REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A. K. NDUNG'U J.

HCCC NO. 2 OF 2019

JOSEPHAT MWANGI MORACHA.....1ST PLAINTIFF/APPLICANT

JIPA OIL COMPANY LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

HFC LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the application brought by way of Notice of Motion dated 4/7/2021 by the Plaintiffs, Josephat Mwangi Moracha and Jipa Oil Company Limited in which they seek orders;

1. Spent

2. Spent

3. Spent

4. That a temporary injunction do issue against the 1st respondent and/or its agents restraining them from transferring ownership of the property L.R No. KISII/MUNICIPALITY/BLOCK III/195 situated in Kisii Town and registered in the names of the 1st applicant pending the hearing and determination of the substantive suit in Josephat Mwangi Moracha & Another versus HFC Limited, Civil Suit No. 2 of 2019.

5. That an order do issue nullifying the sale and purchase of the property L.R No. KISII/MUNICIPALITY/BLOCK III/195 by the 1st respondent and/or its agents in the auction conducted by on 20th April 2021.

6. That a temporary injunction do issue against the 1st respondent and/or its agents from selling or in any way disposing of the property L.R No. KISII/MUNICIPALITY/BLOCK III/195 until the substantive suit Josephat Mwangi Moracha & Another versus HFC Limited, Civil Suit No. 2 of 2019 is heard and determined.

7. Spent

8. That Geoffrey Makana and Kwanza Estates Limited be joined to this suit as the 2nd and 3rd defendants/respondents respectively.

9. That the Plaintiffs be granted leave to further amend the Amended Plaint dated 23rd April 2019.

10. That the costs of this application be borne by the 1st respondent.

2. The application is supported by an affidavit sworn by Josephat Mwangi Moracha (1stplaintiff) and on grounds listed on the face thereof.

3. In a nutshell, the gist of the affidavit and grounds urged is that the applicant is the registered owner of land known as **LR NO.**

Kisii/Municipality/Block III/195 situate in Kisii. The said property was charged as security for loans advanced to the 2nd plaintiff between 2012 and 2017 by the defendant. The defendant sought to exercise its statutory power of sale between 2018 and 2019 but the efforts were thwarted by the court vide a ruling dated 14/2/2020 which invalidated the notices issued.

4. The applicants filed H.C.C.C No. 2 of 2019 on 23.4.2019 challenging;

a) The irregular, punitive, and unlawful interests levied against the principle (sic) amount by the defendant in a unilateral and arbitrary manner.

b) The defendant's blatant refusal to disburse funds as and when requested to complete the ongoing construction on the charged property, thereby delaying its completion, occasioning loss of income to the 2nd plaintiff and also frustrating the loan agreements.

c) Issuing the plaintiffs with statutory notices that were irregular, unlawful, illegal, and otherwise fraudulent.

d) Initiating an irregular statutory power of sale based on erroneous and contested loan amounts.

5. Despite the pendency of the suit and attempts to settle by the applicants, the defendant and its agents conducted an auction on 20/4/2021. This auction is challenged as being irregular and a sham for failure to comply with the 2 distinct terms and conditions of the auction as advertised by the 1st respondent on 6/4/2021 for reasons that;

a. The 1st defendant and its agents allowed the bidders to participate in the auction without the bidders depositing the Ksh. 10,000,000 by way of banker's cheques, which deposit was mandatory for any bidders participating in the auction.

b. The 1st defendant and its agents issued a Memorandum of Sale dated 20th April 2021 to Kwanza Estates Limited as the purchaser which falsely indicated that the said purchaser had already paid a 10% deposit of the purchase price of Kshs. 600,000,000.00 for the property being Kshs. 60,000,000.00 while the purchaser deposited only Ksh. 50,000,000.00 on 20th April 2021.

6. It is urged that the sale price of **Sh. 600,000,000** was far below the market value of the property which was **Sh. 800,000,000**. The defendant thus breached the duty of care owed to the plaintiffs as chargers to obtain the best price reasonably obtainable at the time.

7. It is the plaintiffs' case that unless the court intervenes and nullifies the sale of the 1st plaintiff's property by auction as conducted by the defendant and its agents, Garam auctioneers, the plaintiffs will be unjustly and unlawfully deprived of their property while unjustly enriching the purported purchaser of the property.

8. The application is opposed. On the part of the defendant, Christine Wahome, the legal manager litigation at HFCK, has sworn a replying affidavit. She starts off by challenging the propriety of the representation of the applicants by one Fidelice Opany who according to an extract from the Law Society website has not taken out a practicing certificate for 2021.

9. It is deponed that arising from the foregoing, the said counsel and by extension the Law firm on record is an unqualified person within the meaning of section 2 of the Advocates Act, Cap. 16 Laws of Kenya and their continued participation in the matter ought not to be countenanced by the court.

10. Wahome further depones that the Notice of Motion application herein is misconceived in law and incompetent deserving to be struck out because;

i) The factual circumstances attendant to the issues in dispute in this suit have admittedly substantially changed yet the Plaintiffs have not updated their primary pleading by way of further amendment and the application is therefore for all intents and purposes predicated on a vacuum;

ii) In some respects, it seeks at this interlocutory stage orders that are final in nature yet the same have not been sought for in the main suit;

iii) In some other respects, the application seeks injunctive reliefs to restrain the happening of events that have already occurred; and

iv) In tenor and ultimate effect, the reliefs sought in the application if granted would violate the express provisions of section 99 of the Land Act, 2012.

11. It is the defendants' case that the court record confirms from the ruling delivered on 15/12/2020 and 17/2/2021 that the realization of the suit property by the defendant in exercise of its chargee's statutory power of sale was proper, the court having reached the conclusion among others that a substantial part of the secured debt was outstanding. The advertisement and sale of the property was thus legitimate.

12. It is further deponed that the efforts to secure financing by the plaintiffs did not constitute any evidence of redemption by the plaintiffs of the then outstanding secured amount as would have justified stoppage of sale by public auction.

13. Ms Wahome further states that the auctioneers complied with the terms of the sale. She was informed by Mr. Joseph Gikonyo of Garam

Investments Auctioneers, which information she believes to be true, that the proposed 2nd defendant participating in the auction on behalf of the proposed 3rd defendant duly paid the requisite bidding deposit of Kshs. 10,000,000 before the auction by way of direct transfer to the auctioneer's bank account.

14. It is further deponed that this deposit of Sh 10,000,000 was utilized as part of the applicable 10% deposit when the 2nd proposed defendants bid was accepted to aggregate the sum of **600,000,000** credited to the 2nd plaintiff's escrow account with the defendant and through which repayment of the secured amount was being effected. The balance of the bid price Sh 540,000,000 was duly paid in time.

15. Ms Wahome stated further that the claim by the applicants that the property was sold at a price way below the market value is untrue seeing that in the public auction the property attracted a bid of **Ksh 600,000,000** which is equivalent to its forced sale value as determined in the valuation report dated 25/09/2020 annexed to the supporting affidavit as **"JMM 10."**

16. The 2nd and 3rd proposed defendant's response to the application is found in their grounds of opposition dated 23/7/2021 and a replying affidavit sworn by Geoffrey Makana Asanyo.

17. The substance of the 2nd and 3rd proposed defendants case is that the applicants have not demonstrated how the said proposed defendants are necessary parties in order to enable the court to effectually and completely adjudicate upon and settle all the questions involved in this case.

18. In the grounds of opposition points of law are raised that;

> **1. The applicants have not annexed a draft further amended plaint to enable the court determine the nature of the cause of action they may have against the proposed defendants.**
>
> **2. Any claim that the applicants may have against the proposed defendants lies within the jurisdiction of the Environment and Land Court.**
>
> **3. The proposed defendants are immunized from suit under S 99 of the Land Act, being a purchaser of the suit property in an auction conducted by the defendant in exercise of its statutory power of sale.**
>
> **4. The proposed 2nd defendant was acting as a director of the proposed 3rd defendant and not in his personal capacity.**

19. In the replying affidavit by Geoffrey Makana Asanyo, it is deponed that the proposed 3rd defendant authorized him to bid for property **L.R. No. Kisii/Municipality/Block III/195** which was up for sale following an advertisement in the local dailies in the month of April 2021. He made the bid and the 3rd proposed defendant paid the required 10% and the balance within the prescribed time. The 3rd defendant borrowed money to make the payment.

20. It is urged that this court has no jurisdiction to entertain any claim that the applicants may have against the proposed defendants and that the proposed joinder of the 2nd proposed defendant is malafides as the 2nd proposed defendant was not acting in his personal capacity but as a director of the 3rd proposed defendant.

21. Directions were issued by the court that the application be canvassed by way of written submissions. All the parties have filed their submissions which submissions have been enriched by elaborate Case Law that counsel have cited. The court is greatly indebted to counsel for their industry in this regard. I shall advert to all the submissions even where I may not expressly indicate so in my analysis.

22. Having considered the application, the supporting affidavit and grounds, the replying affidavits, the record generally as well as the learned submissions by counsel, I glean the following issues for determination;

> **1. Whether the Law firm of Oringe Waswa & Opany Advocates is by virtue of failure of one of the Advocates in the firm to take out a practicing certificate for the year 2021 an unqualified person within the meaning of S 2 of the Advocates Act.**
>
> **2. Whether on the evidence and material placed before court the applicants have satisfied the conditions upon which a temporary injunction can be granted.**
>
> **3. Whether Geoffrey Mukana and Kwanza Estates Ltd be joined in this suit as the 2nd and 3rd defendants respectively.**
>
> **4. Whether the plaintiffs should be granted leave to further amend the amended plaint dated 23rd April 2019.**

<u>The Applicable Legal Principles</u>

23. An applicant for an injunction should show a prima facie case with a probability of success. Secondly, an interlocutory injunction shall not issue unless the applicant might otherwise suffer irreparable damage which would not be adequately compensated by an award of damages. Thirdly if in doubt, the court will consider the balance of convenience. (**See Giella –vs- Cassman Brown & Company Limited (1973) EA 358)**. The three conditions are to be applied as separate and distinct and the applicant is to fulfill them sequentially **(see Kenya Commercial Finance Co. Ltd V. Afraha Education Society).**

24 Where a prima facie case is not established, the irreparable injury and balance of convenience need no consideration. The establishment of a prima facie case does not, on the other hand, wish away the requirement to show that damages would not be adequate remedy and that the balance of convenience is in favour of the applicant.

25 The Court of Appeal in **Nguruman Ltd V. Jan Bonde Nielsen and 2 Others [2014] eKLR** had this to say on the meaning of a prima facie case;

> ***"Prima facie" isa Latin phrase for "at first sight", whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", a question which is not vexatious or frivolous", an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. VEthicon Ltd [1975] AC 396 is a case in point. The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Bhatt V. Republic [1975] E.A. 332.***
>
> ***Recently, tis court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] eKLR 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."***

26. In considering whether the threshold for grant of an interlocutory injunction has been met, the court must be alive to the position that at this stage the court is not making a full determination of the issues raised in the suit whose final determination must be the preserve of the trial court.

ANALYSIS

Whether the Law firm of Oringe Waswa &Opany, is, by virtue of failure of one of the advocates in the firm to take out a practicing certificate for the year 2021 an unqualified person within the meaning of section 2 of the Advocates Act.

27. This matter was raised by the defendant through the replying affidavit sworn by Christine Wahome at paragraphs 4, 5 and 6. For some reason, the issue did not appear to call for serious attention from the advocates on record for the plaintiffs as there was no rejoinder to the assertion. I, however, have looked at annexture CW-1 an extract from the Law Society of Kenya Website confirming the claim. This extract is not authenticated by the secretariat at the Law Society of Kenya. In my view, this is a serious allegation that needed proof through cogent evidence, including but not limited to, a confirmation in writing by the Law Society of Kenya on the status of the said advocate. The attempt made by the defendant to prove this point is a halfhearted one and falls short of proving that Fidelice Opany has not taken out a practicing certificate for 2021.

28. Even then, it is worthy of note, however, that in light of the decision of the Supreme Court in **National Bank of Kenya V Anaj Warehousing Limited [2015] eKLR,** the documents drawn by an Advocate who has not taken out a practicing certificate are not necessary invalid and the effect of striking out the pleadings drafted by such an advocate in a case amounts to unjust enrichment of one of the parties.

Indeed, this decision prompted parliament to amend the Advocates Act with the introduction of **section 34B.**

Whether on evidence and material placed before court the plaintiffs have satisfied the conditions upon which a temporary injunction can be granted.

29. The onus was on the plaintiffs to establish a prima facie case with a probability of success, to demonstrate that they would suffer irreparable damage and if there be doubt to show that the balance of convenience tilts in their favour.

30. It is common ground that a sale by public auction of **LR. No. Kisii Municipality/Block III/195** by the 1st defendant through its agents took place on 20/4/2021.

The plaintiffs seek in this application a temporary injunction do issue against the 1st defendant and/or its agents restraining them from transferring ownership of the suit property pending the hearing and determination of the substantive suit. the other live prayer is that an order do issue nullifying the sale and purchase of the suit property by the defendant and/or its agents in the auction conducted on 20/4/2021.

31. I think it merits a quick mention at this early stage that the prayer seeking nullification of the sale conducted on 20/4/2021 is one that is unavailable to the plaintiffs at this stage.

As **Lord Diplock** warned **in American Cyanamid Co. (No1) Vs Ethicon Ltd [1975] UKHL 1;**

> ***"It is not part of the court's function at this stage of litigation to try to resolve conflicts of evidence as to facts which the claims***

of either party may ultimately depend nor decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial".

32. So, has a prima facie case been established? Whether or not a prima facie case is established will depend on the court's evaluation of the strength of the rival affidavit evidence without deciding issues of fact and come to a conclusion one way or the other whether the plaintiffs are likely to succeed at trial.

On this, **Platt JA(held in Mbuthia –vs- Jimba Credit Finance Corporation and another [1988]eKLR** stated;

"The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each sides propositions. There is no doubt in my mind that the learned Judge went beyond his proper duties, and has made final findings of fact on disputed affidavits."

33. The plaintiff's suit as summarized by counsel at paragraph 5.2 of their submissions is anchored on the alleged breach of statutory and common Law obligations owed to the plaintiffs namely;

(a) **Levying and debiting illegal and usury interests and varying the rates without notice to the plaintiff,**

(b) Conducting an auction in an illegal and unlawful manner

(c) Selling the suit property at a gross undervalue

(d) Refusal and/or neglect by the 1st Defendant to honour the Interim Certificates and otherwise refusing to disburse sums to the Plaintiffs' account; and

(e) Loss of income of Kshs. 238,570,000/= as result of breach in

(b) above.

34. In regard to the claim of the plaintiff against the defendant on the levying and debiting illegal and usury interests and varying rates without notice to the plaintiffs, evidence in this regard is hazy and unsubstantiated. The evidence is found in annexture marked **"JMM5"** which is a copy of the amended plaint and copies of emails between the 1st plaintiff and the defendant regarding disbursement of the loan. The affidavit does not expound on the amount and/or interest in dispute.

35. In **Stars and Garters Restaurant & Another Vs. National Bank of Kenya Ltd [2019] eKLR, Korir J** stated;

"The applicants also gave the impression that the amount owed to the respondent is in dispute. That is not a ground for stopping a sale. This was stated long ago in Lalvuna & Others V Civil Servant Housing Co. Ltd [1995] LLR 336 (CAK) as quoted in James Juma Muchemi &Partners Ltd Vs Barclays Bank Ltd 2011 eKLR where Kwach JA stated;

"A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage."

36. In Mrao Ltd –vs- First American Bank of Kenya and 2 others [2003] KLR 125 the court expressed itself as follows;

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgage has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive." (emphasis added). There is no dispute in this case that Mrao Ltd, (the appellant) borrowed more than Kshs 50m from First American Bank of Kenya Ltd, the first respondent, (First American) on the security of a legal charge over Plot No.714 Section IV Mainland North, Mombasa (the suit land) and a debenture dated 27th July, 1999 over its assets to cover the debt which at the time demand for repayment was stood at Kshs88m, but was by mutual consent reduced to Kshs 68m. Under a timetable agreed between the appellant and First American the sum of Shs 5m was to be paid within 4 weeks after the execution and registration of the security thus reducing the ceiling under the debenture to Shs 63m."

37. A brief background to this litigation is apt in dealing with the above issue. The history of default on the part of the plaintiffs is long and has along the way been punctuated by numerous applications seeking to stop realization of security by the defendant.

38. In the application dated 5/4/2019 the plaintiffs, among other grouses, claimed that the monies claimed then in a statutory notice that had been issued by the defendant were coupled with illegitimate interest charged. In a ruling dated 14/2/2020, **Ougo J** stated;

45. "In this case, the applicant also alleged that it had not been notified of variations of the interest rate in accordance with the charge instrument and section 84 of the Land Act. Clause 3.1.4 of the charge instrument provides;

3.1.4. The charge shall pursuant to Section 84 (1) in the LA give the Chargor a Thirty (30) day Notice of the Variation in the interest rate.

46. The respondent on the other hand argues that once they disbursed the first tranche of Kshs. 258,174,960.20/= on 18th January 2013 to the applicants, interest became payable on those sums. It is my considered view that at this stage, the applicants have not demonstrated that the interest rates were varied to their detriment.

47. The parties have also traded accusations of breach of contract with the applicants accusing the respondent of stalling the construction of the building on the suit property to their detriment. The applicant contends that the charging of interest during this period was usurious, prohibitive and calculated to hinder their right of redemption. In their plaint, the applicants have sought compensation for loss of rental income due to the delay they claim was caused by the respondent.

48.These claims were strongly contested by the respondent which blames the delay of the construction on the applicants. The respondent also accuses the applicants of failing to pay deposit which was a condition precedent for issuance of the facility. These are issues that cannot be settled at interlocutory stage."

39. The issue of the correct amount payable was therefore placed before the court. The court after evaluation of the material before it made the following findings;

"In the end, I partially allow the application in the following

terms;

a) The defendant/respondent is restrained either by herself, nominated agents, servants and/or anyone claiming and/or acting under the said defendant/respondent from exercising the statutory power of sale over and in respect of LR No. Kisii Municipality/Block III/195(hereinafter referred to as the suit property) and in particular, advertising for sale, selling vide public auction and/or private treaty, disposing of, transferring, leasing, alienating, clogging and/or in any other manner interfering with the 1st plaintiff's / applicant's title, rights and/or interests therein, whatsoever and/or howsoever, until such time as the Defendant/Respondent shall have served the Plaintiffs/Applicants with valid statutory Notices in accordance with the law;

b) The costs of this application shall be in the cause."

40. It is thus not opportune to this court to re-open that issue of interest and amount payable. At least, not at this interlocutory stage. The issue is res judicata, and looked at differently; any attempt to revisit it could be tantamount to this court sitting on its own appeal. It is only appropriate that the issue be left to be finally ventilated at the main trial.

41. The plaintiffs lodged yet another application dated 25/11/2020. In this one they sought to have the defendant restrained from realizing security on ground that there were negotiations going on and that the nominated auctioneer was not licensed to carry out the exercise. In her final finding, **Ougo J** again stated;

"….In this matter the applicant owes the defendant monies, he is a debtor and has an obligation to meet its obligation. For how long will he keep coming to court to seek orders to stop the defendant from exercising its right as provided in Law? The applicant has failed to show that he is entitled to the said order."

42. In another application, this time before me, the applicant sought similar restraining orders this time on ground that the notice issued was irregular. I delivered myself as follows;

"29. Allowing the applicant to hang onto the straw of non-reissue of the notice, is in the circumstances of this case untenable. This court declines the invite to adopt an interpretation of Rule 15 that would aid a miscarriage of justice. The history of this matter certainly militates against such an interpretation.

30. The facts demonstrate that the applicants are belligerent defaulters bent on hindering the respondents' right to realize its security at all costs, unsympathetic of the consequences of their actions. He who seeks equity must do equity. I find that the inequitable conduct of the applicants makes them undeserving of the orders sought."

43. Of note is that in the later applications, the issue of interest and amount payable were no longer issues. To resuscitate them now in this application is in my view untenable.

44. It is trite law that an application for a temporary injunction under order 40 rule 2 in which the application herein lies, must be made in a suit where the applicant has sought the relief of a permanent injunction against the respondents. In **Kihara –vs- Barclays Bank (K) Ltd [2001] 2 EA 420** the Court stated;

"Now reverting to the application before me, it is evident that although the same is expressed to be grounded under Order XXXIX, rules (1), (2) and (3) the same does not sound under rule 1(a) or (b) at all for the property subject matter of the injunction is neither mentioned in the suit as being in dispute nor is it in danger of alienation to defeat any decree.And rule (3) is merely procedural on the giving of notice of the application for injunction. The application thus falls squarely under rule 2. <u>As indicated above, my reading of that rule is that the application must be made in a suit wherein the relief of a</u>

permanent injunction is sought. Such is not the case in the suit filed by the plaintiff. In those circumstances and seeing that the plaint has not been amended to incorporate such prayer and there is not even an offer of an undertaking to do so (the Plaintiff's counsel merely observed that a plaint can be amended) I am constrained to agree with the submissions on behalf of the bank that the application is incompetent and ought to fail on this ground alone." [Emphasis supplied]

45. In our instant case, based on the current amended plaint there exists no such prayer against the 2nd and 3rd proposed defendants and as determined here below, even the prayer to amend the amended plaint which could have salvaged the situation fails for reasons herein after. The application is thus incompetent

46. On the question whether the defendant conducted an auction in an illegal and unlawful manner, it is the plaintiffs' case that the sale by public auction was advertised by the defendant's auctioneers on 6/4/2021. During the period, the plaintiffs made frantic efforts to negotiate with the defendant with a view to redeeming the charged property and even secured a private, financial institution, AAY investment group which was willing to avail enough funds to repay the Defendant.

47. The defendant is accused of turning down the request to hold off the schedule auction for reason that the financier was based offshore and they could not authenticate the offer letter.

48. The issue of negotiations between the parties is not being raised here for the first time. The same was raised in the plaintiff's application dated 25/11/2020 where the plaintiff invoked the doctrine of estoppel. **Ougo J** at page 7 of her ruling stated in regard thereto;

"According to the applicant during the intervening period between the 22nd of July 2020 the defendant/respondent and the 2nd plaintiff and counsel for the applicant have engaged in various structured negotiations toward and in respect of the takeover of the facility granted by the defendant, correspondence is attached. The applicant argues that during the negotiations the defendant promised to afford the 2nd plaintiff/applicant and himself as counsel latitude to procure an alternative financier for purposes of take over. That during the said negotiations the defendant gave an assurance to facilitate the intended take over and that the defendant was enjoined and/or obliged to observe the terms of the assurance. That the defendant having engaged in the said negotiations cannot now renege on the terms of the engagement and the assurance to facilitate the takeover and thereby commence the realization of the suit property. That the defendant is barred by the doctrine of Estoppel. That the defendant cannot be allowed to proceed and actualize the realization of the suit property. Let me pause here and ask can the applicant really rely on the doctrine of Estoppel? I have read the correspondence referred to by the applicant. The plaintiff has failed to show that the defendant gave an undertaking that it will not proceed with the sale. In the email dated the 21/9/2020 the applicant was reminded by Peter Mugeni that it was more than 2 months since they formally approached the bank for negotiated settlement terms and that they had not received any formal offer of the settlement terms as per their discussion of 20/7/2020. In the said email the applicant was advised that the bank will be proceeding with the next recovery actions, holding the applicant accountable for the recovery loss. Correspondence titled Re: Meeting for discussion over Jipa Oil Company Limited Facility held on the 14th July 2020 at HFC Head Office merely outlines the applicant's efforts to meet his obligation. There is no indication by the applicant that the defendant accepted the said proposals. The Bank's response in its email dated 20/7/2020 was very clear that the applicant should wake up and do the needful."

49. I can't agree more. Negotiations alone cannot be a basis to stop a lender from realizing security. In any event, the plaintiffs have not shown that the offer by the financiers was crystalized into a facility before the sale by public auction. Was the defendant to hold its hands exposing itself to more loss without any certainty on the outcome of the negotiations between the plaintiffs and a 3rd party? Certainly not.

50. The auction is challenged on grounds that the defendant and its agents allowed the bidders to participate in the auction without the bidders depositing the Ksh. 10,000,000 which deposit was mandatory. The Memorandum of sale dated 20/4/2021, it is urged, falsely indicated that the said purchaser had already paid a 10% deposit of the purchase price of **Ksh. 600,000,000.**

51. In rejoinder, Ms. Wahome has deponed that the auctioneer complied with the conditions of sale. The 2nd defendant participating in the public auction on behalf of the proposed 3rd defendant duly paid the requisite bidding deposit of Sh.10,000,000 to the auctioneer. This amount was then utilized as part of the 10% deposit of the bid price and transmitted to the defendant through the 2nd plaintiff's escrow account with the defendant to aggregate the sum of **Ksh.60,000,000** credited into the said account.

52. 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**. Kimaru J** in **Bomet Beer Distributors Ltd & Another V Kenya Commercial Bank Ltd & 4 Others [2005] eKLR** stated;

"In the present case, the chargee in exercise of its powers of sale under a charge sold the suit properties in a public auction.

The plaintiffs are now complaining that the said sale was irregularly conducted. They are seeking injunctive orders of this court to restrain the said property from being transferred to the transferee who purchased the said properties in a public auction. The principles for the grant of interlocutory injunction are now well established. In the landmark case of Giella – versus- Cassman Brown [1973] EA 358 it was held that an injunction would be granted where an applicant establishes a prima facie case. The applicant is further required to establish that he would suffer irreparable loss which may not be compensated by an award of damages. If the court fails to decide the case on the two principles stated above, then it would decide whether or not to grant the injunction based on a balance of convenience.

In the present application, the plaintiffs have not established a prima facie case. The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie prove that they were are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the

way the sale was conducted by public auction, he can only seek to be awarded damages. The plaintiffs cannot therefore say that they would suffer irreparable loss which cannot be compensated by damages if the order of injunction is not granted. Damages will be adequate compensation to them. Further, the balance of convenience tilts in favour of the 5th defendant who purchased the property in the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction. In the premises therefore and for the reasons stated, the application for injunction must fail. It lacks merit. It is hereby dismissed with costs to the defendants."

53. I have considered these rival averments. I have had specific regard to annexture "CW2 and CW 4 to the affidavit of Ms. Wahome. I am satisfied that the requisite bidding deposit of Ksh 10,000,000 and 10% on the bid price were made and therefore the memorandum of sale contains no false information.

54. Even where the requisite monies are not paid in the set time frames, courts have held that this is not a material default that could invalidate the sale. **Mwita J, in David Isoe –V- IM Bank & Another [2020] eKLR** stated;

"108. I have considered respective parties positions on this issue. There is no denial that the interested party paid the balance of the purchase price outside the thirty (30) days period. The reason for this was because the interested party was getting a loan from the 1st defendant to finance the balance of the purchase price. This was done and the balance paid about two weeks outside the thirty days period.

109. In my respectful view, this was not a material default that could invalidate the sale. The 1st respondent and the interested party entered into a contract when the memorandum of sale was signed……..I do not agree with the plaintiff that failure to pay the balance within 30 days period could vitiate the sale so long as the 1st interested party was processing to finance the balance of the sale and the 1st defendant was willing to accommodate him. The property having been knocked down at the fall of the hammer during the auction, the plaintiff's equity of redemption was extinguished and failure to pay the balance of the purchase price within time could not revert the property to him."

55. This court further takes cognizance of the protection afforded by law to a purchase at a public auction. In **Nancy Kahoya Amadivs V Expert Credit Limited & Another [2015] eKLR** the court stated;

"The 2nd respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser" In Captain Patrick Kanyagia and Another –v- Damaris Wangeci and others. This court held that here is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in David Katana Ngomba –v- Shafi Grewal Kaka [2014]eKLR. In Priscilla Krobought Grant –vs- KenyaCommercial Finance Company Ltd and others Civil Appeal No.227 of 1995 (unreported). This court held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the appellant has not demonstrated that the 2nd respondent had any notice of irregular exercise of the statutory power of sale by the 1st respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 2nd respondent before the trial court, the 2ndrespondent'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 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."

56. An issue has been raised that the subject property was sold at a gross under value. It is urged on the part of the plaintiffs that the property was sold at a throw away price far below the market value of the property which was valued at **Ksh 800,000,000.** A valuation report is annexed.

57. In response, the defendant avers that the property attracted a bid of **Ksh600,000,000** which is equivalent to its forced sale value as determined in the valuation report dated 25/9/2020.

58. I have considered the averment from both the plaintiffs and the defendants. From the defendant's own annexture **"JMM10",** a valuation report by Ms. Knight Frank, the forced sale value of the property is **Sh 600,000,000.** This is the amount the property was sold for. It would be preposterous to state that the property was sold at a price way below the market value.

59. In **David Isoe vs IM Bank & another** (*supra*)

It was held;

"The defendant's duty was to ensure that the property fetched the best price possible. According to the defendants forced sale value of the property was Sh 22.5 million and the property was sold for Ksh 23 million. The plaintiff did not adduce evidence to show that the property would have fetched higher the amount it was sold……."

60. The plaintiffs have at paragraph 7 of the supporting affidavit deponed that the plaintiffs have filed suit against the defendant challenging the 1st respondents blatant refusal to disburse funds as and when requested to complete the ongoing construction on the charged property, thereby delaying its completion occasioning loss of income to the plaintiffs. Other than a copy of the plaint and emails attached, I have scoured through the rest of the affidavit and have not found any evidence extrapolating claim.

61. From the foregoing and having considered the history of the matter and evidence on record and without deciding the various issues raised in deference to the trial court which shall have opportunity and the responsibility so to do, on the material before court am satisfied that a prima facie case has not been established by the applicants to warrant the grant of an injunction.

62. Having so found, as held in **Nguruman Ltd V Jan Bonde Nelson & 2 others**(Supra), if prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

63. I, nevertheless, find it necessary to venture into these 2 conditions for grant of an injunction should I be wrong on the first finding. On whether damages would be adequate remedy to the plaintiffs, I take refuge – in the holding of the court in **Jim Kennedy Kiriro Njiru V Equity Bank (K) Ltd [2018] eKLR** where the court held;

> ***"On second issue as to whether the Plaintiff might otherwise suffer irreparable injury which would be adequately compensated by way of damages. From the facts and materials presented, I find that as much as it is important to preserve the Plaintiff's right to property pursuant to article 40 of the constitution of Kenya, it is also of utmost importance that the interest and rights of the Chargee or Defendant Bank to the mortgage in question must be protected. I'm alive to the fact that the Plaintiff is likely to lose the suit property, which is his family home and his only source of livelihood. I wish to associate myself with the case of Andrew M. Wanjohi –v- Equity Building Society & 7 Another (2006) eKLR, where the court held inter alia that:"……..by offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon."***
>
> ***I wish to reiterate that since the suit property was given as security for the loan, it became a commodity for sale and it is therefore subject to sale in case of default in loan repayment in the event that the Chargee decides to exercise its statutory power of sale pursuant to the provisions of section 90 and 96 of the Land Act, 2012. The same proposition was taken by Ringera J in Isaac O. Litali v Ambrose W. Subai & Others HCCC No.2092 of 2000(unreported); John Nduati Kariuki T/A Johester Merchants –vs- National Bank of Kenya Limited (2006) 1 EA 96; Thomas Nyakamba Okong'o vs Co-operative Bank of Kenya Limited (2012) eKLR and Maithya –vs- Housing Finance Co. of Kenya & Another (2003) 1 EA 133."***

64. The same position was taken by the court in **Kitur vs- Standard Chartered bank & 2 others [2002] eKLR** at page 5 of the judgement where the court stated;

> ***"Both Mr. Gicheru and Mr. Manani have relied on these provisions to assert that even if the applicant were to succeeded in its suit, the relief available to him is in damages only. With respect, that is what the law provides. The authorities relied on by the applicant, principally, Nyagilo, Russell and Mbuthia (supra) would apply if fraud was proved but I am not convinced that it has been proved prima facie. Indeed, the same authorities established that in the absence of fraud being established, an injunction cannot issue. I have perused all the authorities that were presented before me and in my considered view, they do not support the case of the applicant. It must also be noted that when a chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that in the event of a default it be sold by a chargee, then damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages" Such an argument is definitely misplaced and has no merits. It is immaterial that the property is a family residence, a fact well known to the chargor at the time of offering it as security to the charge. The upshot of all these is that following Giella's principles, the loss or injury that the applicant stands to suffer should he be successful in his suit is capable of being compensated in damages adequately.***

65. Ringera J put it more succinctly in **Bii v Kenya Commercial Bank Ltd [2001] KLR 458** where he stated;

> ***"Once property is offered as security, by that very fact it becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages."***

The upshot is that the loss suffered by the plaintiffs if any would be compensated in damages.

66. Thus, even assuming that a prima facie case had been established, damages would be an adequate remedy to the plaintiffs. The Defendant is a reputable bank who would be in a position to pay damages, colossal as they may appear to be.

The value of the suit property and any loss can be computed and paid for in monetary terms should the plaintiffs be the successful party at trial.

67. Lastly, I am of the considered view that the balance of convenience tilts in favour of the Defendant. I am fortified in this finding by the words of **Ringera J in Thathy v Middle East Bank (K) Ltd & Another [2002] eKLR** where the Judge stated;

> ***"As regards the balance of convenience, I think the same tilts in favour of refusing the injunction. The plaintiff is not repaying his mortgage debt. From the statement of account, a lot of what is outstanding is interest. That interest continues to accumulate. At the present tempo the charge debt will be more than the value of the security quite soon. In those circumstances,***

neither the debtor nor the borrower stands to gain anything by maintenance of the status quo. The Bank would loose because its security will in effect be no security at all if on sale it cannot realize the debt. And the plaintiff will loose because if the property is ultimately sold, he will not benefit from his investment. A sale of the security now appears to me to be in the best interest of both."

Whether the plaintiffs should be granted leave to further amend the amended plaint dated 23/4/2019.

68. Strangely, the plaintiffs have not annexed a draft further amended plaint to the application before court.

69. Amendments to pleadings should generally be allowed within the parameters stated in **Vol. 2, 6th Ed. At P.2245, of the AIR Commentaries on the Indian Civil Procedure Coder by Chittaley and Rao** and which are reflected in the Court of Appeal decision in **Central Kenya Ltd V Trust Bank Ltd [2000] 2 EA 365** where the court stated;

"The amendments to pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs; Beoco Ltd v Alfa Laval Co. Ltd [1994] 4 All ER 464 adopted. Neither the length of the proposed amendments nor mere delay ere sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs."

70. Among the conditions attached to grant of an application for amendment is that no new or inconsistent cause of action was introduced, no vested interest or accrued legal right was affected and that the amendment could be allowed without injustice to the other side.

71. Without annexing a draft further amended plaint, the respondents herein are deprived of the opportunity to determine if a new or inconsistent cause of action is introduced or a vested interest or accrued legal right has affected and that the sought amendment could be allowed without injustice to them. In the circumstances, the failure to annex the draft further amended plaint is fatal to the plaintiffs' application as it is incapable of an informed response from the respondents. This prayer is not available to the plaintiffs.

Whether Geoffrey Makana and Kwanza Estates Ltd be joined in this suit as the 2nd and 3rd defendants respectively.

72. The answer to this question is tied to the question on amendment of the plaint. A reading of the amended plaint "as is" does not show how the proposed 2nd and 3rd defendants would be necessary parties in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The plaintiff have not shown by way of affidavit evidence or submission how the joinder of the proposed 2nd and 3rd defendants would be necessary in order to enable the court effectively and completely adjudicate upon and settle all issues in the dispute

73. Granted, circumstances have substantially changed with the advent of the sale of the subject property by public auction. This, I suppose, is the reason the plaintiffs sought to amend the amended plaint to reflect the changed circumstances and to include the proposed 2nd and 3rd defendants.

As stated earlier, the attempt to amend vide this application has come a cropper as the plaintiffs failed to include a draft annexed further amended plaint.

Without a further amended plaint there exists no nexus to connect the proposed 2nd and 3rd defendant to this litigation.

74. I agree entirely with the submission by counsel for the 2nd and 3rd proposed defendants that the factual circumstances attendant to the issues in dispute in this suit have admittedly substantially changed yet the plaintiffs have not updated their primary pleading by way of further amendment and the application is therefore for all intents and purposes predicated on a vacuum.

75. What is clear my mind is that the outcome of the present litigation is bound to affect the proposed 2nd and 3rd respondent either adversely or otherwise and perhaps of their own motion they may consider joining the litigation. That is a decision this court cannot make for them.

76. For reasons above stated I make a finding that the Notice of Motion dated 4/7/2021 is without merit. I dismiss the same with costs to the respondents.

Dated, signed and **delivered** at **Kisii** this **27th day of September 2021.**

A.K. NDUNG'U

JUDGE