



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 42 OF 2019

DR.JOHN AYIEKO.....1ST PLAINTIFF/APPLICANT

DR.DAVID CHEMEI.....2ND PLAINTIFF/APPLICANT

DR.DICKSON M.MWANIKI.....3RD PLAINTIFF/APPLICANT

JULIUS KORIR.....4TH PLAINTIFF/APPLICANT

CHRISTINE JEPTOO KIMUGUL.....5TH PLAINTIFF/APPLICANT

CHRISTOPHER SEREM.....6TH PLAINTIFF/APPLICANT

PROF.GREGORY WANYEMBI.....7TH PLAINTIFF/APPLICANT

PAMELLA MORAA.....8TH PLAINTIFF/APPLICANT

REV.MICHAEL KANGONGO.....9TH PLAINTIFF/APPLICANT

STANLEY KIPROP.....10TH PLAINTIFF/APPLICANT

ROSE KOIMA.....11TH PLAINTIFF/APPLICANT

JACK WILLIS OKUMU ABOK.....12TH PLAINTIFF/APPLICANT

JOHN TELO KIPTOO.....13TH PLAINTIFF/APPLICANT

JENIFFER BIRGEN.....14TH PLAINTIFF/APPLICANT

DAVID KEBENEI.....15TH PLAINTIFF/APPLICANT

STEPHEN KEMEI.....16TH PLAINTIFF/APPLICANT

ABRAHAM KETER.....17TH PLAINTIFF/APPLICANT

RAEL KIMITEI.....18TH PLAINTIFF/APPLICANT

STEPHEN TIROP.....19TH PLAINTIFF/APPLICANT

MARY ENDUSA.....20 PLAINTIFF/APPLICANT

FRANCIS K.TIGOI.....21ST PLAINTIFF/APPLICANT

HENRY ADERA.....22ND PLAINTIFF/APPLICANT

TOM WASONGA.....	23 RD PLAINTIFF/APPLICANT
ROSE WANJIRU.....	24 TH PLAINTIFF/APPLICANT
JOSEPH CHELANGA.....	25 TH PLAINTIFF/APPLICANT
JOHN KURGAT.....	26 TH PLAINTIFF/APPLICANT
PAUL BETT.....	27 TH PLAINTIFF/APPLICANT
ALOICE OWINO.....	28 TH PLAINTIFF/APPLICANT
ISAAC BORONGI.....	29 TH PLAINTIFF/APPLICANT
ADELAIDE MUTSEMBI.....	30 TH PLAINTIFF/APPLICANT
CONSOLATA ALUOCH.....	31 ST PLAINTIFF/APPLICANT
WILSON K. BETT.....	32 ND PLAINTIFF/APPLICANT
JOHN K.RUGUT.....	33 RD PLAINTIFF/APPLICANT
HELLEN CHEBET.....	34 TH PLAINTIFF/APPLICANT
SAMUEL K. YEGO.....	35 TH PLAINTIFF/APPLICANT
MARY AYECKO.....	36 TH PLAINTIFF/APPLICANT
PROF.BENARD L.MISIGO.....	37 TH PLAINTIFF/APPLICANT
STEPHEN ONDARI OMOGA.....	38 TH PLAINTIFF/APPLICANT
MARTHA NETTO CHELUGET.....	39 TH PLAINTIFF/APPLICANT
DR.JOHNSTONE KIMANZI.....	40 TH PLAINTIFF/APPLICANT
PROF.AUGUSTINO ONGWARE.....	41 ST PLAINTIFF/APPLICANT
ROSEMARY BARGERI.....	42 ND PLAINTIFF/APPLICANT
DAVID THUO KAMAU.....	43 RD PLAINTIFF/APPLICANT
SUSAN CHEPCHIRCHIR.....	44 TH PLAINTIFF/APPLICANT
MARY WAHOME.....	45 TH PLAINTIFF/APPLICANT
HELLEN IPARA.....	46 TH PLAINTIFF/APPLICANT
WILSON RONO.....	47 TH PLAINTIFF/APPLICANT
HOSEA K. KOGO.....	48 TH PLAINTIFF/APPLICANT
WILSON K.SAINA.....	49 TH PLAINTIFF/APPLICANT
EDNA CHELANGAT.....	50 TH PLAINTIFF/APPLICANT

VERSUS

1. HESBON M. KIURA and JOEL KIPSANAI OFFICIAL LIQUIDATOR OF

MOI UNIVERSITY SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD

(IN LIQUIDATION ON BEHALF OF THE COMMISSIONER FOR

CO-OPERATIVE SOCIETY DEVELOPMENT.....1ST DEFENDANT/RESPONDENT

2. COOPERATIVE BANK OF KENYA LTD.....2NDDEFENDANT/RESPONDENT

RULING

1. The fifty Plaintiffs by an application dated 30th October 2019 and the further affidavit filed on 20th December 2019 pray that:

a) The 2nd defendant (Co-operative Bank Kenya Ltd-hereinafter referred to as the bank) by itself, or agents be restrained from advertising for sale, auctioning, selling, dealing, interfering, alienating or disposing of all that parcel of land known as ELDORET MUNICIPALITY BLOCK 4/321, by auction scheduled on 31st October 2019 or any other day all that parcel of land pending hearing and determination of this suit.

b) The defendant by themselves, their servants, employees, agents, assigns and anybody acting for or through them be and is hereby restrained from selling, leasing, subdividing, charging, partitioning, constructing and erecting any structures, dumping any material of any nature, demolishing or dealing with the property known as ELDORET MUNICIPALITY BLOCK 4/321 in any adverse manner whatsoever pending hearing and determination of this application inter-parties and thereafter pending hearing and determination of this suit.

c) The County Commander Uasin Gishu County do supervise and effect compliance of these orders.

d) Cost be provided for.

2. The 1st Defendants (**HESBON M. KIURA and JOEL KIPSANAI OFFICIAL LIQUIDATOR OF MOI UNIVERSITY SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD (IN LIQUIDATION ON BEHALF OF THE COMMISSIONER FOR CO-OPERATIVE SOCIETY DEVELOPMENT-** hereinafter referred to as **MUSCO**) filed a Replying Affidavit dated 8th November 2019 in opposition to the application.

3. The 2nd Defendant filed a Replying Affidavit dated 4th November 2019, further Affidavit on 7th November 2019 and submissions dated 27th November 2019 in also oppose the application.

4. The matter was canvasses through written submissions

5. The background to this matter is that that the Bank and **MUSO** have a Bank- customer relationship that led to the 1st Defendant, borrowing and the Bank advancing various financial facilities from the year 2008 to 2016. Under the auspices of a Bank-Customer relationship, the Bank advanced various loan, overdraft and other credit facilities to **MUSCO** between the year 2008 and 2016.

6. According to the bank, in its capacity as the registered owners of the suit property, **MUSCO** offered the said property as security to the Bank. Subsequently, a charge dated 18th Mach 2010 was created over suit property where one of the pertinent terms of the Charge was that the Bank had the right to exercise its statutory power of sale in the event of default by **MUSCO**.

7. **MUSCO**, being a corporate body, under **the Co-operative and Societies Act**, executed the Letters of Offers and Charge binding them to the contractual terms therein and the statutory implications therefrom.

8. The defendants' position is that the effect of the security was that should there be default by **MUSCO**, the Bank would exercise its statutory right of sale as legally and contractually provided for.

9. Currently **MUSCO** is under liquidation, leading to the loan account falling into arrears of **Kshs. 553,249,626.60** as demonstrated in the statement of accounts. It is this default by **MUSCO** that triggered the process of the realization of its security by the Bank. The Bank issued statutory notices and the same have been annexed together with the statutory notices.

10. The Plaintiffs, who are members of **MUSCO**, have now sought orders to restrain the Bank from exercising its statutory power of sale.

11. The issues that arise for determination can be condensed as follows:

a) Does the court have jurisdiction to deal with disputes between the **SACCO's** Liquidators and the members therein noting that **section 69 of the Co-operative Society Act** donates this jurisdiction to the **Co-operative Tribunal**?

b) Do the shareholders of a SACCO have locus standi to sue on behalf of a SACCO which is under liquidation or is the same legally unsound under Section 66(1)(b) of the Co-operative Society Act?

c) Are there sufficient grounds to warrant the bank being restrained from exercising its statutory power of sale by third parties?

d) As a secured creditor, does the bank need the court's intervention to realize its security under the Insolvency Act.

12. And finally can an injunction be issued against the Bank's statutory rights where there is an admission to indebtedness, and notices have been served and security offered in the event of default?

JURISDICTION OF COURT

13. The Plaintiffs submit that this court has jurisdiction to grant the orders sought herein under **Section 1A, 1B, 3A & 63 of the Civil Procedure Act as read together with Order 40 of the Civil Procedure Rules 2010**, if and when moved by either a creditor, contributory or liquidator to determine issues raised before it.

14. The applicant lays emphasis to **Order 40 Rule 2 of the Civil Procedure Rules 2010**: -

a) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

b) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

15. The 1st respondent points out that this matter has already been heard and determined in the Eldoret High Court Miscellaneous Civil Application No. 66 of 2018 where for leave to apply for Judicial review orders as was made in the Judicial Review no. 7 of 2018 against the decision of SASRA to revoke the Licence of the said Society before this court dismissed the Judicial review for want of jurisdiction.

16. I hold the view that once the dispute arose, then this court has jurisdiction to hear and make a determination., otherwise I would have to act in obedience to Nyarangi (J)'s sentiments in M.V. Lillian S v Caltex, and down my pen immediately

17. **Do the plaintiffs have locus standi to enforce the contract over the suit property, and file suit?**

The Plaintiffs insist that they have *locus standi* to institute the current suit, and the court's attention is drawn to the filed pay slips (**See annexure JA-Further**, that the Plaintiffs are members of **Moi University Savings and Credit Co-operative Society Ltd** (hereinafter referred to as MUSCO) which purchased **ELDORET MUNICIPALITY BLOCK 4/321**. MUSCO is the current registered owner of **ELDORET MUNICIPALITY BLOCK 4/321** (**See annexure JA-3 being a copy of the certificate of official search.**)

18. It is their contention that they have immense interest and rights over the suit property known as **ELDORET MUNICIPALITY BLOCK 4/321**. **In this regard they rely on the definition of given to the term interest under the Land Act under Section 2 of the Land Act as a right in or over land.**

Further **Section 64 of the Co-operatives Societies Act** allows the application of the Companies Act in the winding up of a Co-operative Society and states as follows:-

The sections of the Companies Act (Cap. 486) specified in Part I of the

Schedule to this Act, modified in accordance with Part II of that Schedule, shall apply *mutatis mutandis* in relation to the winding-up of a co-operative society as they apply to that of a company registered under that Act.

Counsel argues that with the coming into effect of the Companies Act of 2015, the applicable provisions are those found in the **Insolvency Act No. 18 of 2015**, and submits that under **Section 420 of the Insolvency Act** members of a SACCO such as MUSCO currently under liquidation may move the Court requesting that the Court determines any question arising in the liquidation of a company.

The liquidator, or a contributory or creditor, may apply to the Court to determine any question arising in the liquidation of a company, or to exercise, with respect to the enforcing of calls or any other matter, all or any of the powers that the Court might exercise if the company were being liquidated by the Court.

19. The plaintiffs' counsel further contends that a liquidator cannot operate in a vacuum and in isolation and assume that no one is entitled to question their conduct in so far as it relates to the administration of an insolvent institution.

20. The position taken by the respondents on the other hand, is that the plaintiffs became past members upon the cancellation of the registration and appointment of the liquidators of the Society (in liquidation), which ceased to exist as a body corporate from the date the cancellation/Liquidation order dated 29th June, 2019 by the **Commissioner for Co-operative Development** and the appointment joint Liquidators took effect.

21. That the **Sacco Societies Regulations Authority (SASRA)** which revoked the **Deposit- Taking Licence** of the said Society pursuant to **section 27(3) of the Sacco Societies Act (No. 14 of 2008)** as advertised in the Kenya Gazette (LN 6391) of 29-6-2018 for non-compliance with the law, is not a party to these proceedings.

22. As to whether the plaintiffs have locus to institute a suit on behalf of MUSCO, it is pointed out that the Sacco is currently under Liquidation, **the Co-operative Societies Act, and Section 66 (1b)**, grants the Liquidator(s) the power to institute and defend suits on behalf of the Sacco in his own name, and therefore Plaintiffs cannot purport to institute proceedings on behalf of the Sacco in a contract they are not a party to. The Plaintiffs, therefore, have no legal right to institute a suit on behalf of the Sacco.

23. That in any event, the Plaintiff's lack the requisite *locus standi* to institute the suit in their personal capacity as the loan was procured by the Sacco which is governed by the Co-operative Societies Act and which act donates to the Sacco the statutory right to sue and be sued under Section 12 and 28 of the said Act.

24. It is submitted that the contracts giving rise to the statutory rights of the Bank are between the Bank and the Sacco, so the Plaintiffs being strangers to the contracts between the parties, have no privity of contract, and cannot purport to enforce or claim under it.

25. Further, that under **Section 12 and 28 of the Co-operative Societies Act SACCOs are granted** the power to sue and be sued, and the Plaintiffs cannot purport to institute proceedings on behalf of the Sacco in a contract they are not a party to. In support of this argument, the respondents refer to the case of **Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR** while quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, which reiterated thus:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”.

26. It is also submitted that the plaintiffs do not have any legal proprietary rights over suit property, as the Bank has produced an official search of the suit property on which it is shown that **MUSCO** is the legal and registered owners and proprietor of the suit property.

27. Further the **Commissioner for Co-operative Development** cancelled the registration of the said society and ordered the said society to be liquidated to protect members of the public from doing business after the deposit-taking licence has been revoked. It is also contended that the applicants cannot now raise issues of incompetency of the liquidators who acted according to the law in taking possession of the said Society's property because section **65 of the Co-operative Societies Act (cap 490)** provides for the appointment of the Liquidators. In this regard, it is submitted that the plaintiffs/applicants as past members of the said society failed to utilize the provisions of **section 62(2) of the Co-operative Societies Act (cap 490)** and lodge an appeal to the Minister/Cabinet Secretary in charge against the cancellation/Liquidation order dated 29-6-2018.

28. That since the said Society ceased to exist as per section 63 of the Co-operative Societies Act and upon the cancellation/Liquidation order dated 29th June, 2018 took effect under that Act, the plaintiffs/applicants have no legal mandate to bring this suit and other proceedings on matters of MUSCO which does not exist and that such suit and proceedings are an abuse of the process of the court.

29. The 1st defendant emphasizes that under **section 68 of the Co-operative Societies Act**, it is accountable to, and is under the guidance and control of the **Commissioner for Cooperative Development**, under which the Liquidators are not accountable to the plaintiffs and other past members.

30. This court is urged to find that there is no breach of duty on the part of the Liquidators as the **Commissioner for Co-operative Development** even extended the Liquidation period for one year after having been satisfied with the liquidation process. That the commissioner's extension of the liquidation period for one year is evidence that the commissioner is satisfied with the liquidation process including: -

- The disposal of assets in accordance with the applicable law.
- The claims and admissions of claims were addressed and advertised in local dailies and Kenya gazette as per contained in **section 66 (1)(a) and rule 48 of the Act and Rules** respectively.
- The liquidators acted within the power conferred to them in good faith to conclude the exercise or in their duties as per the law, and carried out all statutory duties complied as well as their fiduciary obligations diligently and competently. This includes powers to determine the contributions to be made by past members including the plaintiffs to the funds of society to repay such debts as per section 66(1)(e) of the Act.
- Creditors have been ascertained according to the claims submitted and advertised which fact the plaintiffs ignored, and contingencies have been made as per the Co-operative Societies Act and assets are being distributed in accordance with **section 66(1) of the Cooperative Societies Act**.

31. The respondents reiterate that the Liquidators are not in breach of any statutory duty as: -

- Notice was served before long before moving to the High court in 2018 against the sale, before the matter was settled after parties consented after valid redemption notices were issued to the liquidators;
- Amounts were clearly shown on the redemption notice;
- Provisions of the Land Registration Act, Land Act, Auctioneers Act and other applicable law were adhered to in respect to the sale;
- Remedy was included in the notification that failure to repay the sums due the property was to be sold;
- The claims about under-valuation have not been proved by the plaintiffs;

32. The respondents maintain that the liquidators are not in breach of fiduciary duties and/or have not mismanaged the society business as evidenced by what the liquidators did in their earlier suit (**ELDORET HCC NO. 40 OF 2018**) against the 2nd defendant and former officials on the sale of property before the matter was settled and in defending a suit in Nairobi filed by **Dinesh Construction Ltd** the contractor of **Musco Towers (NBI HCC MISC NO. 301 OF 217)** over the unsettled claim of Kshs. 143 million to defend the suit property.

33. It is also pointed out that the liquidators have no control over the loan and interest charges on the account that has debit balances of over **kshs. 500 million**.

34. The Liquidators confirm that: -

a) The Commissioner has powers to compromise the debt and approve the claim (as provided by section 66(1)(n) of the Cooperative Societies Act) among the parties without incurring further costs by involving consultants other than the Liquidators and making appointments of third parties which is inconsistent with the law;

b) The Commissioner has powers to summon parties and compromise a debt according to the law; therefore, the 2nd defendant's actions are within and not in breach of the law;

The plaintiffs are faulted for attempting to usurp the Commissioner's powers and that their prayers including orders of injunction, permanent or otherwise, to restrain the Commissioner and the officers including the Liquidators shall contravene and render useless the provisions of **section 68(Cap 490) of the Cooperative Societies Act** particularly and all other provisions of that Act and the **Sacco Societies Act (Cap 490 B)** that govern all Cooperative Societies.

35. DO THE PLAINTIFFS HAVE LOCUS TO ENFORCE CONTRACTUAL RIGHTS THAT THEY ARE NOT PRIVY TO?

On the issue as to whether the applicants have *locus standi* to file this suit and enforce proprietary rights, the evidence clearly shows that the plaintiffs are not the registered proprietors of the suit property nor do they have any registered interest in the suit property. In the absence of any legal or registrable right by the Plaintiffs, then they cannot purport to defeat the Bank's legal and registered right as a Chargee. It is abundantly clear that there does not exist privity of contract between the applicants and the bank, as the contracts giving rise to the statutory rights of the Bank are between the Bank and the Sacco. There must be a nexus between privity of contract and *locus standi* in absence of which is that the Plaintiffs are strangers to the contracts between the parties, and cannot purport to enforce or claim under it [see **Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR**].

Have the applicants established a prima facie case with a probability of success?

36. To be able to determine whether this test has been met, it is critical that an examination and analysis be made regarding the place of the statutory notice in this matter, as it appears to be a major bone of contention. Drawing from the principles set out in **Giella –vs- Cassman Brown. & Co**

the applicants must establish a prima facie case with a probability of success which was discussed in the case of in **Mrao Ltd -vs First American Bank of Kenya Ltd (2003) KLR** 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 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, and the Applicant must establish that her legal right has been infringed by a defendant.

37. It is not contested that **MUSCO** is the registered owner of **ELDORET MUNICIPALITY BLOCK 4/321** which was charged to the bank, but the applicants' contention is that the 1st Defendant ought to follow the laid down procedures should it intend to exercise its statutory power of sale. That it is a mandatory requirement that statutory notices have to be issued. Further, that failure to conform to specific obligations by the chargee as provided for under **Section 90 (1) of the Land Act: -**

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

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

a) the nature and extent of the default by the chargor;

b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

38. In support of the argument that there must be strict compliance, the applicant cites case of **Trust Bank Ltd v Eros Chemists Ltd** the Court of Appeal categorically stated as follows: -

“In our judgment, the heart of this appeal lies in the central question as to what constitutes a valid notice under section 69(A)

(1) of the Indian Transfer of Property Act,1882

The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period. To omit to say so or to state a period of less than three months for sale ... is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid.

In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. (Emphasis added)

39. With regard to the non-issuance of the statutory notice of intended sale of a charged property by auction, reference is also made to the case of **David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR** cited the case of **Elizabeth Wambui Njuguna -Vs- Housing Finance Co. of Kenya Ltd [2006]eKLR** emphasizing the importance of issuance and service of a statutory notice as follows:-

“...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption. Therefore statutory notices must be served upon the chargor in accordance with statutes before a chargee exercise power of sale” (Emphasis added by the applicant)

40. In addition, that the 2nd statutory notice required to be served is under **Section 96 (2) of the Land Act** which provides: -

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

It is further pointed out by the applicants' counsel that judicial precedent and analysis by legal scholars of this section have confirmed that **Section 96(2) is a distinct and separate notice from the notice to sale under Section 90(1) and the redemption notice under the Rule 15 of the Auctioneers Rules 1997**. Counsel is insistent that there is a clear legal distinction between these two laws and any attempt to fuse the two or omit stating the length of the notice under each relevant section renders a notice invalid and the sale thereafter void. That each notice issued must state the length of the notice, a positive and obligatory duty upon the chargor.

41. The applicants also draw from the pronouncements made by Gikonyo (J) in **Albert Mario Cordeiro & Another vs Vishram Shamji [2015] eKLR** rendered himself thus on the issue of statutory notice under Section 96(2) of the Land Act:-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell. I refuse that section 96(2) of the Land Act is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the Auctioneers Act.

42. To fortify this, the applicants refer to **Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR** noted the following concerning the statutory notice under Section 96(2) of the Land Act:

“However, I understand the law to be that after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor, is entitled to a notice of not less than 40 days under section 96(2) of the Land Act before the chargee can sell the charged property. I should think that, the rationale of the position of the law I have postulated is that once a mortgage always a mortgage; the charge created on the suit land is a charge for all purposes and intents within the sense of the Land Act and such charge does not become of a different character because it has been created by and over the land of a guarantor of the borrower; it is a charge in favour of the lender. The notice under section 96(2) of the Land Act is mandatory, precedes and is quite apart from the Redemption Notice issued under rule 15 of the Auctioneers Act.” (emphasis added)

43. The applicants also point out to the provisions of **Section 96(3) of the Land Act** which places positive and mandatory duties upon a chargor to serve the following with notice of sale: -

A copy of the notice to sell served in accordance with subsection (2) shall be served on—

- a) the Commission, if the charged land is public land;**
- b) the holder of the land out which the lease has been granted, if the charged land is a lease;**
- c) a spouse of the chargor who had given the consent;**
- d) any lessee and sub-lessee of the charged land or of any buildings on the charged land;**

e) any person who is a co-owner with the chargor;

f) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;

g) any guarantor of the money advanced under the charge;

h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.^[1]”

44. It is the applicant’s contention that a statutory notice was never issued to the liquidators as demanded by the provisions of **Section 90 (1) of the Land Act and Section 96 (2) of the Land Act**, so the attempted 40 day notice failed to comply with with the provisions of **Section 96 (3 a-i) of the Land Act**.

45. The applicants cite the case of **Koileken Ole Kipolonka Orumoi v Mellech Engineering & Construction Limited & 2 others** which emphasized that the charge has a duty to ensure a forced sale valuation is carried out on the charged property in exercise of the statutory power of sale. From this it is pointed out that that notice must be given within a reasonable time before the sale; not too far before the sale nor too close to the sale

46. That the exercise serves important legal calling, that is, it will inform the reserve price of the property and examine the market in order to obtain the best price reasonably obtainable at the time of sale. That the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the chargor to have reasonable value for his property. That section **97(2) of the Land Act** creates a statutory and obligatory duty.

47. It is also argued that in an attempt to cleanse its illegality the 2nd Defendant obtained a valuation report pursuant to **Section 97 of the Land Act** giving the property at **KShs. 220,000,000** way below the value of the suit property as reflected in the valuation report (JA-4) which placed value of the property at **KShs. 340,000,000/=**.

48. **Reference is also made to the procedure under Rule 15 of the Auctioneers Rules, 1997** when selling immovable property within the jurisdiction of Kenya. Counsel submits that main difference between a notice under **section 96(2) of the Land Act and a notice issued under Rule 15 of the Auctioneer’s Rules** is highlighted and clarified in the case of **Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR** to the effect that: -

“A notice under Rule 15 serves the purpose of giving an opportunity to the Chargor to redeem the property and notifies the Chargor of impending sale of the property if the sum demanded is not paid within the period of 45 days provided in the Notice.

The applicant maintains that the requirements under **section 96(2) of the Land Act** are mandatory and quite separate from the requirements under the **Auctioneers Act**, saying that rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee.

49. The statutory notice herein is described as defective and this court is urged to find that lack of compliance with the Law by the Bank, we cannot be swept under the rug by recording of a consent as was done by the Defendants in **ELDORET HCC NO. 40 OF 2018** since a defective statutory notice of sale shall only be cured by the issuance of a new valid notice. **The court is further urged to find that the cure lies in the issuance of a fresh notification of sale that complies with the legal provisions; irrespective of whether the chargee’s statutory right of sale has arisen.**

50. These preceding arguments are raised to demonstrate that the Plaintiffs have established a prima facie case with probability of high chances of success and application ought to be allowed as prayed.

51. The 1st respondent submit that the applicants have failed to make full disclosure on how the 1st defendant as the liquidator is fraudulent and incompetent in discharging up their duties. Drawing from the maxim *“he who comes to equity comes with clean hands”* the plaintiffs are seeking for equity not in good faith but in bad faith. The Commissioner’s extension of the liquidators’ period for one year is described as sufficient evidence that the liquidators have been acting honestly and in good faith and within the liquidators’ power.

52. The 2nd respondent draws to this court’s attention a letter dated 12th July 2016, where **MUSCO** admitted that they are unable to service the loan facilities and approached the Bank seeking for suspension of interest for 24 months on the basis that it was facing financial difficulties and that it needed to dispose the suit property so as to meet its contractual obligations.

53. It maintains that this is what led the bank to act on 4th October 2016, by restructuring the debt amount owed by **MUSCO** to **Kshs. 391,886,074.00**, which loan was to be repaid in 168 monthly instalments of **Kshs. 2,332,536.15**; and the interest would be charged at a rate of 14% per annum;

54. Further that any security held by the Bank would serve as security for the restructured amount and could only be redeemed upon the payment of all the sums advanced under the Letter of Offer

55. The respondents point out that despite this extension, **MUSCO** defaulted on repayment and sought a 2nd **EXTENSION** for four months to enable them dispose the suit property vide a letter dated 7th July 2017. The Bank allowed the request in its letter dated 17th July 2017 so as to enable the Sacco to redeem its property.

56. Further, that on 14th November 2017, **MUSCO** once again wrote to the Bank stating that they needed a further grace period of 3 months so as to dispose the suit property, to which application the Bank granted them a one-month extension. At this point, this was the 4th **EXTENSION TO MUSCO**.

57. However, once again and similar to previous conduct, on 5th March 2018, **MUSCO** once again defaulted and applied for the 5th **EXTENSION** and for a period of six months extension. The Bank acceded to this request and issued the Sacco a 6-months vide a letter dated 19th March 2018.

58. That totality of the requests outlined hereinabove demonstrate that the Bank undoubtedly availed numerous and reasonable opportunities for **MUSCO** to redeem its property in the last 3 years but despite this **MUSCO** has repeatedly failed to service the loan facility, to the prejudice of the Bank.

59. Subsequently and after the Bank granting the Sacco opportunities to regularize the loan account, the Bank, in an effort to redeem the loan amount that had escalated, thus issued **MUSCO** with a Three months Statutory demand Notice and a 40 days Statutory demand notice, dated 31st August 2017 and 3rd August 2018 respectively, by way of registered post, and, through the same address provided in the charge. Despite such notice, the loan account was still not serviced.

60. There was re-issuance of the 40 days statutory notice but unknown to the Bank, at the time it was issuing the 40 days' Statutory Notice, **MUSCO**, had been placed under Liquidation by the **Commissioner for Co-operatives Development** on 29th June 2019. That the Liquidators, being the 1st Defendants herein, instituted a suit, **HCCC No. 40 of 2018 Eldoret, Hesbon M. Kuria & Joel Kipsanai (S/A Joint Liquidators of Moi University Savings And Credit Co-Operative Society Ltd [Under Liquidation]) –vs- Co-operative Bank of Kenya Limited & 4 Others** to challenge the said statutory notice on the ground that it had been addressed to the Chairman of the Sacco instead of the Liquidators.

61. That on 16th May 2019, the Bank and the 1st Defendant (hereinafter, "the Liquidators") compromised the suit by consent which was adopted as an order of the court, and whose terms were;

a) The 1st Defendant shall re-issue the 40 Days' Notice to sell.

b) The 1st Defendant shall be at liberty to proceed with the sale of the property upon the lapse of the 40 days' Notice in the event of default in the clearing of the full arrears.

62. That it was pursuant to the terms of the said consent, the Bank re-issued another 40 days' **Notice dated 29th May 2019** and addressed to the Joint Liquidators. Thus having complied with the Court Order, the Bank instructed **M/s Antique Auctions Agencies** to advertise the suit property for purposes of public auction noting that there was no objection from the 1st Defendant and that the matter had already been determined by the Court.

63. It is re-emphasized that to date **MUSCO** and its liquidators are yet to settle the debt amount which has accumulated to a staggering Kshs. **553,249,626.60** and is continuing to accrue interest and charges. In reaction to these submissions, the respondents point out that the Bank undertook a valuation through **M/s Accurate Valuers Ltd**, whose findings as contained in the Valuation Report dated 3rd July 2019, gave the open market value of the suit property is Kshs. 220,000,000.00.

64. The Plaintiffs' protest regarding the value of the property is faulted as unsubstantiated on grounds that they have not attached a counter valuation report to demonstrate that there was an undervaluation of the suit property. In the case of **Consolidated Bank of Kenya Ltd Vs Jockbed Njeri Muriithi T/A Njesh Enterprises, Civil Appeal Number 27 of 2019** the court held that;

"As regards the (under)valuation, the respondent did not put forth a counter to support her contention that the property was undervalued. In the circumstances the trial magistrate erred in restraining the Bank from exercising its statutory power of sale"

65. I can only echo the sentiments expressed in **Palmy Company Limited vs. Consolidated Bank of Kenya [2014] eKLR** to the effect that I am aware of this requirement of a notice to sell under section 96(2) of the Land Act, and that the chargee shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell, are still points of judicial debate. Yet there are also a host of judicial pronouncements which acknowledge that one cannot proceed to sell until at least 40 days have lapsed from the date the notice is served.

66. The Court of Appeal in the celebrated case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** defined a prima facie case as a case 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".

67. There is the question as to whether the applicants have lived up to the equitable maxim that: **"he who comes to equity comes with clean hands"**, and the respondents contend that the plaintiffs are seeking for equity in bad faith as they have readily admitted and apparent default by the **MUSCO** & its liquidators yet still wants to pay the piper and call the tune: -

68. I am persuaded by the argument raised that, **MUSCO** and the Bank entered into an agreement on the basis of which were advanced funds on the promise to pay. **MUSCO** gave the suit property to the Bank, willingly and as security, which was to be realized in the event of default

69. From the documentation provided, **MUSCO** obtained funds between the years of 2008 and 2016 but failed to honor their obligation on repayment. The Bank issued several demands and statutory notices which were ignored. On five separate occasions the Bank allowed **MUSCO** to renegotiate the loan, but even after the payment terms were restructured, **MUSCO** still defaulted. It is in this process that the Plaintiffs seek to have the court intervene and restrain. In the light of these events, I am constrained to ask - What other option did the bank have other than to realize its security?

70. **MUSCO** ignored the demand notices and even failed to honour their own undertaking and promises to repay and opportunities to redeem the suit property. It is also not lost to me that it is these many events of default by **MUSCO** (clearly evident from the Statement of Accounts) is what triggered the Bank to exercise its statutory power of sale.

71. Indeed, I take cognisance of the fact that the Bank followed to the letter the process of realizing security under a formal charge as decreed by Section 96 of the Land Act

72. The Plaintiff's in their averments that **MUSCO** and the Liquidators were not served with Statutory Notices are less than candid. The Bank has annexed the **Statutory Notices and Certificate of Postage** issued the notices to **MUSCO and the Liquidators** at their known address, which is the postal address issued by **MUSCO** on the Charge Documents [See **Nyangilo Ochieng v Fanuel Ochieng of 1996 in the case of Joseph Ndirangu Waheho t/a Zeeco Auto & 2 others v Co-operative Bank of Kenya Limited [2019] eKLR, held that: -**

“...production of **PROOF OF POSTING** is sufficient to discharge the burden of proving service of notice...”. In the premises the lament about un-procedural approach pegged to the issuance of statutory notices does not hold - I find that all the relevant the notices in contention herein were duly served on the Plaintiffs, and they have failed to establish a prima facie case with probability of success.

73. **Irreparable loss:**

74. The applicant's counsel also contends that the applicants have met the 2nd principle which requires a demonstration that the applicant to show that he is likely to suffer irreparable injury which cannot be adequately compensated by an award of damages. Referring to **Robert Shape in “Injunctions and specific performance Robert Sharpe injunctions and specific performance loose-leaf (Aura on Canada Law Book 1992) page 2-27** to argue that the meaning of “**irreparable harm does not have a universal definition and that its meaning takes shape in the context of each particular case, to submit that the applicants rights cannot be adequately protected by damages**”.

75. That if the Respondents are allowed to proceed with the sale of the suit property, without the Respondents following due process, the Applicants will be greatly prejudiced since they will lose their property and issues of land are emotive hence causing anxiety and mental anguish and stress, and no amount of damages can be quantified to compensate the Applicants.

76. From the earlier observations made, the Plaintiffs are not the registered proprietors of the suit property and therefore cannot purport to lose any proprietary rights or suffer any loss in the suit property upon its realization. The Plaintiffs have no interest in the suit property and therefore cannot purport to lose any right before a court of law. On this I am guided by the case of **Insignia Limited v Zadock East Africa Limited & 2 Others [2012] eKLR** where the court relied on the case **Venture Capital & Credit Ltd vs Consolidated Bank of Kenya Ltd. Civil Application No Nai 349 of 2003** where the Court of Appeal held:

“where the suit property does not belong to the applicant, and the owner is not a party to the suit and has not challenged the intended exercise of the statutory power of sale by the bank, ... the applicant will not lose any proprietary right to the property and in the circumstance...”

The upshot is that there is nothing presented to this court to demonstrate that the applicants will suffer irreparable loss if the orders sought are not issued

77. **IN WHOSE FAVOUR DOES THE BALANCE OF CONVENIENCE LIE?**

There is an outstanding loan, to which **MUSCO** has been making sporadic payments since 2016, with the result that it has grown enormously and even outstripped the value of the security. In the case of **Robert Mugo Wa Karanja Vs Ecobank Limited & Another** clarified the issue of convenience to mean a determination as to which party will suffer the greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction, in which case the court will seek to maintain the status quo.

78. I must commend the applicants' counsel for pitting up very spirited arguments, unfortunately the applicants have failed to demonstrate that they would suffer a greater or any harm, in-fact the harm and prejudice to be suffered greatly is by the Bank. The Applicants have been given sufficient time to redeem the debt and they have still consistently defaulted and the bank has sufficient greater prejudice and increase.

79. I concur with the respondents that taking into account the value of the property as given in the Valuation Report, restraining the Bank any further would reduce the commercial validity of the security. Even if it were to be found that the statutory notice was not properly issued (which is not the case), then all it means is that adequate statutory notice and notification of sale are necessary conditions precedent for a sale to be valid. It is a procedural requirement which does not warrant an injunction. It may simply require the chargor to take remedial steps by giving adequate notice before effecting the sale.

80. The upshot is that the application lacks merit, and is dismissed with costs to the respondents

Delivered and dated this 31st day of January 2020 at Eldoret

H. A. OMONDI

JUDGE
