REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E 154 OF 2019

WILLIS ODHIAMBO OUMA.....PLAINTIFF

-VERSUS-

STANBIC BANK KENYA LIMITED.....DEFENDANT

RULING

By Certificate of Urgency Application dated 31st May 2019 and filed in court on the same date, the Advocate for the Plaintiff urged the court to hear the application on priority basis for reasons;

a) That on 24th April 2007, the Plaintiff borrowed a sum of Ksh10,000,000/- to which was secured by way of a charge over **L.R. No. 12565/29 Nairobi.**

b) That on August of 2011, the Plaintiff borrowed a further sum of Ksh 5,400,000/- that was secured by registering further charge over the same property.

c) That on 27th May 2019, the Plaintiff discovered (when he received a notice addressed to his wife) that the defendant now intends to sell the charged property by way of private treaty and/or public auction without any notice to him.

d) That the Plaintiff has not received any 90 days' notice, or 40 days' notice and or any 45 days' notice from any auctioneer.

e) That the Plaintiff is not aware of any recent valuation of his property.

f) That the subject property is the only matrimonial property of the Plaintiff and there is eminent danger of losing the same.

By Notice of Motion Application dated 31st May 2019, pursuant to **Section 1A, 3, 3A, and 63(c) &(e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, and Order 40 Rule 1, 2 & 8; and Order 51 rule 1 & 3 of the Civil Procedure Rules 2010 section 96 of the Land Act 2012** and all other enabling provisions of the law; the Applicant sought orders;

a) That pending the hearing and determination of this application and/or this suit *interpartes* an order of injunction be issued restraining the Defendant, their servants, licensees, agents or any other persons acting on their behalf from howsoever selling, advertising, auctioning, alienating, transferring, disposing, dispossessing or in any way interfering with the Plaintiff's right of ownership to property registered as L.R. Number 12565/29 Nairobi

b) That pending the hearing and determination of this suit an order be issued directing the Defendant to immediately issue the Plaintiff with a full statement of his loan account number 0100000766865 and the counterpart current account number 0100000482727 used in servicing the loan from the inception on 1st January 2008 to date.

The Application was based on grounds;

a) That on 27th May 2019, the Applicant/Plaintiff discovered (when he received a notice addressed to his wife) that the Defendant intended to sell the charged property by way of private treaty and or public auction without any notice to him.

b) That the Applicant had not received any 90 days' notice and or any 45 days' notice form any auctioneer.

c) The Applicant was verily aware that the defendant would employ a private treaty procedure to sell off the property.

d) The Applicant was not aware of any recent valuation of his property.

SUPPORTING AFFIDAVIT

The Application is supported by an affidavit dated 31st May 2019, sworn by Willis Odhiambo Ouma the Applicant/Plaintiff herein. He contends that on or about 24th April 2007, he borrowed a sum of Ksh 10,000,000/- from the Defendant which was secured by a charge over **L. R. No. 12565/29 Nairobi.**

The Applicant avers that he continued repaying the loan very well and in August of 2011, he borrowed a further sum of Ksh 5,400,000/- that was secured by a further charge over the same property.

He asserts that he had paid the borrowed sum to a tune of over Ksh 25 million but the loan was still said to be outstanding at over Ksh 16.6million.

The Applicant stated that the Defendant was keen on frustrating his right to redeem the loan by ensuring that the loan amount constantly remained high by inflicting illegal charges, interests and penalties since the Defendant told the Applicant that the principal amount had only gone down by less than two million.

That the Applicant is very apprehensive that the 40 days had lapsed and the Defendant may have proceeded by way of private contract or treaty as threatened.

That the Applicant had not received any 90 days' notice, or 40 days' notice and or any 45 days' notice from any auctioneer.

That previously the Applicant had had an exchange of correspondences with the Defendant when they tried to inflate his account with excessive and illegal charges which they refused and ignored to reverse.

That the Applicant was not aware of any recent valuation of his property but he knew his property was worthy over Ksh 100 million since the last valuation by Lloyd Masika in 2014 gave it Ksh 70 million.

That the subject property was the Plaintiff's only matrimonial property and there was eminent danger of losing the same.

REPLYING AFFIDAVIT

The application was opposed by an affidavit dated 12th June 2019, sworn by Mr. Hamilton Suba the Manager Rehabilitation and Recoveries of the Respondent herein. He stated that the application was only but an attempt to derail the Bank in exercising its rights as stipulated by law despite the fact that the Applicant was fully aware that he had breached his obligations by defaulting in the repayment of the loan facility.

That the Applicant had admitted, the fact that he secured a loan facility from the Bank in the total sum of Ksh 15,400,000/-.

That was not disputed that the facility was secured by way of a charge created over the subject property being L. R. No. 12565/29 Nairobi

He stated that he was aware that pursuant to the terms of the charge, and particularly **Clause 1** thereof, the Applicant bound himself to pay the principal amount and interest secured by the charge, and as may be revised from time to time subject to the maximum rate of interest prescribed by law.

That the Applicant in breach of the terms of the agreement regarding payment defaulted in the repayment of the monthly instalment causing the account to go into arrears.

He asserted that the Applicant did not dispute that there was an amount due, and attempts to purport to dispute the amounts payable is therefore not only unsubstantiated, but it is an attempt to delay the rights of the Bank, and in which case the Defendant was informed by its advocates.

The Defendant stated even where there is a dispute as to accounts, of which none exists herein, that cannot be a ground to deny the Bank the right to exercise its statutory power of sale.

The Defendant stated, it was for the said reasons that the Bank proceeded, contrary to the averments by the Applicant, to issue the Applicant with the three months and the 40 days notices. The Applicant annexed a copy of the 40 days' notice received by the him despite alleging otherwise and also pasted the same on the suit property as per the attached photographs marked "**HS 2**". The Defendant annexed hereto "**HS 3**" the three months' notice served upon the Applicant.

That prior thereto, the Bank (the Defendant) issued the Applicant with a 30 days' notice calling upon him to regularize his account after the Applicant had started defaulting on the same.

The Applicant not having complied with the notice, the Bank had the right to proceed to the next step which was to instruct an auctioneer to issue the 45 days redemption notice and subsequently advertise the property for sale.

PLAINTIFF/APPLICANT'S SUBMISSIONS

Has the Defendant followed the due process in trying to enforce the statutory power of sale?

The Applicant submits that, the provisions of **section 90 and 96(2) of the Land Act 2012** are empathically clear on the legal procedure before exercising the statutory right of sale. They are clear on the requirements for the notice of three months and the forty days. If a party does not meet these requirements then they cannot exercise the power of sale.

> **Section 90(2) (b) provides as follows;**
>
> ***"…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"***
>
> **Section 96(2) 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."***

In ***Moses Kibiego Yator -vs- Aco Bank Kenya Limited [2014] eKLR***, the Court had this to say;

> ***"There is therefore some doubt as to whether the statutory notice was sent to the correct address and the benefit of such doubt must be given to the Plaintiff…In the instant case, I have some doubt as to whether the notice was properly dispatched to the proper address of the charge, and I therefore have doubt whether the notice ever reached the charge."***

The Applicant submitted that the Defendant had failed to demonstrate that it carried out a proper valuation before trying to sell the charged properties. The Applicant denied that any Valuer visited the property the year 2019. That the valuation given by the Defendant grossly and deliberately undervalues the property.

Section 97 (2) of the Land Act 2012 states as follows;

> ***"A charge shall, before exercising the right of sale. Ensure that a forced sale valuation is undertaken by a valuer."***

In ***David Gitome Kuhiguka -vs- Equity Bank Ltd [2013] eKLR***, the Court frowned upon such a Defendant for failing to comply with the law. It stated as follows;

> ***"The obligation on a charge to ensure that a forced sale valuation is undertaken by a valuer comes under the heading of section 97 of the Land Act, 2012 – "Duty of charge exercising power of sale". To my mind, such a duty is obligatory"***

J. ***Gikonyo in Olkasasi Limited -vs- Equity Bank Ltd [2015]eKLR***, cited J. Kasango in ***Zum Zum Investment Limited and Palmy Company Limited -vs- Consolidated Bank of Kenya Limited [2014] eKLR***, stated the following;

> ***"The purpose of valuation under section 97(2) of the Land Act is twofold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the Chargor to property …the second one is to prevent unscrupulous charge from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality."***

DEFENDANT/RESPONDENT'S SUBMISSIONS

The Defendant submitted that the Plaintiff/Applicant are indebted to the Defendant/Respondent and are undeserving of any injunctive remedy.

It was their submission that the Justice Lenaola (as he then was) in ***Machakos HCCC No.215 of 2008 Jopa Villas LLC -vs- Private Investment Corporation & 2 Others***, quoted in ***Nyeri HCCC No. 10 of 2016 Brade Gate Holdings Limited & Another -vs- Jamii Bora Bank Limited [2016]eKLR***, stated thus;

> ***"I am clear in my mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced. …Our courts must uphold the sanctify of lawful commercial transactions."***

Whether or not the Plaintiff's Application dated 31st May 2019 should be dismissed?

The Defendant/Respondent at paragraph 23 and 24 of its Replying Affidavit sought dismissal of the Application by the court as the application is an abuse of the court process. The Plaintiff/Applicant breached the terms of contract between the parties and now sought Court assistance to evade the contractual obligations, despite having benefited from the facility.

They further submitted that to be granted an injunction, the threshold in proving a *prima facie* case is more than arguable case was a restrictive one. The Court must ultimately be satisfied by the Plaintiff/Applicant beyond par adventure to warrant the grant of an interlocutory injunction. Such was the finding in the case of ***Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR*** as follows;

> ***"I stand guided by the said passage. Steven Mason & McCathy Tetraut in their well-researched article entitled "Interlocutory injunctions: Practical considerations have authoritatively stated as follows;***
>
> ***"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 not 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." It is usually a brief examination of the facts and law. In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a more strong prima facie case[emphasis Added]. If the injunction will likely end the dispute between the parties, then the court may hold the Plaintiff to this higher standard…"***

That it is trite law as was stated in the case of Nairobi ***HCCC No. 527 of 2013 Palmy Company Limited -vs- Consolidated Bank of Kenya Limited [2014] EKLR***, that;

> ***"Unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction…"***

Justice Emukule in ***Nakuru HCCC No. 8 of 2012 Daniel Ndege Ndirangu -vs- Barclays Bank of Kenya Limited & Another*** quoted in ***Nyeri HCCC No. 10 of 2016 Brade Gate Holdings Limited & Another -vs- Jamii Bora Bank Limited [2016] eKLR*** stated as follows;

> ***"…an injunction will not be granted because the amount is disputed or interest has been filed. Those are matters of inquiry at trial and should the lender be found to blame, it will be condemned in damages to the borrower."***

The Defendant/Respondent's right of possession automatically crystallized upon the Plaintiff/Applicant's default in repayments. This was the court's rendition in the case of ***Nairobi HCCC No. 577 of 2015 John Karanja Njenga & Another -vs Bank of Africa*** quoted in ***Nyeri HCCC No. 10 of 2016 Brade Gate Holding Limited & Another -vs- Jamii Bora Bank Limited [2016] EKLR*** (supra) where Justice Ogolla stated;

> ***"However, for this court, the Defendant's right to exercise its power to sell the charged property arises the moment there is a debt which remains outstanding despite demand. It is therefore upon the Plaintiffs to prove that there is in fact no debt due to the Defendant".*** [emphasis added]

DETERMINATION

The Court considered pleadings and submissions by Counsel and the following issues emerge for determination;

> **a) Did the Plaintiff/Applicant enter into contract /Agreement with Defendant for Loan Facility and default in terms of Agreement?**
>
> **b) Did the Defendants comply with statutory requirements in the process of exercising statutory power of sale of Plaintiff/Applicant's charged property?**

ANALYSIS

a) Did the Plaintiff/Applicant enter into contract /Agreement with Defendant for Loan Facility and default terms of the Agreement?

On 24th April, 2007, the Plaintiff admits by an Agreement, that he borrowed a loan of Ksh 10,000,000 and secured it with a Charge over LR Number 12565/29.

In August 2011, he borrowed a further sum of Ksh 5,400,000/- over a further charge of the same property. He confirmed he duly executed both charges annexed as **WOO2** & **WOO3** and is therefore bound by the terms of the Loan Agreements and Charges.

The Plaintiff's contention is that he serviced the loan which was over Ksh 25 million but the Defendant claimed Ksh 16.6 million to date from him in default of loan facility.

The Plaintiff deposed that he sought from the Defendant through exchange of correspondences explanation on seeming inflation of his account with excessive and illegal charges and no response, explanation was provided and the Defendant refused and ignored to reverse. The

Letter dated 26th April 2018 annexed as **WOO6; reads in part;**

> ***"In my letter dated 30th January 2018 I had requested for statement of my loan account from the time funds were disbursed but you only provided a part that starts from 6th May 2010 so there is a period of nearly 3 years that is not covered by the Statement. Again, I would like to request for complete statement of my account since the funds were first disbursed up to now. I should also be keen to know how the respective interest rates have been applied over the duration of the loan to date…"***

The Plaintiff tried to obtain independent advice in the way his account was run by Defendants and this is evidenced by Letter marked **WOO4** dated 10th May 2019 written to and reply received from **Interest Rates Advisory Centre** (**IRAC)** dated 13th May 2019.

The Defendant deposed that the Plaintiff is in breach of the terms of the Agreement regarding repayment of monthly instalments and caused the Account to go into arrears as shown by annexed statement of account marked **HS1**.

The Defendant further deposed that pursuant to the terms of the Charge, particularly Clause 1, the Plaintiff bound himself to pay the principal amount and interest secured by the Charge, and as may be revised from time to time subject to the maximum prescribed by law.

Clause 1 of the Charge of 24th April 2007 reads;

> **(i) <u>That such all interest shall accrue on a day to day basis and be calculated on the basis of 365 year;</u>**
>
> **(ii) <u>That the Lender shall not be required to advise the Chargor or either of them prior any change in the rate of interest so payable nor shall failure by Lender to advise the Chargor as aforesaid prejudice in any way howsoever the recovery by the Lender of interest charged subsequent to any change;</u>**
>
> **(iii) <u>That the rate of interest payable as aforesaid may from time to time be increased or otherwise varied by the Lender at the Lender's sole discretion</u>**
>
> **(iv) That notwithstanding sub clause (iii) above, in the case of any such monies and liabilities being also secured to the Lender under an Agreement or instrument reserving a higher rate of interest than as aforesaid nothing herein contained shall prejudice the right of the Lender to recover such higher rate of interest or (as the case maybe) the difference between the higher rate and the rates payable hereunder.**

The Court considered correspondence between parties and found that the Plaintiff consistently sought information and explanation on escalating rates of interest from the Defendant. Whereas parties are deemed to freely contract, terms of the contract that thereafter bind them, the terms ought to be capable of compliance of the obligations by parties. A party cannot comply with terms not communicated such as increase of interest from time to time. The arbitrary increase of interest adversely affects and increases the outstanding amount. The Court will not interfere where parties contracted at arms-length basis but where any bargain is unduly harsh and overwhelmingly in favor of and leaves one party solely in charge of the performance of the Contract, the Court has a duty to intervene.

In the case of ***<u>Pius Kimaiyo Langat Cooperative Bank of Kenya Limited [2017] eKLR</u>*** the C.A. referred to its earlier decision, ***<u>Margaret Njeri Muiruri vs Bank of Baroda (K) Ltd [2014] eKLR;</u>*** where the issue was that interest was increased from 14% to 45%. The Court of Appeal had the following to say with regard to exercise of the Bank's sole discretion on charging interest. The Clause that allowed it from time to time to charge different rates for different accounts on daily balances and compound interest monthly;

> ***"We find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the Appellant in this case as to what the rate of interest would be…***

[Further]

> ***Courts have never been shy to interfere with or refuse to enforce contracts that are unconscionable, unfair, oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favorable to one party and would preclude meaningful choice for the other party……..."***

The Plaintiff and Defendant duly executed the Loan facility /agreement and are bound by its terms. The Plaintiff admits 2 loan facilities from the Defendant and default in repayments despite servicing the loans from 2007 to 2019. However, he contests the lack of notice(s) on imposition and variation of interest and the escalating outstanding balance. **Clause1** of the Charge provides sole discretion to impose increase of interest at will but with no notice given to the Plaintiff. The Plaintiff cannot know or tell the principal amount balance interest as there is no specific figure or cap or notice, so the increase is *adhoc* and arbitrary and repayment of outstanding amount is seemingly *ad infinitum*.

The Plaintiff evidenced by correspondence from and to the bank that he questioned the rate of interest from 2007 to date. The Bank did not give notice of variation or change of rate of interest and that it was in compliance with **Section 44 of Banking Act and /or Central Bank of Kenya** interest caps relevant at the time. He sought independent advice from **IRAC** but the relevant documents from the Bank were not released to him. Later, when filed in Court, the Statements of Account run from 201

to date. Yet, there was another facility from 2007 which the Plaintiff made repayments and which ought to be reflected or an explanation given as to what happened to the earlier facility and repayments.

Therefore, although the issue of interest may not arrest the bank's right of statutory power of sale as there is the principal amount due and owing, clearly the notice to the Applicant on interest rate increase and/or variation and cap of interest is relevant and key to the outstanding amount.

I have perused the Statements of Account annexed to Defendant's affidavit. The Plaintiff made payments each month, but of varied amounts at times too low and at times too high. I noted the amounts were/are reflected as defraying interest rather than the principal amount. For example; on 5th June 2010, the Plaintiff paid Ksh 105,598 interest repayment; Ksh 15,086 principal amount and Long term Insurance Ksh 6,205 and short term insurance Ksh3,139/- How would the bulk of the amount repayment be allocated to mainly interest? Interest at what rate over what amount and for what period? Even if **Clause 1** of the Contract gave the Bank sole discretion, it is not unfettered, there must be notice and/or explanation.

b) Did the Defendants comply with statutory requirements in the process of exercising statutory power of sale of Plaintiff/Applicant's charged property?

With regard to whether the Defendant in the process of exercising statutory power of sale on suit property LR **12565/29 Red Hill Lane – New Muthaiga** charged as security for the Plaintiff's 2 Loan facilities served the Plaintiff the statutory notices and conducted valuation of the suit property.

The Defendant ought to have served Notice of Default to pay Notice prescribed under **Section 90 of the Land Act** stating the nature and extent of default/nonpayment and state the amount required to be paid **within 3 months (90 Days)** and in default the Chargor would sue for what is due and owing. The Notice crystallizes after the expiry of 90 days. **See *Cieni Plains Company Ltd & 2 Others vs Ecobank Kenya Ltd [2017]eKLR*.**

The Defendant ought to have served the Plaintiff with Notice to exercise Power of Sale under **Section 96 of Land Act** which **notice expires after 40 days from date of service of the Notice to the Plaintiff.**

The Defendant was to serve the Notice to Auction the suit property under **Rule 15 of Auctioneers Rules** which Notice would expire **after 45 days from date of service.**

From the record, the Defendant deponed at paragraphs 15 16 & 17 of Replying Affidavit that the Plaintiff was served with **the 90-day Notice and 40 day Notice** as shown by annexed copies **H-2** & **H-3**. The 90 day Notice was by letter dated 16th November 2018 and the 40 day Notice was through letter dated12th April 2019. Both were sent through registered post with the address provided by the Plaintiff. The 90 day Notice was also pinned at the residence and is evidenced by the photograph copy

Marked **HS 2** annexed to defendant's application. The Defendant was waiting to serve the last Notice before the onset of the current litigation in the instant matter. The Court finds that despite the Plaintiff's objection that notices were not served, to the contrary, there is ample evidence the Respondent complied with proper service of the statutory notices.

The Plaintiff challenged the Defendant's failure to ensure valuation of the suit property was conducted prior to the intended sale. The Defendant confirmed valuation of the property and annexed the Valuation Report as **HS 5** by Ebony Estate Limited on 5th April 2019. The Market Value is Ksh 78 million; Mortgage Value 62.4million; Forced Sale value Ksh 58.5 million and Insurance Value Ksh 40 million.

The Plaintiff also conducted valuation whose Report is annexed as **WOO7** by Lloyd Masika on 20th May 2014. The Market Value Ksh 70million; Mortgage Value Ksh 56 million; Forced Sale Value Ksh 52.5 million & Insurance Value at Ksh 32 million.

Therefore, **Section 97 of Land Act** was complied with regard to having valuation of the suit property to be used within 1 year of intended sale. Where parties are disagreed on the sale price and average of both current valuation reports is sufficient.

c) Should the Court grant Temporary Injunction?

In the celebrated case of ***Giella –vs- Cassman Brown & Co. Ltd [1973]EA 358;*** an injunction is granted where;

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

The same principle were held in the case of ***Assanand –vs- Pettitt (1989)eKLR,*** where the court stated that;

> ***"the object of Temporary Injunction is to keep things in status quo so that if at the hearing the Plaintiffs obtain a judgment in their favour the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual."***

On whether the Court should grant temporary injunction or not both parties made compelling arguments. The Plaintiff argued that the issue of interest is germane to the amount outstanding. The Defendant is alleged not to have credited all payments the Plaintiff made and instead imposed illegal interest charges and penalties; thereby making it impossible for the Plaintiff to redeem his property.

The Defendant on the other hand took the position that the Defendant failed to make out a *prima facie* case, the Plaintiff obtained loan

facility from the Defendant and secured it with the suit property. The Plaintiff defaulted in repayments and the amount outstanding is not settled despite the statutory notices.

The Defendant deposed that the issue of interest charges and penalties cannot prevent the Defendant's right to exercise statutory power of sale as the Plaintiff shall be compensated by damages.

This Court is of the view that the question of interest as envisaged in **Clause 1 of the Charge Agreement** ought to be interrogated as the sole discretion to impose or vary rates of interest is fettered by issuance of notices to the Plaintiff of current interest and/or variation of the same. The Plaintiff sought information and/or clarification on the matter, the Defendant did not address the issue. Looking through the statements of Accounts I noted they start from 2010 and not 2007 when the 1st Loan was granted of Ksh 10,000,000/- and later in 2010 the Loan of Ksh 5,400,000/=

The Defendant has not explained whereabouts of statements of 2007-2010 nor credited Plaintiff's payments during that period.

There is no dispute that Defendant varied the rate of interest without consent notice or knowledge of the Plaintiff under **Clause 1 of the Agreement.** There is no evidence on record that each time there was variation of interest the Plaintiff was informed. ***See Givan Okallo Ingari & Anor vs HFCK (K) Ltd HCCC No 79 of 2007*** which provides;

> ***"The Primary complaint is that the Defendant has unilaterally and in breach of the express provisions of the charge instrument levied unsanctioned interest rates, penalty charges and default charges on the loan account, which have erroneously increased Plaintiffs indebtedness thereby frustrating and/or clogging the efforts of the Plaintiffs to redeem the charge property. Such grave accusation needs and/or requires rebuttal from the Defendant. However, the Defendant says that the charges were levied in accordance with the implied terms of the charge documents, prevailing customs and trade usage in the banking and financial industry……There is no dispute that the Defendant varied the rate of interest without the consent, knowledge and permission of the Plaintiffs. There is no evidence that each time there was a variation, the Plaintiffs were informed."***

These are issues /questions that ought to be heard and determined before the Bank exercises the statutory power of sale. Therefore, even if the Plaintiff has not proved a *prima facie* case as the principal amount is due and owing, the issue of interest goes to the root of the outstanding amount and of necessity must be confirmed. The *status quo must* be maintained pending the hearing and determination of the pending issue of interest.

DISPOSITION

> **1. The Plaintiff's application of 31st May 2019 is granted with costs. A temporary injunction is granted for 120 days from date of delivery of the Ruling to maintain *status quo* pending hearing and determination of the matter.**
>
> **2. The Parties/Counsel to engage and reconcile Accounts with a view of determining the outstanding amount and/or reaching amicable settlement on interest.**
>
> **3. If not agreeable; the Parties/Counsel to engage in Case Management Conference (CMC) with Deputy Registrar Commercial & Tax Division within 30 days and then obtain hearing date.**
>
> **4. The Plaintiff shall continue to service the Loan Facility on the principal amount pending resolution of interest.**
>
> 5. **During the Corvid 19 pandemic lockdown, there shall not be any execution until official announcement on resumption of normalcy**.

DELIVERED DATED & SIGNED IN OPEN COURT ON 29TH MAY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

KINYANJUI KIRIMI & CO ADVOCATES- PLAINTIFF

MULANYA &MAONDO ADVOCATES -DEFENDANT