REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 49 OF 2020

ADSITE LIMITED.....PLAINTIFF

-VERSUS-

IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 27th July, 2020 brought under the provisions of Sections 1A and 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules, 2010. The plaintiff/plaintiff seeks the following orders -

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) Spent;

(v) Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the defendant, its agents, officers, employees, assigns or any other person acting for, in the legal place of and on authority of the defendant from charging interest and penalties on the Plaintiff's loan account numbers 044xxxx and 004xxxx;

(vi) Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the defendant, its agents, officers, employees, assigns or any other person acting for, in the legal place of and on authority of the defendant from the realizing the securities and more specifically from selling, auctioning, disposing of or in any other manner interfering with Title No. 1870/VIII/124, Mombasa/Freretown/29 and motor vehicle registration number KBP 651V;

(vii) Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the defendant, its agents, officers, employees, assigns or any other person acting for, in the legal place of and on authority of the defendant from referring the plaintiff's name to any Credit Reference Bureau on the basis of Loan Account numbers 044xxxx and 004xxxx; and

(viii) Costs of this application be provided for.

2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 27th July, 2020, by Samir Ramesh Shah**,** a director of the plaintiff company. The defendant on 27th October, 2020 filed a replying affidavit sworn on the same day by Andrew K. Rutto, the defendant's/defendant's Receiver-Manager.

3. On 14th October, 2020, directions were given to the effect that the application dated 27th July, 2020 shall be canvassed by way of written submissions. The plaintiff's submissions were filed on 27th January, 2021 by the law firm of Oluga & Co. Advocates, while the respondnet's submissions were filed by the law firm of TripleOKLaw LLP Advocates on 19th March, 2021.

4. Mr. Oluga, learned Counsel for the plaintiff relied on the case of **Giella v. Cassman Brown & Co. Ltd** [1973] EA 358, where the Court laid down the principles to be satisfied for an order of interlocutory injunction to issue. He submitted that the plaintiff had established a *prima facie* case with a probability of success. He argued that vide a letter dated 16th December, 2015, the plaintiff instructed the defendant to set off the loan balances with the fixed deposits and that the said instructions were repeated on several other occasions but the defendant refused to comply with them, without giving any reasons sufficient or otherwise as to its refusal.

5. The plaintiff's Counsel submitted that the respondnet had now purported to give reasons as to why it did not execute the plaintiff's instructions and that some of the reasons given were that the deposits held by the plaintiff were not sufficient to cover the outstanding loan due to the defendant and that if the set off was to be done, it would amount to discrimination against the other depositors. He contended that the reasons advanced by the defendant were baseless and had nothing to do with any fraud committed by the management of the defendant as alleged, thus fraud cannot be cited as a reason to decline the plaintiff's request. Mr. Oluga also stated that with regard to the allegation that the deposits held by the plaintiff were not sufficient, the defendant had only given details of the amounts as at 30th June, 2020 and 8th May, 2020 yet the request to set off was made in December, 2015.

6. He further submitted that the defendant had not tabled any evidence to show that other customers had made a request to set off their loan arrears with their bank deposits hence the defendant could not claim discrimination as the reason for refusing to comply with the plaintiff's instructions. Mr. Oluga relied on clause 11 of the letter of offer which provides that the defendant reserves the right to set off the balance outstanding against proceeds of the fixed deposits held under contract number 004DEP6071270003 in the name of the plaintiff. He indicated that the he said right of set off was also executed by the plaintiff's directors. He stated that commencement of receivership was not an automatic reason to refuse to set off the loans against the deposits.

7. He relied on the provisions of Section 50(2)(a) of the Kenya Deposit Insurance Act, 2012 which permits the Receiver Manager to set off deposits against loans despite commencement of the receivership. He contended that the purported moratorium was only against payments to depositors. He also relied on Section 45(1)(b) of the Kenya Deposit Insurance Act, 2012 which requires that a Receiver is under an obligation to conduct the businesses and affairs of the bank in a prudent manner but in his view, the defendant's actions were not in line with the said provisions.

8. Mr. Oluga submitted that the defendant refused to supply the plaintiff with account statements which were necessary to facilitate the takeover of the plaintiff's credit facilities by Prime Bank Limited despite the plaintiff making several requests for the same. He submitted that through a letter dated 24th October, 2015, Prime Bank Limited outlined the requisite documents for the takeover. He thus submitted that the plaintiff had discharged its duty of establishing a *prima facie* case with high chances of success.

9. On the issue of whether the plaintiff would suffer irreparable injury, he submitted that security is created over a credit facility to ensure that in the event of failure to pay, the security was recovered and as a result, the plaintiff shall suffer irreparable injury incapable of being adequately compensated by way of damages if an order for an injunction was not granted. He submitted that in the present case, the plaintiff's credit facilities were secured by amounts held in fixed deposit accounts hence the plaintiff was within its right to instruct the defendant to realize the security so as to clear the loan. It was indicated that the defendant was still charging both normal and penalty interest on the plaintiff's account while the fixed deposit accounts were not attracting any interest. He stated that the foregoing scenario posed a real danger in that the loan balances would shoot exponentially and exceed the securities therefore exposing the plaintiff to personal liability and great loss and suffering incapable of being compensated by way of damages. He also stated that because the defendant is under receivership it will not be able to compensate the plaintiff for any loss suffered.

10. Mr. Oluga relied on the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai** [2018] eKLR, where the Court described the balance of convenience in favor of the plaintiff is if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. He submitted that in the present case, the balance of convenience tilts in favor of granting the application so that the defendant does not charge interest. He indicated that in the event the case fails, it will be easy for the defendant to calculate the interest accrued during the pendency of the suit and apply the same to the plaintiff's accounts. Counsel for the plaintiff contended that there is a danger that the defendant can during the pendency of the suit, pursue the plaintiff for the loan arrears plus the irregularly charged interests.

11. He submitted that it is tidier to stop a recovery process before its commencement since if the recovery process is commenced, the costs will go up and the matter will get more complicated since it will involve additional persons who are not parties to the suit between the parties herein. He urged this Court to allow the application

12. In her submissions, Ms. Koskey, learned Counsel for the defendant also relied on the case of **Giella vs Cassman Brown & Co. Ltd** (supra) and the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 others** [2014] eKLR, on the conditions for granting an interlocutory injunction. She submitted that the plaintiff must at first establish a *prima facie* case with a probability of success. She cited the Court of Appeal decision in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others** [2003] KLR 125, where the Court held that 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.

13. She further submitted that in the present application, the plaintiff must show a clear and unmistakable right to be protected which is directly threatened by the act sought to be restrained. She stated that the invasion of that right has to be material and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. Ms. Koskey submitted that by a letter dated 1st April, 2016, one Ramesh Shah wrote to Prime Bank Limited and applied for the said bank to take over the plaintiff's facilities with the defendant. That the defendant vide a letter dated 23rd May, 2016 informed the plaintiff that it had no objection to the takeover, release and discharge of security documents in its custody, provided that the plaintiff furnished it with a bank guarantee and lawyers' undertaking on documents in a format acceptable to the defendant. The defendant's Counsel indicated that the plaintiff acknowledged the said conditions but failed to comply with them.

14. Ms. Koskey argued that from the statement of accounts annexed to the defendant's replying affidavit, it is clear that the amounts held in the plaintiff's account were not sufficient to set off the outstanding amount. She stated that the plaintiff through a letter dated 16th December, 2015 presented to Kenya Deposit Insurance Corporation (KDIC) two courses of action on either to set off its credit facilities with the directors' deposits or have the credit facilities taken over. She submitted that the defendant elected the second cause of action through a letter dated 23rd May, 2016 and it was inequitable for the plaintiff to allege that it was entitled to have the credit facilities set off with the directors' deposits.

15. The defendant's Counsel submitted that the plaintiff breached terms of the various letters of offer as well as the pre-conditions set by the defendant for the takeover of the facilities. She relied on the decision by the House of Lords in the case of **Alghussein Establishment vs Eton College** [1991] 1 ALL ER 267, and submitted that the plaintiff cannot seek to enforce a contract that it has already breached. Ms. Koskey submitted that in the various facilities extended to the plaintiff by the defendant, it was an express term that the defendant was entitled to charge interests as well as penalties in the event the plaintiff defaulted on its repayment obligations.

16. She contended that the plaintiff was inviting this Court to re-write the contract it had with the defendant when such a course of action is not permitted in law. She relied in the Court of Appeal decision in **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another** [2001] eKLR. She submitted that since the plaintiff had fallen into arrears, the defendant was mandated under the Credit Reference Bureau Regulations, 2013 to forward the name of the plaintiff and its directors to the Credit Reference Bureau.

17. On the issue of irreparable loss, Ms. Koskey cited the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others** [2016] eKLR, where the Court held that *prima facie* the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. She submitted that the charged properties were encumbered for a specific amount of money thus the plaintiff can be adequately compensated by an award of damages. She cited Section 99(4) of the Land Act which provides 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.

18. She submitted that on 22nd May, 2020, the Central Bank of Kenya announced the acquisition of assets valued at 3.2 Billion and assumption of liabilities of the same value of the defendant by Kenya Commercial Bank Limited effective from 2nd June, 2020, pursuant to Section 9 of the Banking Act. She stated that if this Court grants an order of an injunction, there is a danger that the defendant will be restrained from exercising its remedies of a charge under Section 90 of the Land Act which will be prejudicial to the defendant.

19. On the issue of a balance of convenience, Ms. Koskey stated that the plaintiff's adamant request for the defendant to exercise its right to set off the loan was not feasible as the defendant was placed under management of KDIC for unsound business conditions. She also stated that the course adopted by KDIC in declining to set off the plaintiff's liabilities using its deposits but rather entering into an agreement with among others KCB for structured payments of deposits was approved by CBK and conforms with the principles of equality and non-discrimination among the depositors and creditors. Ms. Koskey argued that in light of the foregoing, the balance of convenience tilts in favour of KDIC being allowed to continue with management of the defendant in a manner that does not allow selective treatment of the plaintiff by stopping the accrual of interest and payment of the principal sum owed by the plaintiff. She urged this Court to dismiss the application with costs.

ANALYSIS AND DETERMINATION.

20. I have considered the application filed herein, the affidavit filed in support thereof, the replying affidavit by the defendant and the written submissions by both Counsel. The issue that arises for determination this Court is whether the application dated 27th July, 2020 is merited.

21. In the affidavit filed by the plaintiff, it deposed that through a letter of offer dated 24th March, 2014 the defendant availed to the plaintiff a credit facility in the nature of a term loan of Kshs. 27,500,000/=. That through another letter of offer dated 23rd January, 2015 the defendant availed to the plaintiff a credit facility in the nature of overdraft facility of over Kshs. 1,750,000/=. It was deposed that the term loan was repayable in 72 months with effect from the date of the initial drawdown. The plaintiff stated that the term loan was secured by the right of set off executed by the plaintiff under seal, first legal charge over Title No. 1870/VIII/124, insurance policy for Title No. 1870/VIII/124 against all perils, personal guarantee and indemnity of the plaintiff's directors for a sum of Kshs. 27,500,000/= and a right of set off executed by the plaintiff's directors.

22. The plaintiff averred that the hire purchase was secured by the right of set off executed by the plaintiff under seal, personal guarantee and indemnity of the plaintiff's directors for a sum of Kshs. 12,000,000/=, a right of set off executed by the plaintiff's directors, charge over Title No. 1870/VIII/124, Title No. Mombasa/Freretown/29, Title No. Kajiado/Kisaju/3807 and motor vehicle registration number KBP 651V. It further averred that the plaintiff and its directors collectively had deposits amounting to over Kshs. 30,000,000/= with the defendant and as such, the amounts in the fixed deposit accounts was sufficient to cover the loan arrears.

23. The plaintiff deposed that through a letter dated 16th December, 2015 the plaintiff requested the defendant that either the credit facilities be set off with the directors' deposits since the credit balances in their accounts were sufficient to clear the loan balances as at 16th December, 2015 or that the same be taken over by an independent financier. It further deposed that despite the fact that the deposit accounts were sufficient to cover the loan liabilities, the defendant continued to hold onto the funds in the said fixed deposit accounts while at the same time alleging that the plaintiff was in loan arrears thereby charging both penalty and normal interest rates on the outstanding loan arrears.

24. The plaintiff averred that 6 months later through a letter dated 23rd May, 2016, the defendant acceded to the plaintiff's request that the liabilities be taken over by an independent financier and in order to facilitate the takeover, the independent financier (Prime Bank Limited) requested for updated statements of accounts which were required for purposes of the takeover. The plaintiff averred that the defendant declined to supply the plaintiff with any account statements thus making it impossible for the takeover to be undertaken. It further deposed that the defendant's actions of declining to set off the loan arrears with the fixed deposit amounts and to supply the plaintiff with statements of accounts are in utter breach of the loan agreement between it and the defendant.

25. The plaintiff asserted that it was not in loan arrears since the defendant was holding its funds and since the alleged arrears posted on its account were as a result of the defendant's failure to act on the plaintiff's instructions, the defendant should be barred from charging interest and penalties thereof and from referring the plaintiff's name to the Credit Reference Bureau for alleged default. The plaintiff further stated that the defendant had threatened to dispose of the plaintiff's assets/securities to recover the loan arrears.

26. The plaintiff averred that if the order sought of an injunction was not given, the defendant will either make real its threats of realizing the securities by selling the charged assets to the plaintiff's detriment or the interest charged on the loan accounts will shoot exponentially to the extent that the assets used to secure the loans will not be able to cover the liabilities, thus making the defendant to come after the plaintiff or its director's directly. The plaintiff stated that the defendant would not suffer any prejudice if the orders sought were granted since it has the plaintiff's assets as security for the loans.

27. The defendant in its replying affidavit deposed that on 13th October, 2015, the Central Bank of Kenya appointed the KDIC to assume the management and control of the defendant after the unsafe business practices inherent within the bank had become apparent. The defendant deposed that prior to it being placed under receivership of KDIC, through a letter of offer dated 21st August, 2013, the defendant extended a credit facility to the plaintiff in terms of an overdraft facility of Kshs. 10,000,000/= and a term loan of Kshs. 6,500,000/= at a lending rate of 19% per annum and a default rate of 165 per annum. The said facility was secured by a further legal charge of Kshs. 5,500,000/= over land Title No. Mombasa/Freretown/29, lien over fixed deposits under contract number 004DEP6071270003, and personal guarantee and indemnity of the plaintiff's directors for a sum of Kshs. 10,000,000/=. That in addition to the foregoing, the defendant notified the plaintiff that it would continue to hold the securities created in terms of the letter of offer dated 15th May, 2010 for Kshs. 6,500,000/=.

28. The defendant stated that through a letter of offer dated 24th March, 2014, the defendant extended to the plaintiff a credit facility in terms of a term loan of Kshs. 27,500,000/= for the purchase of a 5 acre property in Kitengela. The facility was secured by a right of set off duly executed by the plaintiff, first legal charge of Kshs. 27,500,00/= over property known as LR. No. 1870/VIII/124 Peponi Road, Spring Valley, personal guarantee and indemnity of the plaintiff's directors and a right of set off duly executed by the plaintiff's directors. It further stated that the lending and default interest rate for the said facility was 17% and 15% per annum respectively, and confirmed that the defendant reserved the right to amend or alter the said interest rates after issuing written notice to the plaintiff.

29. The defendant deposed that by a letter dated 23rd January, 2015 it extended an overdraft facility of Kshs. 12,000,000/= to the plaintiff which was secured by a right of set off executed by the plaintiff, personal guarantee and indemnity signed by the plaintiff's directors, right of set off executed by the plaintiff directors and a first and further legal charge securing a maximum principal sum of Kshs. 6,500,000/= and Kshs. 5,500,000/= respectively over Title No. Mombasa Freretown/29. It stated that the lending and default interest rate under the facilities were 18% and 17% per annum respectively.

30. The defendant averred that on 13th October, 2015, the Central Bank of Kenya appointed KDIC as a Receiver for the defendant herein for a period of 12 months and directed that any matter relating to the defendant should be directed to the Receiver. The defendant also stated that on 13th October, 2015, KDIC declared that with effect from 13th October, 2015 and until such time as normal operations of Imperial Bank Limited shall have resumed, a moratorium would apply and without discrimination on the liabilities of the defendant, KDIC also informed members of the public that neither deposits on any types of accounts operated by the defendant would be paid nor claims by any other class of creditors be met. The defendant also averred that through a press release of 27th October, 2015 CBK reviewed a report on the financial affairs of the defendant and confirmed that there was fraudulent activities of substantial magnitude and misrepresentation of the defendant's financial statement which largely related to the irregular granting of loans by the defendant's management.

31. The defendant deposed that CBK met KDIC together with defendant's shareholders and presented a proposal that would enable the reopening of the defendant and the proposal entailed injecting of new capital, conversion of some large deposits to equity, recovery and collateralization of the fraudulent loans, among others. The defendant averred that on 2nd December, 2015, CBK communicated to the public its endorsement of the joint agreement between KDIC, KCB and DTB which would provide the depositors of the defendant access to their deposits in a structured manner with each depositor being paid up to a maximum of Kshs. 1 Million and the remaining deposits and loans would be subjected to a due diligence review which would inform what portions could be transferred to KCB and DTB. That the defendant's borrowers were directed to continue making payments on their loans as required.

32. The defendant stated that the plaintiff did a letter dated 16th December, 2015 to KDIC where it stated that the plaintiff's liability to the defendant was approximately Kshs. 20,000,000/= while the directors of the plaintiff held deposits with the defendant in excess of Kshs. 30,000,000/= and the plaintiff suggested to either set off the plaintiff's credit facilities with the directors' deposits or that the credit facilities be taken over. The plaintiff did a similar letter dated 8th February, 2016 to KDIC. It was deposed by the defendant that vide a letter dated 1st April, 2016, the plaintiff wrote to Prime Bank Limited and applied for it to take over the plaintiff's credit facilities with the defendant and that on 23rd May, 2016, the defendant informed the plaintiff that it had no objection to the takeover provided that it be furnished with a bank guarantee and lawyers' undertaking on documents in a format acceptable to the defendant.

33. The defendant stated that despite the plaintiff acknowledging its pre-conditions for the takeover through a letter dated 28th June, 2016, it failed to comply with the said conditions. It was averred that through a letter dated 23rd May, 2016, the defendant notified the plaintiff that it had defaulted on its loan repayment and advised it that the outstanding overdraft and term loan facilities as at the date of the letter were Kshs. 8,787,213.80 and Kshs. 28,266,691.38 for accounts 044xxxx and 004xxxx respectively hence the deposits held by the plaintiff were not sufficient to cover the outstanding loan due. The defendant averred that as a consequence of the plaintiff's breach of clause 4 of the letters of offer, the overdraft facility and the term loan continued to accrue interest hence as at 30th September, 2020, the outstanding balance in the overdraft account was Kshs. 16,088,893.12 while the term loan as at 8th May, 2020 stood at Kshs. 67,713,325.00.

34. It was stated by the defendant that it would amount to discrimination against its depositors to permit the plaintiff to set off its liabilities against the deposits it held with the defendant since such a course would accord undue advantage to the plaintiff to the detriment of other depositors and creditors. It further stated that in view of the circumstances leading to the placing of the defendant under management of KDIC, it was not feasible to set off the deposit or other liabilities by the defendant to any depositor or other creditors against any loans owed by such depositor to the defendant.

35. The defendant averred that the Land Act, 2012 has an elaborate procedure to be followed by a chargee such as the defendant before it can exercise its right to sell the charged properties but in this case, the defendant has not issued any notices as contemplated under the Land

Act, 2012 in preparation for the sale of the charged properties. The defendant deemed the application herein as having been made prematurely and prayed for it to be dismissed.

Whether the application dated 27th July, 2020 is merited.

36. The law appertaining to interlocutory injunctions is set out under Order 40 Rule (1)(a) and (b) of the Civil Procedure Rules, 2010 which provides as hereunder-

> ***"Where in any suit it is proved by affidavit or otherwise—***
>
> ***(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***
>
> ***(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."***

37. The power exercised by Courts in applications seeking interlocutory injunctive orders is discretionary in nature. The discretion is guided by the conditions for that are set out in the case of **Giella v. Cassman Brown & Co. Ltd** (supra). In the words of Spry, V.P., the principles are-

> ***"First, a plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the plaintiff might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

38. Similarly, in the case of **American Cyanamid Co. vs Ethicom Limited** [1975] A AER 504, the Court considered the test for granting of an interlocutory injunction where three elements were noted to be of great importance namely:

> ***i. There must be a serious/fair issue to be tried,***
>
> ***ii. Damages are not an adequate remedy,***
>
> ***iii. The balance of convenience lies in favour of granting or refusing the application.***

39. In **Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)** the Court of Appeal explained that all the three conditions are to be applied as separate, distinct and logical hurdles which the plaintiff is expected to surmount sequentially. The Court held as follows: -

> ***"In an interlocutory injunction application, the plaintiff has to satisfy the triple requirements to;***
>
> ***a) establish his case only at a prima facie level,***
>
> ***b) demonstrate irreparable injury if a temporary injunction is not granted, and***
>
> ***c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.***
>
> ***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the plaintiff is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the plaintiff establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the defendant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the defendant is capable of paying, no interlocutory order of injunction should normally be granted, however strong the plaintiff's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the plaintiff to injunction directly without crossing the other hurdles in between.***
>
> ***It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the plaintiff if interlocutory injunction is refused would be balanced and compared with that of the defendant, if it is granted.***
>
> ***On the second factor, that the plaintiff must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the plaintiff to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the plaintiff. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of***

whatever amount, will never be adequate remedy."

40. Under Order 40 Rule 1 of the Civil Procedure Rules, 2010 it is mandatory for the party seeking a temporary injunction to demonstrate and/or prove that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or being wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose of the property. In such scenarios, Courts will more often than not, grant orders for temporary injunction to restrain such acts.

41. In the present case, there is no doubt that the suit property is in danger of being alienated since the defendant asserts that Section 90 of the Land Act, 2012 provides for remedies available to a chargee in case of default. The plaintiff on the other hand avers that the defendant is not entitled to realize the securities it holds on grounds that it refused to comply with the plaintiff's instruction for set off of the loan balances with the fixed deposits despite the fact that set off was provided for in the letter of offer, and the amounts in the fixed deposits were sufficient to set off the said loan balances. The plaintiff in furtherance of its case contends that when it requested Prime Bank Limited to take over the loan balances from the defendant, the defendant refused to issue the plaintiff with updated account statements which was a pre-condition for Prime Bank Limited to initiate the takeover.

42. It is not disputed that the defendant is yet to commence the recovery process but there is no doubt from the parties' affidavits, that the suit property is in danger of being alienated by the defendant since it shall continue to charge both lending and penal interest until the said loan balances are fully paid and can at any time decide to exercise some of the remedies available to it under Section 90 of the Land Act, 2012.

Whether the plaintiff has established a *prima facie* case with a probability of success.

43. **A *prima facie* case was defined by the Court of Appeal in the case of Mrao Ltd vs First American Bank of Kenya & 2 others [2003] KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others [2014] eKLR,** as follows-

> ***"A Prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".***

44. In **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 others** [2016] eKLR, the Court cited with approval the following passage by **Steven Mason & McCathy Tetraut** in an article entitled ***"Interlocutory Injunctions: Practical Considerations"***

> ***"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald vs. Canada (Attorney General). Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."[11] It is usually a brief examination of the facts and law."***

45. Further, in **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another** [1990] eKLR, the Court held as follows on what a party seeking an injunction must demonstrate-

> ***"To succeed in an application for injunction, a plaintiff must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."***

46. The plaintiff herein has averred that it instructed the defendant vide a letter dated 16th December, 2015 addressed to KDIC to set off the loan balances with the fixed deposits. I have looked at the letter dated 16th December, 2015 and established that the plaintiff listed the accounts it holds with the defendant. Cumulatively, account numbers 7400004795 and 7400003788 had approximately USD 87,092.66. The said letters also stated that the directors of the plaintiff collectively had over Thirty five million Kenya Shillings in personal deposits, while the plaintiff's total approximate liability was Kshs. 20,000,000/=. The plaintiff made a proposal to either set off the said loan with their bank deposits or have a financier take over their liabilities. The said letter elicited no response hence the plaintiff sent another letter dated 8th February, 2016 whose contents were similar to the letter dated 16th December, 2015.

47. Through a letter dated 1st April, 2016, which was copied to KDIC and the defendant herein, the plaintiff listed the accounts it holds with the defendant indicating how much is in each account and the loan balances in each account. In the said letter, the plaintiff also disclosed that it had a fixed deposit account with Kshs. 950,000/=, the plaintiff requested Prime Bank Limited to take over the said accounts and have their three charged properties released. Through a letter dated 23rd May, 2016, the Receiver Manager notified the plaintiff herein that he had no objection to the takeover. He indicated the outstanding balances in each account, the daily interest accrual and set down conditions prior to release and discharge of the security documents in the defendant's custody.

48. The plaintiff through its Advocates M.M Gitonga Advocates, wrote a letter dated 28th June, 2016 to the defendant herein requesting for statements of the bank accounts it holds with the defendant in order to expedite and facilitate the takeover of the credit facilities by Prime Bank Limited. The said letter elicited no response from the defendant and the plaintiff's Advocates sent to the defendant follow up letters dated 5th July, 2016, 10th October, 2016, 14th February, 2017 and 2nd June, 2017 requesting for updated statements of accounts for purposes of facilitating the takeover. From the affidavits before me, it is indeed without a doubt that the said statements of accounts were never supplied and the loan balances were not set off by the fixed deposits.

49. The defendant averred that despite the plaintiff acknowledging the pre-conditions for the takeover, it failed to comply with the same.

This Court notes that the defendant did not explain and/or given any reasons as to why it declined to issue the plaintiff with the statements of the accounts it held with defendant so as to facilitate the takeover. This Court finds that the plaintiff has proved by way of documentary evidence that it made efforts to ensure that Prime Bank Limited took over its credit facilities with the defendant. Other than giving an explanation as to why the set off contemplated in clause 4 of the letters of offer was not feasible, the defendant has failed to demonstrate and/or give a satisfactorily explanation as to why it did not respond to the plaintiff's letters requesting for updated statements of accounts and/or issue the plaintiff with the same all together.

50. The defendant averred that there is no evidence from Prime Bank Limited to the effect that the said bank declined to progress the takeover due to lack of bank statements. In response to this, the plaintiff referred the Court to a letter by Prime Bank Limited dated 24th October, 2015 addressed to the plaintiff which is contained in its supplementary list of documents. In the said letter, Prime Bank acknowledged receipt of the letter from the plaintiff requesting it for credit facilities to facilitate takeover of the liabilities with the defendant herein. It went further and requested for several documents to enable it to process their request. Requirement No. 13 of the said letter was bank statements for the last 12 months for the plaintiff's account with the defendant, while No. 14 was loan statements since inception of the facilities with the defendant.

51. From the above it is clear that the loan statements and the account statements played a crucial role in facilitating the takeover that was frustrated by the defendant's failure to issue the plaintiff with the same. The plaintiff having discharged the evidential burden by producing documents on its part has demonstrated its efforts and willingness to have the credit facilities taken over by Prime Bank Limited. The onus of proof to rebut the said *prima facie* position shifts to the defendant to demonstrate through documents that that the statements of accounts and the loan statements for the plaintiff were supplied as requested and if not supplied, explain the reason for failure to supply them.

52. In the case of **Winfred Nyawira Maina vs. Peterson Onyiego Gichana, [2015] eKLR the Court held as follows:**

> ***"I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence... Therefore, the Plaintiff must first lay prima facie evidence against the Defendant if evidential burden is to be created on the shoulders of the Defendant. "***

53. **In view of the foregoing,** I am satisfied that the defendant has failed to discharge the evidential burden of proof by failing to furnish the plaintiff with updated loan and/or account statements before the institution of the suit.

54. In view of the above, I am satisfied that the Plaintiff has raised serious issues for trial; and has demonstrated that this application is neither frivolous nor vexatious. I am further satisfied that on the strength of the documents produced in this application by the plaintiff, it has established a *prima facie* case with a probability of success. The documents produced by both the plaintiff and the defendant relate to the legality of interest charged after 16th December, 2015. I have considered the arguments advanced by both sides and I find that in view of the rival positions taken by both sides, the same can only be determined and resolved after full hearing of the suit as the issues cannot be determined at the interlocutory stage. This may therefore call for the Court in the interest of doing substantive justice to issue conservatory orders to ensure that the suit property is not alienated to the detriment of the plaintiff. In view of the above I find the plaintiff has established a *prima facie* case with probability of success.

Whether the plaintiff will suffer irreparable injury/loss that cannot be compensated by an award of damages if the application for temporary injunction is not allowed?

55. The plaintiff submitted that security is created over a credit facility to ensure that in the event of failure to pay, the security should be recovered. It further submitted that despite the defendant's failure to either set off the loan balances with the fixed deposit amounts or facilitate the takeover of the same by Prime Bank, the defendant is still charging interest both penal and normal on the plaintiff's accounts while the fixed deposit accounts are not attracting any interest.

56. To rebut this position, the defendant averred that on 22nd May, 2020, CBK announced the acquisition of assets valued at 3.2 billion and assumption of liabilities of the same value of the defendant by KCB effective 2nd June, 2020. It submitted that if the Court grants an order of injunction, the defendant will be restrained from exercising its remedies of a chargee under section 90 of the Land Act which will prejudice the defendant.

57. This Court notes from the defendant's replying affidavit that as at 30th September, 2020 the outstanding balance in the overdraft account was Kshs. 16,088,893.12 while the term loan as at 8th May, 2020 stood at Kshs. 67,713,325.00. It is clear that the loans have already increased and/or multiplied approximately three times more than what was advanced to the plaintiff. Indeed, if the injunction orders are not granted, the interest charged both normal and penalty shall cause the loan balances to shoot exponentially to the extent that the assets used to secure the loans will not be sufficient to cover the liabilities.

58. I find that if injunction pending hearing and determination of this suit is denied, the plaintiff shall not only risk losing the suit properties but the defendant shall also come after the plaintiff and its directors/shareholders directly thus infringing on the plaintiff's right to property and to a fair hearing as provided for under Article 40 and 50 of the Constitution of Kenya, respectively, before a full hearing and determination of this suit. It cannot be said that the plaintiff won't suffer irreparable loss incapable of adequately being compensated by way of damages if the application for temporary injunction is not granted. This Court holds that since the defendant is under receivership, it may not be able to compensate the plaintiff by way of damages.

In whose favour does the balance of convenience lie?

59. In **Amir Suleiman v Amboseli Resort Limited [2004] eKLR,** Ojwang, Ag. J (as he then was), elaborated on what a *"balance of convenience"* means by stating that-

"The Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice."

60. In the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others [2016] eKLR,** the Court when addressing the issue of balance of convenience expressed itself thus-

"Where any doubt exists as to the plaintiffs' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Defendant on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the plaintiff has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. "

61. This Court has considered and weighed the conflicting parties' interest in regard to the balance of convenience and in which position the same tilts to, in regard to granting or rejecting the application for an injunction. I have considered all the facts of this application on which party stands to suffer the greater harm following the decision of the application herein. The plaintiff contended that if the injunction is not granted, the plaintiff will suffer greater hardship since the outstanding balances shall continue to accrue interest thus shooting exponentially and exceeding the securities held by the defendant. This Court finds that if an order of injunction is issued, and it is found ultimately that the plaintiff was not entitled to the said order, the defendant will easily compute the interest it ought to have received during the period the injunction was in place. In view of the above it is evident that the plaintiff stands to suffer more than the defendant if an order of injunction is not granted.

62. I also find that the defendant will suffer no harm if the injunction is granted, as it still has the plaintiff's security (the suit properties), money in the plaintiff's and directors' accounts and the fixed deposits and it will be at liberty to exercise its statutory power of sale, if eventually, the case is decided in its favour. Since some of the security is land, it is unlikely to lose its value but stands to appreciate in value.

63. **The upshot is that plaintiff's application dated 27th July, 2020 is merited and the same is allowed in the following terms-**

(i) That an order of injunction is hereby issued to restrain the defendant, its agents, officers, employees, assigns or any other person acting for, in the legal place of and on authority of the defendant from charging interest and penalties on the Plaintiff's loan account numbers 044xxxx and 004xxxx pending the hearing and determination of this suit;

(ii) That an order of injunction is hereby issued to restrain the defendant, its agents, officers, employees, assigns or any other person acting for, in the legal place of and on authority of the defendant from the realizing the securities and more specifically from selling, auctioning, disposing of or in any other manner interfering with Title No. 1870/VIII/124, Mombasa/Freretown/29 and Motor Vehicle registration number KBP 651V pending hearing and determination of this suit;

(iii) That an order of injunction is hereby issued to restrain the defendant, its agents, officers, employees, assigns or any other person acting for, in the legal place of and on authority of the defendant from referring the plaintiff's name to any Credit Reference Bureau on the basis of Loan Account Numbers 044xxxx and 004xxxx pending hearing and determination of this suit**;**

(iv) The costs of this application shall abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED and **DELIVERED** at **MOMBASA** on this **19th** day of **November, 2021.** In **view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued**

by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

No appearance for the parties

Mr. Oliver Musundi – Court Assistant.