the Plaintiff lost his right of redemption in relation to the suit property at the fall of the hammer at the public auction. Section 99 of the Land Act, 2012 details the protection to which the purchaser of the suit property at auction is entitled. … That Section now statutorily encompasses the right of the chargor prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages."**

32. In **Nancy Kahoya Amadiva v Expert Credit Ltd and Another [2015] e KLR** the Court of Appeal said of a purchaser in circumstances similar to the present:

> **"…[T]he 2nd Respondent's action to purchase was based on the advertisement for sale advertised in the newspaper. The 2nd Respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of a charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security."**

33. The purchaser in the instant case was protected under the ITPA and/or the Land Act and secondly, the sale having taken place, the equity of redemption by the chargor is extinguished, and the only remaining remedy is a suit for damages. In the result, the Court finds that the Applicants have not established a prima facie case with a probability of success. Secondly, it appears that damages as provided under the law would be adequate compensation. The court notes that some reliefs in the plaint (prayers (v) and (vii)) are for damages. Moreover, the balance of convenience appears to tilt in the Respondents' favor as the debt outstanding as of November 2020 was Kshs. 19,000,000/= odd, which exceeds the proceeds realized in the sale of the charged property by public auction. No doubt the delay in the realization process to which the Applicants have contributed has led to this situation.

34. Finally, the remedy of interlocutory injunction sought by the Applicants' motion is an equitable one and seeks to restrain the perfection

of a sale that has already taken place. Consequently, the Applicants' equity of redemption has been extinguished. In **Hadija Shee Abu v. John Lopez Lutuka Kibwenge & 4 others [2020] eKLR** the court observed that:

> "25. **Moreover, even if the Applicant had succeeded in demonstrating a prima facie case, the equitable orders she sought would still have been denied. On account of the fact that, the suit property has in fact already been sold by way of a public auction, held on the 27th June 2018, to the 4th Respondent Company and transferred to it on 13th July 2018. These two are essentially the actions that the Applicant by her motion sought to stop, and in my view the reasoning of the Court of Appeal in Eric v J. Makokha and Others v Lawrence Sagini and Others, Civil Application No. NAI 20 of 1994 as cited by the 2nd Respondent's counsel is apt for this case.**
>
> **26. An injunction is an equitable remedy to which the principles of equity do apply. In the case of Eric v J. Makokha the Court of Appeal considered the grant of an injunction where the action sought to be restrained had already occurred. The Court delivered itself thus:**
>
> **"An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the court. So, its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said "Equity, like nature will do nothing in vain." On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it"**

35. I think I have said enough to demonstrate that the motion dated 30/11/2020 has no merit and is for dismissal. The motion is dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 12TH DAY OF AUGUST 2021.

C. MEOLI

JUDGE

In the Presence of:

For the Applicants: Ms. Kathurima

For the Respondents: Mr Shah

Court Assistant: Carol