REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NUMBER 6 OF 2020

CAPITAL REALTY LIMITED.....PLAINTIFF

VERSUS

HOUSING FINANCE.....1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

RULING

Introduction

1. The Plaintiff, it is a Limited Liability Company duly registered in the Republic of Kenya. The 1st Defendant is described as a licensed bank under the Law of Kenya (sic) while the 2nd Defendant is described as an auctioneering firm.

The Plaintiff's Case

2. According to the Plaintiff, it is the registered owner of all that parcel of land known as Land Reference Number 12750/11472 situated off Mombasa Road, in the Syokimau area within the County of Machakos (hereinafter referred to as "the suit property"). It sought to develop the suit Property and caused to be designed 76 Town Houses together with other amenities known as Gables Park with the intention of offering the Town Houses for sale in the open market for gain. In order to do so the Plaintiff, pursuant to its development plans, approached the 1st Defendant and sought a loan facility to assist the Plaintiff with the necessary finance required for the purpose.

3. By a Letter of Offer dated 10th June, 2010, the 1st Defendant agreed to advance the Plaintiff the sum of Kshs. 310,000,000/= to be utilised towards the proposed Project. To secure the proposed advances, by a Charge dated 21st June, 2011, the Plaintiff charged the suit Property and by another Letter of Offer dated 23rd May, 2013, the 1st Defendant agreed to advance the Plaintiff a further sum of Kshs 40,000,000/= to meet additional Project Costs based on a Further Charge dated 27th August 2013.

4. According to the Plaintiff, it was an express term of the Loan Agreement that the Plaintiff would inject Land an additional equity into the Project prior to the drawdown of the loan facility and the 1st Defendant being satisfied that the Plaintiff had met the criteria and terms spelt out in the Letters of Offer advanced and allowed the Plaintiff commencing on or about August 2011 to draw down on the Loan Facility by making direct payments to the Building Contractor based on Certificates of Payment raised by the Project Architects from time to time.

5. It was averred that it was an express term of the Loan Agreement that the Plaintiff would market and sell the Town Houses and utilise the sale proceeds and/or "pre-sales" to:

> (a) Cover the interest and principle (sic) payments due to the 1st Defendant from time to time under the terms of the Loan Agreement;
>
> (b) Cover the shortfall of the required Development Funds necessary to implement and complete the Project in accordance with the approved designs, drawings, plans and specifications such as payments due to specialised sub-contractors and Suppliers not covered by the main Building Contract;
>
> (c) Cover the shortfall of the required Development Funds necessary to meet the costs of necessary ancillary and integral supportive

services such as the Consultants' Costs, Marketing Costs, Statutory Expenses for e.g. stamp duties, rates, and rents, Management and Administration Costs for the site and other logistics.

6. In accordance with the aforesaid Arrangement or Agreement, the Plaintiff averred that it proceeded to sell the Town Houses and utilise the sale proceeds in the manner detailed hereinabove with the express and/or implied knowledge, consent and/or approval of the 1st Defendant and that the project was substantially completed on or about the month of April 2014 and Certificates of Practical Completion issued by the Project Architects in respect of the Town Houses.

7. According to the Plaintiff, all through the Project, the Plaintiff continued to provide the 1st Defendant with Sales Reports and updates regarding the ongoing sales in the Project. It was the Plaintiff's case that the process of sales was broadly under two (2) main categories:

(a) Cash Sales where the Purchasers paid for their respective Town Houses to the Plaintiff in such instalments as agreed by the parties in the relevant Agreements for Sale;

(b) Mortgage Sales where the Purchasers paid a cash deposit to the Plaintiff and subsequently secured the balance of the purchase price through Mortgage Finance.

8. The Plaintiff avers that there was considerable and material delay on the part of the 1st Defendant in designing an exit strategy in respect of any concluded sale which in turn occasioned:

(a) delay in the execution and release of the requisite Partial Discharges required for Purchasers who had completed their transactions and/or secured the balance of the purchase price through Mortgage;

(b) delay in the collection of funds secured by Mortgages which funds were only realizable upon registration of a Partial Discharge in respect of the Town House, a Lease in favour of the Purchaser and a Charge in favour of the Financing Bank.

9. The Plaintiff also avers that further and considerable delays in collection of the funds realizable from Mortgage sales was also occasioned by various changes in the Land Administration System stemming from the Change of the Constitution, the enactment of the ***Land Act***, the Digital Migration of the Land System, the introduction of Capital Gains Tax and the introduction of the electronic iTax System. These factors, according to the Plaintiff:

(a) were unforeseeable and beyond the control of the Plaintiff;

(b) occasioned the Plaintiff cash flow difficulties who struggled with keeping up with the interest and loan repayments levied by the 1st Defendant;

(c) enabled and/or occasioned the 1st Defendant to apply runaway interest at over double the Loan amount which was simply not sustainable and/or affordable from the proceeds realized from the sales of the Town Houses.

10. The Plaintiff also avers that as a result of the strained cash flows, it was unable to clear the payment due to the Building Contractor who retained a lien and possession over the completed Town Houses in accordance with the terms of the Building Contract.

11. It was its case that by an Accord and Satisfaction Agreement dated 6th May 2015 and subsequently by a Variation Agreement dated 28th March 2016, the Plaintiff released 8 Town Houses, namely Town Houses No. A1, C17, C18, C19, C20, C21, C22 and C24 to the Building Contractor in lieu of payment of the sum of Kshs. 82,902,601.31 due and payable to the Building Contractor as per the terms of the Construction Agreement.

12. However, the 1st Defendant being dissatisfied with the process of collections of the sale proceeds by a letter 8th November 2017 proceeded to demand the immediate sum of Kshs. 455,311,599.45 together with interest thereon failure to which they would appoint a Receiver Manager.

13. Pursuant to negotiations held between the Plaintiff and the 1st Defendant, the 1st Defendant by a letter dated 8th December 2017 agreed to forego the threatened appointment of a Receiver subject to the Plaintiff agreeing to hand over the Project, the Sales Process and the remaining Conveyancing Project to Advocates appointed by the 1st Defendant, namely the firm of Kimani & Michuki Advocates. Faced with no other alternative, the Plaintiff agreed to the handover and prepared a **"Status Report"** dated June 2018 in respect of the status of all sales and the Project which Report it released to the 1st Defendant prior to the handover.

14. The Plaintiff's Advocates subsequently released all the documents relevant to the Project and ongoing transactions to the 1st Defendant's appointed Advocates accompanied with a **"Handover Report"** which Report provided details of the status of each transaction entered into by the Plaintiff up-to the date of the handover receipt of which the 1st Defendant and/or its Advocates acknowledged and have to date never raised an issue or questioned the validity, accuracy or otherwise of either Report.

15. According to the Plaintiff, the Status Report was simply a comprehensive summary of similar Reports provided to the 1st Defendant by the Plaintiff throughout the course of the Project. At the time of the handover, the Plaintiff had sold and/or conveyed 75 out of the 76 Town Houses with 67 of the units being either Cash or Mortgage Sales whereas 8 units had been released to the Building Contractor in full and final settlement of the debt owed which information was disclosed and contained in the aforesaid Reports.

16. However, in a complete and surprise turn of events and a year later in June 2019, the 1st Defendant by a 90-day Statutory Notice dated 24th June, 2019, demanded the sum of Kshs. 350,361,219.25 as due and owing on the loan account and threatened *inter alia* to exercise its Statutory Power of Sale in the event that the demanded amount was not paid prior to the expiry of the Notice.

17. It was the Plaintiff's case that the Statutory Notice was defective, illegal, null and void *abinitio* particulars whereof being:

(a) Failing to clearly identify the specific property that was the subject matter or target of the purported exercise of the 1st Defendant's Statutory power of sale in a manner that would enable the Plaintiff to exercise its legal and equitable right of redemption;

(b) Failing to provide an account or provide a report of the proceeds of sales collected or due to be collected from the ongoing sales of the Town Houses within the Project as from the date of the "handover";

(c) Issuing the Statutory Notice despite knowing that 75 out of the 76 Town Houses within the Gables Park had already been sold and/or conveyed to 3rd Party beneficiaries in accordance with the terms of the Agreements for Sale and the Accord and Satisfaction Agreement availed to the 1st Defendant at the time of the handover;

(d) Issuing the Statutory Notice despite knowing that the aforesaid transactions were entered into with the express and/or implied knowledge, consent and approval of the 1st Defendant;

(e) The Statutory Notice was at variance with the previous threat by the 1st Defendant to appoint a Receiver/Manager over the Project;

(f) The Statutory Notice was inconsistent with the "handover" of the Project to the 1st Defendant and the responsibility of collection of the sales proceeds towards payment of the Loan Facility having shifted to and within the control of the 1st Defendant;

(g) The Statutory Notice demanded the Plaintiff to pay the sum claimed in the Notice despite knowing that the Plaintiff had been rendered incapable of generating any revenues from the sale proceeds once the 1st Defendant took over the Project and the process of sales.

18. Despite advising the Plaintiff of its grievances with regard to the issuance of the Statutory Notice, the 1st Defendant ignored, declined and/or refused to address the same and instead and by a 40-day Notification for Sale proceeded to list 35 Town Houses as the subject matter of the threatened sale by way of Public Auction unless the Plaintiff paid the sum of Kshs. 316,962,724.76 together with interest on the arrears at the rate of 26% per annum prior to the expiry of the Notice.

19. The Plaintiff's position was that the said Notification for Sale is also illegal, unlawful, null and void *ab-initio* on the following grounds:

(a) The Notification of Sale was not preceded by a valid 90-day Statutory Notice complying with the mandatory provisions of law and served upon the Plaintiff;

(b) The 1st Defendant proceeded to list 35 Town Houses as earmarked for Sale namely Town House No. A1, A6, A8, A10, A13, A15, A19, A24, B1, B4, B5, B10, B13, B14, B15, B16, B19, B22, B25, C5, C7, C9, C12, C13, C14. C16, C17, C18, C19, C20, C21, C22, C23, C24 and C26 which Town Houses were not the subject matter of the previous Statutory Notice;

(c) The 1st Defendant proceeded to list the said Town Houses despite having full knowledge that the Units had been previously been sold and/or conveyed by the Plaintiff to 3rd Party Purchasers and the Building Contractor with the express and/or implied consent and approval of the 1st Defendant;

(d) Issuing the Notification of Sale despite having full knowledge that it had taken over the process of sales and collection of the sale revenues earmarked for re-payment of the Loan.

20. According to the Plaintiff's own calculations from the Bank Statements, the Plaintiff has paid the 1st Defendant an amount of approximately 446,000,000/=. It was therefore its case that the 1st Defendant after collection of the sale proceeds generated from the already existing Mortgage Sales where it had already issued Partial Discharges is mischievously and illegally attempting to ignore the Cash Sales with the aim of attempting to re-sell those Town Houses through Public Auction.

21. The Plaintiff lamented that it had on several occasions and through its Advocates continued to request Partial Discharges in respect of the Cash Sales but the 1st Defendant deliberately declined to execute such Partial Discharges which acts or omissions were mischievously calculated so as to take over control of the Project and re-sell the Town Houses and maximise its profits.

22. The Plaintiff reiterated that the Town Houses were sold and/or conveyed to *bona fide* 3rd parties without notice of any arising issues as between the Plaintiff and the 1st Defendant and with the express, implied knowledge, consent and/or approval of the 1st Defendant. It was its case that the 1st Defendant's acts and/or omissions have occasioned the Plaintiff alongside with the 1st Defendant to be sued in several Cases namely ELC. No. 123 of 2019 (Machakos), ELC No. 133 of 2019 (Machakos), ELC No. 136 of 2019 (Machakos) ELC No, 2 of 2020 (Machakos), CMCC No. 148 of 2019 (Machakos), CMCC No. 83 of 2019 (Mavoko) and CMCC No. 106 of 2020 (Mavoko), HCCC No. 3 of 2020 (Machakos) which exposes the Plaintiff to serious loss, damage, injury and the risk of insolvency.

23. The Plaintiff further avers:

(a) that as far as it is aware, the purported exercise of the statutory power of sale was not preceded by a Valuation of the Town Houses scheduled for the threatened sale by way of Public Auction as required by the Law;

(b) it is apprehensive that the Town Houses shall be offered for sale by the Defendants at a gross undervalue thereby occasioning the Plaintiff irreversible loss, injury and damage.

24. By a newspaper advertisement placed in the Daily Nation of 10th February, 2020, the 2nd Defendant advertised the aforesaid Apartments for sale by Public Auction scheduled for 25th February 2020. In its view, the intended exercise of the 1st Defendant's power of sale and threatened sale by public auction of the Town Houses exposes the Plaintiff to breach of contract and consequential damages in respect of the agreements entered into by the Plaintiff that are now the subject matter of the threatened sale by way of Public Auction. Further, the interest rate of 26% levied by the 1st Defendant on the arrears is illegal, unlawful, extortionate, excessive, exorbitant and in contravention of the ***Banking Act*** capping the interest rates chargeable on a loan account to a maximum of between 13% and 14% as from 14th September 2016 to-date. The Plaintiffs also avers that the amount claimed by the 1st Defendant as interest offends the *"duplum"* rule being in excess of double the amount loaned to the 1st Plaintiff under the facilities.

25. The Plaintiff was therefore apprehensive that the 1st Defendant would dispose of the Town Houses at a throwaway price and gross undervalue and subsequently leave the Plaintiff exposed to claims from the 3rd party purchasers. It also averred that the 1st Defendant's inconsistent acts and/or omissions throughout the Project materially contributed to the current crises and are a clog and fetter to the Plaintiff's equity of redemption under the law. It was its case that the scheduled sale by Public Auction shall occasion the Plaintiff irreparable loss, damage and injury that cannot be easily compensated by a measure of damages and that the 1st Defendant's acts are extremely prejudicial to the Plaintiff's interests and if allowed to continue unchecked have the likelihood of occasioning the Plaintiff significant and irreversible loss and damage. Its apprehension was that if the public auction set for 25th February 2020 proceeded prior to the determination of these issues its interest in the Apartments as well as the right of redemption will have been extinguished irreversibly thus occasioning it irreparable injury.

26. The Plaintiff averred that despite requests made to the 1st Defendant to halt and or suspend the planned sale of the Apartments by way of Public Auction, the 1st Defendant appeared determined in selling the Suit Premises in this manner.

27. In this suit, the Plaintiff therefore seeks the following reliefs against the Defendants jointly and severally:

a) A declaration that the purported exercise of the statutory power of sale as contained in respect of Town Houses No. A1, A6, A8, A10, A13, A15, A19, A24, B1, B4, B5, B10, B13, B14, B15, B16, B19, B22, B25, C5, C7, C9, C12, C13, C14. C16, C17, C18, C19, C20, C21, C22, C23, C24 and C26 within the Gables Park and erected on L.R. No. 12715/11742 is illegal, invalid, null and void for all intents and purposes;

b) A permanent injunction restraining the 1st and 2nd Defendant from proceeding to sell or in any other way dispose of by public auction, private treaty or in any other way exercise its statutory power of sale or other remedies provided in the charge and in respect of Town Houses No. A1, A6, A8, A10, A13, A15, A19, A24, B1, B4, B5, B10, B13, B14, B15, B16, B19, B22, B25, C5, C7, C9, C12, C13, C14. C16, C17, C18, C19, C20, C21, C22, C23, C24 and C26 within the Gables Park and erected on L.R. No. 12715/11742 in the manner intended in the Advertisement published in the Daily Nation Newspaper on 10th February 2020 or otherwise whatsoever;

c) An Order of Specific Performance directed at the 1st Defendant to complete and execute the Partial Discharges in respect of Town Houses No. A1, A6, A8, A10, A13, A15, A19, A24, B1, B4, B5, B10, B13, B14, B15, B16, B19, B22, B25, C5, C7, C9, C12, C13, C14. C16, C17, C18, C19, C20, C21, C22, C23, C24 and C26 within the Gables Park and erected on L.R. No. 12715/11742.

d) A declaration that the interest rates being levied by the 1st Defendant over and above the legal limits against the Plaintiff's loan account, are illegal, null and void;

e) An Order compelling the 1st Defendant to recalculate the loan account in accordance with the provisions of the *Banking Act* and/or as dictated by the law with regard to the capping of interest rates and/or the application of the "duplum rule";

f) Costs of this Suit; and

g) Such other Orders that the Court may deem fit.

28. Together with the plaint, the Plaintiff filed an application dated 21st February 2020 seeking the following orders:

1) Spent.

2) Spent.

3) THAT a temporary injunction restraining the 1st and 2nd Defendants whether by themselves, their agents and their servants from selling, dealing, interfering, alienating or disposing off all those Town Houses known as House Nos. A1, A6,

A10, A15, B5, B13, B19, C17, C18, C19, C20, C21, C22, C24 and C26 erected on Land Reference Number 12715/11742, within the development known as The Gables Park situated off Mombasa Road, in the Syokimau area of Machakos County pending the hearing and determination of this Suit.

4) THAT the costs of the Application be provided for.

29. It is the said application that is the subject of this ruling. The said application was supported by affidavits sworn by **Francis Anthony Mburu,** one of the Directors of the Plaintiff Company. While reiterating the foregoing, the deponent averred that it was an express and/or implied term of the various loan agreements and the Letters of Offer and the Charge in particular that:

(a) The Plaintiff would inject its Land and additional equity in the Project which input was a pre-condition and to be injected prior to draw-down of the Loan Facility;

(b) The 1st Defendant would fund the project up-to a maximum total aggregate of Kshs. 350,000,000/= being the total amount secured by both Loan Facilities by paying the Building Contractor directly, the Certificates of Payment raised by the Project Architects from time to time;

(c) The Plaintiff would sell the Town Houses earmarked for development in the Project and would utilise such proceeds of sale to:

a. Cover the shortfall of funds required towards the Developments Costs of the Project such as payments towards the balance of the Building Contractor's costs, the costs of other directly nominated sub-contractors, the Consultants charges, marketing and promotion costs, sales commissions, maintenance and other administration costs;

b. Cover the accruing interest and principal loan payments as demanded by the 1st Defendant

30. It was averred that from time to time throughout the Project and at the 1st Defendants request, the Plaintiff held meetings with the 1st Defendant and also provided status reports and updates with regard to the ongoing sales of the Town Houses within the Project, which broadly comprised of Mortgage Sales where the Purchaser paid a deposit to the Plaintiff and such Financier's undertaking to pay the balance of the purchase price directly to the 1st Defendant upon registering a Charge over the Town House purchased; and Cash Sales where the Purchaser paid the entire purchase price to the Plaintiff in such instalments as stipulated in the respective Agreements for Sale.

31. According to the deponent, over the course of the loan, the Plaintiff has to date paid an amount of approximately Kshs. 446,909,116.00 towards the loan which amount has been realised from the ongoing sales of the Town Houses within the Project. However, as a result of a slowdown in the real estate market and the economy in general, the Plaintiffs experienced difficulties in sustaining the intended sales of the Town Houses in the project within the time frame initially projected which in turn rendered it difficult for the Plaintiff to keep up with the loan repayments in accordance with the schedule demanded by the 1st Defendant. Further to the above, the Project which was initially projected to be concluded within a period of 3 years has now lasted for a period of over 9 years with the result that runaway interest on the Loan Facility has been applied by the 1st Defendant to unsustainable levels and which threatens both the project and the 1st Defendant with Insolvency.

32. The 1st Defendant apprehensive that repayment of the loan was at risk and by a Letter dated 8th November, 2017 issued a Demand Notice addressed to the Plaintiff and threatening to exercise their power to appoint a Receiver Manager to oversee the collection of the expected revenues pursuant to the ongoing sale of the Town Houses. Subsequent to the aforesaid Notice negotiations were held between the Plaintiff and the 1st Defendant where the 1st Defendant demanded that it would withdraw the Notice and the threatened appointment of a Receiver if the Plaintiff conceded to hand over the Project and the conveyancing process in particular to the 1st Defendant's appointed Advocates, who would then be in charge of the remaining sale, legal and conveyancing processes. Under the threat and coercion of the threatened receivership, the Plaintiff agreed to handover the project and sale process to the 1st Defendant who had appointed the firm of Kimani & Michuki Advocates to handle and oversee the remaining conveyancing processes and collection of the sale proceeds from the concluded sales. However, the Plaintiff prior to the handover as aforesaid proceeded to prepare a Status Report aimed at informing the 1st Defendant of all matters pertaining to the Project and in addition at the point of handover, the Plaintiff's Advocates provided:

(a) a summary of the sales of the Project concluded by the Plaintiff as at the date of the handover;

(b) the status of the conveyancing process as at the date of the handover;

(c) all the Agreements for Sale, Leases, Charges (where applicable), Bank to Bank undertakings and other relevant documents pertaining to the Project and the Sale Process.

33. It was averred that from the aforesaid "Status" and "Handover" Reports the following pertinent information was revealed to the 1st Defendant and/or its authorised agents:

(a) At the time of the handover 67 out of the 76 Town Houses had already been sold;

(b) At the time of the handover 8 Town Houses had been released in lieu of payment to the Contractor;

(c) Accordingly, only one (1) Town House remained to be sold;

(d) The receivable income from the concluded sales of the Town Houses amounted to Kshs. 201,317,080/=

(e) The Project was indebted to various Consultants, Suppliers and other Consultants to the tune of Kshs. 96,562,281/= as particularized in the debt schedule.

(d) The status of all Mortgage Sales including the deposits received by the Plaintiff and the balance of the purchase price payable (where applicable);

(e) The status of all Cash Sales including the amounts received by the Plaintiff and the balance of the purchase price payable (where applicable);

(f) The details of the 8 Town Houses released to the Building Contractor in lieu of payment.

34. According to the deponent, upon receipt of the aforesaid Reports and Documentation, the 1st Defendant's went silent thereby creating the impression that they were satisfied with the contents of the Report which in any event was only a culmination of Reports, Documents and facts previously conveyed to the 1st Defendant over the course of the implementation of the Project and were well within the 1st Defendant's knowledge. However, in a surprise turn of events and by a 90-day Statutory Notice dated 24th June, 2019, the 1st Defendant proceeded to demand the sum of Kshs. 350,361,219.25 as due and owing on the loan account and threatened *inter alia* to exercise its Statutory Power of Sale in the event that the demanded amount is not paid prior to the expiry of the Notice.

35. The Plaintiff was aggrieved by the Statutory Notice and deems it as improper, illegal, null and void *abinitio* for the following reasons:

(a) The Statutory Notice was at variance and inconsistent with the previous demand made by the 1st Defendant which Notice was in respect of the Appointment of a Receiver;

(b) The previous demand had been compromised by the amicable and the Agreement concluded at the request and demand of the 1st Defendant, namely that the Project, the Sale Process and the collection of the sale proceeds be handed over to the 1st Defendant's appointed Advocates, being the firm of Kimani & Michuki;

(c) There was no previous Report prepared or issued by the 1st Defendant and neither did the Statutory Notice disclose what amounts had been collected from the receivables sales proceeds over the period of over one (1) year since the handover of the Project as aforesaid;

(d) There was no Report or information provided to the Plaintiff by the 1st Defendant as to how much money remained outstanding and was yet to be collected from the concluded sales previously entered into by the Plaintiff and now under the control and responsibility of the 1st Defendant's and/or its Advocates to collect;

(e) The Statutory Notice did not disclose or contain a sufficient description of the specific Property earmarked or intended for Sale;

(f) The Statutory Notice purported not to affect "excluded units" comprising of Town Houses that had previously been sold or were the subject matter of ongoing sales which in itself was vague and irrational in that:

a) according to the Plaintiff and as per their last Report, 75 out of 76 Town Houses had been sold and/or conveyed by the Plaintiff prior to the handover over a year ago;

b) the Plaintiff had sold the remaining last Town House to a purchaser introduced by the 1st Defendant and executed an Agreement for Sale prepared by the 1st Defendant's Advocates;

c) the 1st Defendant had not informed the Plaintiff whether any of the purchasers of the ongoing sales had defaulted in payment of the balance of the Purchase Price to enable the Plaintiff terminate the relevant Agreement for Sale;

d) without the benefit of the aforesaid Report and considering that all the Town Houses had been previously sold and/or conveyed, the Plaintiff was perplexed as to which Town Houses the 1st Defendant had targeted for enforcement of their Statutory rights;

e) the previous Arrangement and Agreement resulting in the 1st Defendant taking over the process of sales, collection of the sale proceeds and applying such funds towards the repayment of the loan - it therefore made no sense that the 1st Defendant was now demanding payment of the loan amount despite having full knowledge that it was in sole control of the payment of such loan;

f) under the previous Arrangement and Agreement as aforesaid, the Plaintiff was denied all income or participation in the sale process and/or collection of the sale proceeds – accordingly it was rendered totally incapable of paying any amount towards the loan as from the date of the handover one (1) year earlier;

g) the Statutory Notice revealed that the 1st Defendant was levying interest at a rate of 26% in respect of the loan arrears which was contrary to the law capping interest rates at between 13 to 14% as more particularly discussed hereinafter;

h) in as far as the Statutory Notice threatened to sell the property or properties, no independent valuation had been carried out to

ascertain the forced sale value of the threatened (but unknown property) prior to the purported exercise of the statutory power of sale;

i) out of all the remedies listed in the Statutory Notice and available under the provisions of the Land Act, the 1st Defendant failed to reveal which remedy it was adopting.

36. By a Letter dated 20th August, 2019 the Plaintiff wrote to the 1st Defendant and expressed its grievances against the issuance of the Statutory Notice including the issues stipulated hereinabove but the 1st Defendant ignored the issues and failed to accord the Plaintiff any response. Instead the 1st Defendant issued a 40-day Notification of Sale dated 7th October, 2019 demanding a lesser amount of Kshs. 316,962,724.76 as allegedly due and owing. In the aforesaid Notification of Sale, the 1st Defendant in contrast to the earlier Statutory Notice:

(a) elected to adopt the specific remedy of power of sale of the Town Houses;

(b) now listed 35 Town Houses for sale pursuant to the threatened exercise of the statutory power of sale, namely Town House No. A1, A6, A8, A10, A13, A15, A19, A24, B1, B4, B5, B10, B13, B14, B15, B16, B19, B22, B25, C5, C7, C9, C12, C13, C14. C16, C17, C18, C19, C20, C21, C22, C23, C24 and C26.

37. Again, the Notification of Sale was a complete surprise to the Plaintiff for the following reasons:

(a) As indicated earlier, all the 76 Town Houses in the project had been completely sold out and/or conveyed;

(b) The Plaintiff had on several occasions as hereinbefore detailed provided Sales Reports in respect of the affected Town Houses;

(c) The Plaintiffs Advocates had on several occasions requested the 1st Defendant's previous Advocates, Miller & Company Advocates for Partial Discharges duly executed by the 1st Defendant in respect of the affected Town Houses.

(d) The specifics of the sale transactions in respect of 26 out of 35 listed Town Houses, namely Town Houses No. A1, A6, A8, A10, A13, A15, A19, A24, B1, B4, B5, B10, B13, B14, B15, B16, B19, B22, B25, C5, C7, C9, C12, C13, C14. C16, C17, C18, C19, C20, C21, C22, C23, C24 and C26 had been detailed in the "Handover Report" released to the 1st Defendant's Advocates together with the supporting documents, namely:

i. the various Agreements for Sale duly executed by the Plaintiff and the respective Purchasers;

ii. the amount paid and received by the Plaintiff and/or the 1st Defendant pursuant to the sales;

iii. the balance of the purchase price payable (where applicable);

iv. the Leases duly executed by the Plaintiff and the respective Purchasers and conveying the interest in each Town House to the respective Purchasers who had completed their transactions and where all that was required was for the 1st Defendant to executed partial discharges for registration of the Leases in favour of the said Purchasers.

(e) The specifics of the Accord and Satisfaction Agreement and Variation Agreement in respect of 8 out of the 35 listed Town Houses, namely Town Houses No. A1, C17, C18, C19, C20, C21, C22 and C24 released to the Building Contractor in lieu of payment of the sum of Kshs. 82,902,601.31 due and payable to the Building Contractor as per the terms of the Construction Agreement had been detailed in the Handover Report and copies of the Accord and Satisfaction Agreement and the Variation Agreement availed to the 1st Defendant's Advocates;

(f) The Plaintiff had executed an Agreement for Sale prepared by the 1st Defendant's Advocates in respect of the remaining one (1) unit – Town House No, A9.

38. The Plaintiff lamented that at no time prior to the issuance of the Notification of Sale did the 1st Defendant question the validity or accuracy of the various sales reports, Status Report and/or the Handover Report with regard to the transactions detailed therein. The Plaintiff was therefore suspicious that the 1st Defendant first proceeded to collect all or most of the sale proceeds collectable from the concluded sales and only issued the 90-day Statutory Notice and the 40-day Notification of Sale:

(a) as an afterthought and/or;

(b) is a strategic and mischievous attempt to maximise on the amount collected way beyond what was sustainable or collectable from the genuine sales of the Town Houses within the Project;

(c) is an attempt to ignore, renege and/or deny the existence of the genuine sales and conveyances of the Town Houses conduct with the express and/or implied knowledge, consent and/or approval of the 1st Defendant;

(d) is an attempt to re-sell or sell twice Town Houses that have already been sold by the Plaintiff during the course of the Project and with the express knowledge, approval and consent of the 1st Defendant.

39. The Plaintiff therefore was of the view the 1st Defendant acts and/or omissions are illegal, unlawful, wrongful, insincere and grossly unfair in that:

(a) As stated hereinbefore it was an express and/or implied term and/or expectation of the terms of the Loan that the Plaintiff would procure sales of the Town Houses within the Project;

(b) The 1st Defendant for all intents and purposes sold or conveyed the Town Houses as a disclosed agent of the 1st Defendant Chargee and with the express, implied and/or ostensible authority to enter into and conclude the sales and/or conveyances;

(c) The Purchasers and/or beneficiaries of such Town Houses are bona fide purchasers for value without notice of any want of authority (if any) or processes or issues regarding the relationship between the Plaintiff and the 1st Defendant;

(d) The 1st Defendant expressly and/or implied by its acts, omissions and/or conduct that it was aware of and approved the sales and/or conveyances;

(e) The 1st Defendant readily issued Partial Discharges in respect of the Mortgage Sales simply on the basis unlike in the cash cases, it was a pre-condition that the Financing Bank *inter alia* received such Partial Discharge prior to disbursement of payment.

(f) The 1st Defendant is a direct and indirect beneficiary of the sale proceeds generated from the sale of the listed Town Houses and the conveyances referred to hereinabove in the following manner:

i. Part of the sale proceeds were utilised by the Plaintiff towards payment of the Loan Facility;

ii. Part of the sale proceeds were utilised by the Plaintiff towards payment of other essential Development Costs which enabled the Project to be completed as designed thereby enhancing the sale value of the Town Houses and the security enjoyed by the 1st Defendant way beyond the initial projections;

iii. The conveying of the Town Houses to the Building Contractor in lieu of payment was deemed necessary to enable the release of the Town Houses to the Plaintiff, which Town Houses were previously being held by the Building Contractor as a lien pending payment for the Works done.

40. It was averred that as a consequence of the 1st Defendants acts and/or omissions, several suits initiated by the Purchasers and/or beneficiaries of the Town Houses have been filed both against the Plaintiff and the 1st Defendant and one against the Plaintiff solely and that the 1st Defendant's illegal acts or omissions exposes the Plaintiff to serious damages based on breach of contract in respect of the several legally binding and enforceable Agreements for Sale and the Accord and Satisfaction Agreement. The Plaintiff averred that despite the foregoing and the several Injunctive Orders obtained in the aforesaid Court Cases, the 1st Defendant has proceeded to instruct the 2nd Defendant to proceed with the forced sale of 15 Town Houses by way of Public Auction.

41. According to the Plaintiff, the 1st Defendant by its deliberate acts and omissions materially and substantially contributed to the default of the loan and which acts and/or omissions the Plaintiff shall endeavour to approve at the main trial of this Suit. Further, the amount claimed by the 1st Defendant is in any event grossly inflated in that as is evident from the annexed bank statements referred to hereinabove, that the 1st Defendant (i) has failed to apply the interest rate caps stipulated by the provisions of the ***Banking Amendment Act*** in force between 14th September, 2016 and November 2019 when the provision was repealed; and (ii) has failed to apply the *duplum rule* is as far as the maximum amount of interest claimable in the operation of the account as provided under the same Act. To the Plaintiff, the interest rate of **26%** levied by the 1st Defendant on the arrears is illegal, unlawful, extortionate, excessive, exorbitant and in contravention of the Banking Act capping the interest rates chargeable on a loan account to a maximum of between **13%** and **14%** as from 14th September 2016 to-date.

42. It was the Plaintiff's belief that the 1st Defendant has adopted an inconsistent exit strategy and not abided and/or has disregarded the underlying principles regarding the circumstances, namely that the exercise of a Chargee's Statutory Power of Sale is a measure of last resort; and that the sale of the Charged Property should be at the best price reasonably obtainable.

43. The deponent took issue with the replying affidavit sworn on behalf of the 1st Defendant contending that based on previous pleadings, it is unlikely and doubtful that the said Affidavit was executed by the said **Joseph Lule** thereby offending the provisions of the ***Oaths & Statutory Declarations Act*** and the ***Civil Procedure Act*** and Rules and should accordingly be struck out and expunged from the Court record.

44. It was deposed that the loan disbursements directed specifically to the Project Costs amounting to Kshs. 302,591,406.00 together with the Plaintiff's equity of Kshs. 60,000,000/= totalling Kshs. 362,591,406.00 were not sufficient to meet the costs of the Project and that that even under the initial cost projections, it was clear to both parties that the Project was not sufficiently funded and the Plaintiff was expected to fund the shortfall from sales of the housing units within the Project. The deponent averred that from the course of dealing between the Plaintiff and the 1st Defendant, it is clear that the 1st Defendant absorbed all the funds paid to it from the "Mortgage Sales" towards payment of the loan whereas the Plaintiff applied the funds it received from the "Cash Sales" towards servicing of the interest demanded by the 1st Defendant and meeting the other Project Costs not covered by the Plaintiff's equity and the loan facilities granted by the 1st Defendant. According to the deponent, without the benefit of the funds received and disbursed by the Plaintiff directly into the Project, the Project simply would not have not been completed, which in essence would have resulted in further losses in that the Purchasers of all the units would not have completed their purchase agreements.

45. The deponent averred that the well-established course of dealing between the Plaintiff and the 1st Defendant throughout the implementation of the Project was at variance with the strict terms of the escrow agreement and this departure proceeded with the full knowledge and/or acquiescence of both parties. Further, the strict terms of the escrow agreement were at variance and inconsistent with the express and/or implied terms of the loan agreement and specifically, the anticipated funding structure of the Project. It was on this basis that the Plaintiff contended, based on legal advice, that the 1st Defendant ought to be estopped from denying that by the actions, omissions, conduct or otherwise of both parties, the strict terms of the escrow agreement were set aside and/or varied.

46. The Plaintiff denied that the sale of the Town Houses commenced in May 2015 as alleged by the 1st Defendant in the Replying Affidavit and averred that the first house was sold in June 2011 and by May 2015, the Plaintiff had already sold 16 Town Houses which fact is well known to the 1st Defendant and which payments assisted the Plaintiff in keeping up with the interest payments levied by the 1st Defendant.

47. As regards the Escrow Agreement, it was reiterated that the Plaintiff and the 1st Defendant initiated and established a course of dealing, necessitated by the circumstances on the ground and common business efficacy, that was at a clear variance and departure with the terms of the Escrow Agreement. Further, the Plaintiff under the instructions, supervision and/or knowledge of the 1st Defendant proceeded to credit its Savings Account No. SA 200-0068575 with the proceeds generated from the sale of the Town Houses and for the period between October 2011 and March 2013, the 1st Defendant proceeded to debit the aforesaid Savings Account and credit the Mortgage/Loan Account with such proceeds and which amounts were utilised to offset the interest, capital and other payments due to the 1st Defendant under the terms of the loan. During the aforesaid period, not even a single cent was placed in the alleged Escrow Account, which account had not even been opened by the 1st Defendant at the time, yet the Plaintiff had already commenced receiving revenues from the Sales. Despite that no complaint, query or request was raised by the 1st Defendant to the Plaintiff to open and place the funds into an Escrow Account and instead the 1st Defendant readily collected the funds generated from the sales and as evidenced by the bank statements collected the following payments directly from the Savings Account.

48. The Plaintiff noted that the initial loan as per the terms of the Letter of Offer was for a period of 30 months yet for a period of 19 months (October 2011 to April 2013) there was no Escrow Account and the 1st Defendant deducted payments to itself from the Plaintiff's Savings Account. The said Escrow Account, it was deposed, was only opened in April, 2013 being approximately 20 months after the first disbursement of the loan hence the Plaintiff clearly could not disburse payments into an account that did not even exist. The Plaintiff asserted that from the 1st entry in the aforesaid account statement, the 1st Defendant on its own volition and without consulting the Plaintiff, debited the Plaintiff's Savings Account with the sum of Kshs. 11,595,827/50 and credited the equivalent amount to the Escrow Account, the point being that the 1st Defendant reserved and exercised the right to debit any amount in any of the Plaintiff's accounts and credit the Escrow Account if they so wished and indeed if they were keen to ensure that <u>all</u> payments made were to be strictly processed through the Escrow Account.

49. It was contended that a total sum of Kshs 104,249,507.85 were received by the 1st Defendant directly into the Mortgage Account without being processed through the Escrow Account**,** this being effected with the full knowledge, consent, acquiescence and participation of the 1st Defendant.

50. The Plaintiff's position therefore was that it is wrong both in law and fact for the 1st Defendant to deny payments received by it through the Savings & Mortgage accounts simply on the *technicality* that such payments were not processed through the Escrow Account and that the 1st Defendant has failed, refused and mischievously neglected to "recognise" the receipt of funds from "cash sales" processed through the Savings Account and payments made directly into the Mortgage Account totalling to an amount in excess of the sum of Kshs. 145,000,000/= despite absorbing these funds towards payment of the Loan and from cash sales and the application of such funds to meet other Project Costs not covered by the 1st Defendant's Loan and the Plaintiff's equity.

51. As regards the Building Contract, it was averred that at the end of the Project the Plaintiff owed the Contractor approximately Kshs. 57,000,000/= plus another approximately Kshs. 25,000,000/= in interest on account of late payments partially attributed to the 1st Defendant not paying the certificates on time. Accordingly, the total amount due to the building Contractor amounted to Kshs. 82,902,601. As a result of the debt, the Building Contractor exercised a lien over Court C within the Project and comprising of 26 Town Houses with a sale value of Kshs. 301,340,000/=. Faced with the risk of further heavy losses, the Plaintiff had no alternative but to negotiate with the Contractor where it was agreed that the Building Contractor would retain 8 units within Court C in lieu of payment. In the Plaintiff's view, the above arrangement was beneficial to the Plaintiff and the 1st Defendant as it (i) mitigated against further losses and (ii) released and paved way for the sale of 19 Town houses within the same Court C thereby generating a further Kshs. 222,590,000/= from these sales. It was contended that the 1st Defendant was made aware of the above transaction and in particular details of the Agreement and a copy of the Accord and Satisfaction Agreement was availed to the 1st Defendant in the Status and handover report and that in addition, the 1st Defendant specifically requested the Plaintiff's Advocates for information in respect of this Accord and Satisfaction Agreement vide an e-mail dated 14th June 2018, which information was availed by the Plaintiff via an e-mail of the same date. Upon receipt of the supporting documents in respect of the aforesaid transaction, the 1st Defendant did not raise any query and/or question the basis, validity or otherwise of the arrangement entered into between the Plaintiff and the Building Contractor over the said 8 houses.

52. It was the Plaintiff's case that the handover of the 8 houses to the Building Contractor would have been avoided if the 1st Defendant applied all the loan proceeds of Kshs. 350,000,000/= towards the development costs of the Project, namely payments to the Building Contractor being the envisaged purpose and intent of the loan and if the 1st Defendant paid the Building Contractor in a timely manner which would have avoided the accrual of a further amount of Kshs. 25,000,000/= on account of penalty interest. To illustrate this point it was averred that the principal amount (without interest) due to the Building Contractor at the end of the Project was the sum of approximately Kshs. 57,000,000/= whereas the 1st Defendant failed to disburse approximately Kshs. 47,000,000/= into the Project Costs and diverted the funds to itself. If these amounts were paid to the Building Contractor, the shortfall would have been only approximately Kshs. 10,000,000/= which would have been covered by a lien of only 1 house.

53. According to the Plaintiff, despite being fully aware that the Plaintiff had handed over the 8 houses to the Building Contractor in lieu of payment or in part payment of the Construction Costs not met by either the Plaintiff or the 1st Defendant, the 1st Defendant irregularly and illegally in the Notification of Sale issued a year later, proceeded to purport to exercise its Statutory power of sale over the same houses.

54. The Plaintiff's position was that the 1st Defendant's comments in as far as these 8 Town Houses are concerned are immaterial since these were not "cash sales" as alleged by the 1st Defendant. Accordingly, there was no expectation of any funds to be paid into the escrow account or any other account.

55. The Plaintiff denied that there was a criteria or procedure for "recognising sales" spelt out or stipulated by the 1st Defendant either in the Letter of Offer, the Charge or any other instrument and that in any case the Plaintiff did keep the 1st Defendant's and its Advocates informed of the ongoing sales and at no time did the 1st Defendant express its dissatisfaction with the availed information, reports or the sales process in general. The Plaintiff therefore asserted that the claims of not being aware and sanctioning the ongoing sales of the 7 Town Houses and the handover of the 8 Town Houses to the Building Contractor are insincere, belated, not genuine and a mischievous attempt by the 1st Defendant to "re-sell" or sell twice the Townhouses without any or due consideration to the legitimate legal and/or equitable interests of the Purchasers and the Building Contractor over the same Town Houses.

56. The Plaintiff while admitting that it was rendered incapable of servicing the loan as demanded by the 1st Defendant attributable this to several factors including the slow sales due to a change and negative economic factors since the Project was initially projected to be sold off within the 30 months (2 and a half years) of the loan tenure, but the sale process took 8 years to sell off all the 76 Town Houses developed on the Property; the exorbitant, extortionate and runaway interest applied by the 1st Defendant resulting from the fact that despite paying them a sum of over Kshs. 447 million against a loan drawdown of Kshs. 350,000,000/=, the 1st Defendant continues to demand a further payment of Kshs. 350,361,219.25, which amounts to over double the amount lent thereby offending the provisions of the Law in regard to the duplum rule; the acts and omissions of the 1st Defendant in failing to put in place and implement a clear, consistent and efficient exit strategy thereby causing serious delays in the collection of the proceeds of sale from the Mortgage Sales which in itself significantly contributed to the account deterioration; and the fact that from early 2018, the 1st Defendant took over the Project, the sale process and the collection of the proceeds of sale.

57. The Plaintiff further averred that the loan falling into default does not legally entitle the 1st Defendant to exercise its statutory power of sale over the Town Houses that had already been sold or handed over to their rightful owners for due consideration and on terms that were well known to the 1st Defendant and/or with the express and/or implied consent of the 1st Defendant.

58. According to the Plaintiff:

(a) The correspondence, copies of sale agreements, lists of cash purchasers, requests for partial discharges in respect of the cases where the cash purchasers had fully paid for their Town Houses, the Plaintiff's reconciliation is credible evidence that the 1st Defendant was at all material times kept duly informed and advised of all the ongoing sales and the payments thereunder;

(b) The aforesaid information as availed to the 1st Defendant also defeats its argument expressing or implying that it was unaware of the Sales;

(c) The aforesaid information as availed to the 1st Defendant is also evidence that the 1st Defendant did not object, protest or raise any concerns regarding the operation of the sale process and/or the collection of the sale proceeds;

(d) The Plaintiff provided a full and comprehensive account of all the sale proceeds received and indicating how the funds were applied namely towards payments to the 1st Defendant and other Project Costs, which account the 1st Defendant did not dispute;

(e) The analysis provided hereinabove, clearly shows that a sum of over Kshs. 41 million was debited from the Plaintiff's Savings Account and credited into the Mortgage Account and a further sum of over Kshs. 104 million was paid directly into the loan account. These amounts were received by the Plaintiff from the sale of the 7 Town Houses and other cash purchasers, but the 1st Defendant inexplicably refuses to give credit or recognise these payments;

(f) The Plaintiff has also demonstrated that it was the expectation of the parties that part of the Project Costs would be funded from the cash sales;

(g) The Plaintiff has also demonstrated that the said Escrow Account was not even opened for close to 2 years into the Project and neither party adhered to the terms of the Escrow Agreement in respect of the receipt and disbursements of funds.

(h) The issue here is <u>not</u> whether the 1st Defendant has a statutory power of sale under the terms of the Charge, but rather whether or not the 1st Defendant is entitled to exercise its Statutory Power of Sale over the specific Town Houses that are the subject matter of this suit, which Town Houses the Plaintiff sold and/or conveyed with the express and/or implied permission, knowledge and consent of the 1st Defendant <u>and</u> the proceeds of which the 1st Defendant is a direct or indirect beneficiary of.

(i) There was no meeting of minds with regard to the forced take-over of the Project by the 1st Defendant as alleged in paragraph 17(b). The handover was on the back-drop of the 1st Defendant's threat to appoint a Receiver evidenced by the demand letter dated 8th November 2017, which was clear and unambiguous in its terms.

(j) The reconciliation of the Project accounts was availed to the 1st Defendant by the Plaintiff, which accounts the 1st Defendant acknowledged and undertook to review. It has conveniently failed to review the accounts or provide any feedback and/or give credit to any amounts clearly acknowledged as having been paid by the cash purchasers. Instead the 1st Defendant ignored the Reports and opted to proceed with the exercise of its Statutory Power of Sale.

(k) Contrary to the allegations made by the 1st Defendant, it only proceeded to issue a fresh Statutory Notice once it had collected all the balances of the purchase prices from the Mortgage Sales and unilaterally made a decision to "re-sell" the cash purchasers housing units despite knowing full well that the said units had already been sold and the sale proceeds accounted for.

(l) It is simply not true that the legal department raised any issues with regard to the Status Report as alleged in paragraph 17 (e) of the 1st Defendant's Replying Affidavit. It is noteworthy that the 1st Defendant has failed to exhibit any such queries.

(m) The Plaintiff sold the 7 Town Houses to the Cash Purchases and conveyed the 8 Town Houses to the Building Contractor as a disclosed agent of the 1st Defendant with the express, implied and/or ostensible authority to enter into the transactions. Alternatively, the Plaintiff entered into those transactions with the express and/or implied authority and consent of the 1st Defendant. The 1st Defendant did nothing to water down or challenge such authority or consent despite having several opportunities to do so. Indeed, on the contrary, such failure to raise concern is attributed to the fact that the 1st Defendant was a beneficiary of those transactions. The Cash Purchasers and the Building Contractor are innocent parties unaware of any limitations in the aforesaid authority, consent or processes. The transactions were carried out with the 1st Defendant's and its Advocates being fully appraised and in the picture, which was sufficient due diligence that the transactions had been sanctioned and approved by the 1st Defendant.

(n) It is noteworthy that the set-out system of disclosure of the Cash Sales was exactly similar to the disclosure of the Mortgage Sales, yet irrationally and mischievously, the 1st Defendant recognises the latter but feigns ignorance of the former.

(o) It is also noteworthy that in all the 75 transactions involving the Town Houses developed on the Property, the Purchasers and the Building Contractor were each represented by different practising Advocates who proceeded to sanction the sale or conveyancing processes based on the acts, omissions and/or conduct of the 1st Defendant throughout the transactions.

(p) The purpose of illustrating the other suits referred to in my previous Affidavit is to demonstrate that the 1st Defendant's acts or omissions in respect of the cash sales has occasioned the filing of several suits by aggrieved purchasers in which the Plaintiff and the 1st Defendant have been jointly sued, which I believe, will assist the Court in appreciating the magnitude of the issue and the irreparable harm and injury likely to be occasioned to innocent Purchasers and the Plaintiff in the event that the injunctive Orders sought are not granted.

(q) The Plaintiff reiterate its earlier stand on the interest levied by the 1st Defendant Bank and in particular that it is the motivation of maximising on the collection of such extortionate and unconscionable interest that is the real reason why the 1st Defendant has adopted the theory of belatedly denying recognition of the cash sales at the expense of the third party Purchasers and the Building Contractor.

59. Based on legal advice, the Plaintiff averred that there is a likelihood that the 2nd Defendant's inherent Statutory Power of Sale as set out in the provisions of the ***Land Act*** is affected and/or limited by the following factors:

(a) It was an express term of the Loan Agreement that the loan was to be disbursed for the purposes of developing the Town Houses;

(b) It was also an express term of the Loan Agreement that the 1st Defendant was required to offer the Town Houses for sale in the open market to both Cash and Mortgage purchasers;

(c) It was also an express or implied term of the Loan arrangement that the Loan amount was insufficient to fund the entire Project Costs and it was anticipated that the proceeds of sale of the Town Houses would meet any shortfall in the funding requirements;

(d) It was also an express term of the Loan Agreement that the loan would be paid in whole or part from proceeds of sale received from purchases of the Town Houses;

(e) In the transactions between the 1st Defendant and the third-party Purchasers and the Building Contractor, the 1st Defendant was a disclosed agent with the actual and/or ostensible authority of the 1st Defendant to enter into the Sale Agreements;

(f) The 1st Defendant did not specify any terms of sale that were to be included in the various Agreements for Sale. All the Agreements for Sale including those sanctioned by the 1st Defendant are in similar terms being usual terms in such transactions;

(g) The third parties are not privy to the terms of the loan and/or escrow agreement and cannot be deemed to have notice of any limitations or conditions pursuant to any sale;

(h) The Plaintiff has received and remitted the funds to the 1st Defendant in respect of the sales of the Town Houses to the 7 Purchasers and/or applied the funds towards the Project Costs;

(i) The funds were initially credited into either the 1st Defendant's current account, savings account, escrow account or directly into the loan account. In either event, the funds were subsequently credited by the 1st Defendant into the Loan Account;

(j) The 1st Defendant has to date paid to the 1st Defendant a sum of over Kshs. 400 million as hereinbefore detailed, which amount far exceeds the amount paid by the Purchasers herein.

(k) The said Purchasers and the Building Contractor have significantly contributed to the completion of the Project and to the payment of the Loan and the 1st Defendant is a direct beneficiary of these transactions;

(l) The 1st Defendant has at all material times been informed of the Sales through various correspondence, Reports and finally by a full overview of the status of the Project at the point of handover;

(m) The purported exercise of the Statutory Power of Sale by the 1st Defendant against the Town Houses purchased by the Plaintiffs is equivalent or tantamount to re-selling and receiving the sale proceeds twice;

(n) The 1st Defendant has not exercised a clear and consistent policy and exit strategy throughout this Project and the attendant Sales that would have enabled both the Plaintiffs and other third-party purchasers to be well advised and aware of the procedures necessary for the discharge of the sold units;

(o) The 1st Defendants (without stipulating so) appears to have had a preference for the mortgage financed cases, yet in these and the cash cases, the end result was the same in that the proceeds of sale were received by the Plaintiff and directed to repayment of the Loan and to other Project Costs as envisaged in the Loan Arrangement.

(p) The purported exercise of the Statutory Power of Sale by the 1st Defendant exposes the Plaintiff to breach of contract and other adverse consequences through no fault of its own and without the benefit of the funds realized from the Sales, which funds have since been remitted to the 1st Defendant towards payment of the Loan.

60. Based on the foregoing and legal advice, it was the Plaintiff's belief that the Plaintiffs do have *a prima facie* case and have raised the following triable issues that ought to be heard and determined in full trial:

a) Whether the Plaintiff's sold or dealt with the Town Houses with the express and/or implied knowledge, consent and/or authority of the 1st Defendant;

b) By entering into Agreements for Sale/Accord and Satisfaction Agreement, paying/offsetting the Purchase Price and taking possession of the Houses, whether the third parties herein acquired a legal and/or equitable interest in the suit premises capable of protection by this Honourable Court;

c) By encouraging and authorizing the Plaintiff's to sell the Town Houses developed in the Property, whether the 1st Defendant is estopped from denying the subsequent sales;

d) Whether the third parties were privy to or required to be privy to the terms of the Loan and Escrow Agreements as between the Plaintiff and the 1st Defendant;

e) Whether the 1st Defendant had express and/or implied knowledge of the Sales and if so, whether on the basis of such knowledge they are estopped in law and equity from denying the existence of such sales;

f) Whether the Third Parties are bona fide purchases for value without notice of the procedures allegedly set up by the 1st Defendant for acquiring good title in respect of the Town Houses purchased;

g) Whether the 1st Defendant has applied a consistent policy with regard to payment of funds realized from the sale of the Town Houses and if not, whether such deviation or course of dealing in operation of the various accounts excused the parties from the strict compliance thereof;

h) Whether the terms of payment of the Loan and receipt of funds from the sale of the Town Houses are consistent in the Letter of Offer, Charge, Debenture and the Escrow Agreement;

i) Whether the payment into the Escrow Account or the lack thereof is fundamental, material, significant or substantial enough or was there an overriding intention to pay the Loan Account irrespective of which account the funds were received;

j) Whether the 1st Defendant has indeed received the proceeds from the sale of the Town Houses;

k) What was the effect of the handover of the Project to the 1st Defendant and its Advocates and whether this imposed on the 1st Defendant a duty of care, responsibilities and obligations to the purchases of the Town Houses;

l) Whether the issue of assumption of risk is relevant to these proceedings and if so, who are the parties who should bear such risk as

between the Plaintiff and the 1st Defendants;

m) Whether the third-party beneficiaries ought to be victimized and/or bear the brunt of the issues arising out of the business relationship between the Plaintiff and the 1st Defendant;

n) Whether in the interests of Justice and Equity the Plaintiff is entitled to the prayers and reliefs sought in the Application and in the main suit.

61. To the Plaintiff, the foregoing issues are weighty and ought to be heard and determined at the main trial where the parties to the suit shall be in a position to table their full evidence regarding the issues and this Court shall be also enabled to hear and determine all the issues in controversy. Further, the exposure of damages to the 1st Defendant is irreparable and is not easily quantifiable and in addition the balance of convenience favours the granting of an injunction since the Plaintiff would not like to see a situation where the Third Parties loose Town Houses that they have paid for and occupied without the litigants herein being accorded a full opportunity to be heard on the main arising issues of knowledge of the sales by the 1st Defendant and allocation of payments thereof.

62. In its submissions made on its behalf by its Learned Counsel, **Mr Enonda**, the Plaintiff relied on the oft cited case of ***Geilla vs. Cassman Brown*** and reiterated that it raised several triable issues. In support of its submissions the Plaintiff relied on Section 2 of the ***Land Act*** which defines "disposition" , "instrument", "interest", "lease", "lessee", "lessor" "transfer" "transferee" and "transferor" and submitted that it is clear from the averments made in the Plaintiff's Supporting and Further Affidavits the Supporting documents annexed thereto that (i) Agreements for sale were entered into between the Plaintiff and third party purchasers for the sale of 7 Town Houses to the said third parties and for the consideration, terms and conditions stated in the said Agreements and (ii) An Accord and Satisfaction Agreement was entered into with the Building Contractor for the passing of the beneficial interest in respect of 8 Town Houses. To the Plaintiff this is clearly a disposition within the meaning of the ***Land Act***, which the Plaintiff as registered proprietor was entitled to enter into subject to the consent of the Chargee being the 1st Defendant, whether such consent was expressed and/or implied. It was further submitted that it is clear that the instruments (being the Agreements for Sale and the Leases) are in writing and intended to create or affect legal or equitable rights in respect of the Town Houses sought to be disposed within the definition of the ***Land Act*** and that the definition of the term "Lease**"** squarely fits the description of the intended Lease documents necessary to confer Title in the Town Houses in favour of the third-party purchasers and the Building Contractor. It was contended that the intention of the Instruments was to create a legal interest in the properties in favour of the said third-party beneficial owners and that the terms Transferor, Transferee, Lessor, Lessee as defined in the Act describe the position of the Plaintiff/Vendor as Transferor/Lessor and the third parties as Transferee/Lessee whereas the term Transfer (also defined in Section 43 of the Act) refers to the intended *passing or disposition* of the Town Houses by the Plaintiff.

63. The Plaintiff therefore submitted that from the above it is entitled to bring a cause of action relating to the intended disposition and/or Transfer and/or creation of Leases in respect of the Town Houses sold and/or conveyed by the Plaintiff being the central intention of the Agreements for sale and Accord and Satisfaction Agreement entered into with the respective parties.

64. No doubt, it was contended, in this instance, there are competing interests between the Plaintiff (as Proprietor/Chargor) and the 1st Defendant (as Chargee) and the third parties (as intended beneficiaries of the Plaintiff's disposition). However, these competing interests are exactly the issues in controversy in this suit that require the full hearing and determination of this Court. Therefore, it is wrongful and an incorrect interpretation of the Law for the 1st Defendant to claim that the Plaintiff has no interest capable of being canvassed before the Court, yet the Plaintiff is the registered proprietor of the suit property and claims to have disposed its interest in the Town Houses with the express and/or implied knowledge, authority and consent of the 1st Defendant and had a legitimate expectation that the third parties would acquire a legal interest in the Town Houses.

65. According to the Plaintiff, it demonstrated:

(a) that it entered into Agreements for Sale for the purchase of their respective Maisonettes and into the Accord and Satisfaction Agreement in settlement of the Building Contractor's debt;

(b) that the 1st Defendant executed the aforesaid Agreements which constituted an intention to transfer the respective Maisonettes in favour of the respective third parties;

(c) that the third parties who entered into the aforesaid Agreements acquired a Purchaser's or Transferee's interest in their respective Maisonettes which legal and/or equitable interest is capable of protection under the law;

(d) that the 1st Defendant also has an interest in the entire Property by virtue of the Charge and Further Charge registered against the said Property, which means that no disposition or transfer can be completed without the 1st Defendant executing a Discharge of Charge over the Maisonettes in question;

(e) despite several requests, the 1st Defendant has declined to execute the requisite Partial Discharge of Charge over the Town Houses and instead proceeded to initiate the exercise of its Statutory Power of Sale over the same units;

(f) the failure or decline to execute the Partial Discharges required to pave way for the registration of the Leases in favour of the third parties is, from the pleadings filed, the grievance that has occasioned the Plaintiff to institute the cause of action herein;

(g) the Plaintiff has averred and led credible evidence establishing that from the outset, the 1st Defendant provided the Plaintiff with the legal mandate and authority to sell the Town Houses and that the consideration of those transactions were utilised to complete the Project and pay the 1st Defendant;

(h) the Plaintiff has also averred and led credible evidence establishing that it disclosed the transactions to the 1st Defendant and/or its authorised Advocates;

(i) the Plaintiff has averred that the 1st Defendant's acts, conduct and/or omissions led the Plaintiff to believe that the transactions and the subsequent expenditure into the Project Costs were sanctioned by the 1st Defendant;

(j) the Plaintiff avers that the 1st Defendant at all material times encouraged the Plaintiff to market and sell the Town Houses which acts were mischievously calculated to ensure that the Plaintiff had the necessary funds to complete the Project and make the payments it did to the 1st Defendant;

(k) the Plaintiff avers that the 1st Defendant despite being made aware of the ongoing transactions, failed to raise any objections that would have alerted the Plaintiff and/or the said third parties of any arising issues and/or discouraged the continuation of such transactions;

(l) the Plaintiff aver that the third parties are innocent parties for value unaware and not made aware of any issues arising between the Plaintiff and the 1st Defendant;

(m) From the course of dealings, neither party as between the Plaintiff and the 1st Defendant adhered to the terms of the Escrow Agreement, which in any event was at variance with the express and/or implied terms of the Letter of Offer where part of the Project Costs were to be funded directly from the proceeds generated from the sales of the Town Houses;

(n) In addition, the Accord and Satisfaction Agreement is outside the scope of the Escrow Agreement as no funds were received from the Building Contractor capable of being deposited in the Escrow Account;

(o) the Plaintiff avers that the Plaintiff and the 1st Defendant are beneficiaries of the proceeds of sale of the Town Houses and the Accord and Satisfaction Agreement since without these transactions: (a) the Plaintiff would not have had the necessary funds to complete the Project and effect the payments it did to the 1st Defendant and (b) the Plaintiff and the 1st Defendant would not have realized the proceeds of sale generated from the sale of completed Town Houses purchased by several "Mortgage buyers" and whose payments were received directly by the 1st Defendant.

66. The Plaintiff submitted that on the basis of the pleadings filed by the parties, they are clearly competing interests between the Plaintiff as proprietor, the third parties who are entitled to be registered as proprietors and the 1st Defendant who desires to exercise its Statutory Power of Sale based on the Charge over the suit premises.

67. In the Plaintiff's view, the issue(s) that ought to be canvassed and determined at the main trial is whether the Plaintiff entered into the transactions with the third parties with the express and/or implied knowledge, authority and/or consent of the 1st Defendant and if so, whether such knowledge, authority or consent negates and/or estops the 1st Defendant from exercising its Statutory Power of Sale. In the Plaintiff's view, the above issue cannot be heard and determined at this preliminary stage as it requires extensive evidence to be led to establish the veracity or otherwise of these allegations. In the interim, the Plaintiff has introduced and laid enough evidence before this Honourable Court to establish that this is indeed a genuine triable issue.

68. According to the Plaintiff, during the development of the Project and pursuant to the ongoing sales, the Plaintiff through its Advocates, proceeded to prepare Partial Discharges in respect of the Maisonettes that had been sold and fully paid for by the respective Purchasers. This Partial Discharges were then forwarded to the 1st Defendant's Advocates for execution by the 1st Defendant so as to pave way for registration of the Leases. There is also evidence on record that the 1st Defendant's Advocates, Miller & Company, did forward the Partial Discharges to the 1st Defendant for the said execution and release of the various Maisonettes. It is noteworthy that the 1st Defendant has not denied the several requests received to discharge the Maisonettes sold from the Charge. The above process went on for several years. At no time, despite several reminders, did the 1st Defendant indicate that it was unwilling to execute the Partial Discharges or raise any queries or doubts as to whether it shall execute the same. It was therefore contended that this conduct and/or failure to raise any red flag enabled and even encouraged the Plaintiff and the third parties to proceed on with their transactions since had the 1st Defendant been aggrieved by any of the sale transactions, it had plenty of opportunity to raise or issue warnings either by itself or through its Advocates, which would have precluded, corrected, aligned and/or ironed out any issues and avoided the situation where the litigants now find themselves. Further to the above, it is also clear that the Plaintiff released copies of the Agreements for Sale and the Accord and Satisfaction Agreement to the 1st Defendant**.** Again, no issue, query or objection was raised by the 1st Defendant regarding the transactions, the terms and conditions stipulated in the Agreements or the mode of payment of the respective purchase prices (where applicable) and/or the handover of physical possession of the Town Houses to the intended beneficiaries.

69. It is also not in dispute that the 1st Defendant demanded and took over the Project and in particular the process of sales and collection of the sales proceeds. Coupled with the foregoing was the release of all the documents pertaining to the Project to the law firm of Kimani Michuki & Company Advocates appointed by the 1st Defendant to oversee the sale process together with collection of any due sale proceeds and the Plaintiff also prepared and released to the said Advocates a Status Report which disclosed in every detail the status of all transactions in the Project including the transactions that are the subject matter of this suit. It was therefore submitted that the 1st Defendant's acts, omissions and conduct had a serious effect and influenced the course of dealings between the parties.

70. In summary, the Plaintiff's position was that:

(i) The terms of the loan as spelt out in the Letter of Offer required the Plaintiff to sell the Town Houses to the open market.

Accordingly, the Plaintiff sold the Town Houses under the actual authority, knowledge and consent of the 1st Defendant. The Plaintiff did exactly this and sold the Town Houses to 7 third parties amongst others;

(ii) The third parties amongst others were not privy or a party to the terms of the Loan or the Letter of Offer and purchased and/or acquired the Town Houses on the basis of the apparent and/or implied authority of the 1st Defendant to sell the Units, which authority, despite having plenty of opportunity to do so, the 1st Defendant did not question in anyway throughout the course of the transactions;

(iii) Indeed, the transactions involved plenty of correspondence and communication between Advocates representing the 3 parties, namely the Plaintiff, the 1st Defendant and the third-party beneficiaries, thereby imputing actual knowledge of the ongoing transactions on all the parties that cannot at this late stage be genuinely denied. At no time during this long period of full disclosure of the ongoing transactions did the 1st Defendant or its Advocates either object, raise any procedural, technical or legal anomalies and/or assert any of their rights as Chargee and/or claim that there was any infringement of the terms of the Loan.

(iv) The express and/or implied terms of the Loan were that the proceeds of sale would be utilised to fund the Project Costs not funded by the Loan and the Developer's equity together with the payments due to the 1st Defendant on account of the Loan and interest. The Plaintiff did exactly this and utilised the funds to complete the Project and the funds were also part of the funds utilised to pay the 1st Defendant approximately Kshs. 447 million;

(v) The blatant truth of the matter as can be discerned from the pleadings is that the 1st Defendant **recognised** all the mortgage sales in respect of the purchasers who were financed simply because in such instances it was a prerequisite of such financing and payment of the purchase price that the 1st Defendant issues a Partial Discharge of the Maisonette sold;

(vi) The other blatant truth of the matter is that the 1st Defendant after realising that the ongoing sales may not be able to finance interest amounting to over Kshs. 300 million has opted to belatedly "disown" the sales conducted by the Plaintiff to the third parties;

(vii) That it would be wrongful and unjust for the Plaintiff and the 1st Defendant to attempt to "recoup" their apparent losses and so to speak "throw the third parties under the bus" by effectively re-selling Town Houses that have already been sold to the Plaintiffs with the full knowledge of all the parties;

(viii) The risk of developing the Project, recouping their investment and generating profits lies with the Plaintiff and its financier the 1st Defendant. The risk is based on the assessment of the real estate sector at the time and the business plan promoted by the Plaintiff and accepted by the 1st Defendant that the Project would be implemented and the Maisonettes sold for gain sufficient to recoup the Plaintiff's investment (equity) and the 1st Defendant's investment (loan) plus profits for the Plaintiff and the 1st Defendant, the latter being in the form of interest on capital. The actualisation of the Project however produced different results due to economic factors and as the accounts tendered demonstrate, the 1st Defendant has to date been able to recoup its investment (Kshs. 350 million) and generate a portion of its anticipated profits (approximately 97 million) whereas the Plaintiff has been faced with a total loss and is unable to recover its equity injected into the Project.

(ix) Taking the above into account, the risk or motive of maximising on its profits by recovering all the interest claimed (another 300 million plus) should not be, in the interests of justice, be visited upon the third parties who are not parties to the aforesaid risk or business plan.

(x) 7 of the Town Houses were purchased by third parties who are innocent purchasers for value, strangers to the aforesaid business plan and loan agreements. 8 of the Town Houses were acquired by the Building Contractor in lieu of payment legitimately due to the Building Contractor for completion of the building works. Indeed, both are significant contributors to the partial success of the Project on the basis that their payments were integral to the completion of the Project and the repayment of the principal component of the loan plus a significant margin of interest. On this basis, we submit that as simple beneficiaries of their own investment in acquiring the Town Houses, there was no assumption of risk to be borne or passed to the said third parties.

(xi) Even if there is any wrongdoing or any failure on the part of the Plaintiff to observe the strict terms of the Loan Agreement (which the Plaintiff denies), this is an issue between the Plaintiff and the 1st Defendant that should not be visited upon the third parties who are not parties to such terms of the Loan Agreement.

71. In the Plaintiff's contention, the Plaintiff had the 1st Defendant's actual authority and the Plaintiff was indeed required to sell the Town Houses as envisaged under the terms of the Letter of Offer. Indeed, this was the entire purpose of the loan facility and the only source of the funds necessary to repay the loan, interest and other costs thereon. What appears to be in dispute is the conduct, operation and/or terms of such sales. The 1st Defendant's position, by their own words, as a seasoned financier, is that the proceeds of such sales were exclusively to be directed to the escrow account as per the terms of the escrow agreement.

72. To the Plaintiff the questions for trial in this respect are:

(a) Are the third parties bound by the terms of the Escrow Agreement? It submitted that they are not and cannot be expected to oversee the compliance, performance or otherwise by the Plaintiff of the terms of an Agreement that they are not a party to;

(b) It was submitted that if indeed it is admitted that the Plaintiff had actual authority to conduct sales for the mutual benefit of both the Plaintiff and the 1st Defendant, this placed the Plaintiff in the position of a Disclosed Agent with the actual authority of the 1st

Defendant to conduct the sales and the actual, implied and/or ostensible authority to conclude such sales on terms stipulated by the Plaintiff;

(c) The rules of agency and actual/implied/ostensible authority is that a principal is bound by the actions and/or omissions of its agent if the principal led a third party unaware of the limitations of such agency to believe that the agent had such authority. In such instances the principal is *estopped* from raising the limitations or otherwise of such implied or ostensible authority.

(d) The facts highlighted in the earlier part of this submissions are relevant here. It has been disclosed that the 1st Defendant's and its Advocates were appraised of the various transactions. The Plaintiff provided the 1st Defendant with regular reports disclosing the sales to the third parties in respect of the 7 Town Houses and the amounts received. Copies of the executed Agreements for Sale disclosing *inter alia* the terms of payment were availed by the Plaintiff to the 1st Defendant. At the point of handover over 2 years ago, the 1st Defendant and its Advocates were availed a full report disclosing all the sales and funds received. The project was initiated 9 years ago in the year 2011, whereas the 1st Defendant apparent objection to the "cash sales" was only recently raised when all the payments had already been received and applied. Officials of the 1st Defendant regularly conducted physical inspections of the Property whilst the third parties were in occupation. With respect to the 8 Town Houses released to the Building Contractor, we submit that the 1st Defendant was at all material times aware of the shortfall in the funds due and payable to the Building Contractor. Indeed, this was the intention of the funds applied for and secured by the Further Charge, which funds the 1st Defendant unilaterally appropriated to itself leaving the Building Contractor's bill unpaid. The Plaintiff availed the Accord and Satisfaction Agreement to the 1st Defendant and received no objection.

(e) It was submitted that by their aforesaid acts, omissions and conduct, the 1st Defendant led both the Plaintiff and the third parties to believe that they had the 1st Defendant's mandate to conduct the transactions in respect of the 15 Town Houses that are the subject matter of these proceedings.

(f) On this basis, it was submitted that the 1st Defendant ought to be estopped from denying the Plaintiff's authority and mandate to enter into and conclude the transactions. At the very least, this is a serious triable issue that ought to be canvassed at the main hearing for final determination.

73. According to the Plaintiff, it entered into legally binding agreements with the third parties over the 15 Town Houses for the consideration stipulated in the respective agreements. The agreements were expressly or impliedly sanctioned by the 1st Defendant. The Plaintiff entered into those transactions in good faith and in the legitimate interests of both itself and the 1st Defendant. The Plaintiff avers that without those transactions, the Project would not have been completed leading to a disaster and immeasurable losses for both the Plaintiff and the 1st Defendant. The transactions entered into were in the circumstances necessary to mitigate such losses. The 1st Defendant is a direct beneficiary of the commercial value generated as a result of those transactions, which value has translated into the repayment of the principal component of the loan and significant interest. The 1st Defendant by its acts, omissions and conduct is guilty of laches and in particular its failure to raise any objections in a timely manner to the conduct of these transactions. As a result, there was a legitimate expectation that the transactions were sanctioned, which expectation was relied upon (to their potential detriment) by the Plaintiff and the third parties. The Plaintiff raises an element of bad faith on the part of the 1st Defendant by averring that the 1st Defendant's aforesaid omissions in raising any objections to the aforesaid transactions in a timely manner was mischievously based on the 1st Defendant's full knowledge of the necessity and benefit of the transactions in completion of the Project and is now reneging and/or disowning the transactions so as to dispose the Town Houses *twice.* This process of realising the Town Houses is in total disregard to the third-party interests over those properties.

74. On the flip side, the third parties have a legitimate beneficial interest in the Town Houses. They completed the transactions on their part and provided the consideration stipulated in their respective agreements. They are innocent purchasers for value without knowledge or notice of any issues arising between the Plaintiff and the 1st Defendant. They are in occupation of the Town Houses, some of them as their matrimonial homes and have been possession for over 2 years whilst the 1st Defendant has been in control of the Project.

75. To the Plaintiff, in the event that the 1st Defendant is allowed to proceed with the proposed exercise of its statutory power of sale, the third parties will loose their properties before the issues raised hereinabove have been fully canvassed and tried. There is also the risk or danger that such an action will be conducted before this Court is able to fully inquire into the fundamental issue as whether or not the 1st Defendant has already received the value of the contentious transactions, is a direct and indirect beneficiary of the transactions and whether or not it ought to be estopped from denying the transactions or the Plaintiff's express or implied authority to conduct the same.

76. It was therefore submitted that the above circumstances would occasion both the Plaintiffs and the third-parties irreparable injury that cannot be easily quantified or payable in damages. In this regard, it is noteworthy that the Plaintiff has averred that it does not have the funds to compensate the third parties having released such funds to the 1st Defendant and towards the completion of the Project all with the express or implied knowledge, consent and approval of the 1st Defendant.

77. Accordingly taking into account the above factors and the third-party rights that are likely to be irreversibly infringed, it was submitted that the balance of convenience dictates that an injunction is merited and ought to be granted.

78. In support of its submissions the Plaintiff relied on the dicta in **Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR).**

79. On the requirement in Clause 5(g) and (h) of the Charge as read with Section 87 of the ***Land Act*** and Section 59 of the ***Land Registration Act***, of written consent before the disposition of any interest in the Charged Property, the Plaintiff's position was that:

(a) The above clause 5 (g) and (h) provides for such written consent to be obtained prior to any disposition of any of the Maisonettes;

(b) No format was prescribed in the Charge instrument with respect to the form or substance of such consent;

(c) Prior written consent was provided in the Letter of Offer both expressly and by necessary implication as the sale of the maisonettes was the sole source of the funds necessary (i) to repay the loan and the interest accruing thereon and (ii) meet the other project costs not funded with the agreed Developer's equity and the Loan.

(d) It is the Plaintiff's intention to lead evidence at the main trial to prove that in all the cases where the 1st Defendant has executed Partial Discharges (being approximately 41 out of the 76 Maisonettes), no special "written consent" was accorded by the 1st Defendant in respect of those transactions.

(e) The 1st Defendant requested and was from time to time provided with all the Agreements for Sale in respect of the 76 Maisonettes developed. To date, the 1st Defendant has in its possession all the Agreements for Sale and has never advised the Plaintiff which of the documents it has endorsed and which ones it has not. Indeed, even in the cases where the 1st Defendant executed Partial Discharges, the 1st Defendant has not availed either a copy of the endorsed Agreement for Sale and/or the alleged written consent (save for the written consent expressed or implied by the Letter of Offer as aforesaid).

(f) The consent envisaged in Section 87 of the ***Land Act*** and Section 59 of the ***Land Registration Act*** is signified by the execution of a Partial Discharge by the Chargee which is a registrable document. It is the neglect and/or refusal by the 1st Defendant/Chargee to issue and execute Partial Discharges in respect of the 15 Maisonettes that has given rise to the cause of action herein on the basis that such refusal is illegal and contrary to the agreed or implied terms of the Charge and the Loan.

(g) The Plaintiff took issue with the 1st Defendant's averments in paragraph 5(ii) of their further submissions. The alleged Policy or Practise of endorsing Agreements for Sale to third parties was not stipulated in any of the contractual documents entered into by the parties. Further, at no time during the long duration of this transactions, did either the 1st Defendant or its Advocates disclose to the Plaintiff of any such requirements.

(h) Indeed if there was such a policy or practise, the 1st Defendant is guilty of mischievously withholding such information and of omitting to disclose even to its own Advocates representing them in the transactions of such a requirement. The Plaintiff has in this regard pointed out in its Supporting and Further Affidavit that (i) Agreements for Sale and the Accord and Satisfaction Agreement in respect of the transactions involving the 15 Maisonettes that are the subject matter were released to their Advocates; (ii) Partial Discharges were prepared and released to their Advocates with a request that the same be executed. At no time did the 1st Defendant raise any issue as to these transactions or intimate in any way that the same were devoid of or lacking any required consent.

(i) On the basis of the above, we submit that raising the issue at this late stage, after the transactions have been concluded and consideration provided is a clear and mischievous afterthought and insincere.

(j) With regard to averments in respect of the Purchase Price made in paragraphs 5(i) and (ii) of the 1st Defendant's Submissions, the Plaintiff reiterated its earlier submissions.

80. On the authorities cited, the Plaintiff submitted that the 1st Defendant's authorities ought to be distinguished for the following reasons – Unlike in the instant case,

(a) There was no claim by any of the litigants that there was any express and/or implied consent or authority in the sale transactions to third parties;

(b) There was no claim or evidence led to establish that the Bank/Chargee was informed or aware of the ongoing sale transactions to third parties;

(c) There was no claim or evidence that the Bank/Chargee's consent was sought and/or unreasonable withheld;

(d) There was no claim or prima facie evidence led to establish that the Bank/Chargee received any payment or other consideration for the sale transactions to the third parties;

81. The Plaintiff maintained that it had raised triable and weighty issues that require to be heard and determined at the main hearing and that this Court ought to grant the temporary injunction sought to enable the above issues be determined.

The 1st Defendant's Case

82. In response to the Application, the 1st Defendant Bank averred that on 21st June 2011 the Plaintiff/Applicant applied for a loan facility of Kshs. 310,000,000.00 from the 1st Defendant/Respondent towards the construction of 76 Maisonettes on the suit property. On 27th August 2013 a further loan of Kshs. 40,000,000.00 was advanced to the Plaintiff/Applicant on account of higher tendered construction costs, that surpassed the initial estimate, as well as subsequent escalation costs. The said facilities were secured by a revolving charge of Kshs. 310,000,000.00 over the suit property and a further charge over the same suit property of Kshs. 40,000,000.00, amounting to KSh. 350,000,000.00. In addition, the Plaintiff/Applicant further executed a fixed & floating and a supplementary fixed & floating debenture on all

it assets on 21st July 2011 and 15th August 2013 respectively, gave personal guarantees from its Director **Mr. Andrew Lucas Rosana** on 27th August 2013 as well as a Corporate Guarantee from Holiday Resort Development Co. Ltd. dated 27th August 2013.

83. It was averred that the said loan facility was disbursed in 19 tranches from 30th August 2011 to 31st October 2013.

84. Subsequently, construction of the project was successfully completed and handed over to the 2nd Defendant/Respondent, by the contractor, in May 2015 and the sale of the Maisonettes began soon thereafter. The said sale was to constitute both Cash and Mortgage Buyers and further that as a prerequisite of Clause 3.0 of the Escrow Agreements dated 28th July 2011 and 27th August 2013, all monies in respect of the sale of the 76 Maisonettes were to be deposited in the Plaintiff/Applicant's Escrow Account with the 1st Defendant/Respondent. According to the 1st Defendant, among others, Town House Nos. A1, A6, A10, A15, B5, B13, B19, C17, C18, C20, C21, C22, C24 and C26 were Cash purchases, whose purchase price the 1st Defendant/Respondent is yet to receive.

85. It was averred by the 1st Defendant that as a seasoned mortgage finance provider, its policy is that it only recognizes a sale once the original Agreement for Sale is forwarded to it, for consent and the full purchase price and/or undertaking for the financed amount received. Consequently, as per Clauses 5(g & h), 6.8.1 & 9.1 of the Charge & Further Charge and section 87 of the ***Land Act*** the failure by the Plaintiff/Applicant (Chargor) to obtain the written consent of the 1st Defendant/Respondent (Chargee) prior to *inter alia* selling the aforementioned town houses sees to it that the sale of the suit property to the alleged respective cash purchasers was invalid. Therefore, as far as the 1st Defendant/Respondent is concerned, it does not recognize the sale of the listed Maisonettes.

86. The 1st Defendant therefore averred that the failure of the Plaintiff/Applicant to regularize its mortgage account thus being in breach of the Charge & Further Charge (Clauses 8(a) & 3, 7.1.1 & 7.1.2 respectively) necessitated the issuance of a Statutory Notice on 24th June 2019 by the 1st Defendant/Respondent, whose Statutory Power of Sale had crystallized by virtue of the failure to repay the loan as in the Charge and Further Charge. Based on legal advice, it contended that before a Chargee, such as the 1st Defendant/Respondent herein, can exercise its Statutory Power of Sale under section 96 of the ***Land Act,*** there are two main preconditions namely service of a Notice, in writing, to the defaulting Chargor to pay the money owing or perform and observe the agreement (section 90(1) of the Land Act); and in default of (a) above, service of a Notice to sell to the Chargor in the prescribed form, with a copy to any person with an interest/right in the charged property. The Chargee is then required to refrain from completing any contract for the sale of the charged land until at least 40 days have lapsed from the date of service of the said Notice to Sell. The 1st Defendant's position was that it complied with the provisions of section 96 of the ***Land Act*** in the following manner:

a) Served the 90-days Statutory Notice to the Chargor- the Plaintiff/Applicant, to perform its obligations under the Charge, on 24th June 2019.

b) The Notice period expired without the Chargor- the Plaintiff/Applicant having fulfilled its obligations under the Charge and as such the 1st Defendant/Respondent issued a Notice to Sell on 7th October 2019, copied to all the relevant persons with interests/rights in the charged property namely the guarantors and the tenants. The 1st Defendant/Respondent further stated that it would exercise its Statutory Power of Sale upon the expiry of 40 days from the date of service of the said Notice to Sell.

87. Therefore, having complied with the requisite statutory provisions, the 1st Defendant/Respondent is entitled to exercise its Statutory Power of Sale.

88. The 1st Defendant averred that apropos to paragraph 11 of the Supporting Affidavit of **Francis Anthony Mburu** (hereafter 'the Mburu affidavit') the fact that the entire purchase price was received by the Plaintiff does not meant that the same was remitted to the 1st Defendant/Respondent as per Clause 3 of the Escrow Agreement and it insisted that the Plaintiff/Applicant was in default of the loan repayment to the tune of Kshs. 296,113,293.51 as at 4th March 2020. It was its position that since it did not consent to the sale/transfer of the listed maisonettes to the alleged cash purchasers, it does not recognise such sale. It noted that consent is usually given by endorsement on the Agreement for Sale and since the Agreements for Sale relating to the listed do not contain such endorsement, the 1st Defendant did not consent to sell the listed maisonettes.

89. According to the 1st Defendant:

a) On 8th November 2017, it issued a Demand for payment of arrears, failure to which it would resort to the appointment of a Receiver Manager.

b) Thereafter, on or about 8th December 2017, a meeting was held between the Plaintiff/Applicant's and 1st Defendant/Respondent's representatives, where at the Plaintiff requested that the 1st Defendant/Respondent hold off on the appointment of a Receiver Manager on condition that firstly, the 1st Defendant/Respondent appoints an Advocate to finalize the registration of the conveyances and secondly, that the Plaintiff/Applicant does remit, to the Escrow Account, the rent from the rented Maisonettes situate on the same parcel as the suit property collected from 1st February 2018. Therefore, there was no ***'threat and coercion'*** as alleged by the Plaintiff but only a meeting of the minds.

c) Under the agreement, the mandate of the 1st Defendant/Respondent was to finalize the collection of sales balances of the on-going sales that were handed over to its then Advocates. In addition, partial discharges were to be prepared once a proper reconciliation of the purchase price paid was concluded. Therefore, since there was no evidence of payment of the full purchase price in relation to the alleged cash purchases, the 2nd Defendant/Respondent could not reasonably be expected to register leases and discharges in respect thereof.

d) The handover process, despite commencing in March 2018 after pressure to comply from both the 1st Defendant/Respondents and the appointed Advocates, was never completed for the cash buyers of the Maisonettes at the suit property and in addition, the collected rent was never remitted and therefore, the 1st Defendant/Respondent, sought to recover its security and thus issued a fresh Statutory Notice on 24th June 2019.

e) The legal department of the 1st Defendant/Respondent raised numerous queries with regard to the information contained in the Status Report, and the same was brought to the attention of the Plaintiff/Applicant.

90. According to the 1st Defendant:

a) The Statutory Notice issued on 24th June 2019 was validly issued because the 1st Defendant/Respondent's Statutory Power of Sale had crystallized by virtue of the failure of the 1st Defendant/Respondent to regularize its mortgage account thus being in breach of the Charge & Further Charge.

b) Furthermore, the Charge and Further Charge are in respect of the whole of L.R. No. 12715/11742 as per the schedule on pages 20 and 35 of the Charge and Further Charge respectively therefore, it suffices that the Statutory Notice made reference to the charged parcel as a whole.

c) A Chargee is at liberty to choose which of the five remedies under section 90(3) of the ***Land Act*** to pursue in the event that a Chargor fails to comply with the 90-days Statutory Notice issued under section 90(1) of the ***Land Act*** and therefore the 1st Defendant/Respondent, a seasoned mortgage finance provider, chose the most efficient way to recover from the defaulting Plaintiff/Applicant herein. In any case, the 1st Defendant/Respondent had already issued two prior Statutory Notices, the first on 31st March 2015 and the second on 8th November 2017 for Appointment of a Receiver Manager but the parties negotiated a settlement before the same was actualized.

91. The 1st Defendant's position was that due diligence at the time of the purported sale of the suit property would have revealed that there was an existing charge in favour of the 1st Defendant/Respondent over the suit property, and that a sale thereof is only recognized by the 1st Defendant/Respondent upon the original sale agreement being forwarded to the 1st Defendant/Respondent for consent and the full purchase price and/or undertaking for financed amount received by the 1st Defendant/Respondent under Clause 6.8.1 of the Charge and Further Charge. Therefore, the alleged cash purchasers of the listed maisonettes do not have a registrable property right and/or interest superior to that of the 1st Defendant/Respondent (Chargee) over the charged suit property and their only recourse is for indemnity against the 1st Defendant/Respondent and not against the charged property. Since the Charge and Further Charge between the 1st Defendant/Respondent & 2nd Defendant/Respondent in respect of L.R. No. 12715/617 North West of Athi River Township in Machakos District are valid and have not been vitiated, the 2nd Defendant/Respondent's Statutory Power of Sale has arisen validly.

92. The 1st Defendant contended that the listed suits are *sub judice* and as such the Plaintiff/Applicant cannot purport to put blame on the 1st Defendant/Respondent for alleged illegal acts or omissions threatening to expose it to *serious damages based on breach of contract.* Moreover, the injunctive orders are temporary, with respect to the respective maisonettes and pending the hearing and determination of the respective applications. However, the Charge and Further Charge are in respect of the whole of the suit property and the 1st Defendant/Respondent's statutory power of sale has crystallised.

93. As regards the issue of interest, it was averred that:

a) Firstly, the Plaintiff/Applicant (Chargor) and 1st Defendant/Respondent (Chargee) are bound by the terms of the Charge and Further Charge (see clause 3) which provide as follows:

i) payment of interest at a rate of 18% p.a. or at such other rate(s) as the Chargee may in its sole discretion from time to time decide;

ii) payment of default interest at the rate of 19.75% p.a. or at such other rate(s) as the Chargee may in its sole discretion from time to time decide;

iii) the Default interest may at the sole discretion of the Chargee be at any time capitalised and added for all purposes to the loan or so much thereof as shall remain unpaid AND the Chargor also agrees that the said margin may be reviewed by the Chargee to a higher or lower rate should the Chargee so decide (having regard to all the circumstances the Chargee shall deem appropriate) and the decision of the Chargee shall not be questioned on any account whatsoever.

iv) All overdue interest whether capitalised or not and the interest thereon shall be secured in the same manner as the loan and all the covenants and provisions contained in the Charge and all powers and remedies conferred by law or by this Charge and all rules of law or equity in relation to the loan and the interest thereon shall equally apply to such overdue interest whether capitalised or not and to be the interest thereon.

b) Secondly, the 1st Defendant/Respondent maintains that it has all along been abiding by the said terms in respect of interest chargeable and that it is the default in loan and interest repayment as scheduled, occasioned by the Plaintiff/Applicant that has given rise to accruing interest such that the Plaintiff/Applicant is currently in default to the tune of Kshs. 296,113,293.51 as at 4th March 2020.

94. According to the 1st Defendant, under Clause 2.4 of the Charge and Further Charge it was agreed between the parties that no payment by the Chargor shall be treated as being a payment on account of principal unless all interest due or deemed to be due or accrued has been paid and therefore the longer the default in repayment by the Plaintiff/Applicant subsists the more the interest amount accrues.

95. It was contended that it has now been judicially settled that an Applicant seeking an interlocutory injunction has to establish his case prima facie; demonstrate irreparable injury if a temporary injunction is not granted; and allay any doubts as to (b) above by showing that the balance of convenience is in his favour. In the present case, it was contended that the Plaintiff/Applicant has not satisfied the three conditions based on the following:

a) On the material presented to this Honourable Court by the Plaintiff/Applicant herein, it cannot be concluded that there is a clear and unmistakable right to be protected, and which right is directly threatened by the 1st Defendant/Respondent's exercise of its statutory power of sale. Without going into the merits or otherwise of the Plaintiff's case, I wish to reiterate the contents of paragraph 13 above that the 1st Defendant/Respondent only resorted to issuing the Notice to Sell, as per section 96(2) of the Land Act, on 7th October 2019 after the 90-days Statutory notice expired without the 1st Defendant having regularized its mortgage account.

b) In addition, the Plaintiff/Applicant has not demonstrated that if the 1stDefendant/Respondent proceeds, and rightfully so, to exercise its Statutory Power of Sale over the suit property, they might otherwise suffer grave and irreparable injury which cannot be adequately remedied by damages. In any case, the 1st Defendant/Respondent is the party that stands to suffer irreparable financial loss on account of the continuing default in loan repayment as well as the accruing interest.

c) From the foregoing, it is evident that the balance of convenience does not favour the Plaintiff/Applicant herein for the reasons that:

i) The alleged cash sale of the listed Maisonettes to the alleged respective cash purchasers was invalid because the Plaintiff/Applicant (Chargor) did not obtain the written consent of the 1st Defendant/Respondent (Chargee) prior to selling the suit property, contrary to Clauses 5(g & h), 6.8.1 & 9.1 of the Charge & Further Charge and section 87 of the Land Act.

ii) The Plaintiff/Applicant has defaulted in repayment of the loan facility advanced to it by the 1st Defendant/Respondent contrary to Clauses 8(a) & 3, 7.1.1 & 7.1.2 of the Charge and Further Charge thus giving rise to the latter's right to exercise its Statutory Power of Sale over L.R. No. 12715/11742 North West of Athi River Township in Machakos District.

iii) The Charge and Further Charge between the Plaintiff/Applicant and the 1st Defendant/Respondent in respect of L.R. No. 12715/11742 North West of Athi River Township in Machakos District are valid and have not been vitiated and as consequently, the 1st Defendant/Respondent's Statutory Power of Sale has arisen validly.

iv) The alleged cash purchasers do not have a registrable property right and/or interest superior to that of the 1st Defendant/Respondent (Chargee) over the charged property. Therefore, the only recourse is for indemnity against the Plaintiff/Applicant and not against the charged property.

v) The requisite and valid Statutory Notices were issued to the Plaintiff/Applicant (Chargor) on 24th June 2019 and 7th October 2019 and as such the Application for an injunction should fail.

96. In light of the foregoing, the 1st Defendant/Respondent's position was as follows:

a) There is a charge for Kshs. 350,000,000.00 over the suit property registered in the names of both the Plaintiff/Applicant and the 1st Defendant/Respondent;

b) Both parties entered into Escrow Agreements, of which Clause 3 requires that all monies in respect of the sale of the 76 Maisonettes were to be deposited in the Plaintiff/Applicant's Escrow Account with the 1st Defendant/Respondent.

c) As per the Statement of Account of the said Escrow Account, the Plaintiff/Applicant is in default to the tune of Kshs. 296,113,293.51 as at 4th March 2020.

d) According to the 1st Defendant/Respondent, it did not authorize any sale to the alleged respective cash purchasers of the listed Maisonettes and since no money was remitted to the Escrow Account and no consent of the Chargee was sought for the transfer as per Clause 6.8.1 of the Charge and Further Charge, the Plaintiff/Applicant as Chargor is the only party with a legal right over the property and thus the 1st Defendant/Respondent does not recognize the alleged cash purchasers' alleged rights over the suit property.

e) The alleged sale of the listed maisonettes to the alleged cash purchasers was invalid because the Plaintiff/Applicant (Chargor) did not obtain the written consent of the 1st Defendant/Respondent (Chargee) prior to selling the suit property, contrary to Clauses 5(g & h) & 9.1 of the Charge & Further Charge and section 87 of the Land Act.

f) The Plaintiff/Applicant has defaulted in repayment of the loan facility advanced to it by the 1st Defendant/Respondent contrary to Clauses 8(a) & 3, 7.1.1 & 7.1.2 of the Charge and Further Charge thus giving rise to the latter's right to exercise its Statutory Power of Sale over L.R. No. 12715/617 North West of Athi River Township in Machakos District.

g) The Charge and Further Charge between the Plaintiff/Applicant and the 1st Defendant/Respondent in respect of L.R. No. 12715/11742 North West of Athi River Township in Machakos District are valid and have not been vitiated and as consequently, the 1st Defendant/Respondent's Statutory Power of Sale has arisen validly.

h) The alleged cash purchasers of the listed maisonettes do not have a registrable property right and/or interest superior to that of the 1st Defendant/Respondent (Chargee) over the charged property. Therefore, their only recourse is for indemnity against the Plaintiff/Applicant and not against the charged property.

i) The 1st Defendant/Respondent is a leading financial institution which, in the ordinary course of business, holds funds in trust for its depositors and thus any monies lent out that are not being repaid as scheduled belong to the depositors. The 1st Defendant/Respondent thus has a moral, legal and statutory duty to recover such loans from defaulters, as in the present case.

j) Therefore, since there is a charge over the suit property and the 2nd Defendant has defaulted, the only way for the 1st Defendant/Respondent to realize its facility is to resort to the remedies of a Chargee under section 90(3) of the ***Land Act***.

97. In a further affidavit it was deposed that:

a) The 1st Defendant was only aware of the escalation of the construction costs by up to Kshs. 400,000,000.00, at which point the further advance of Kshs. 40,000,000.00 was made so as to bridge the funding gap on construction.

b) As regards the allegation the Plaintiff incurred Kshs. 119,000,000.00 as 'consultants' fees' it was contended that this amount is highly exaggerated because as per the initial funding plan consultants' fees were accounted for at approximately 12% of the total construction costs. Therefore, the Plaintiff's assertion that the fees amounted to about 27% is unconscionable and cannot be sustained.

c) Further, the professional fees for two professionals involved in the project namely the Project Managers and the Architects were to be deferred and paid after the loan facility was repaid as stated in paragraph B of the Letter of Offer of the Exhibit marked 'FAM2 annexed to the Mburu affidavit.

d) That some loan repayments and cheques encashment by the deponent herein, who is one of the Plaintiff's directors, in the statements provided by the Plaintiff from CFC Stanbic and Jamii Bora Banks pointing to the fact that the Plaintiff may have taken a loan facility from either of the two banks and repaid the same using sale proceeds of the units contrary to the terms of the Escrow Agreement with the 1st Defendant herein. The various cheques encashment by one of the Plaintiffs directors point to a trend of diversion of cash proceeds that may require further investigation. For example, in the Jamii Bora statement, there is a payment to loan account 1001739261003- Kshs. 31,237.20 on 9th September 2015 as well as other payments to accounts 1001739261001 and other various accounts on diverse dates in a monthly pattern- Kshs. 2,858,500 in March 2015, Kshs. 2,185,540 in February 2015, Kshs. 1,415,652 in January 2015 2,185,540.

98. According to the 1st Defendant:

a) Account No. 200-0068575 (otherwise known as the Lengo Account) was being used as an Escrow Account for the project prior to the bank introducing current account products in late 2012, after which the Account No. 7210000004 was opened and then used as the Escrow Account. Consequently, the terms of the Escrow Agreement with regard to the depositing of sale proceeds applied to both aforementioned accounts.

b) Essentially and in ordinary transactions, the Escrow Account is used to service the loan account and as such payments made directly to the loan account are deemed to have passed through the Escrow Account, which was the case for the present transaction.

99. The 1st Defendant insisted that it did not receive Kshs. 104,249,507.85 in the loan account as alleged at paragraph 13 of the Mburu affidavit but instead, received only Kshs. 51,820,986.50 directly into the loan account, an amount which was clearly described as 'sales' and was applied to either interest or capital reduction of the loan facility. Similarly, the 1st Defendant did not receive Kshs. 145,000,000.00 as cash sales as alleged at paragraphs 15 of the Mburu Affidavit. Instead, the amount received in the aforementioned Lengo Account was only Kshs. 31,116,733.00, which amount was not clearly marked as 'sales'. The balance was loan disbursements. Therefore, not all the money received therein was from cash sales as alleged.

100. The 1st Defendant insisted that since the whole property upon which the units stand (L.R. No. 12715/617 North West of Athi River Township in Machakos District) is charged, legally and validly, to the 1st Defendant in the event of default, the 1st Defendant as chargee has a superior interest in the property. Therefore, no other party has a registrable property right or interest superior to that of a Chargee when the Chargor defaults on its obligations as in the present case.

101. The 1st Defendant averred that a dispute as to the amount owed to the Chargee is not sufficient to vitiate the exercise of the statutory power of sale. It insisted that being the holder of the Charge as Chargee, it has first priority over the property as long as the land remains charged which means that the Chargee's interest is superior to those of any third parties for so long as a valid charge subsists, like in the present case. Therefore, it is evident that the 1st Defendant's statutory power of sale arose validly and that its interest as chargee is superior to any purported third party's interest and the Plaintiff's application should be dismissed with costs to the 1st Defendant.

102. It was submitted on behalf of the 1st Defendant by **Mr Kanjama**, its Learned Counsel, that as per section 96 of the ***Land Act,*** it

complied with the two main preconditions imposed on a Chargee prior to exercising its Statutory Power of Sale namely, (a) service of a Notice, in writing, to the defaulting Chargor to pay the money owing or perform and observe the agreement (section 90(1) of the ***Land Act***) and (b) In default of (a) above, service of a Notice to Sell to the Chargor in the prescribed form, with a copy to any person with an interest/right in the charged property. The Chargee is then required to refrain from completing any contract for the sale of the charged land until at least 40 days have lapsed from the date of service of the said Notice to Sell.

103. In the 1st Defendant's view, the following issues for determination arise:

a) What is the effect of default in servicing a loan facility?

b) Whether the Plaintiff/Applicant is entitled to the injunctions as prayed;

c) What recourse do the alleged owners of Nos. A1, A6, A10, A15, B5, B13, B19, C17, C18, C20, C21, C22, C24 and C26 erected on the suit property have?

104. It was submitted that it is not in dispute that the suit property is charged to the 1st Defendant/Respondent on account of a loan facility of Kshs. 350,000,000.00 advanced to the Plaintiff/Applicant between 2011 and 2013. As per clauses 1, 2 & 5 of the Charge and Further Charge, the Plaintiff/Applicant is contractually bound to repay the principal loan amount and interest accruing as per the terms therein until completion in full. It is also not in dispute that the Plaintiff/Applicant has defaulted on the covenant for repayment severally and this default has necessitated the exercise of the 1st Defendant/Respondent's statutory power of sale in an effort to realize its security. The 1st Defendant/Respondent has on occasion rescinded the statutory notice/demand for payment and negotiated terms with the Plaintiff/Applicant but this has not borne fruit.

105. It was submitted that Section 90 of the ***Land Act*** provides for the remedies available to a Chargee in the event that a Chargor fails to honour the covenants under the Charge.

106. In support of its submissions the 1st Defendant cited the case of **Al-Jalal Enterprises Limited vs. Gulf African Bank Limited [2014] eKLR** which cited with approval the High Court **(Nyamu, J.)** in the case of **Mathya vs. Housing Finance Co. of Kenya Limited & another [2003] 1 EA 133** and **Kyangaro vs. Kenya Commercial Bank Ltd & Another [2004] 1 KLR 126** and urged the Court to find that the Plaintiff/Applicant is in default to the tune of Kshs. 296,113,293.51 as at 4th March 2020, a fact that has not been denied, and as such it has not come to equity with clean hands hence the 1st Defendant/Respondent's right to exercise its statutory power of sale over the suit property has crystallized thus the Plaintiff/Applicant's application for injunction must fail. Since the Plaintiff/Applicant has admitted to being in default of the loan, the amount is in dispute, the 1st Defendant relied on **Al-Jalal Enterprises Limited case supra** and **Bharmal Kanji Shah and Another V Shah DeparDevji [1965 EA) quoted in the case of James Otiang Okoth & Another vs. NIC Bank Limited [2017] eKLR.**

107. The 1st Defendant therefore submitted that it is evident that a Chargee is entitled to the remedies in section 90(3) of the ***Land Act*** in the event that a Chargor defaults in servicing a loan once the proper Notices are served.

108. According to the 1st Defendant, it has now been judicially settled that an Applicant seeking an interlocutory injunction has to satisfy the triple requirements sequentially- to establish his case prima facie, demonstrate irreparable injury if a temporary injunction is not granted and showing that the balance of convenience is in his favour before the same is granted and reliance was placed on the holding in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** and **Mrao Ltd vs First American Bank Of Kenya Ltd & 2 Others (2003) KLR 125.**

109. It was submitted that in the present case, it is not in dispute that the suit property is charged to the 1st Defendant/Respondent on account of a loan facility of Kshs. 350,000,000.00 advanced to the Plaintiff/Applicant between 2011 and 2013. As per clauses 1, 2 & 5 of the Charge and Further Charge, the Plaintiff/Applicant is contractually bound to repay the loan and interest accruing as per the terms therein until completion in full. It is also not in dispute that the Plaintiff/Applicant has defaulted on the covenant for repayment severally (see letters dated) and this default has necessitated the exercise of the 1st Defendant/Respondent's statutory power of sale in an effort to realize its security. The 1st Defendant/Respondent has on occasion rescinded the statutory notice/demand for payment and negotiated terms with the Plaintiff/Applicant but this has not borne fruit.

110. The 1st Defendant relied on Section 90 of the ***Land Act*** which provides for the remedies available to a Chargee in the event that a Chargor fails to honour the covenants under the Charge including appointment of a receiver which the 1st Defendant/Respondent elected to do in 2017 and selling the charged land, as in the present case. Therefore, the 1st Defendant/Respondent issued the 90-days Statutory Notice to the Chargor- the Plaintiff/Applicant, to perform its obligations under the Charge, on 24th June 2019. The Notice period expired without the Chargor- the Plaintiff/Applicant having fulfilled its obligations under the Charge and as such the 1st Defendant/Respondent issued a Notice to Sell on 7th October 2019, copied to all the relevant persons with interests/rights in the charged property namely the guarantors and the tenants. The 1st Defendant/Respondent further stated that it would exercise its Statutory Power of Sale upon the expiry of 40 days from the date of service of the said Notice to Sell. In that regard the 1st Defendant relied on the case of **Executive Curtains & Furnishings Ltd vs. Family Finance Building Society [2007] eKLR**.

111. According to the 1st Defendant, similarly, the present case, the Plaintiff/Applicant was given an opportunity to regularize its mortgage account but failed to do so. Therefore, having complied with the requisite statutory provisions, we submit that the 1st Defendant/Respondent is entitled to exercise its Statutory Power of Sale. It relied on the case of **Emrre Global Investors Ltd vs. Housing Finance Company of Kenya Ltd & 2 others [2014] eKLR** and contended that having shown that it is well within its right to exercise its statutory power of sale over the suit property, there is nothing to be tried at trial and as such the Plaintiff/Applicant has failed to prove its case *prima facie*.

Regarding the injury, the 1st Defendant relied on the case of **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] Vol. 1 EA (quoted in the Nguruman Limited case (supra)); Elijah Kipng'eno arap Bii vs. Kenya Commercial Bank limited [2001] eKLR** and **Anita Chelagat O'donovan & 2 Others [2017] eKLR,**

112. According to the 1st Defendant, though the Plaintiff/Applicant contends that it will suffer irreparable damage/loss if the injunction is denied, the Plaintiff/Applicant voluntarily put up the suit property as security and was fully aware of the default clauses in the Charge and Further Charge as well as the provisions of section 90 and 96 of the ***Land Act.*** Moreover, it is the blatant default in loan repayment, a fact which the Plaintiff/Applicant has not denied, that has led to the 1st Defendant/Respondent's crystallization and thereafter exercise of statutory power of sale. The Plaintiff/Applicant has known all along that the security offered for the Charge and Further Charge debt would be realized if there is default in repayment. From the foregoing judicial pronouncements, the sale of the suit property will not result in irreparable injury or irredeemable loss and as such we pray that the Court so finds.

113. Dealing with the balance of convenience, it was submitted that the 1st Defendant/Respondent herein is a leading financial institution which, in the ordinary course of business, holds funds in trust for its numerous depositors and thus any monies lent out that are not being repaid as scheduled belong to the depositors. The 1st Defendant/Respondent thus has a moral, legal and statutory duty to recover such loans from defaulters, as in the present case, in a bid to safeguard the interests of said depositors and facilitate the ease of doing business.

114. It was submitted that in the event that the injunction sought is granted, the net effect shall be to inflict greater financial hardship on the 1st Defendant/Respondent because the interest on the outstanding principal will continue to accumulate and reliance was placed on the case of **Thathy vs. Middle East Bank (K) Ltd [2002] 1 KLR 595.**

115. The Court was urged to be guided by the foregoing as well as the reasons spelt out in the Replying Affidavit and to find that the balance of convenience favours the 1st Defendant/Respondent in the present case.

116. As for the recourse available to the alleged owners of Nos. A1, A6, A10, A15, B5, B13, B19, C17, C18, C20, C21, C22, C24 and C26 erected on the suit property, it was submitted that the 1st Defendant/Respondent, it did not authorize any sale to the alleged respective cash purchasers of the listed Maisonettes and since no money was remitted to the Escrow Account and no consent of the Chargee was sought for the transfer as per Clause 6.8.1 of the Charge and Further Charge, the Plaintiff/Applicant as Chargor is the only party with a legal right over the property and thus the 1st Defendant/Respondent does not recognize the alleged cash purchasers' alleged rights over the suit property. It was submitted that due diligence at the time of the purported sale of the suit property would have revealed that there was an existing charge in favour of the 1st Defendant/Respondent over the suit property, and that a sale thereof is only recognized by the 1st Defendant/Respondent upon the original sale agreement being forwarded to the 1st Defendant/Respondent for consent and the full purchase price and/or undertaking for financed amount received by the 1st Defendant/Respondent. The 1st Defendant insisted that the alleged cash purchasers of the listed maisonettes do not have a registrable property right and/or interest superior to that of the 1st Defendant/Respondent (Chargee) over the charged suit property. Therefore, their only recourse is for indemnity against the 1st Defendant/Respondent and not against the charged property.

117. In its submissions the 1st Defendant relied on the Court of Appeal case of **Keziah Njambi Maingi t/a Arrivals Textile Shop vs. Barclays Bank of Kenya Limited (2016) eKLR.**

118. According to the 1st Defendant:

a) On the material presented to this Court by the Plaintiff/Applicant herein, it cannot be concluded that there is a clear and unmistakable right to be protected, and which right is directly threatened by the 1st Defendant/Respondent's exercise of its statutory power of sale since the 1st Defendant/Respondent only resorted to issuing the Notice to Sell, as per section 96(2) of the ***Land Act,*** on 7th October 2019 after the 90-days Statutory notice expired without the 1st Defendant having regularized its mortgage account. In addition, the Plaintiff/Applicant has not demonstrated that if the 1st Defendant/Respondent proceeds, and rightfully so, to exercise its Statutory Power of Sale over the suit property, it might otherwise suffer grave and irreparable injury which cannot be adequately remedied by damages. In any case, the 1st Defendant/Respondent is the party that stands to suffer irreparable financial loss on account of the continuing default in loan repayment as well as the accruing interest.

b) From the foregoing, it is evident that the balance of convenience does not favour the Plaintiff/Applicant.

119. Therefore, having complied with the requisite statutory provisions, and having shown that as per the Statement of Account, the Chargor is indeed indebted to the Chargee to the tune of Kshs. 296,113,293.51 as at 4th March 2020, it was submitted that the 1st Defendant/Respondent is entitled to exercise its Statutory Power of Sale over the suit property.

120. As regards the Plaintiff's claim that following the purchase of the Maisonettes, a beneficial interest and trust in the property was created in favour of the third parties who allegedly purchased the Maisonettes and therefore they are entitled to partial discharges, the 1st Defendant relied on clauses 5(g & h) & 9.1 of the Charge & Further Charge as well as section 87 of the ***Land Act*** and section 59 of the ***Land Registration Act*** that the written consent of a Chargee must be obtained before any disposition of charged land is undertaken by a Chargor.

121. The 1st Defendant reiterated that its policy and practice, as is with all seasoned mortgage financiers, is that it will only give its consent by endorsing on the Agreement for Sale once both the original Agreement for Sale and purchase price of the Maisonette are forwarded to it. In the present case, the purchase price was to be deposited in the Escrow Account as per Clause 2.3 of the Escrow Agreement. In the present case it is common ground between the Plaintiff and 1st Defendant that the purchase prices were not deposited in the Escrow Account as per Clause 2.3 of the Escrow Agreement. Furthermore, the 1st Defendant did not give its written consent for the alleged sale by endorsing the

Agreement for Sale contrary to clauses 5(g & h) & 9.1 of the Charge & Further Charge, Clause 2.3 of the Escrow Agreement and section 87 of the ***Land Act*** and section 59 of the ***Land Registration Act*****.** Consequently, there was no valid sale of the Maisonettes to any third parties. They therefore do not have a legal and registrable right and/or interest in the suit property superior to that of the Chargee. Their only recourse in the present case thus lies in indemnity against the Plaintiff and not the suit property.

122. On the issue of partial discharges, the 1st Defendant relied on Clause 31 of the Further Charge and averred that the purchase prices were not deposited in the Escrow Account as per Clause 2.3 of the Escrow Agreement and as such none of the Maisonettes were redeemed. The third parties, according to the 1st Defendant, are thus not entitled to partial discharges.

123. Further, it is trite law that a charge is an overriding interest within the meaning of section 28(g) of the ***Land Registration Act*** which means that the rights and interest of a chargee in the charged property are rights in rem and therefore remain superior to any other interest even where there is a sale, transfer or any other disposition in the property. The 1st Defendant relied on the case of **HCCC No. E035 of 2020: Monica Waruguru Kamau & Anor vs. Innercity Properties Ltd.)** where **Tuiyott, J** in dismissing the claim for an injunction quoted with approval the case of **Innercity Properties Limited vs. Housing Finance & 3 others- HCCC No. E030 of 2020** and submitted that the Courts have recently agreed with this position and emphasized that the Bank being the holder of the charge would have first priority over the property as long as the land remains charged.

124. On the question whether the Plaintiff was at all times acting under the actual, implied and/or ostensible authority of the 1st Defendant, the 1st Defendant reiterated that it was mandatory for the Plaintiff to seek its written consent as Chargor prior to undertaking any dealings in the charged property. (See clauses 5(g & h) & 9.1 of the Charge & Further Charge as well as section 87 of the ***Land Act*** and section 59 of the ***Land Registration Act*****.** Looking at all sale agreements attached to the Mburu affidavit, annexure FAM 16 at pages 221-420, executed between the plaintiff and a purchaser, there was no written consent obtained from the 1st Defendant contrary to the Charge and section 87 of the ***Land Act*** aforementioned and as such the 1st Defendant did not endorse the Sale Agreements as is the practice.

125. In conclusion, the 1st Defendant maintained that its statutory power of sale in the present case has arisen validly. Therefore, as a leading financial institution which, in the ordinary course of business, holds funds in trust for its depositors and thus any monies lent out that are not being repaid as scheduled belong to the depositors, it thus has a moral, legal and statutory duty to recover such loans from defaulters, as in the present case.

Determination

126. I have considered the application, the affidavits both in support of the application and in opposition thereto, the submissions both written and oral made on behalf of the parties herein and the authorities relied upon and this is the view I form of the matter.

127. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court restated the law as follows:

> **"In an interlocutory injunction application, the applicant 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 applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant 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 respondent 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 respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant'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 applicant 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 applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."**

128. The Court of Appeal in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR** further opined that:

> **"…these are the three pillars on which rest 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 applicant is expected to surmount sequentially… if the applicant 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 respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however**

strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

129. While reiterating the said principles, **Ringera, J** (as he then was) in **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002** stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in **Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR)** where it was stated:

"....I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein....."

130. However, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition that she did not appear before an advocate to execute the charge and have the effects of the pertinent provisions of law explained to her.

131. It was therefore held by **Ringera, J** (as he then was) in **Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001**:

"The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

132. According to the Court of Appeal in **Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991**:

"The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory…As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

133. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the ***Civil Procedure Act***, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

134. What then constitutes *a prima facie* case? In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,** the Court of Appeal held as follows:

"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant

must show 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 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

135. While adopting the same position the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** added that:

"The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

136. In determining this matter, the Court is enjoined to not only consider the contractual instruments entered into between the parties herein but also the legal regime guiding the transaction in question. That the position of the Court of Appeal in **Keziah Njambi Maingi t/a Arrivals Textile Shop vs. Barclays Bank of Kenya Limited (2016) eKLR** where it made the following remarks with regards the exercise of statutory power of sale:

"A charge is not merely a contract of lending between a lender and a borrower. It is also governed by the elaborate statutory provisions in part VII of the Land Act and Part V of the Land Registration Act. By section 90 and read with section 96(1) of the Land Act, the chargee has power to exercise power of sale of the charged land, if, inter alia, the chargor defaults in payment of money due under a charge and if all, the requisite notices have been served on the chargor."

137. In this case, the agreed facts are that the Plaintiff is the registered owner of Land Parcel known as Land Reference Number 12750/11472 situated off Mombasa Road, in the Syokimau area within the County of Machakos (hereinafter referred to as "the suit property"). Desirous of developing the Plaintiff caused to be designed 76 Town Houses/ Maisonettes together with other amenities known as Gables Park with the intention of offering the Town Houses for sale in the open market for gain, the Plaintiff approached the 1st Defendant and sought a loan facility to assist the Plaintiff with the necessary finance required for the purpose.

138. The Plaintiff applied for a loan facility of Kshs. 310,000,000.00 from the 1st Defendant/Respondent and by a Letter of Offer dated 10th June, 2010, the 1st Defendant agreed to advance the Plaintiff the said sum of Kshs. 310,000,000/= to be secured by a Charge dated 21st June, 2011. By another Letter of Offer dated 23rd May, 2013, the 1st Defendant agreed to advance the Plaintiff a further sum of Kshs 40,000,000/= to meet additional Project Costs based on a Further Charge dated 27th August 2013, amounting to Kshs. 350,000,000.00.

139. According to the 1st Defendant, in addition, the Plaintiff further executed a fixed & floating and a supplementary fixed & floating debenture on all it assets on 21st July 2011 and 15th August 2013 respectively, gave personal guarantees from its Director **Mr. Andrew Lucas Rosana** on 27th August 2013 as well as a Corporate Guarantee from Holiday Resort Development Co. Ltd. dated 27th August 2013.

140. Subsequently, the 1st Defendant allowed the Plaintiff to draw down on the Loan Facility by making direct payments to the Building Contractor based on Certificates of Payment raised by the Project Architects from time to time.

141. It would seem that the construction of the project was successfully completed subsequently and was handed over to the Plaintiff by the contractor and the sale of the Maisonettes began soon thereafter. The said sale was to constitute both Cash and Mortgage Buyers and further that as a prerequisite of Clause 3.0 of the Escrow Agreements dated 28th July 2011 and 27th August 2013, all monies in respect of the sale of the 76 Maisonettes were to be deposited in the Plaintiff/Applicant's Escrow Account with the 1st Defendant/Respondent.

142. It was the Plaintiff's case that it was an express term of the Loan Agreement that the proceeds of the said sales were to be utilised to cover the interest and principal payments due to the 1st Defendant from time to time under the terms of the Loan Agreement; the shortfall of the required Development Funds necessary to implement and complete the Project in accordance with the approved designs, drawings, plans

and specifications such as payments due to specialised sub-contractors and Suppliers not covered by the main Building Contract; and the shortfall of the required Development Funds necessary to meet the costs of necessary ancillary and integral supportive services such as the Consultants' Costs, Marketing Costs, Statutory Expenses for e.g. stamp duties, rates, and rents, Management and Administration Costs for the site and other logistics.

143. In accordance with the aforesaid Arrangement or Agreement, the Plaintiff averred that it proceeded to sell the Town Houses and utilise the sale proceeds in the manner detailed hereinabove with the express and/or implied knowledge, consent and/or approval of the 1st Defendant and that the project was substantially completed on or about the month of April 2014 and Certificates of Practical Completion issued by the Project Architects in respect of the Town Houses. According to the Plaintiff, all through the Project, the Plaintiff continued to provide the 1st Defendant with Sales Reports and updates regarding the ongoing sales in the Project.

144. Apart from the said sales, by an Accord and Satisfaction Agreement dated 6th May 2015 and subsequently by a Variation Agreement dated 28th March 2016, the Plaintiff released 8 Town Houses, namely Town Houses No. A1, C17, C18, C19, C20, C21, C22 and C24 to the Building Contractor in lieu of payment of the sum of Kshs. 82,902,601.31 due and payable to the Building Contractor as per the terms of the Construction Agreement.

145. Here the 1st Defendant takes a divergent position. According to it, it only recognized a sale once the original Agreement for Sale was forwarded to it, for consent and the full purchase price and/or undertaking for the financed amount received. Consequently, as per Clauses 5(g & h), 6.8.1 & 9.1 of the Charge & Further Charge and section 87 of the ***Land Act*** the failure by the Plaintiff/Applicant (Chargor) to obtain its written consent of the 1st Defendant prior to *inter alia* selling the aforementioned town houses rendered the sale of the suit property to the alleged respective cash purchasers was invalid as the said sales were not recognised by the 1st Defendant. According to the 1st Defendant, among others, Town House Nos. A1, A6, A10, A15, B5, B13, B19, C17, C18, C20, C21, C22, C24 and C26 were Cash purchases, whose purchase price the 1st Defendant/Respondent is yet to receive. Therefore, as far as the 1st Defendant/Respondent was concerned, it did not recognize the sale of the listed Maisonettes.

146. The first issue for determination here is whether it was a requirement that the written consent of the 1st Defendant be obtained before the said units were sold off and whether this was actually done.

147. Clause 5 of the Charge states as follows:

> ***The Chargor hereby covenants and agrees with the Chargee that during the continuance of this charge the Chargor shall at all times:***
>
> **…….**
>
> ***(g) not lease, agree to lease…or part with possession of the Mortgaged Property or any part thereof or any estate or interest in the Mortgaged Property…without the prior written consent of the Chargee…"***
>
> ***(h) not sell or agree to sell…the Mortgaged Property or any part thereof without the prior written consent of the Chargee…***

148. Clause 9.1 of the Further Charge on the other hand provides that:

> ***The Chargor shall not sell, transfer, lease, agree to lease, accept surrenders of leases, charge or part with the possession of any part of the Charged Property or any estate or interest thereof without the prior written consent of the Chargee.***

149. As for Section 87 of the ***Land Act,*** it provides that:

> ***"If a charge contains a condition, express or implied that chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar."***

150. A similar provision is contained in Section 59 of the ***Land Registration Act*** which provides that:

> ***If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.***

151. There is no evidence that the Plaintiff expressly sought and obtained the 1st Defendant's written consent before the said sales were undertaken. The Plaintiff however avers that the 1st Defendant's and its Advocates were appraised of the various transactions and that the Plaintiff provided the 1st Defendant with regular reports disclosing the sales to the third parties in respect of the 7 Town Houses and the amounts received and that copies of the executed Agreements for Sale disclosing *inter alia* the terms of payment were availed by the Plaintiff to the 1st Defendant. At the point of handover over 2 years ago, the 1st Defendant and its Advocates were availed a full report disclosing all the sales and funds received. In addition, the officials of the 1st Defendant regularly conducted physical inspections of the Property whilst the third parties were in occupation.

152. According to the Plaintiff, with respect to the 8 Town Houses released to the Building Contractor, the 1st Defendant was at all material

times aware of the shortfall in the funds due and payable to the Building Contractor and that this was the intention of the funds applied for and secured by the Further Charge, which funds the 1st Defendant unilaterally appropriated to itself leaving the Building Contractor's bill unpaid. The Plaintiff availed the Accord and Satisfaction Agreement to the 1st Defendant and received no objection.

153. The Plaintiff lamented that though the project was initiated 9 years ago in the year 2011, the 1st Defendant's apparent objection to the "cash sales" was only recently raised when all the payments had already been received and applied.

154. Therefore, the Plaintiff's position was that by their aforesaid acts, omissions and conduct, the 1st Defendant led both the Plaintiff and the third parties to believe that they had the 1st Defendant's mandate to conduct the transactions in respect of the 15 Town Houses that are the subject matter of these proceedings. On this basis, it was submitted that the 1st Defendant ought to be estopped from denying the Plaintiff's authority and mandate to enter into and conclude the transactions. To the Plaintiff, this is a serious triable issue that ought to be canvassed at the main hearing for final determination.

155. According to the Plaintiff, in good faith and in the legitimate interests of both itself and the 1st Defendant, it entered into legally binding agreements with the third parties over the 15 Town Houses for the consideration stipulated in the respective agreements. The Plaintiff avers that without those transactions, the Project would not have been completed leading to a disaster and immeasurable losses for both the Plaintiff and the 1st Defendant. The transactions entered into were in the circumstances necessary to mitigate such losses and the 1st Defendant is a direct beneficiary of the commercial value generated as a result of those transactions, which value has translated into the repayment of the principal component of the loan and significant interest. The 1st Defendant by its acts, omissions and conduct is guilty of laches and in particular its failure to raise any objections in a timely manner to the conduct of these transactions. As a result, there was a legitimate expectation that the transactions were sanctioned, which expectation was relied upon (to their potential detriment) by the Plaintiff and the third parties. The Plaintiff raises an element of bad faith on the part of the 1st Defendant by averring that the 1st Defendant's aforesaid omissions in raising any objections to the aforesaid transactions in a timely manner was mischievously based on the 1st Defendant's full knowledge of the necessity and benefit of the transactions in completion of the Project and is now reneging and/or disowning the transactions so as to dispose the Town Houses *twice.* This process of realising the Town Houses is in total disregard to the third-party interests over those properties.

156. In this case the charged documents which contained the terms of the contract between the parties herein as well as the law clearly spelt out that the consent to dispose of the Plaintiff's interest in the charged property was to be obtained in writing. On the face of it and without determining the issue conclusively, based thereon, I am unable to find that the alleged conduct of the 1st Defendant raises a prima facie case for the reason that to accept the plaintiff's contention would amount to a variation of the terms of the contract as contained in the charge document. That cannot be done, based on the affidavit evidence before me, for two reasons. First, it would amount to a variation of a written document by way of oral stipulations. Secondly, there is no consideration with respect to the said oral stipulation. This Court has no powers to vary the terms of the contract agreed between the parties herein as was held by the Court of Appeal in **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** that:

> **"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."**

157. The second issue raised by the Plaintiff was that the third party purchasers have a legitimate beneficial interest in the Town Houses. They completed the transactions on their part and provided the consideration stipulated in their respective agreements. They are innocent purchasers for value without knowledge or notice of any issues arising between the Plaintiff and the 1st Defendant. They are in occupation of the Town Houses, some of them as their matrimonial homes and have been possession for over 2 years whilst the 1st Defendant has been in control of the Project.

158. The Plaintiff argues that if indeed it is admitted that the Plaintiff had actual authority to conduct sales for the mutual benefit of both the Plaintiff and the 1st Defendant, this placed the Plaintiff in the position of a Disclosed Agent with the actual authority of the 1st Defendant to conduct the sales and the actual, implied and/or ostensible authority to conclude such sales on terms stipulated by the Plaintiff. This argument is based on the principle that under the rules of agency and actual/implied/ostensible authority, a principal is bound by the actions and/or omissions of its agent if the principal led a third party unaware of the limitations of such agency to believe that the agent had such authority. In such instances the principal is *estopped* from raising the limitations or otherwise of such implied or ostensible authority.

159. On its part the 1st Defendant argues that due diligence at the time of the purported sale of the suit property would have revealed that there was an existing charge in favour of the 1st Defendant/Respondent over the suit property, and that a sale thereof is only recognized by the 1st Defendant/Respondent upon the original sale agreement being forwarded to the 1st Defendant/Respondent for consent and the full purchase price and/or undertaking for financed amount received by the 1st Defendant/Respondent under Clause 6.8.1 of the Charge and Further Charge. Therefore, the alleged cash purchasers of the listed maisonettes do not have a registrable property right and/or interest superior to that of the 1st Defendant/Respondent (Chargee) over the charged suit property and their only recourse is for indemnity against the 1st Defendant/Respondent and not against the charged property. Since the Charge and Further Charge between the 1st Defendant/Respondent & 2nd Defendant/Respondent in respect of L.R. No. 12715/617 North West of Athi River Township in Machakos District are valid and have not been vitiated, the 2nd Defendant/Respondent's Statutory Power of Sale has arisen validly.

160. The argument by the Plaintiff was the subject of the holding of **Tuiyott, J** in the case of **Monica Waruguru Kamau & Anor vs. Innercity Properties Ltd. (HCCC No. E035 of 2020)** where the Learned Judge found that:

"even if the third parties were to obtain a beneficial interest in the suit property, the said interest would be subordinate to the 1st Defendant's interest as Chargee."

161. In arriving at thee said decision the Learned Judge cited with approval the decision of **Majanja, J** in the case of **Innercity Properties Limited vs. Housing Finance & 3 Others- HCCC No. E030 of 2020** where the Learned Judge expressed himself as hereunder:

"The Interested Parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank's consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour…"

162. Without evidence at this stage that the said third parties acquired their interests in the suit property based on the contract between the Plaintiff and the Defendant, this Court cannot state for the purposes of thee injunction sought that the Plaintiff has established a *prima facie* case in so far as that issue is concerned.

163. The Plaintiff's issue with the alleged conduct of the 1st Defendant in not taking any issue with the manner in which the Project was being undertaken for more than 9 years ago seems to have an answer in clause 30.2 of the Charge which states that:

No failure or delay by the Chargee in exercising any such right or remedy shall impair the same or operate or be construed as a waiver of the same nor shall any single, partial or defective exercise of any such right, power or remedy preclude its further or future or other exercise or the exercise of any other such right, power or remedy.

164. Again without arriving at a definite finding at this stage, that clause on the face of it seems to deal with the allegations of partial discharges made by the Plaintiff.

165. From the averments made by the Plaintiff, it is clear that the Plaintiff was in default in its repayments. The plaintiff partly attributed this to considerable and material delay on the part of the 1st Defendant in designing an exit strategy in respect of any concluded sale which in turn occasioned delay in the execution and release of the requisite Partial Discharges required for Purchasers who had completed their transactions and/or secured the balance of the purchase price through Mortgage and delay in the collection of funds secured by Mortgages which funds were only realizable upon registration of a Partial Discharge in respect of the Town House, a Lease in favour of the Purchaser and a Charge in favour of the Financing Bank. Further, the Plaintiff blamed the default on delays in collection of the funds realizable from Mortgage sales was also occasioned by various changes in the Land Administration System stemming from the Change of the Constitution, the enactment of the ***Land Act***, the Digital Migration of the Land System, the introduction of Capital Gains Tax and the introduction of the electronic iTax System, factors which, in the Plaintiff's view, were unforeseeable and beyond the control of the Plaintiff; ooccasioned the Plaintiff cash flow difficulties who struggled with keeping up with the interest and loan repayments levied by the 1st Defendant; and enabled and/or occasioned the 1st Defendant to apply runaway interest at over double the Loan amount which was simply not sustainable and/or affordable from the proceeds realized from the sales of the Town Houses.

166. To compound the foregoing, it was contended that as a result of a slowdown in the real estate market and the economy in general, the Plaintiff experienced difficulties in sustaining the intended sales of the Town Houses in the project within the time frame initially projected which in turn rendered it difficult for the Plaintiff to keep up with the loan repayments in accordance with the schedule demanded by the 1st Defendant. Further to the above, the Project which was initially projected to be concluded within a period of 3 years has now lasted for a period of over 9 years with the result that runaway interest on the Loan Facility has been applied by the 1st Defendant to unsustainable levels and which threatens both the project and the 1st Defendant with Insolvency.

167. The Plaintiff conceded that as a result of the strained cash flows, it was unable to clear the payment due to the Building Contractor who retained a lien and possession over the completed Town Houses in accordance with the terms of the Building Contract.

168. It may well be true that due to intervening circumstances and occurrences, the Plaintiff was unable to meet the terms of the Charge. However, default is not denied. According to the 1st Defendant, both parties entered into Escrow Agreements, of which Clause 3 requires that all monies in respect of the sale of the 76 Maisonettes were to be deposited in the Plaintiff/Applicant's Escrow Account with the 1st Defendant/Respondent. As per the Statement of Account of the said Escrow Account, the Plaintiff/Applicant is in default to the tune of Kshs. 296,113,293.51 as at 4th March 2020. The Plaintiff's contention that the terms of the said Escrow Agreement were not strictly adhered to may similarly be dealt with by clause 30.2 of the Charge.

169. He 1st therefore contends that the failure of the Plaintiff/Applicant to regularize its mortgage account thus being in breach of the Charge & Further Charge (Clauses 8(a) & 3, 7.1.1 & 7.1.2 respectively) necessitated the issuance of a Statutory Notice on 24th June 2019 by the 1st Defendant/Respondent, whose Statutory Power of Sale had crystallized by virtue of the failure to repay the loan as in the Charge and Further Charge. Section 96 of the ***Land Act, 2012*** provides that:

Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.

170. The Plaintiff's case is also based on the allegations that in breach of the Facility Agreement and provisions of the Charge instruments, the 1st Defendant charged exorbitant and illegal interest on the facilities, and is contrary to duplum rule. that owing to the 1st Plaintiff's

constrained cash flows experienced by the Plaintiff, the Plaintiffs was unable to service the facility in accordance with the terms of the charge hence it was necessary to enter into the sale agreements with the third parties in order to offset the liability.

171. Section 90 of the ***Land Act*** states as follows:

> ***(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;***
>
> ***(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;***
>
> ***(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and***
>
> ***(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.***
>
> ***(3) If the chargor does not comply within NINETY DAYS after the date of service of the notice under, subsection (1), the chargee may—***
>
> ***(a) sue the chargor for any money due and owing under the charge;***
>
> ***(b) appoint a receiver of the income of the charged land;***
>
> ***(c) lease the charged land, or if the charge is of a lease, sublease the land;***
>
> ***(d) enter into possession of the charged land; or***
>
> ***(e) sell the charged land.***

172. As regards the contentions of the levy of exorbitant and illegal interest on the facility, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal held that a mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive. That was the position in on **Al-Jalal Enterprises Limited vs. Gulf African Bank Limited [2014] eKLR, where** the Court while dismissing the application for injunction held that:

> **"it was well settled law that a dispute as to amount due cannot be a ground for an injunction to restrain a lender from appointing a receiver on grounds of default in payment obligations…the plaintiff's injury can be compensated by damages."**

173. That was the position taken in the case of **Bharmal Kanji Shah and Another vs. Shah DeparDevji [1965 EA) quoted in the case of James Otiang Okoth & Another vs. Nic Bank Limited [2017] eKLR** where the Court held that:

> **"the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage. Consequently, we implore this Court to be guided by the aforementioned judicial pronouncements and find the application for injunction lacking."**

174. In **Kenya Commercial Bank Ltd. vs. Pamela Akinyi Ochien'g Civil Appeal No. 114 of 1991,** the Court of Appeal held that:

> **"Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered Land Act Cap 300. For instance they must serve on the chargee three months' written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family…The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out.**

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim…The Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage."

175. That was the position adopted in the case of **Al-Jalal Enterprises Limited vs. Gulf African Bank Limited [2014] eKLR** cited with approval by **Nyamu, J.** (as he then was) in the case of **Mathya vs. Housing Finance Co. of Kenya Limited & another [2003] 1 EA 133** where the Court stated that:

"…he who comes to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the Applicant outside the realm of exercise of the court's discretion."

176. In this case, the Plaintiffs' case is not that there is no amount due. In fact, the Plaintiff's problems seem to be, according to them, partly due to constrained cash flows. In my view the Defendants can only be restrained if the Plaintiffs pay the amount claimed into court or claims that having repaid the sum that was lawfully due from them, the claim now being made by the Defendants is, on the terms of the mortgage, excessive. That is not the case before me. Accordingly, the issue of exorbitant levies does not constitute a *prima facie* case for the purposes of restraining the Defendants from exercising the statutory power of sale.

177. As regards the issue of constrained cash flows, while the court may empathise with the circumstances under which the Plaintiff finds himslf due to harsh economic conditions, **Pall, J** (as he then was) in the case **Muhani & Another vs. National Bank of Kenya Ltd [1990] KLR 73** stated as follows:

"The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale."

178. It follows that the issue of constrained cash flows and the allegation that the Plaintiffs had entered into arrangements with third parties to dispose of some of the facilities in order to reduce their liabilities to the Defendant and also with thee contractor to offset the Plaintiff's liability to the Contractor do not constitute a *prima facie* case to warrant the orders sought herein.

179. It is not denied that the 1st Defendant issued statutory notices. The Plaintiff however avers that having opted to appoint a receiver, the 1st Defendant ought not to have resorted to realisation of the security. However, clause 30.2 states that:

No failure or delay by the Chargee in exercising any such right or remedy shall impair the same or operate or be construed as a waiver of the same nor shall any single, partial or defective exercise of any such right, power or remedy preclude its further or future or other exercise or the exercise of any other such right, power or remedy.

180. The Plaintiff also contends that since the earlier notice was in respect of the whole parcel, the same notice could not be construed to apply to partial realisation of the suit property. With due respect I am unable to attach much weight to that contention. As was appreciated by **Warsame, J.** (as he then was) in the case of **Executive Curtains & Furnishings Ltd vs. Family Finance Building Society [2007] eKLR**:

"The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charge property is out of the hands of the borrower."

181. I associate myself with the position in the case of **Kyangaro vs. Kenya Commercial Bank Ltd & Another [2004]1 KLR 126** where it was held that:

"the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this court, quite frankly, that since leaving the employment of the bank over four years ago he has never paid a cent towards redemption of the loan. He admits that he is in default and yet he is also in possession. He can't have it both ways. Either he pays the loan or allows the bank to realize its security. He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting on his rights… While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Court's must not at the same time be converted into a haven of refuge by defaulters."

182. As regards the issue of valuation section 99(4) of the ***Land Act*** provides as follows:

A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

183. Dealing with such a scenario, the Court in **Joyce Wairimu Karanja vs. James Mburu Ngure & 3 Others [2018] eKLR** appreciated that:

> **"both statutory and decisional law have clearly stated that the remedy for a mortgagee who has suffered damages as a result of improper auction, is not to reverse the auction against an innocent purchaser – but in damages."**

184. A similar position was adopted in **Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 Others [2005] eKLR,** where the court held that:

> **"The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie proof that they are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages… What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages…The balance of convenience tilts in favor of the 5th Defendant who purchased the property at the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th Defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction."**

185. Therefore, as the statute provides for a specific remedy, the remedy of injunction is not available in those circumstances.

186. The Plaintiff contended that the previous demand had been compromised by the amicable and the Agreement concluded at the request and demand of the 1st Defendant, namely that the Project, the Sale Process and the collection of the sale proceeds be handed over to the 1st Defendant's appointed Advocates, being the firm of Kimani & Michuki. With due respect, I do not agree with the plaintiff that that issue establishes a *prima facie* case with probability of success. In **Kyangavo vs. Kenya Commercial Bank Ltd & Another [2004] 1 KLR 126** it was held that it was not necessary to give another notification for 45 days after the lapse of the previous one since notification need not be given every time as opposed to advertisements which need to be given afresh every time fresh instructions are received by the auctioneer, and the sale should be at least 14 days after the first newspaper advertisement. Again in the case of **Nathakal Monji Rai vs. Standard Chartered (K) Ltd. & Another Nairobi (Milimani) HCCC No. 830 of 1999** it was held that where the auctioneer has given a notice of 45 days and the sale is subsequently stopped by the Court, the auctioneer need not give another notice ***just like the chargee is not required to give another notice under section 74 of the Registered Land Act every time a sale is suspended to accommodate the chargor.*** (Emphasis mine).

187. Having considered the issues raised by the Plaintiff, I am unable to find that the Plaintiff has established a *prima facie* case for the purposes of the grant of an injunction pending the hearing and determination of the suit. That does not necessarily mean that the Plaintiff will not succeed. What it means is that there is no basis upon which this Court can restrain the 1st Defendant's statutory power of sale. Therefore as was held in the case of **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] Vol. 1 EA (quoted in the Nguruman Limited case (supra)),** the triple requirements in an interlocutory injunction application are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent and all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. Therefore, 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 applicant to injunction directly without crossing the other hurdles in between.

188. Nevertheless, as regards the second condition, whether the Plaintiff stands to suffer irreparable loss, it would seem that the Plaintiff is more concerned about the interests of the third party purchasers than its own interests. As I have held hereinabove, I am not satisfied based on the material placed before me in these proceedings, that the interests of the third parties who are in any case not parties to this suit establish a *prima facie.*

189. Dealing with that condition the Court in **Nguruman Limited case (supra)** expressed itself as hereunder:

> **"On the second factor, that the applicant 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 applicant to demonstrate, prima face, 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 applicant. 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 their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."**

190. In the case of **Elijah Kipng'eno arap Bii vs. Kenya Commercial Bank limited [2001] eKLR Ringera, J.** (as he then was) held that:

> **"is the applicant's probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. …I am on a rational consideration of the matter impelled to conclude that the Applicant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award. The application fails on this ground too."**

191. On the same point it was held in the case of **Anita Chelagat O'donovan & 2 others [2017] eKLR,** that:

> **"it is patent that both under statute and the authorities, the sale of a charged property in exercise of a statutory power of sale is not an irreparable injury or an irredeemable loss. Should it be found upon the hearing of the case that there was irregularity or impropriety in the sale, such property is well-capable of valuation and the ensuing monetary compensation is sufficient to repair the harm or loss."**

192. In light of my finding above, I agree with the 1st Defendant that in the event that the injunction sought is granted, the net effect shall be to inflict greater financial hardship on the 1st Defendant/Respondent and even thee Plaintiff because the interest on the outstanding principal will continue to accumulate. That was the Court's view in the case of **Thathy vs. Middle East Bank (K) Ltd [2002] 1 KLR 595,** where it delivered itself thus:

> **"as regards the balance of convenience, I think the same tilts in favour of refusing the injunction. The Plaintiff is not repaying his mortgage debt. From the statement of account, a lot of what is outstanding is interest. That interest continues to accumulate. At the present tempo, the charge debt will be more than the value of the security quite soon. The bank would lose (sic) because its security will in effect be no security at all if on sale it cannot realize the debt."**

193. In this case it is clear to me that the Plaintiff/Applicant has failed to satisfy the conditions necessary for the grant of interlocutory injunction.

194. Consequently, the Notice of Motion dated 21st February, 2020 fails and is hereby dismissed with costs to the 1st Defendant.

195. It is so ordered.

196. This ruling has been delivered by email with concurrence from the advocates for the parties' respective counsel.

Ruling read, signed and delivered at Machakos this 17th day of September, 2020.

G.V. ODUNGA

JUDGE

In the presence of:

CA Geoffrey