



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.221 OF 2018**

**ROBERT MUGO WA KARANJA.....PLAINTIFF/APPLICANT**

**VERSUS**

**ECOBANK (KENYA) LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DALALI TRADERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 31<sup>st</sup> May 2018 and filed on 5<sup>th</sup> June 2018. It is brought pursuant to Article 40 of the Constitution, order 40 Rule 1,2,3,4, Order 51 Rule 1 of the Civil Procedure Rules; Section 3A and 63 of the Civil Procedure Act, and all other enabling provisions of the law. The applicant is mainly seeking the following orders:-

- a) **THAT** application herein be certified as urgent and be heard *ex-parte* in the first instance;
- b) **THAT** pending the hearing and determination of this application, a temporary order of injunction do issue restraining the Respondents whether by themselves or their representatives, servants, agents, and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as Land Reference Number **Nairobi/Block 97/1513, Fedha Estate, House No.1513**, Nairobi (*the suit property*);
- c) **THAT** pending the hearing and determination of this suit, an order of injunction do issue restraining the Respondents whether by themselves or their representatives, servants, agents, and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as Land Reference Number **Nairobi/Block 97/1513, Fedha Estate, House No.1513**, Nairobi (*the suit property*).
- d) **THAT** pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the 1<sup>st</sup> Respondent, to withdraw the Statutory Demand Notice dated 28<sup>th</sup> August, 2017.
- e) **THAT** pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the 1<sup>st</sup> Respondent, to withdraw the Notice of Public Auction published in the Daily Nation Newspaper of 28<sup>th</sup> May 2018.
- f) **THAT** the costs of this application be awarded to the Applicant in any case.

2. The application is premised on the grounds (a) – (i) on the face of the application. It is further supported by supporting affidavit of Robert Mugo wa Karanja dated 4<sup>th</sup> June 2018; further affidavit dated 20<sup>th</sup> July 2018; and supplementary affidavit dated 29<sup>th</sup> October 2018.

3. The defendants are opposed to the application and in doing so the defendants rely on a Replying affidavit sworn on 26<sup>th</sup> June 2018 by Jack Kimathi.

4. The brief facts of the suit is that the Plaintiff/Applicant avers that he is a joint owner together with Ms. Jacqueline A. Mugo of all that parcel of land Reference Number **Nairobi/Block 97/1513**. That they obtained a mortgage facility from the then East African Building Society in the amount of Kshs.1,350,000 to facilitate purchase of the suit property and a charge was established over the suit property and they continued making payments to service the loan.

5. It is further averred that the Plaintiff/Applicant and his wife continued making payments towards settling the loan by way of standing order. It is their averment that EABS continued making charges as to the monthly installments in which they complied and that by

December 2013 they had paid fully the total amount towards settlement of the original debt of Kshs. 1,350,000 by paying a colossal figure of Kshs.2, 932,067. It is further averred the Applicant despite clearing the outstanding loan balance the Respondents through their auctioneers purported to place the suit property for sale by way of auction. That the Respondent issued a statutory demand notice dated 28<sup>th</sup> August 2017 alleging the Applicant was indebted to the Respondent to the tune of Kshs. 1,561,163/03 and further stating that the Respondent herein had falsely submitted negative credit information in relation to his loan account without any notice of default or intention to declare the loan non-performing or notification of credit listing being given to the Applicant as required by law.

6. It is Applicant's contention that the 1<sup>st</sup> Respondent is unable to give proper statement of account to prove their allegation that the loan is not fully repaid. Further that the statutory notice is defective, by failure to issue it to his wife who is a joint owner of the suit property.

7. The brief facts of the Defendants/Respondents' case is that the Applicant has not been servicing the debt nor has he cleared the debt as alleged. It is Respondent's position that the bank would only produce part to of the statements of account from 31<sup>st</sup> December 1994 to 31<sup>st</sup> May 2018 as reproducing full copies of the statement would require voluminous printing. It is contended that the Plaintiff/Applicant paid a sum of Kshs.821, 734/95 and an interest of Kshs.147, 735/- and that the plaintiff was not regularly paying the installments through his service order as he only serviced the loan twice. It is further contended the payments alluded to in paragraph 8 of the Plaintiff/Applicant's affidavit in the year 2014 and 2015 were towards the settlement of the loan which stood at Kshs.1,284,608/05 as at 31<sup>st</sup> December 2015.

8. The Defendants/Respondents aver that the statutory notices were duly issued to the joint chargors by a registered post and that at no time did the bank issue statements of account as alleged in paragraph 17 and 20 of the Applicant's supporting affidavit. It is further 1<sup>st</sup> Respondent's contention that it has an obligation under the law to report the plaintiff to the Credit Reference Bureau.

9. I have very carefully considered the Notice of Motion herein, the affidavit in support, further affidavit and supplementary affidavit as well as the Replying affidavit. I have also considered the written submissions as well as the oral submissions made by both counsel in support of their opposing positions. The issue arising thereto for consideration is as follows:-

**a) Whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which a temporary injunction can be granted?**

10. In the instant application, the interim orders of injunction were not initially granted ex-parte as submitted by the Respondent's but were granted in presence of both the plaintiff's and the defendants' counsel on 6/6/2018 and as such the issue of non-disclosure and granting of an ex-parte order do not arise. I therefore need not go further on the issue relating to granting of an ex-parte order and material non-disclosure as alluded to by the Respondents.

11. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides:-

**"Where in any suit it is proved by affidavit or otherwise—**

**(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;**

**(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."**

12. The conditions for consideration further in granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction:-

**"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not 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."**

13. The Applicant/Plaintiff referred this court to the case of **R. J. R. Macdonald vs. Canada (Attorney General)**, which was cited with approval by this court in **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** which captured the principles in **Giella vs Cassman Brown** as follows:

**"i) Is there a serious issue to be tried?;**

**ii) Will the applicant suffer irreparable harm if the injunction is not granted?**

**iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")**

14. The test for granting of an interlocutory injunction was considered in the American **Cyanamid Co. vs Ethicom Limited (1975) A AER**

504 where three elements were noted to be of great importance namely:

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

15. The circumstances for consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1<sup>st</sup> defendant do not deny that but contends that it has a legal right to exercise a statutory power of sale, whereas the Plaintiff/Applicant challenges such a right contending that it had completed paying the loan which had formed the basis of the charge, hence according to the Plaintiff/Applicant, the Respondent has no right whatsoever to purport to exercise its statutory power of sale as the Plaintiff/Applicant urges the same is unlawful and has no basis, as he had long settled the debt in question.

16. Without considering the merits of the parties rival submissions, there is no doubt from the parties affidavits, that the suit property is in danger of being alienated or sold by the respondents. Indeed the 1<sup>st</sup> Respondent's Replying affidavit sworn by Jack Kimathi confirms the Respondents had set in motion the process of alienating the suit property herein, on the basis that it has a legal right to undertake such alienation notwithstanding the Applicant allegation that he had completely paid the entire loan from which the charge had been established over the suit property. I have considered the arguments advanced by both sides and I find that in view of the rival positions taken by both sides, the same can only be determined and resolved after full hearing of the suit as the issues cannot be determined at the interlocutory stage. This may therefore call for the court in the interest of doing substantive justice to issue conservatory orders to ensure that the suit property is not alienated to the detriment of the Applicant until the suit is heard and determined.

**i) Whether plaintiff has established a prima facie case with a probability of success?**

17. The Plaintiff/Applicant position is that he has cleared the debt whereas the 1<sup>st</sup> Respondent contention is that the Plaintiff/Applicant's is in arrears, therefore the suit property should be sold in a public auction. It is evidently clear there is a dispute as to whether the loan amount has been cleared or not. Both parties have put in uncompromising sets of accounts in support of their respective positions and Affidavits in support and annexures.

18. In *Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case as:

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

19. It is contended by the 1<sup>st</sup> Respondent that it is trite law a dispute as to the amount outstanding cannot be a ground for an injunction. In the case of *Mrao Limited vs First American Bank of Kenya Ltd & others (supra)* the court address and itself thus:-

*"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. 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."(emphasis added) There is no dispute in this case that Mrao Ltd, (the appellant) borrowed more than Kshs 50m from First American Bank of Kenya Ltd, the first respondent, (First American) on the security of a legal charge over Plot LR No 714 Section IV Mainland North, Mombasa (the suit land) and a debenture dated 27th July, 1999 over its assets to cover the debt which at the time demand for repayment was made stood at Kshs 88m, but was by mutual consent reduced to Kshs 68m. Under a timetable agreed between the appellant and First American the sum of Shs 5m was to be paid within 4 weeks after the execution and registration of the security thus reducing the ceiling under the debenture to Shs 63m."*

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

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

21. Further, in *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*, (1990) eKLR the court held as follows on what a party seeking an injunction must demonstrate:

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

22. In the instant case the Applicant/Plaintiff has through annexed listed documents demonstrated overpayment of the loaned amount, whereas the Bank has given half statement in support of their claim. The Applicant demanded to be supplied with full statements which the Respondent has failed to avail on alleged costs for printing the statements. I find that the Plaintiff/Applicant has been able to produce documentary evidence showing that it repaid either the loan fully or substantial sum towards the loan due to the 1<sup>st</sup> defendant by December 2013 which the 1<sup>st</sup> defendant did rebut by way of producing statements but instead purported to exercise its statutory power of sale thus threatening and/or infringing the Plaintiff/Applicant's right to the suit property. The Applicant has further provided evidence demonstrating that over and above completing the loan repayment in December 2013, he continued without any admission of guilt, to make further payments demanded by the 1<sup>st</sup> Respondent. The document provided reveal that from the original debt of Kshs.1, 350,000 the Applicant has paid Kshs.2, 932,067 as at December 2013. In view of the above the Plaintiff/Applicant contended he has paid the loan amount in full and is therefore entitled to full property rights as owner of the suit property, which rights he urges the 1<sup>st</sup> Respondent threaten and/or has infringed by purporting to unlawfully exercise its statutory power of sale and claim excessive amount notwithstanding the Applicant contention he has fully paid the full claim.

23. The Respondent contend by virtue of the decision in **Mrao Limited vs First American Bank of Kenya Ltd & 2 others (supra)** the amount outstanding cannot be a ground for an injunction. The facts of the above-mentioned case are distinguishable from the present case in that the Applicant herein is not admitting of being in any arrears at all as his contention is that he has not only paid in fully but he has overpaid he loaned about by more than double. The dispute before this court is fundamentally on account. It is not purely of the amount paid by the Plaintiff/Applicant and received by the Respondent. This is what distinguishes the case relied upon by the Respondent's. In view of the foregoing it is upon the Respondents to demonstrate full evidence on outstanding amount but not by piece meal evidence that the amount has not been fully paid. The Respondent has instead supplied the Applicant with an extract and part statements instead of full statements of accounts. The Applicant on his part having discharged the evidential burden by producing documents, has in my view demonstrated he had repaid substantial parties the loan, and most likely exceeded the amount he was required to pay or paid fully loan. The onus of proof to rebut this prima facie position shifts to the 1<sup>st</sup> Respondent to show through documents that the amount paid by the Plaintiff/Applicant has not resulted to fully and finally settlement of the sum loaned.

24. In the case of **Winfred Nyamira Maina vs Winfred Nyawira Maina vs. Peterson Onyiego Gichana, (2015) eKLR** the court held as follows:

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

25. I have perused the 1<sup>st</sup> Respondent's documents on record, and I am satisfied that the 1<sup>st</sup> Respondent has failed to discharge the evidential burden of proof. The 1<sup>st</sup> Respondent declined to furnish the Applicant with full statements before the institution of the suit and has also in this court failed to provide full supporting documents in support of its claim that the Applicant is still in arrears and/or owes some amount arising from the loan. The Respondent instead of providing evidence has given unjustified excuses that it will require printing voluminous pages to furnish the Applicant with full statements. The party who asserts, has the burden of proof. I have considered the documents on record on part of the Respondents case and find that the documents do not support the figures the 1<sup>st</sup> Respondent claims are owed to it by the Plaintiff/Applicant.

26. On the other hand, upon perusal of the statements by the Plaintiff/Applicant, I have found them to be consistent and clear, whereas the statements by the Respondent are neither consistent between themselves nor can they be said to be reflecting true and fair position. They cause some doubt. The closing balances for plaintiff's loan accounts have different closing balances. None of the balance indicated on statements of accounts provided by 1<sup>st</sup> Respondent are similar to those found in the 1<sup>st</sup> defendants demand notices dated 24<sup>th</sup> April 2014 and 28<sup>th</sup> April 2017. I therefore find that the Respondent has failed to discharge the evidential burden of proof that was shifted to it once the Plaintiff/Applicant provided documents demonstrating substantial and excessive payments towards the loan.

27. In **Ezekiel Ezekiel Osugo Angwenyi & another v National Industrial Credit Bank Limited [2017] eKLR** the court held as follows in frowning upon banks which do not provide consistent statements of account in such cases:

**"In view of the different figures stated above, it was necessary for the Defendant to provide an account to the Plaintiff... The Plaintiffs were entitled to know which entries had been made to their loan accounts, interests applied and applicable penalties. It is thus clear that with no accounts rendered, the sums owed by the Plaintiffs', if any, are not known and will never be known. Indeed, this is why the Defendant's witness carelessly testified that they were owed in excess of the Kshs. 20,000,000. It is therefore true that any amount alleged to be due to the Defendant by the Plaintiffs is a result of guesswork. A court of law cannot determine issues of account based on guesswork, and any bank which fails to keep proper records of account cannot make ascertainable claim against a customer. Banks must keep proper records of account. It is on the basis of such record that a claim for or against a bank can be determined. Since between a bank and a borrower the former is the one obligated to keep a more dependable record and to avail statements of account, a bank, like in this case, which cannot keep and avail accountable record will be disqualified from making any claims against a borrower, and would be hard put to discharge any such claims by a borrower."**

28. In view of the above, I am satisfied that the Applicant has raised serious issues for trial; and has demonstrated that this application is not intended to buy time nor is it frivolous nor vexatious. I am further satisfied that on the strength of the documents produced in this application by the Plaintiff/Applicant, he has established a prima facie case with a probability of success. The documents produced by both the Plaintiff/Applicant and the 1<sup>st</sup> Respondent relate as to whether the loaned amount has fully been paid and/or overpaid by the Plaintiff, as opposed to incomplete documents of the Respondent claiming that there are arrears outstanding. The confusion created by the available documents as produced by both sides creates doubt as to whether there is overpayment or any amount owed as claimed by the Respondent. The doubt in my view should be resolved in favour of the Plaintiff/Applicant at this stage as the only way to resolve the matter as regards overpayment or outstanding arrears, is only by full hearing and not by summary manner. In view of the above I find the Plaintiff/Applicant

has established a prima facie case with probability of success.

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

29. The Respondents contend that even if an injunction is not granted, the Plaintiff/Applicant will not suffer any substantial loss, that cannot be adequately compensated by an award of damages, the reason being that the suit property was offered as security to be sold in the event of default. It is for that reason the Respondent is of the view that the Plaintiff cannot claim that he will suffer irreparable loss in capable of compensation by an award of damages as the property is a security which can be sold at any time upon proof of default to service the loan. The Respondent in support of the above proposition referred to the case of **Kitur vs Standard Chartered Bank & 2 others (2002) 1KLR** where the court opined as follows:-

**“It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits.”**

30. The Plaintiff/Applicant contended if injunction orders are not granted he stands to suffer irreparable injury pending the hearing and determination of this suit. It is Plaintiff/Applicant’s contention, if injunction orders are denied he will stand to lose the suit property and such loss cannot be adequately compensated by way of damages. The Plaintiff/Applicant has demonstrated through production of documents on record that he repaid the 1<sup>st</sup> Respondent a sum of Kshs.2, 932,067/- which is more than double the loan amount of Kshs.1, 350,000 which had been advanced to him by the 1<sup>st</sup> Respondent. I find that if injunction pending hearing and determination of this suit is denied, the Plaintiff/Applicant shall not only risk losing the suit property but also Kshs.2,932,067 paid to the 1<sup>st</sup> Respondent and thus infringing his right to property before a full hearing and determination of this suit. This court is aware that the subject matter in this suit relates to Plaintiff/Applicant’s matrimonial home. In determining whether an award of damages would be sufficient compensation, I am alive to the fact that land is not the same everywhere and more specifically when it comes to property, a matrimonial home sits because of its sentiment at value. This therefore cannot be said that the Plaintiff/Applicant won’t suffer irreparable loss or injury if the application for temporary injunction is not granted.

**iii) In whose favour do the balance of convenience lie?**

31. In the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on balance of convenience expressed itself thus:-

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

32. The Respondent urges if the injunction is granted, it will inflict greater hardship on the 1<sup>st</sup> Respondent because the outstanding debt shall continue to accumulate interest. On the other hand if an injunction is refused and it is found that the plaintiff was entitled to an injunction, the 1<sup>st</sup> Respondent can easily compensate the Plaintiff/Applicant for any loss as it is a reputable Bank capable of doing so. In view of the above the Respondent position is that the 1<sup>st</sup> Respondent stands to suffer more than the Plaintiff/Applicant if injunction is granted. It is therefore the Respondent’s position that, the balance of convenience tilts in favour of the Respondent. In support of that proposition the Respondent relies on the case of **Thathy vs Middle East Bank (K) Ltd (2002) 1 KLR 595** where the court expressed 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 loose (sic) because its security will in effect be no security at all if on sale it cannot realize the debt. And the plaintiff will loose (sic) because if the property is ultimately sold, he will not benefit from his investment. A sale of the security now appears to me to be in the best interest of both parties.”**

33. I have considered and weighed the conflicting parties interest as regards the balance of convenience and in which position the same tilts to as regard granting or rejecting the application for injunction. I have considered all fact of this application as regards which party stands to suffer the greater harm following the decision of this motion. I have to consider amongst the two parties which party have a stronger case on the merit and on whether there is irreparable harm, if I decide the motion in a particular manner, which in my view may influence the balance in favour of granting or rejecting to grant the injunction. I have in considering the application for the Plaintiff/Applicant on the strength of the documents submitted to the court found that the applicant has a stronger case unlike the Respondent who has produced half of the documents, which are also contradictory and inconsistent. The Respondent has not produced all relevant documentary evidence in support of the alleged arrears whereas the Plaintiff/Applicant has produced documents in support of his contention of overpayment of the loaned sum. In view of the above the Plaintiff/Applicant stands to suffers greater harm if the application for injunction is dismissed. The 1<sup>st</sup> Respondent on the other hand will suffer no harm if the injunction is granted, as in the event that it is successful in the main suit, and as it still has the Applicant’s security, (the suit property), it will be at liberty to exercise its statutory power of sale. The security being land, it is not likely to

lose its value but will appreciate in value. It will therefore lawfully sell the property and deprive the Plaintiff/Applicant of the suit property.

34. On prayers for mandatory injunction, the Applicant has urged that, this is a clear and straight forward case and the court should grant the mandatory injunction, sought. In the case of **Canadian Pacific Railway vs Rand (1949) 2KB 239 at 249 and Locabail International Finance Ltd vs Afro-Export (1988) ALL ER 901**, both cited with approval in the Moses Njoroge case (*supra*) the court held that the principle governing mandatory injunction is as follows:

*“A Mandatory Injunction can be granted on an Interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff mandatory Injunction will be granted on an interlocutory application.”*

*Having considered the facts of this case and the law and the conclusion I have come to, I am satisfied that the case is clear and the mandatory orders sought to be granted at the interlocutory stage can be granted at this stage.*

35. Having said that much, I find the Plaintiff/Applicant’s application should be allowed. I proceed therefor to make the following orders:-

- a) **THAT** pending the hearing and determination of this suit, an order of injunction do issue restraining the Respondents whether by themselves or their representatives, servants, agents, and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as Land Reference Number Nairobi/Block 97/1513, Fedha Estate, House No.1513, Nairobi (the suit property).
- b) **THAT** pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the 1<sup>st</sup> Respondent, to withdraw the Statutory Demand Notice dated 28<sup>th</sup> August, 2017.
- c) **THAT** pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the 1<sup>st</sup> Respondent, to withdraw the Notice of Public Auction published in the Daily Nation Newspaper of 28<sup>th</sup> May 2018.
- d) **THAT** cost of the application is awarded to the Plaintiff/Applicant.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of January, 2019.

.....

J .A. MAKAU

JUDGE