REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 1 OF 2019

MARPLE BROOKS PROJECTS COMPANY LIMITED..1ST PLAINTIFF/APPLICANT

ESTHER DOREEN ODHIAMBO.....2ND PLAINTIFF/APPLICANT

VERSUS

I & M BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

Introduction

This matter commenced by a Plaint dated 15th and filed on 17th January 2019. Contemporaneously, the Applicants filed an Injunction Application, subject matter of this ruling, which was accompanied by the affidavit of Esther Doreen Odhiambo, a director of the 1st Applicant, sworn on the 15th January 2019.

The Application sought for orders:

a. THAT the application be certified as urgent, and heard ex-parte in the first instance

b. THAT pending the inter partes hearing and determination of this application a temporary injunction do issue to restrain the Respondent, its employees, servants and/or agents from trespassing onto, advertising for sale, selling, transferring or disposing off the Suit Properties.

c. THAT pending the hearing and determination of the main suit a temporary injunction do issue to restrain the Respondent, its employees, servants and/or agents from trespassing onto, advertising for sale, selling, transferring or disposing off the Suit Property.

d. THAT pending the inter-parties hearing and determination of this application an interim mandatory injunction be granted compelling the Defendant/Respondent to forthwith issue the 1st Plaintiff/Applicant with correct statements of accounts reflecting the accurate interest rates payable;

e. THAT pending the hearing and determination of this suit the status quo of the Suit Property be maintained.

f. THAT costs of this Application be provided for.

By a court order dated 18th January 2019, the court directed that an interim order of temporary injunction issue. The court further suspended the sale that was scheduled to take place on 22nd January, 2019 on condition that the plaintiff paid the auctioneers fees and any incidental costs incurred by the defendant this far in exercising the statutory power of sale on or before close of business on 22nd January, 2019 and that as a sign of good faith and or without prejudice the plaintiff makes a down payment of Ksh. 3,000,000/- on or before 6th February, 2019. The interim orders were extended by an Order dated 8th February 2019.

The Respondent opposed the Application through an affidavit sworn by Vincent Barchok Ngochoch on the 13th February 2019 and filed on 14th February 2019. On the same date, counsel for the Respondents filed its submissions.

On the 28th February 2019, the Applicants filed a rejoinder affidavit sworn by Esther Doreen Odhiambo on 27th February 2019 as well as their submissions.

Applicant's Case

The Applicants' case was that by a Letter of Offer dated 12th April 2012, the Respondent agreed to advance the sum of Ksh. 42,000,000/- to the 1st Applicant for putting up several residential units for sale on Land LR. No Kajiado/Kaputiei-North/31755, 31756, 31757, 31758, 31759, 31760, 31761, 31762, 31763 and 31764 together referred to as the "Suit Properties". As security for the loan facility, the Defendant/Respondent created a charge over the Suit Properties.

According to the letter of offer the loan was to be disbursed to the 1st Applicant in two equal disbursements of Ksh. 21000000 /- upon completion of certain construction stages. It was however confirmed that the actual loan amount disbursed was Ksh. 32,000,000/- to two separate loan accounts. The first disbursement of Ksh. 18,883,632/- was made on 12th February, 2013 to the Loan Account No. 0120056035401200. Further, the sum of KES 10,914,062/- was disbursed to the 1st Plaintiff in the loan account number 01200560351210.

In response to the claim that they had not demonstrated payment of Ksh. 28,000,000/- it was averred that the Respondent had neglected to inform the court that the Loan was also secured by the 2nd Plaintiff's property known as Nairobi/Block/103/466 together with the charge on the suit properties. This property was sold and from its sale, Ksh. 16,000,000/- was used to settle the loan. It was further contended that the 1st Plaintiff made several repayments amounting to Ksh. 1,202,504.92/- to loan account no. 01200560351210. Further payments totalling to Ksh.16, 590,417/- were made to this account, fully paying off the 2nd loan. Regarding the sum of Ksh. 21,000,000/- disbursed to the 1st Applicant's loan account number 0120056035401200, it was averred that this was paid back in different instalments to wit Ksh. 2,000,000/- from Amos Odhiambo Oyombe on the 10th April, 2012, Ksh. 4,500,000/- from Jethro Kennedy Papa on 30th November, 2015 and KSh. 5,000,000/- from Meshack Jacob Otieno Olanya on 30th November, 2016.

According to the Applicants therefore, the total amount repaid was KSh. 28,090,417/- which amount was Ksh. 3,909,583/- short of the Ksh. 32,000,000/- disbursed to the Applicants. The fact that the Respondent marked the loan account number 01200560351210 as dormant confirmed their acknowledgement of the repayments.

The Applicants contended that they fell into significant loan arrears for the loan account number 0120056035401200 on 30th April, 2014. On 31st December, 2014, the loan arrears together with the interest were amounting to KES 24,204,492.74. Despite the account being dormant for over a year, it continued earning interest and by 21st December, 2015 the loan arrears together with the interest were amounting to Ksh. 27,293,799.20/- as at 31st December 2016, the account was still active and accruing interest at the same rate, the loan arrears had accumulated to Ksh. 31,650,040.3/-. It was averred that the account continues to accumulate interest to date despite the fact that the account has been non-performing for almost 4 years. As at 31st August, 2018 the loan arrears were at Ksh. 47,287,441.12/- more than double the loan disbursed of Ksh. 21,000,000 /-. According to the Applicant's, if the loan account was a normal account as suggested by the Respondent, then the present suit will be in vain. Further, that it is illegal to charge interest and other charges more than the outstanding amount at the time the amount became non-performing.

The Applicants' contended that despite the Respondent being aware of the difficulties that the Applicants were facing in paying the loan from the day the first loan disbursement was made to the Applicants on the 12th February 2013, the Respondent continued disbursing the loan monies despite the fact that no repayments were being made instead of deeming the loan to be non-performing from 12th February, 2013.

According to the Applicants', on 9th March 2018, the Respondent served the 1st Applicant with a 90 days' statutory notice demanding payment of the outstanding loan amount of Ksh. 42,060,459.12/- failure to which they would proceed to exercise their statutory power of sale and dispose off the Suit Property to recover the amounts. After receiving the statutory notice, the 1st Applicant requested Respondent to give it the certified statements of the loan accounts but to date the statements are yet to be given to the 1st Applicant.

It was further averred that on the 26th of June, 2018 the Respondent sent the 1st Applicant 40 days' notice where the loan amount was Ksh. 44,612.713.12/-. Thereafter, the 1st Applicant approached the Respondent to discuss the interest rates charged on the loan facility and to issue them with the statements of the loan accounts.

The Applicants' argued that efforts to negotiate with the Respondent and have the interest on the loan accounts amended had fallen on deaf ears.

The Applicants' averred that the Respondent appointed Garam Investment Auctioneers who served the Applicant with a 45 days' redemption notice and notification of sale of the suit property dated 25th October, 2018. The loan arrears indicated in the said notice amounted to 46,579,377.77/-

The 1st Applicant maintained that at the time of the default, it had managed repay up to Kenya Shillings Twenty-Eight Million 28,000,000/- of the Ksh. 32,000,000/- loan. As such, the outstanding balance was not the alleged Ksh. 46,579,377.77 as claimed in the statutory notices.

It was averred that 1st Applicant engaged auditors to review its loan account statement for account No.0120056035401200 for the period running from February 2013 to August, 2018. This audit revealed that the Respondent had been charging the 1st Plaintiff/Applicant exorbitant charges and had concealed interest rates in breach of the Agreement between the parties. It was further posited that the law prohibits any banking institution from charging interest that exceeding the principal owing when the loan becomes non-performing.

The Applicants' contended that the Respondent was in breach of the rate cap law that was introduced in September 2016, limiting lending rates to 4% above the Central Bank Rate as it had failed to incorporate these amendments on the interest cap and had been charging interest

way above the required limit. Furthermore, it was averred that the charge instrument provided specifically that the interest rate charged on the loan shall not exceed any maximum permitted by law.

It was further averred that the 1st Applicant entered into sale contracts with different potential buyers who had made substantial payments for some of the house units on the Suit Property and if the Respondent proceeded to sell the suit Properties, the 1st Applicant would suffer irreparable loss and damage. According to the Applicants', one such 3rd party had on 9th January 2019 obtained orders against the Respondent herein in Kajiado CMCC No. 154 of 2018 restraining it from disposing off the property Title Number Kajiado/Kaputiei North/ 31761.

To the Applicants', the Respondent action of attempting to sell the 1st Applicant's properties was geared towards concealing the overcharged interest.

It was averred that despite numerous correspondences, meetings and attempts by the Applicants' advocates on record requesting the Respondent to amend their statements to indicate the principal amount, the loan disbursed and the amount the 1st Applicant should have paid up in case there was no default, the Respondent had neglected to do so.

The Applicants' position was that they had expressed their interest at all times to ensure that they comply with the order of the Court but the Respondent has denied them the opportunity to do so by disregarding their attempts for a meeting to discuss best mode of payment of the outstanding amounts. Potential purchasers need assurance that the Respondent will issue them with discharges of charges once they commit to the transaction The Respondent is non-committal on this front and is adamant on continuing with the auction of the suit properties.

In closing, the Applicants' averred that the issue of the exorbitant interest that was still being charged on the loan facility raised triable issues and that the Court should allow the same as prayed.

According to the 1st Applicant, unless this Court orders the Defendant/Respondent to provide the true statements of accounts in relation to the loan account, the Defendant would not willingly share the same to the Applicants.

The Applicants maintained that if the orders sought were not granted, the 1st Applicant and the other 3rd party purchasers stood to suffer irreparable loss not capable of being compensated by an award damages.

The Respondent's case

Vincent Barchok Ngochoch, the Debt Recovery Manager of the Defendant/Respondent opposed the Applicants' motion. He admitted that as per a letter of offer dated 12th April 2012, the Respondent offered the 1st Applicant term loan facilities for the aggregate principal sum of Ksh. 42,000,000/- upon the latter's request on the terms and conditions set out therein, which offer was accepted. It was further averred that the actual disbursed amount was the sum of approximately Ksh. 32,000,000/-.

It was contended that as per the said letter of offer, the term loan facility was for purposes of constructing ten 4 bedroomed maisonettes on the properties set out under schedule 5(b) of the letter of offer dated 12/04/2012 and the suit properties were one of the properties mentioned therein. Further that as per clause 3 of the letter of offer the term loan facility was to be repaid by way of lump sum payment(s) within a period of six (6) months commencing after an initial moratorium period of eighteen (18) months from the date of the first draw down subject however to the Defendant's right to demand immediate payment of the facility at any time and that interest would be serviced regularly even during the moratorium period and also thereafter.

According to the Respondent, as per the statutory notice dated 26th June 2018 the outstanding balances at the time of issuance were with regard to the Plaintiffs' account numbers 01200560351210, 01200560351211 and 0120056035401200 and the outstanding balances were clearly indicated therein.

To the Respondent, the 1st Plaintiff had not demonstrated payment and the loan statement did not reflect payment of Ksh. 28,000,000/= as alleged.

It was further averred that the 1st Applicant fell into significant loan arrears and as at 15/08/2018 as per the notification of sale the outstanding loan amount was Ksh. 46,579,377.77/- which amount continued to accrue interest at the rate of 13% per annum with 10% additional interest on excess until payment in full.

A case was made that pursuant to advertising of the charged properties for sale by way of public auction scheduled on 22/01/2019 at 11:00 a.m., the Defendant ensured that the statutory notices were served upon the 1st Plaintiff in consonance with section 90 and 96(2) of the Land Act No. 6 of 2012 and which have not been challenged by the Plaintiffs'. Further that a valuation report over the subject properties was conducted by Highlands Valuers Limited who ascertained the market value and the forced sale value.

The Respondent was adamant that its actions in the matter herein were lawful and in compliance with contractual and statutory rights that had accrued under the said loan facilities.

It was contended that because as per the Court order issued on 18/01/2019, the auction scheduled for 22/01/2019 was suspended on condition inter alia that the plaintiffs make a down payment of Ksh. 3,000,000/- on or before 6/02/2019, this to date had not been complied with. Further, under prayer (c) and (d) of the Plaint, the plaintiffs had prayed for general damages for breach of contract and Ksh. 16,500,000/- being specific damages: a clear indicator that damages would be an adequate remedy. Additionally, it was contended that the Plaintiffs' had not demonstrated that they performed and kept their part of the bargain in the letter of offer dated 12/04/2012 hence equity could not aid

them. The Applicants had failed to demonstrate payment of Ksh. 28,000,000/- and even so ought to have settled the acknowledged outstanding loan balance of Ksh. 14,000,000/- prior to the filing of the injunctive application herewith.

According to the Respondent, the Plaintiffs' were not entitled to the injunctive orders as their allegations of exorbitant and concealed interest rates were an attempt to scuttle the Defendant's statutory right of sale and which issue had been raised belatedly in view of the fact that the statutory notices were served upon the 1st Plaintiff way back on 9/03/2018 and 26/06/2018 respectively. That the multiple sale agreements between the 1st Plaintiff and third parties could not affect the rights of the Defendant in view of the fact that the Defendant was not aware of their interest, was not a party to the stated sale agreements and the suit properties are charged to the Defendant who had superseding interests over the same. The issue of in duplum as alleged by the plaintiffs' did not arise whatsoever.

It was intimated that the Plaintiffs' had not on the basis on the material placed on record satisfied the criteria upon which Courts grant the reliefs sought in the application under consideration at an interlocutory stage as they had not established a prima facie case. As such, the court ought to dismiss with costs the Plaintiffs Application dated 15/01/2019.

The Applicants' Submissions

The Applicants' submissions were put forth by Miss Azenga of the firm of Soita and Associates. She identified four issues for determination to wit:

> *(a) Whether the Applicants have established a prima facie case for the granting of an injunction;*
>
> *(b) Whether the Applicants have demonstrated that they will suffer irreparable loss if the suit property is to be sold;*
>
> *(c) Whether the Plaintiffs have satisfied the Court's order issued on 18th day of January, 2019;*
>
> *(d) Whether the interest charged by the Defendant are exorbitant and in contravention of the in duplum rule as established by the Banking Act, Cap 486 Laws of Kenya.*

It was submitted that Plaintiffs/Applicants had fulfilled all the conditions for awarding a temporary injunction as they had paid a substantial amount of the loan disbursed. Specifically, Ksh. 28,090,417/- of the disbursed 32,000,000/- had been repaid. Counsel reiterated that the Respondent continued to charge exorbitant interest rates on the loan amount despite the fact that the account has been non-performing for over four years. It was further submitted that the valuation of the suit properties presented by the Respondent only covered a single property yet all the suit properties were at different stages of construction and therefore their value could not be the same.

Per Counsel, the Applicants' had therefore established a prima facie case for the grant of a temporary injunction pending hearing and determination of the main suit to allow this court to extensively evaluate and decide on the issue of the interest and the balance of the loan arrears owed to the Respondent. Reliance was placed on **Charter House investments Ltd vs. Simon K. Sang and others, Civil Appeal No.315 of 2004**

Submitting on whether the applicants had demonstrated that they would suffer irreparable loss if the suit properties were to be sold, counsel stated that the Applicants had invested significantly in the suit properties and any attempt to sell the same before realization of their investment is sufficient proof of the loss to be suffered by them. In addition, the Applicants had demonstrated in the Supporting Affidavit and the Further Affidavit the amount of money repaid to the Respondent for the loan disbursed. The fact that the amount repaid was over and above half of the loan amount disbursed not only confirmed that the Applicant would suffer irreparable loss but also that this was a matter best dealt with in the main suit.

Explaining why the Applicants had failed to honour the Court's order to make a good faith payment of Ksh. 3,000,000/-, Miss Azenga submitted that the Respondent ignored the Applicants attempts to organize for the payments. It was submitted that the Respondent knowingly thwarted any attempts by the Applicants to settle the amounts ordered by the Court on the 18th January, 2019.

Finally, on whether the interest charged by the Defendant was exorbitant and in contravention of the in duplum rule, Counsel relied on Section 44A of the Banking Act, Cap 486, Laws of Kenya for the submission that the Section estopped the Respondent from the surcharging interests as it was since doing since the loan became non-performing on the 30th April, 2014 and the loan arrears on the said date were Ksh. 21,000,000/-. It is for this reason that the Applicants' submitted that this was an issue that should best be addressed during the hearing of the main suit before the sale of the suit properties to establish the correct amounts owed. For this line of submissions, counsel cited the case of **Scholastica Nyaguthii Muturi vs Housing Finance Co. Of Kenya Ltd & Another [2017] eKLR.**

On the basis of the foregoing, it was submitted that the Applicants' had adduced enough grounds to warrant the granting of a temporary injunction against the Respondent. Counsel urged the court to allow the Notice of Motion application dated 15th January, 2019 as prayed.

The Respondent's Submissions

Advancing the case on behalf of the Respondent was Miss Akunga from the firm of Macharia-Mwangi & Njeru Advocates. She identified the sole issue for determination as whether the Plaintiffs/Applicants had satisfied the conditions for grant of an injunction. Her point of departure was whether the Plaintiffs/Applicants had established a prima facie case with a probability of success. Citing **Mombasa Civil Appeal No. 39/2002 Mrao Limited vs First American Bank of Kenya Limited & 2 Others KLR [2003]** counsel submitted that the Applicants had not established a prima facie case. This submission was anchored on the argument that the 1st Plaintiff had failed to demonstrate repayment of the sum of Kshs. 28,000,000/- . It was further submitted that the Defendant had ensured compliance with Section 90 and Section 96 (2) & (3) of the Land Act by issuing the letter dated 9/03/2018 and the letter dated 26/06/2018. Additionally, the

Respondent had complied with Section 97 (2) of the Land Act, 2012 as regards valuation of the suit property. In any event, it was submitted, the aspect of valuation had neither been raised nor was it an issue before the Court but nonetheless the Defendant secured compliance with the law.

Counsel went on to submit that the failure by the 1st Plaintiff to deposit a show of good faith of Kshs. 3,000,000 /= disentitled it from seeking the orders in the application. Further that, the Plaintiff's prayer for general damages for breach of contract and Kshs. 16, 500,000/=being specific damages under prayer (c) and (d) of the Plaint was a clear indicator that damages would be an adequate remedy and thus injunctive orders ought not to issue.

Ms. Akunga submitted that the Plaintiffs' allegations of exorbitant and concealed interest rates were an attempt to scuttle the Defendant's statutory right of sale and which issue has been raised belatedly in view of the fact that the statutory notices were served upon the 1st Plaintiff way back on 9/03/2018 and 26/06/2018 respectively.

It was further argued that the multiple sale agreement between the 1st Plaintiff and Third parties could not affect the rights of the Defendant in view of the fact that the Defendant was not aware of their interest if any, it was not a party to the stated sale agreements and the suit properties are charged to the Defendant who has superseding interests over the same.

According to counsel, the interim mandatory injunction cannot issue at the interlocutory stage in view of the fact that the issue will be best handled at the trial where each party will have an opportunity to present its case accordingly.

In view of the foregoing, it was submitted that the Plaintiffs/Applicants had not established a prima facie case with a probability of success against the Defendant and there were no special circumstances that exist to warrant the issuance of a temporary injunctive order pending the hearing and determination of the suit herein.

Turning to whether the Plaintiffs/Applicants had demonstrated irreparable loss, it was submitted that no evidence had been adduced by the Plaintiffs' to demonstrate irreparable loss that cannot be adequately compensated by way of damages. That, the Plaintiff's prayer for general damages for breach of contract and Kshs. 16, 500,000/=being specific damages under prayer (c) and (d) of the Plaint was a clear indicator that damages would be an adequate remedy and thus injunctive orders ought not to issue. Reliance was placed on **Kisumu HCCA No. 21/2014 Vivo Energy Kenya Limited vs Maloba Petrol Station & 3 Others (2015) eKLR** and **Mrao Limited vs First American Bank of Kenya Limited [supra]**

On the balance of probability, it was submitted that the Defendant was a reasonably sound financial institution that would be able to compensate the 1st Plaintiff should it succeed in the trial. Further, it was submitted that if the injunctive orders restraining the Defendant from exercising its statutory power of sale are granted, the amount of the debt which was currently in excess of Kshs. 46,000,000/= would continue to rise exponentially and the security may prove to be insufficient to cover the ultimate balance.

The court was therefore urged to dismiss the plaintiffs' application with costs to the Defendant/Respondent.

Analysis and Determinations

Taking into account both parties pleadings and evidence as well as the submissions of the able learned counsels for the respective parties, Ms. Azenga for the Plaintiffs' and Ms. Akunga for the Defendants, I find that the sole question posed for this court is whether the Applicants' case meets the threshold set out by law for the granting of temporary injunctions.

The law on temporary injunctions is **Order 40 Rule 1(a)** of the Civil Procedure Rules which provides:

> ***"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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 orders."***

The principles established in **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** for the granting of interlocutory injunctions are now well settled in Kenyan law. In Giella, the court stated:

> *"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. 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.**"*

The position above was further elaborated by the Court of Appeal in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** where the following opinion was rendered:

> *"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."

In **Jan Bolden Nielsen Versus Herman Philiipussteya Also Known As Hermannusphillipus Steyn & 2 Others (2012) Eklr** Mabeya J observed as follows*:*

"*I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Versus Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman Versus Amboseli Resort Ltd (2004) eKLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself:*

"*……counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Versus Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English Case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781: "A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn to have been "wrong" …."*

Reminding itself of the need to restrain from making final determinations on matters that ought to be the preserve of the main suit at an interlocutory stage, this court in **Royal Mabati Factory Limited v Imarisha Mabati Limited [2018] eKLR** rendered itself as below:

My role at this stage is to ensure that I do not embark on a journey resulting that of in depth analysis meant to be of a trial of the suit. This is indeed so given the fact that at this stage I have been presented with a rival affidavit evidence. I consider resultation of any disputes in the affidavit evidence and any difficult queries of the law to be a preserve of the main action.

It is also a principle of law that in exercising discretion for grant of interlocutory injunction the court should take the approach that appears to carry what I can call a lower risk of injustice to either of the parties in the suit. I am therefore guided by the above principles in determining whether or not the applicant notice of motion on interlocutory injunction should be granted pending the hearing and determination of the main suit.

Guided by the foregoing, I will first examine whether the Applicants have established a prima facie case. If I find in the affirmative, I shall then ponder whether they are likely to suffer irreparable harm not capable of being compensated by an award of damages before finally considering in whose favour the balance of convenience titled.

In **Mrao Ltd v. First American Bank of Kenya Ltd& 2 Others [2003] eKLR, Bosire, JA** defined a prima facie case as follows:

"So what is a prima facie case" I would say that in civil cases 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 as to call for an explanation or rebuttal from the latter."

The Court of Appeal deliberating what amounted to a *prima facie* case in **Nguruman (Supra)** made the following comments:

"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."

From the affidavit evidence at hand, it is not in dispute that by a Letter of Offer dated 12th April 2012, the Respondent agreed to advance the sum of Ksh. 42,000,000/- to the 1st Applicant for putting up several residential units for sale on the Suit Properties. As security for the loan facility, the Defendant/Respondent created a charge over the Suit Properties. It is also not disputed that the actual sum disbursed to the 1st Applicant was in the region of Ksh. 32,000,000/-. What was in dispute was the amount repaid by the 1st Applicant and the arrears and interest payable. The Respondent maintained that the 1st Applicant had not adduced evidence of payment of the 28,000,000/- it had claimed to have paid. However, an analysis of the evidence paints a different picture. The evidence by the Applicants showed that the Loan was also

secured by the 2nd Plaintiff's property known as Nairobi/Block/103/466 together with the charge on the suit properties. This property was sold and from its sale, Ksh. 16,000,000/- was used to settle the loan. Evidence also showed that the 1st Plaintiff made several repayments amounting to Ksh. 1,202,504.92/- to loan account no. 01200560351210. Further payments totalling to Ksh.16, 590,417/- were made to this account. Evidence also showed that the Ksh. 21,000,000/- disbursed to the 1st Applicant's loan account number 0120056035401200, was paid back in different instalments including Ksh. 2,000,000/- from Amos Odhiambo Oyombe on the 10th April, 2012, Ksh. 4,500,000/- from Jethro Kennedy Papa on 30th November, 2015 and KSh. 5,000,000/- from Meshack Jacob Otieno Olanya on 30th November, 2016. This brought the total amount repaid to Ksh. 28,090,417/- which amount was Ksh. 3,909,583/- short of the Ksh. 32,000,000/- disbursed to the Applicants.

The Applicants have clearly demonstrated how they made their payments contrary to the averments by the Respondent. The Respondent's claim for the outstanding loan amount being Ksh. 46,579,377.77/- as at 15th August 2018 is in stark contrast to the amount of Ksh. 3,909,583/- which is the amount the Applicants' have proven as owing to the Respondent less interest. In the face of the above facts I therefore find that the Applicants have demonstrated the existence of a prima facie case.

The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage. However, the position taken by **Ringera J.A** in the case of **Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd 2002 2 KLR 207** was that "*No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."*

In the instant case, the Respondent is demanding a disputed amount of Ksh. 46,579,377.77/-. It is not lost on the court that from the initial sum borrowed, the Applicant has endeavoured to make repayments to the tune of Ksh. 28,090,417/- which amount was Ksh. 3,909,583/- short of the Ksh. 32,000,000/- disbursed initially. This court takes the view that the Applicants' have input substantial investment into the development of the suit properties and to lose the said property at this late stage without having the chance to have their matter considered on its merits would amount to an irreparable loss.

Drawing from the preceding discussions, it therefore follows that the balance of convenience tilts in favour of the Applicants. This is so because if the orders sought herein were not granted and the Respondent was left to proceed with the auction of the suit properties, were the Applicants' to succeed in the main suit their Orders would be purely academic as they would have lost their property which they had heavily invested in. However, were the Respondent to succeed in its suit, it still held a charge over the suit property and could then exercise its statutory power of sale. This is the course that to this court carries a lower risk of injustice.

In the premises, having laid down the legal threshold pertaining to grant of injunction, considering the equitable nature of the reliefs sought by the Applicants and on the face of the affidavit evidence together with the annexures I hereby exercise discretion to entitle the Applicant interlocutory injunctions.

As a result, the notice of motion dated 15th and filed on 17th January 2019 succeeds in terms of prayer No. 3 & 5 in favour of the Applicants' as against the Respondent. Prayer No. 4 is denied on account of it being a matter for the preserve of the main suit. The court further directs that the matter be set down for hearing and concluded within 60 days from the date of this judgement on the disputed claims not limited to the rate of interest. The cost of this application to abide the outcome of the main suit.

Dated, Signed and Delivered at Kajiado This 29th Day of March 2019.

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R. NYAKUNDI

JUDGE

Representation

- Mr. Azenge for the Plaintiffs/Applicants

- Akung'a for the Defendant Bank