REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL CASE NO. E015 OF 2021

RONALD RATEMO MOTURI.....1ST PLAINTIFF

VIABLE DECO SOLUTIONS LIMITED.....2ND PLAINTIFF

VERSUS

CREDIT BANK LIMITED.....1ST DEFENDANT

WESTMINISTER COMMERCIAL AUCTIONEERS.....2ND DEFENDANT

RULING

Notice of Motion

This Ruling relates to a Notice of Motion dated 19th July 2021 brought under Certificate of Urgency by the Plaintiffs (Applicants) against the Defendants (Respondents). It is anchored on Order 40 Rules 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B, 3A AND 63 (e) of the Civil Procedure Act (Cap. 21 Laws of Kenya). The Applicants seek the following orders:

1. That this application be heard as urgent and the same be heard ex parte in the 1st instance (spent).
2. That pending the inter parties hearing and determination of this application, this Honourable court be pleased to grant temporary injunction restraining the Defendants from selling, offering for sale, leasing, entering into occupation (where acting jointly or severally or through their successors, assignees, servants or agents or the assignees, servants or agents or any of them), from interfering with the Plaintiffs' right, title and interest in the Plaintiffs' property known as KAJIADO/KAPUTIEI-NORTH/xxxx on the 21st July 2021 and also restraining the Defendants, jointly and severally from trespassing upon the suit property.
3. That pending the inter parties hearing and determination of this suit, this Honourable court be pleased to grant temporary injunction restraining the Defendants from selling, offering for sale, leasing, entering into occupation (where acting jointly or severally or through their successors, assignees, servants or agents or the assignees, servants or agents or any of them), from interfering with the Plaintiffs' right, title and interest in the Plaintiffs' property known as KAJIADO/KAPUTIEI-NORTH/xxxx on the 21st July 2021 and also restraining the Defendants, jointly and severally from trespassing upon the suit property.
4. That the costs of this application be provided for.

The application is supported by grounds found on the face of it and in the Affidavit of the 1st Plaintiff that the 1st Defendant instructed the 2nd Defendant to sell by public auction on the 11th December 2017 the 1st Plaintiff's property known as KAJIADO/KAPUTIEI-NORTH/xxxx which sale is slated to take place on the 21st July 2021 at the Offices of the 2nd Defendant at 11am, without complying with the mandatory provisions of Sections 90 and 96 of the Lands Act 2012; that there was no statutory notice sent or served on the Plaintiffs as required by law or at all; that the Plaintiffs stand to suffer irreparable loss and damage as the suit premises constitutes his family home and he will be rendered destitute together with his family; that the Plaintiffs stand to be prejudiced in the event the Defendants are not restrained by an order of this Honourable court, as an award of damages is not an adequate remedy at all in the circumstances of this case; that the intended sale of the suit property is not *bona fide* as the Defendants have colluded to have the suit property sold without due process of the law being followed and that this court ought to uphold the rule of law and uphold the present application.

The 1st Plaintiff has sworn an affidavit sworn on 19th July 2021 in which he deposes that in September 2015 he approached the 1st Defendant to take over banking facilities that had been granted to the 2nd Plaintiff by the National Bank of Kenya and which facilities had been secured by inter-alia a charge over his property known as Land Reference No. 1160/754 and Title No. KAJIADO/KAPUTIEI-NORTH/xxxx. The depositions in the said affidavit shows that this request was accepted and the 1st Defendant granted the 2nd Plaintiff credit facilities for an

aggregate sum of Kshs 98,000,000 subject to terms, *inter alia*, that include first ranking legal charge for the same sum over the property KAJIADO/KAPUTIEI-NORTH/xxx which is in the name of the 1st Plaintiff. The existence of the said facility with the 1st Defendant was confirmed vide a memorandum dated 16th February 2016. Thereafter the 1st Defendant continued granting the 2nd Plaintiff the said financial facilities as and when the same fell due. The 2nd Plaintiff sought renewal of the facility and this was accepted for an aggregate of Kshs 100,300,000. The 2nd Plaintiff sought, through a Board resolution made on 30th May 2017, to have the outstanding facilities amounting to Kshs 45, 713, 216 then owing to be restructured which was accepted by the 1st Defendant on the terms spelt out in the letter dated 2nd July 2017.

The affidavit further shows that the 2nd Plaintiff experienced difficulties in servicing the facility leading to a demand letter to it. The 2nd Plaintiff explained the reasons behind its financial difficulties. It approached the 1st Defendant again seeking accommodation and the 1st Defendant offered credit facilities for an aggregate sum of Kshs 52, 811,210.55 which offer was accepted by the 2nd Plaintiff. Things did not work out between the parties and the 1st Defendant wrote to the 2nd Plaintiff demanding a sum of Kshs 4,425,000 on account of arrears in account number 0151007xxxx. A proposal from the 2nd Plaintiff on the payments then outstanding was rejected by the 1st Defendant.

The affidavit shows that the 2nd Plaintiff requested for a memorandum and restructure of the facility but there was no response from the 1st Defendant. It is deposed that the 1st Plaintiff has all along been in touch with 1st Defendant's officers in regard to this matter who always urged him to try to make repayments as far as arrears were concerned and that none of them informed him that the 1st Defendant was intending to sell the said property by public auction at all; that he had not been served with the statutory notice of sale and neither was his spouse or the 2nd Plaintiff and further that no notification of sale as required by law has been served upon him or his spouse or the 2nd Plaintiff as required by the provisions of the Land Act 2012.

He deposes that he learned of the his property had been advertised for sale by a friend of his and that this shocked him since he was not aware of the same. Through the Daily Nation of 5th July 2021 at page 29 he learned that indeed his property was advertised for sale by public auction on the 21st July 2021. He deposed that he has been advised by his legal counsel that failure to follow the law vitiates the entire auction process and such an auction should not be allowed to take place.

Replying Affidavit

The application is opposed. Through a Replying Affidavit sworn by Wainaina Francis Ngaruiya, the head of the Legal Department of the 1st Defendant on the 26th October 2021, it is deponed that on 9th October 2015, the 1st Defendant granted a term of loan and other various credit facilities to the 2nd Plaintiff totalling Kshs 98,000,000; that these facilities were secured by an all asset debenture, guarantees as well as a charge dated 4th November 2015 over the property title No. KAJIADO/KAPUTIEI-NORTH/xxxx which is owned by the 1st Plaintiff; that the 2nd Plaintiff's accounts with the Bank have fallen into arrears and the Plaintiffs owe the 1st Defendant Kshs 69,896,981.62.

It is deponed that the 1st Defendant opted to exercise its statutory power of sale and has in accordance with the law issued the following notices:

i. A three (3) month statutory notice dated 10th June, 2020, which was dispatched by registered post on the 16th June, 2020 pursuant to Section 90 of the Land Act.

ii. A forty (40) day notice of sale dated 7th October, 2020 which was dispatched by registered mail on 9th October 2020 pursuant to Section 90 (2) of the Land Act.

iii. A forty five (45) redemption notice dated 15th December, 2020 which was issued by the 2nd Defendant, the same having been dispatched by registered post on 17th December, 2020 and the notice further having been pinned at the subject property.

It is deponed that the 1st Defendant conducted a valuation over the subject property and subsequently thereafter the property was advertised on 5th July 2021 for sale on 21st July, 2021; that the 2nd Plaintiff has been in default on several occasions prior to the decision by the 1st Defendant to exercise its statutory power of sale but the 1st Defendant had each time accepted the 2nd Plaintiff's request and restructured the loan to accommodate the 2nd Plaintiffs' circumstances and support the 2nd Plaintiff's businesses; that even after the statutory notices had been issued with the time in the notices having lapsed, the 1st Defendant was still engaging with the Plaintiffs; that the 1st Defendant has been more than accommodating to the Plaintiffs through exchanges of letters with the 2nd Plaintiff and emails as late as 14th September 2021 which emails elicited no response with phone calls going unanswered. It is deponed that the Plaintiffs have not shown any goodwill and that after obtaining interim orders stopping the sale the Plaintiffs have not made any payments.

The 1st Defendant urges that this application be dismissed and the 1st Defendant be allowed to proceed with the sale of the subject property for recovery of the amounts due.

On 22nd November 2021, the 1st Plaintiff made a Further Affidavit in response to the Replying Affidavit. I have read and understood the contents of the said Further Affidavit. He deposed that the provisions of the law under Section 84(3) of the Land Act 2012 was not complied with in that for the 1st Defendant to rely on the securities created in November 2015 it is mandatory that the 2nd Plaintiff and the 1st Defendant execute a memorandum in compliance with Section 84(3) of the Land Act and that no memorandum was ever endorsed or annexed to the charge instrument dated 4th November 2015. He deposed that the provisions of Section 84(3) Land Act 2012 are mandatory.

The 1st Plaintiff has reiterated that the statutory notice is null and void for failure to comply with the mandatory provisions of Section 90 (2) (b) of the Land Act in failing to indicate the amounts the Plaintiffs were required to pay to rectify the default and that such failure renders the Notice dated 10th June 2020 defective, null and void *abinitio* and thus any subsequent notices issued therefore invalid and cannot confer any right to the 1st Defendant to exercise any of the remedies available to it.

Plaintiffs' Submissions

On 23rd November 2021, both counsel for the rival parties, Mr. Njenga for the Plaintiffs and Ms Maitai for the Defendants appeared before me through video link and orally argued this application.

In his submissions, Mr. Njenga for the Plaintiffs stated that the notice issued to the Plaintiffs is defective and does not comply with Section 90(2) of the Land Act in that it only indicates the entire amount and interest and fails to specify the amount in default. It is stated that the notice does not offer opportunity to guarantor or borrower to rectify the default. It was stated that where notice fails to comply with the law, it becomes null and void. On this point Mr. Njenga relied on **Manasseh Denga v. Eco Bank Kenya Limited & another [2015] eKLR, David Gitome Kuhibguka v. Equity Bank Ltd [2013] eKLR and Florence Njeri Karanja v. Molyn Credit Limited [2014] eKLR,** where courts in those three cases found that a statutory notice that fails to indicate the amount in default denies the borrower an opportunity to rectify the default therefore rendering the notice null and void.

Mr. Njenga submitted that there was restructuring of the facility; that by relying on the same security to make further advances to the 2nd Plaintiff creates great violation of the mandatory provisions of Section 82 (3), 84 (2) and 84 (5) of the Land Act as there is no memorandum attached to the charge. Counsel relied on **Kisima Holdings Limited & another v. Fidelity Bank Limited [2013] eKLR, Joseph Siro Mosioma v. Housing Finance Company of Kenya & 3 others [2008] eKLR** to emphasize the point that failure to comply with mandatory requirements was a violation of the law. He argued that the Plaintiffs have established a prima facie case with a probability of success.

On the issue of irreparable loss, Mr. Njenga argued that there is clear breach of the law and therefore payment of damages is not adequate in the circumstances. He cited the case of **Florence Njeri Karanja case** (supra) where the court cited with approval the case of **Joseph Siro Mosioma** (supra) that damages were not an automatic remedy when deciding whether or not to grant an injunction and that the same could not be a substitute for loss occasioned by a clear breach of the law. Counsel submitted that there are legal provisions which the 1st Defendant is bound to comply with before realizing securities; that if the 1st Defendant proceeds to realize its security without following the law, then an illegality will been committed on the face of the court.

It was submitted that the statutory notice was also required by dint of Section 90 (2) (e) of the Land Act to inform the chargor of the remedies it can apply to court; that the statutory notice in this case does not indicate that the chargor has a relief and that this, again, renders the statutory notice defective and further that the effect of a defective notice is that anything else arising from thereon is null and void. It was submitted that the statutory notice was not served on the 1st Plaintiff's spouse who had given consent as required under Section 96 (3) (c) of the Land Act and that renders the notice a nullity.

It was submitted that the notification of sale and schedule of movable properties makes a blanket demand of the sum therein without specifying the amount of default or interest; that account number 0153203xxxxx and number 0151001xxxx are not one of the accounts relating to the amounts advanced to the Plaintiffs and that nothing would have been easier than to show arrears in those accounts but this is not disclosed because the amounts would have been at variance with the figures. It was submitted that the Standard Form of Guarantee and Indemnity document is blank at page 33 with no names of the parties; that on page 40 of the document, it is blank and the amount recoverable from the guarantor is not specified and it is not dated as shown on page 41; that on page 43 there is no name of the guarantee by a limited company and the names of the parties are not shown; that the document does not show the seal of the company, is not dated and it fails to show the principal amount recoverable; that the effect of all these anomalies is that no reliance can be placed on this document and failure to have a stamp for payment of stamp duty, the presumption is that no stamp duty had been paid.

Mr. Njenga concluded the submissions by stating that the Defendants have made a prima facie case and this matter ought to go for trail; that the grant of the orders sought will not in any way prejudice Defendants who have a recourse: to issue such relevant notices to comply with the law and once this is done, Defendants will be in compliance. He submitted that the balance of convenience tilts in favour of the Plaintiffs; that the charge is a continuing and is collateral to a debenture of even date, 4th November 2015 and that Defendants have met the threshold of the orders sought. He urged that this court considers this application and the authorities cited and find that the Plaintiffs deserve the prayers sought.

Defendants Submissions

Ms Maitai for Defendants argued that it is not contested that a loan was taken and charge registered and that there is an outstanding amount that is not disputed; that counsel for the Plaintiffs is testifying from the bar; that statutory notices were issued and duly served with proof to that effect; that the three (3) months' notice is attached to the Replying Affidavit indicating the amount to be paid as the principal, interest and the whole amount. She submitted that the entire amount was payable as per clause 9 of the charged document at pages 13 and 14 of the Defendants' bundle of documents; that it is clear that any default renders whole amount due. She submitted that the Notice is not defective and that it ought to be interpreted in accordance with the terms of the agreement of the parties and the charge. She relied on **Rehebeam Agencies Limited & another v. Equity Bank Limited and another [2015] eKLR** where it was stated that:

> **"The charge states that default of any one payment on its due date renders the entire debt due and payable. It is arguable, therefore, that in determining the default which should be rectified, section 90 (2) of the Land Act is to be interpreted in accordance with the terms and conditions of the agreement of the parties and the charge. The argument by the 2n Plaintiff is not, therefore, indomitable one that would impel the court to ground its decision on at this stage."**

She submitted that the 1st Plaintiff has come to court with unclean hands; that the Plaintiff says no notice was served yet in the letter of 28th September 2020 marked "RRM14" from the 1st Plaintiff to the 1st Defendant, the 1st Plaintiff is pleading with the 1st Defendant requesting it to "withdraw the running statutory notices"; that in the letter dated 27th October 2020 he requested the 1st Defendant to hold on issuing instructions to the auctioneers, another confirmation that the notices had been served and received; that the 1st Plaintiff is misrepresenting facts.

Ms Maitai further submitted that it was not the first time the 2nd Plaintiff had defaulted, the loan facility had been restricted twice to accommodate the Plaintiffs; that even after restructuring and notices the 2nd Plaintiff still requested the 1st Defendant to allow him find a buyer which request was allowed. She submitted that the Plaintiffs are not paying the loan facility. She submitted that the 1st Defendant is enforcing the charge not the debenture or guarantee and indemnities; that at no time did the 1st Defendant issue notices on the guarantee or debenture and that these two are not relevant in this application; that the charge stands alone as a legal document.

On the issue that there were further advances of the facility, counsel submitted that the letter of offer dated 13th September 2019 is specific that it was for consolidation and restructuring of the existing credit facilities and not further advances to the Plaintiffs. She submitted that Section 84 (2) and 84 (5) of the Land Act are not relevant here because no further advances were made; that the charge is for a maximum of 98 million and the nature of the facility was varied but the amount did not change and therefore the memorandum under Section 84 is not necessary and does not apply. She submitted that the Defendants have shown the amount due and that the statutory notices were properly served; that 1st Defendant cannot be stopped from exercising its statutory power of sale. She cited **Nancy Wacici v. Kenya Women Micro Finance Bank Ltd [2017] eKLR** where the court stated that:

> **"Once a power of sale has arisen a mortgagee has a right to exercise it. The court has no power to prevent the exercise of that power if it is being properly exercised. It is a power parliament has granted a mortgagee and courts cannot and ought not to interfere if it is being exercised."**

Ms Maitai submitted on the principles of injunction and relied on the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others [2003] eKLR** where the Court of Appeal held that:

> **"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began 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."**

She submitted that no right has been infringed in this case; that only where a right has been shown to have been infringed that a prima facie case arises; that the 1st Plaintiff will not suffer irreparable loss; that if the property is sold wrongly there is a remedy; that the only loss the 1st Plaintiff will suffer is sentimental attachment to the property which is not a ground for issuing an injunction; that the moment the charge was signed the Plaintiffs put themselves in this position: they understood any loss that may arise; that the issue with notices can be rectified; that this is not a reason for injunction; that this can be remedied by the time this suit is ready for hearing; that the restraining orders are prejudicial to the 1st Defendant which is owed over 69 million which will continue accruing interest; that the 1st Defendant has been very accommodative and has given the Plaintiffs all the help it could.

Counsel submitted that the value of the property has been given and any money above can be paid to the Plaintiffs; that there is no loss that will be occasioned to the Plaintiffs.

On the issue of accounts, it was submitted that the 1st Defendant is at liberty to consolidate all accounts due to it. She submitted that the Plaintiffs are not entitled to the prayers they are seeking and that this application should be dismissed with costs to the Defendants.

In a rejoinder, Mr. Njenga submitted that there was a fresh loan that was disbursed and for this reason there was a requirement to comply with the law. He submitted that counsel for the Defendants did not submit on service of the notices to the spouse of the 1st Plaintiff. He submitted that the power to exercise its statutory power of sale was not exercised properly due to failure to comply with the law; that the agreement of parties cannot oust the contract of the parties; that the provisions of Section 90 (2) of the Land Act are mandatory and must be complied with and that damages are not adequate where there is breach of the law.

Analysis and Determination

In determining whether or not to grant an interlocutory injunction, a court is guided by the well settled principles laid down in the case of **Giella v. Cassman Brown & Co. Ltd (1973) EA 358** that:

> **i. An applicant must show a prima facie case with a probability of success.**
>
> **ii. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.**
>
> **iii. If the court is in doubt, it will decide an application on the balance of convenience.**

In the application under consideration, the Plaintiffs advanced their case that they have established a prima facie case in that they have established that the notices alleged to have been served on them did not comply with the provisions of the law, specifically Sections 90 (2), 96 (3) and 84 (3) of the Land Act. It is claimed that the notice did not adequately inform the recipient of the nature and extend of the default

to enable the Plaintiffs rectify the default and therefore the notice contravened Section 90 (2) of the Land Act. To this claim, the 1st Defendant stated that the entire amount became payable as indicated on clause 9 of the charged document which is clear that any default renders whole amount due and payable. It was stated that the notice is not defective and ought to be interpreted in accordance with the terms of the agreement of the parties and the charge as was held **in Rehebeam Agencies case** (supra).

It has been claimed by the Plaintiffs that the provisions of the law under Section 84(3) of the Land Act 2012 were not complied with in that for the 1st Defendant to rely on the securities created in November 2015 it is mandatory that the 1st Plaintiff and the 1st Defendant execute a memorandum in compliance with Section 84(3) of the Land Act and that no memorandum was ever endorsed or annexed to the charge instrument dated 4th November 2015. To this, the 1st Defendant stated that the letter of offer dated 13th September 2019 is specific that the existing facility was consolidated and restructured and not further advances to the Plaintiffs and therefore that Section 84 (2) and 84 (5) of the Land Act are not relevant to this case because no further advances were made. It was stated that the charge is for a maximum of 98 million and the nature of the facility was varied but the amount did not change and therefore the memorandum under Section 84 is not necessary and does not apply.

I have looked at the cited provisions of the law, specifically Section 96 (3) of the Land Act. It is framed in mandatory terms. Among those to be served with the statutory notice of sale is the spouse who has given consent. I have noted that counsel for the Defendants did not submit on this point. Among the issues raised by the 1st Plaintiff is the lack of service to his spouse. The problem I have with this issue is that the spouse who is alleged to not have been served did not state so in court. She did not file an affidavit to that effect and there is no evidence to the court to that effect save for the word of the 1st Plaintiff on the issue. This court is therefore not able to rely on the allegations made by the 1st Plaintiff that his spouse was not served without evidence being presented in court to that effect.

It is not lost to me that the 1st Plaintiff, on his part, is denying service of the statutory notice when in actual fact there is a letter by the 1st Plaintiff dated 28th September 2020 (marked "RRM-14") addressed to the Branch Manager in which he is pleading with the Branch Manager of the 1st Defendant to withdraw the running statutory notice. Further, there is a letter dated 27th October 2020 by the 1st Plaintiff to the Branch Manager of the 1st Defendant, Kitengela Branch requesting that office to hold the auctioneer notice to allow the Plaintiffs time to dispose of the land in order to service the facility. It is clear to me that the 1st Plaintiff was aware of the statutory notice and that the same had been served on him.

Further, it cannot be true that the 1st Plaintiff knew of the sale of his property through a friend and thereafter saw it in the daily newspapers. Given the communication I have shown above, his claim cannot be true. It could be true as submitted by counsel for the Defendants that the 1st Plaintiff did not approach this court with clean hands.

Has the 1st Plaintiff made a prima facie case? The Court of Appeal in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others** (supra) had this to say in respect of prima facie case:

> **"a prima facie case includes a genuine and arguable case, one which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"**

Do the Plaintiffs have a right which has apparently been infringed by the Defendants? This court was told that "if the 1st Defendant proceeds to realize its security without following the law, then an illegality will been committed on the face of the court". The Defendant's failure to follow the law is attributed to failure to comply with Section 90 (2) Land Act, that is, failure to show in the statutory notice the principal amount, interest and amount in default to enable the Plaintiffs rectify the default. Secondly, failure to comply with Section 96 (3) Land Act for not serving the statutory notice to the spouse who had given her consent and thirdly failure to comply with section 84 (3) Land Act for not attaching a memorandum to the charge in respect of the fresh facility advances made to the Plaintiffs. The 1st Defendant, through its counsel, has given plausible explanation that the charge document was clear that if the chargor/borrower failed to pay when demanded to do so any sum due and owing to the 1st Defendant, then the whole amount becomes due and payable, in other words any default renders the whole amount due. I am also persuaded by the reasoning in **Rehebeam Agencies Limited & another v. Equity Bank Limited & another** (supra) that Section 90 (2) Land Act should be interpreted in accordance with the terms and conditions of the agreement of the parties and the charge.

In my considered view and as stated above, I have no evidence that the 1st Plaintiff's spouse was not served given that she has not sworn an affidavit to that effect. I have also shown the conduct of the 1st Plaintiff as far as the service of the statutory notice to him is concerned. He has contradicted himself on that issue. Given the evidence before the court and the letters to the branch manager of the 1st Defendant, I am satisfied that he was served with the statutory notice.

On the issue of memorandum in respect of new loan facility advances, this is an issue that were better canvassed during the hearing of the main suit. The Plaintiffs say it was a new loan advancement while the 1st Defendant says it was a consolidation and restructuring and not a new loan and therefore there was no need of a memorandum.

Having carefully given this matter much thought and consideration, and having taken into account the authorities cited by each party, it is my considered view that the Plaintiffs have not made out a prima facie case. They have not established a right that has been infringed by the Defendants. I have noted the efforts made by the 1st Defendant to accommodate the 1st Plaintiff. But even with that effort, the 1st Plaintiff has not made any attempt to try to pay some funds in respect of the facilities he guaranteed. Some little effort on his part would have, to some extent, demonstrated his seriousness in settling the outstanding amounts.

Having admitted that the Plaintiffs owe the 1st Defendant money arising from the loan facility advanced to them and the only claim being the

alleged failure by the Defendants to comply with the law in serving the statutory notice, it is my finding that the Plaintiffs have not demonstrated infringement of their rights and therefore they have not established a prima facie case. On that ground alone, their application fails.

Even if this court were to proceed and determine the second limb of the principles of interlocutory injunction, that of irreparable injury or loss, it is clear to me that the Plaintiffs, in signing the charge document were aware that failure to meet the conditions therein would lead to the 1st Defendant exercising its statutory power of sale and that the property owned by the 1st Defendant being sold. The amount to be recovered is the amount owed to the 1st Defendant, any money over and above that figure belongs to the 1st Plaintiff. Secondly, the 1st Defendant is a financial institution and is in a position to compensate the 1st Plaintiff in the event any loss occurred. On that principle, I also find that the Plaintiffs have not demonstrated they will suffer irreparable loss that cannot be adequately compensated by an award of damages.

Having considered all the material placed before me, it is clear to me that the balance of convenience tilts in favour of the 1st Defendant.

I remind myself that I am not conducting the main suit but determining this application whose central issue is whether the Plaintiffs have satisfied this court that they deserve the interlocutory injunction they are seeking. I have shown in this ruling that they have not. The notices herein were, in my view properly served. Where it is claimed that they were not, I was not given any evidence to persuade me this was the case. Consequently, the Notice of Motion dated 19th July 2021 must fail and is hereby dismissed with costs to the Defendants. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF NOVEMBER. 2021

S. N. MUTUKU

JUDGE