



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E082 OF 2020

BETWEEN

MUGA DEVELOPERS LIMITED..... PLAINTIFF

AND

EQUITY BANK OF KENYA LIMITED.....1ST DEFENDANT

PRICE WATERHOUSE COOPERS-LIMITED.....2ND DEFENDANT

MUNIU THOITHI3RD DEFENDANT

GEORGE WERU.....4TH DEFENDANT

SANYI JITUAN SENSEN INVESTMENT LTD.....5TH DEFENDANT

RULING

Introduction

1. The Plaintiff has moved the court by the Notice of Motion dated 19th March 2020 made, inter alia, under **Order 40 rule 1** of the **Civil Procedure Rules**. It has invoked **sections 90 (1) (2), 92 (2), 104 (1) (b), (2) (b) and (c)** of the **Land Act, 2012** (“the **Land Act**”), **section 56 (1)** of the **Consumer Protection Act**, **section 531, 532 (b) and 561** of the **Insolvency Act, 2015** (“the **Insolvency Act**”) and seeks, inter alia, the following main reliefs:

[4] Pending the hearing and final determination of this suit, a temporary injunction do issue restraining the Respondents by themselves, their proxies, servants, agents or otherwise whomsoever from transferring, assigning, disposing of, dissipating, advertising for sale and/or alienating and/or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty or from in any other manner whatsoever or howsoever dealing, interfering with any known or unknown assets of the Applicant, including land parcel numbers LR Nos. 28223/33 C6, C7 ,C8, J, U,V D2 AND Z-2 registered in the name of the Plaintiff/Applicant and all developments on land parcel number LR. No. 28223/33/A that have not been discharged and registered before 1st December 2019.

[5] An order do issue directing the 1st Respondent to render a complete, true and accurate statement of accounts of the Plaintiff/Applicant’s purported loan account showing the exact indebtedness if any of the Applicant to date. The information to be made as follows:

- i) The various agreements issued over the nine years and the actual disbursement for each loan agreement
- ii) The actual interest charged per month and overall
- iii) The actual penalties charged

- iv) The actual Bank charges incurred and debited to the various accounts
- v) Actual interest rate used for specific period of the loan
- vi) The actual interest on interest charged
- vii) The actual legal fees and any other fees or commissions incurred and debited to the account
- viii) Valuation charges
- ix) The actual interest on arrears charged

[6] An order be made under the doctrine of lis pendens and Section 106 of the Land Registration Act, previously enshrined under Section 52 of the Indian Transfer Property Act (1959) (repealed) that during the pendency of this suit, ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the charged properties with any land registry, Government department and all other registering authorities is hereby prohibited in ALL THOSE land parcel numbers LR Nos. 28223/33 C6, C7, C8, J, U, V D2 AND Z-2, plus any property or unit developed on land parcel number L.R. No. 28223/33/A that had not been discharged and registered by 1st December 2019.

[7] Costs of this Application be provided for and be borne by the Respondents

2. The Application is grounded on the affidavits of Peter Kiarie Muraya, a co-director of the Plaintiff, sworn on 19th March 2020 and 20th July 2020, respectively. The application is opposed by the 1st Respondent through the replying affidavit of its Associate Director, Corporate Banking, Moses Ndirangu, sworn on 10th June 2020. The parties filed written submissions which their advocates highlighted briefly.

Background

3. From the parties' pleadings, depositions and submissions several matters are uncontested especially background facts. The Plaintiff ("the Company") is the registered proprietor of the parcels of land known as LR Nos. 28223/33 (the "suit property"). The Company was incorporated pursuant to a joint venture agreement between Suraya Property Group Limited, on the one hand, and Dr. Samuel Mundati Gatabaki and Mrs. Nancy Gatabaki, on the other hand, with the sole aim of undertaking a development project known as the Fourways Junction Project ("the Project") estimated to cost Kshs. 15-billion and made up of mixed used development comprising of over 1000 houses, hotel, and office park on 100 acres of land to be undertaken in phases.

4. The 1st Respondent ("the Bank") extended various loan facilities to the Plaintiff ("the Company") for the Project. As evidenced by several facility letters dated 18th February 2011, 19th September 2011, 15th November 2011, 5th March 2012, 14th September 2012, 15th May 2013, 11th April 2014, 19th February 2019. As condition of the facilities, the Company was to provide Charges over the suit property, an All-Asset Debenture over the Company's assets securing the maximum principal amount of Kshs. 1,500,000,000/-, corporate guarantees of Kshs. 1,500,000,000/- each by Sagana Developers Limited, Suraya Sales Limited and Suraya Property Group Limited. Consequently, the Company created a Debenture dated 25th January 2012 under which it charged all the goodwill, undertakings, property, assets, revenues and rights of the plaintiff to secure banking facilities of up to Kshs. 1,500,000,000/-. It created another Supplemental Debenture dated 4th April 2012 that charged all the goodwill, undertakings, property, assets, revenues and rights of the plaintiff to secure an additional Kshs. 262,000,000/- and a Second Further Debenture dated 3rd October 2014 that charged all the goodwill, undertakings, property, assets, revenues and rights of the plaintiff to secure the balance in excess of the aggregate maximum sum secured by the debenture and the supplemental debenture.

5. The Company also charged the suit property by a Charge dated 28th March 2011 securing a principal sum of Kshs. 1,500,000,000/-, a Further Charge dated 4th April, 2012 under which the Bank agreed not to call in the amount secured by the preceding charge and offered the Company a further Kshs. 262,000,000/- which was not secured by the Further Charge. By a Second Further Charge dated 4th April, 2012, the Bank agreed not to call in the amount secured by the previous charges and offered the Company further facilities amounting to Kshs. 1,256,000,000/- secured by the Second Further Charge.

6. The Bank contends that the Company has defaulted on its obligation under the terms and conditions of the facilities. By the letter dated 15th December 2016, the Bank issued the statutory notice under **section 90** of the **Land Act** to the Company with respect to the charges over the Charged Property. As the Company did not make payment within the time set out in the statutory notice aforesaid, by the letter dated 9th May 2017, the Bank issued the statutory notices to sell the Charged Property required under **section 96** of the **Land Act** to the Company. Further, the Bank appointed the 2nd and 3rd defendants as joint receivers of the Company on 10th February 2020. It is these two events that have now precipitated this suit.

7. In order to resolve the application and based on the prayers set out in the application, this court has to determine the following three issues:

- a. Whether the court should restrain the Bank from exercising its statutory power of sale in respect of LR Nos. 28223/33 C6, C7, C8, J, U, V, D2 and Z-2 registered in the name of the Plaintiff/Applicant and all developments on land parcel number LR. No. 28223/33/A that have not been discharged and registered before 1st December 2019.
- b. Whether the court should order the Bank to provide accounts as prayed for.
- c. Whether the court should make an order under the doctrine of lis pendens to prevent registration of LR Nos. 28223/33 C6, C7, C8,

J, U, V, D2 and Z-2 registered in the name of the Plaintiff/Applicant and all developments on land parcel number LR. No. 28223/33/A that have not been discharged and registered before 1st December 2019.

8. Bearing in mind that this is a decision on an interlocutory application, I will only deal with the facts and issues raised by the parties that are germane to the determination.

Whether the Bank is entitled to exercise its Statutory Power of Sale

9. The gravamen of the Company's case is that it is not indebted to the Bank and that it was not served with the statutory notices under the **Land Act**, which would entitle the Bank to exercise its statutory power of sale.

10. The Company contends that on 8th June 2016, the Bank issued a notice of default demanding the payment of Kshs 238,215,438.80, being the sum in arrears, in respect of which payment was required to regularize the loan account and that notice stated that the aggregate of the total outstanding liabilities to the Bank by the Company was Kshs 2,647,149,466.37. The Company contends that following the notice, it rectified the default within the three months' notice period leaving a balance of Kshs 2.2 billion.

11. Thereafter and by an agreement dated 19th September 2016, the Bank restructured the existing loan facilities and debt repayment portfolio by advancing a fresh facility of Kshs 2.2 billion to the Company thereby completely clearing all previous debts based on the earlier agreements and existing facilities. The Company stated that it would fully service this facility within four years.

12. The Company states that it has to-date paid the Bank Kshs 4.8 billion against a total disbursement of Kshs 2,848,837,715/= and from 27th September 2016, the date when the aforesaid fresh facility of Kshs 2.2 billion was made, it has paid a total payment of Kshs 1.4 billion, excluding Kshs 462,376,183/= realized by the Bank on 28th December 2019, from the illegal and fraudulent sales and transfers of LR. No. 28223/33, C6, C7 and C8 to the 5th Defendant hence the Bank cannot exercise its statutory power of sale.

13. The thrust of the Defendants case is that the Company has not established a case for the grant of an injunction. The Defendants contend that the Company has admitted default and indebtedness and therefore, there is no legal basis to prevent the Bank from exercising its right to appoint a Receiver under the said Debenture or from exercising its statutory power of sale under the charge dated 28th March 2011. The Bank avers that the Company owes it Kshs. 1,054,936,628.03 and that the sum continues to accrue interest.

14. The Bank explained that the facility letter dated 18th February 2011 had initially provided for 3 loans amounting to a total of Kshs. 4,000,000,000/- with a maximum of Kshs. 1,500,000,000/- to be disbursed to the plaintiff at any one time. The 3 loans were however restructured by the facility letter dated 5th March 2012 that consolidated all the loans resulting in a single facility with a maximum limit of Kshs. 1,762,000,000/-. The loan was disbursed to the Company and was to be used towards the development of the suit property. The loan reconciliation indicates that there is an outstanding balance of Kshs. 1,066,751,033.15. Due to the failure to pay the outstanding amount the Bank proceeded to issue statutory notices.

15. The Bank contends that the Company has admitted its indebtedness. By a letter dated 8th February 2018, the Company admitted that the Bank had disbursed Kshs. 3.2 billion and that the Company still owed Kshs. 2.1 billion. The Bank rejects the Company's assertion that it had disbursed Kshs. 1.8 billion and avers that it disbursed Kshs. 3,474,533,373.18. The Bank pointed out that in the same letter, the Company admitted that not all the funds from the Project were paid to the Bank as required under the Charges. The Bank accused the Company of violating provisions of the charge by failing to channel sale proceeds through the appointed escrow account and selling units without the knowledge and consent of the bank, a fact admitted by the email dated 28th February 2018 forwarded to the Bank by Beatrice Wairimu of Suraya Property Group together with a summary of the deposits made by the Company to other banks amounting to Kshs. 208,877,896/-. As a result of the breach, the Bank contends that it was entitled to appoint a receiver under the Debenture.

16. The principles upon which the court is required to apply in determining the application for injunction are not disputed. In **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR**, the Court of Appeal reiterated the settled principles in **Giella v Cassman Brown [1973] EA 358** 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) allay 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.

17. As to what constitutes a prima facie case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR** explained that it 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." In relation to the application under consideration, the Company seeks to establish that the Bank is not entitled to exercise its statutory power of sale.

18. In order to exercise its statutory power of sale, the Bank must issue a notice under **section 90** of the *Land Act* when the chargor defaults in any of its obligations under the charge. Such obligations include payment of interest or any other periodic payment or any part thereof due under the charge. If the chargor does not comply with the demand within 90 days after service of the notice, the chargee may proceed to sell the charged property. It is at this point that it is said the statutory power of sale has crystallised. Upon crystallization of the power of sale, the chargee is required to issue and serve on the chargor a 40-day notice to sell under **section 96** of the *Land Act*.

19. The Company's case is founded on the Bank's letter dated 19th September 2016 which it contends cleared all the previous debts owed to the Bank by the Company. The letter of offer for the Banking Facilities states that the purpose of the facility is, "*Consolidation of the Borrower's existing facilities*". Does this consolidation mean that the Company was discharged from its obligations in previous facilities as contended by the Company? I do not think so because it is clear that the facility was meant to consolidate the 3 existing facilities and further the consolidated facility was to be secured by the existing securities which included existing Charges, Corporate and Personal Guarantees and asset debentures. The continuing securities meant continuing obligations on the part of the Company which were not discharged or extinguished. In so far as the Company's case is for an injunction is founded on the facility letter dated 19th September 2016, it collapses on its own weight.

20. The Company submitted that the Bank was not entitled to exercise its power of sale because, its own statements show that for the period between 15th December 2016 and 22nd March 2017, being three months after the purported Demand Notice was issued by the Bank, it paid Kshs. 100,900,000/=, which exceeds the Kshs. 88,266,498/= demanded by the Bank. The Bank countered by stating that entries in its statement show that the credits for the same period amounted to Kshs. 122,400,000/- while debit entries amounted to Kshs. 94,063,811/- meaning that the Company only made payment of 28,336,189/- for the period which was below what the Bank demanded. I am inclined to agree with the Bank that the statements speak for themselves and the Company failed to pay the amount demanded in the notice. In my view, nothing would have been easier than for the Company to provide evidence of payment for example through bank deposit slips, electronic or other instructions confirming payment of the amount.

21. Further, the argument by the Company that it has paid a total of Kshs. 4.8 billion against a total disbursement of Kshs. 1.4 billion fails to take into account the time period any payments were made and the interest and penalties due for late payments and default. I therefore find that the Company was truly indebted at the time the notice was issued.

22. The issue of indebtedness is easily resolved by the fact that the Company admitted indebtedness. In the letter dated 8th February 2018, the Company admitted that as at January 2018, the Bank had disbursed to it Kshs. 3.2 billion while it had paid approximately Kshs. 5 billion leaving a balance of Kshs. 1.2 billion owing. Following a meeting between the Company's directors and the Bank's Chief Executive, the Company wrote another letter dated 19th February 2018 in which it reiterated the balance owed to the Bank was Kshs. 1.2 billion.

23. Even after the said admissions, when the Company applied for further facilities by the letter of offer dated 19th February 2019, it admitted that it owed Kshs. 1,336,257,894/- as at 20th February 2019. There is no evidence to show that to date, the amount it had admitted owing has been settled. If anything, the clear evidence that the Company was disposing of units in the Project without paying the purchase price to the Bank, over the period before filing this suit supports the fact that the facilities were in arrears at the time the notice was issued and remain unpaid.

24. Turning to the issue whether the statutory notice was served on the Company, I hold that service of the statutory notice on the chargor is mandatory before the exercise of the power of sale. It is only upon service, that a chargor is notified of default of obligation under the charge and given the opportunity to exercise its right of redemption. The issue of service was articulated by the Court of Appeal in *Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others [1995-1998] 2 EA 260* as follows:

The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements.... That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. It must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya. It is quite possible that such notices were sent but that fact, in the face of the denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the "villain in the matter". In the absence of proof of such posting the Court is constrained to hold that the sale by auction was void. [Emphasis mine]

25. The legal position, as I understand from the foregoing decision, is that unless the chargor admits service of the statutory notice, the burden is on the chargee to establish service. The Bank produced the Statutory Notice dated 15th December 2016 issued under **section 90** of the *Land Act* and the Statutory Notice to Sell dated 9th May 2017 issued under **section 96** of the *Land Act*. It produced the Certificate of posting in relation to the Statutory Notice to Sell but not the one in relation to the Statutory Notice dated 15th December 2016 meaning there is no evidence that the Bank served the notice on the Company by registered post.

26. The Bank submits that the allegation by the Company that it was not served with the statutory notice is an afterthought in light of its argument that it paid Kshs. 100,900,000/- which exceeds the Kshs. 88,266,498/- demanded in the Statutory Notice dated 15th December 2016. It submits that this approach is disingenuous as it cannot state that on one hand allege it did not receive notice and in the same breath allege that it made payment as required by the notice. Moreover, it points out that while the Plaintiff accepts it was served with the notice to sell dated 9th May 2017 and which makes reference to the earlier Statutory Notice dated 15th December 2016, the Company ought to have informed the Bank that it never received the said notice which was in any event sent to the same address.

27. Having reviewed the evidence and in light of the affirmative duty of the chargee to prove service of the statutory notice on the chargor, I find that the supplementary affidavit of Peter Kiarie Muraya which the Bank relies on to support the contention that the Company admitted that it received the statutory notice is not an admission of service. On the contrary, the position taken by the Company is argumentative and is made to support the contention, which I have dismissed, that the Bank was not entitled to sell the property. I therefore find and hold that the statutory notice dated 15th December 2016 was not served on the Company. It follows that the subsequent steps and more particularly the Notice to Sell dated 9th May 2017 is null and void.

28. My finding is that the Statutory Notice dated 15th December 2016 does not affect the position of the Receivers appointed by the Bank. The Company argues that the Bank has not produced a 30-day Notice of Intended of Appointment of a Receiver, as provided in **section 92 (2)** of the **Land Act** and the purported Notice of Appointment of Receivers dated 10th February, 2020 is therefore unlawful and void *ab initio*. The Defendants position is that the Bank appointed the Receivers over the Company under the Debenture dated 25th January 2012 and not under **section 92** of the **Land Act**.

29. I agree with the Bank, that the Company has not sought any orders in the application in relation to the Receivers and more so an order in the nature of a mandatory injunction to remove them from office. The Receivers are appointed under the Debentures issued by the Company in favour of the Bank and which have not been challenged. The fact that a chargee has the right to appoint a receiver under a charge under **section 90(3)(a)** as read with **section 92** of the **Land Act**, does not disentitle it from exercising the right to appoint a receiver under the Debentures. In this case, the Bank has exercised the right to do so under the Debenture and no relief is sought in the application in respect of the Receivers.

30. In Prayer 6, the Company seeks an order be made under the doctrine of *lis pendens* previously enshrined under **section 52** of the **Indian Transfer Property Act (Repealed)** and applicable under **section 106** of the **Land Registration Act, 2012**. **Section 106** of the **Land Registration Act** preserves the rights, liabilities and remedies of the parties under the repealed legislation among them the doctrine of *lis pendens* which the Court of Appeal (per Madam JA) explained as follows in **Mawji v US International University and Another [1976] KLR 185**,

The doctrine of *lis pendens* under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...

31. In relation to the applicability of the doctrine of *lis pendens* to the **Land Registration Act**, the Court of Appeal in **Naftali Ruthi Kinyua v Patrick Thuita Gachure and Another NRB CA Civil Appeal No. 44 of 2014 [2015] eKLR** stated;

The necessity of the doctrine of *lis pendens* in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of **section 52** of the **ITPA** by the **Land Registration Act (LRA) Number 3 of 2013**, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of **Section 107 (1)** of the **LRA** which provides the saving and transitional provisions of this Act

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to **section 107 (1)** of the **LRA**, it is evident the rights flowing from **section 52** of the **ITPA** including those under doctrine of *lis pendens* would remain applicable to the circumstances of this case.

32. It is not disputed that L R Nos 28223/33 C6, C7 and C8 have been sold to the 5th defendant and the transfers duly registered. The position regarding L R Nos 28223/33 J, U, V, D2 and Z2 is not disclosed in the depositions filed in support of the Company's case. As submitted by the Defendants, the Company did not submit on or explain how the doctrine of *lis pendens* applied to the subject properties.

33. I have found that the statutory notice issued under **section 90** of the **Land Act**, was not served. I have also found that the Company is indebted to the Bank. In the circumstances, the proper cause is to allow the bank to issue fresh notices in order to comply with the law rather than issue an injunction pending the hearing and determination of the suit (see **National Bank of Kenya v Shimmers Plaza Limited NRB CA Civil Appeal No. 26 of 2009 [2009] eKLR** and **Lemmy Kaburi Mbogori v Kenya Commercial Bank Limited [2014] eKLR**).

Accounts

34. The Company seeks an order for accounts. The Company submits that under the **CBK Prudential Guidelines**, the Bank is required as a matter of right to furnish the borrower with a proper Repayment Schedule and a Total Cost of Credit Schedule upon which the determination of arrears can be based. It submits that no such Schedules have ever been availed to the Company and none has been provided by the Bank. It further contends that the Statements of Accounts provided by the Bank are sketchy, erroneous and inaccurate and they do not therefore suffice. That the statements of account do not indicate the actual rate of interest charged for given periods, legal fees paid and commissions debited to the loan account. It therefore urges the court to furnish it with a proper, accurate and detailed statements of account and reconciliation statement as prayed in the application.

35. The Bank stated that it has produced the statements of account as part of its deposition and to which the Company has only responded that the statements are, "*sketchy, erroneous and inaccurate*". It points out the Company has not challenged any specific entry in the statement of accounts nor provided any evidence to suggest that these accounts are not complete, true and accurate. It submits that the Company has in fact relied on these statements in its own depositions. The Bank therefore submits that since the information sought is available from

studying the transaction particulars of each entry in the statements, the court should dismiss the application as there is no basis for the application. It adds that the Company has not prayed for a, “*proper Repayment Schedule and a Total Cost of Credit Schedule*” hence the schedules referred to in the submissions cannot be granted.

36. The Company’s plea is for the Bank to render a complete, true and accurate statement of accounts. The Bank has provided a statement of account as part of its deposition. **Section 176** of the **Evidence Act** creates a presumption in favour of the Bank as follows:

176. A copy of any entry in a banker’s book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

37. In this case, the statement of account provided by the Bank is one that it usually provides in the ordinary course of business. In the interactions between the Company and Bank supported by correspondence forwarded to the Bank by the Company, it has never contended that the statements of account are, “*sketchy, erroneous and inaccurate*” or even shown which of the entries in the statements are incorrect. On the contrary, the Company has always been seeking to find ways to liquidate the debt. I therefore decline to make the order at this stage as the accounts provided by the Bank are complete, true and accurate.

Conclusion and disposition

38. For the reason stated above, I shall only grant an injunction against the Bank limited to the period necessary for it to comply with the law by issuing and serving on the Company a statutory notice under **section 90** of the **Land Act** as a prelude for it exercising its statutory power of sale. For the avoidance of doubt, the finding does not affect the position of the Receivers appointed by the Bank under the Debentures issued by the Company to the Bank.

39. Consequently, I now allow the Notice of Motion dated 19th March 2020 on the following terms:

a. The 1st Defendant be and is hereby restrained from exercising its statutory power of sale in respect of the property known as **LR Nos. 28223/33** unless and until it issues and serve a fresh statutory notice under **section 90** of the **Land Act, 2012**.

b. The 1st Defendant shall bear half the costs of the application.

DATED and DELIVERED at NAIROBI this 14th day of DECEMBER 2020.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Murgor, SC with him Mr Ouma and Mr Otieno instructed by Murgor and Murgor Advocates for the Plaintiff.

Mr Kimani, SC with him Mr Ondieki instructed by Hamilton, Harrison and Mathews Advocates for the 1st, 2nd, 3rd and 4th Defendants.