REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL SUIT NO. 50 OF 2018

FORMERLY MILIMANI ELC NO. 99 OF 2015

JOSEPH NDIRANGU WAHEHO T/A ZEECO AUTO.....1ST PLAINTIFF/APPLICANT

WANYOIKE NJUGUNA KATEKAE.....2ND PLAINTIFF/APPLICANT

MARY WAMBUI WANJORA.....3RD PLAINTIFF/APPLICANT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

Before me is a Notice of Motion Application presented to the Court on 10th February, 2015 by the Counsel for the Plaintiff/Applicants under Order 40 rule 1,2,3 and 4 of the Civil Procedure Rules, Section 3, 3A, 1A, 1B of the Civil Procedure Act Cap 21 and all the enabling provisions of law, seeking the following Orders: -

1. *THAT this application be certified as urgent and be heard ex-parte in the first instance.*

2. *THAT a temporary injunction do issue against the Defendant, its agents and/or servants from selling by public auction Title No. Ngong/Ngong/15202 pending the hearing of this matter inter-partes and/or further orders of this Court.*

3. *THAT an injunction do issue restraining the Defendants, its agents and/or servants from selling y auction Title No. Ngong/Ngong/15202 pending hearing and determination of the suit.*

4. *THAT costs of this application be provided for.*

The application is based on the grounds that the defendant has illegally advertised for sale by public auction the sale of Title No.Ngong/Ngong/15202 (herein *"the suit property*) belonging to the 2nd and 3rd plaintiffs, without issuing statutory notices and contrary to the Land Registration Act 2012, the Land Registration Act, 2012 and the Constitution of Kenya 2010; that the Defendant Bank has also issued illegally an advertisement for sale by public auction the suit property without statutory notices as required; that the defendant is claiming an illegal amount contrary to Section 39 of the Central Bank of Kenya Act Cap 491 by computing interest at high rates. Further grounds are that the loan is bring paid based on the agreements herein and that the Defendant has undervalued the suit property to the valuation reports herein.

Undisputed Facts

The 1st Plaintiff obtained financial accommodation by way of a loan facility from the Defendant Bank amounting to Kshs. 5,200,000/= on the 19th of May 2011 and the 2nd and 3rd Plaintiffs provided the suit property being Title Number Ngong/Ngong/15202 as security. The Parties herein executed the charge dated 23rd June 2011and the charge was thereafter registered in favour of the Bank. *(Annexure marked as "J1-2a & J1- 2b" is a copy of the charge and guarantee & indemnity executed by the parties herein.*

It is also not in disputed that the Borrower (1st Plaintiff) defaulted in servicing the loan account and sought the Bank's indulgence on 28th April 2012 and requested for the restructuring of the loan. The Bank, at the behest of the borrower and vide a letter dated 14th July 2012 agreed to restructure the loan and have the outstanding amount being Kshs. 3,755,555.50/= to be paid within 50 months. Despite the

favourable intervention in favour of the Borrower, the 1st Plaintiff still defaulted soon after the restructuring agreement. I have seen the annexure marked as "J1-3A" and "J1-3B" which are the letters requesting for restructuring the loan and the agreement restructuring the loan.

The Plaintiff's Case

The Plaintiffs alleged that during the course of repayment of the loan facility, the Defendant Bank started issuing statements showing manifestly flawed amounts comprising of rates of interests, levies and other charges excessive, exorbitant unlawful and patently illegal as they were arbitrarily and unilaterally debited to the account while not based on any contract between the parties or allowed by the law. They told the court within the span of seven months in the beginning of the year 2012 the back was claiming Kshs. 700,000/= as interest which is quiet unrealistic given that the sum advanced in May 2011 was Kshs. 5, 200, 000/= and in the circumstances the plaintiffs requested for a statement which the defendant has declined to issue up to date.

The Plaintiffs confirmed having engaged the Defendant Bank in negotiations for the aforementioned restructuring of the loan after the Bank had threatened to sell the security (the suit property).

The Plaintiffs also stated that they have been pursuing negotiations with the bank to restructure the loan and/or to give consent to the plaintiffs to sell the security being the suit property by private treaty and the proceeds to be applied towards offsetting the indebtness but the bank has been dilly dallying on the issue.

They further asserted that they learnt through the daily nation newspaper of 26th January, 2015 that the bank has illegally advertised the suit property for sale by way of public auction without giving proper statutory notices as required by law and the plaintiffs are apprehensive that unless restrained by an order of this Honourable Court the Defendant will irregularly exercise its statutory power of sale to the detriment and loss of the plaintiffs which would not be compensated by way of damages.

Further that the 2nd and 3rd plaintiffs, their children and entire family reside at the suit property which the bank has instructed their agent Dalali Traders Auctioneers to sell by public auction on 11th February, 2015 which will cause the entire family untold suffering as they will be rendered destitute and be bound to suffer irreparable loss and damage if the auction proceeds.

It was also contended that the Defendant Bank has illegally undervalued the property at Kshs.10 million while its market value is Kshs. 12 million and the Advertisement of sale issued by Dalali Traders Auctioneers does not indicate the amount allegedly owed to the bank if any.

From the foregoing, the Plaintiffs are of the view of the intended sale has no legal import and is therefore null and void and should be declared illegal and the defendants will wrongfully and illegally proceed with the intended sale thereby depriving the plaintiffs of their rightful ownership of the property unless they are restrained from doing so by an order of this Honourable Court.

It was also contended that the Plaintiffs stand to greatly suffer and will continue to suffer irreparable loss and damage as a result of the defendants' illegal and wrongful actions unless the orders sought herein are granted.

The Defendant Case

The Defendant Bank opposed this suit by way of a Replying Affidavit filed on the 10th of March 2015. Besides the undisputed facts I have alluded to above, the Defendant Bank stated that they served upon the guarantors as chargors statutory notices calling for payment and intimating the Defendant's intention to exercise its statutory power of sale upon lapse of the notice in case of failure to repay the entire amount due. That the sane was forwarded to the Guarantors or Chargors by registered mail a statutory notices dated 10th October 2013 and 20th February 2014 which notices contained the intention of the Defendant to exercise its statutory power of sale over the suit property after the expiry of the statutory notice period. (Annexure "J1-6A" & "J1-6B" is a copy of the statutory notices and the certificate of postage as "J1-6C").

Further the Defendant dully instructed, Auctioneers to sell the suit property by public auction as envisaged in the charge and loan agreement thus lawful. It was deposed that a letter made by Mr. Karanja of Dalali Traders dated 28th November 2014 and the notification of sale dated 25th November 2014 was served by both registered post as well as personal service and the same was done in accordance with the provisions of the Auctioneers Act and the Land Act.

That pursuant to the borrower's failure to redeem the security and not having offered any proposal on a repayment structure and consequently Dalali Traders Advertised in the daily nation newspaper the suit property for sale by public auction. ***(Annexure marked as J1-8 is a copy of the newspaper advertising).***

As regards Plaintiff's statements, the Defendant Bank stated that they have always been available to them and if they required any additional statements, they had the right to request for the same from the relevant branch, and to date the Plaintiffs have never made any applications for issuance of the statements and the bank would have no reason to refuse to give him statements.

The defendant Bank rejected the 2nd Plaintiff's claim that he has not been issued with any notices, pointing out that prior to advertisement by auction, the Plaintiffs were served with mandatory statutory notices. Further that the notice was evidently served upon the guarantor's postal which is the address on charge document and the letter has not been retained unclaimed to date.

As regards valuation report, the Defendant Bank asserted that the same was done prior to advertising the property and a valuation report was prepared. (Annexure marked J1-9 is a copy of the Valuation Report. It was therefore averred that the allegation by the Plaintiff that the property was undervalued is therefore unsubstantiated and not merited.

The Defendant therefore deposed that the plaintiffs failed to establish a primary facie case with a probability of success to warrant the granting of an injunction and the premises the application should be dismissed with costs.

Analysis and Determination

I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter. The issue for determination is whether or not the Plaintiffs' have met the threshold for granting interlocutory injunction.

The underlying principles for grant of an injunction, as enunciated in the case of ***Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358*** as follows:

> ***"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."***

What constitutes a prima facie case is clearly set out in ***Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125*** the court held that:

> ***"In civil cases, a prima facie 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."***

In view of the above principles, I wish to interrogate whether the Plaintiff/Applicant has demonstrated a prima facie case with a probability of success. Firstly, it is not in dispute that 1st Plaintiff obtained financial accommodation by way of a loan facility from the Defendant Bank amounting to Kshs. 5,200,000/= on the 19th of May 2011 and the 2nd and 3rd Plaintiffs provided the suit property being Title Number Ngong/Ngong/15202 as security. The Parties herein executed the charge dated 23rd June 2011and the charge was thereafter registered in favour of the Bank. *(Annexure marked as "J1-2a & J1- 2b" is a copy of the charge and guarantee & indemnity executed by the parties herein.*

It is also not in disputed that the Borrower (1st Plaintiff) defaulted in servicing the loan account and sought the Bank's indulgence on 28th April 2012 and requested for the restructuring of the loan. The Bank, at the behest of the borrower and vide a letter dated 14th July 2012 agreed to restructure the loan and have the outstanding amount being Kshs. 3,755,555.50/= to be paid within 50 months. Despite the favourable intervention in favour of the Borrower, the 1st Plaintiff still defaulted soon after the restructuring agreement. I have seen the annexure marked as *"J1-3A"* and *"J1-3B"* which are the letters requesting for restructuring the loan and the agreement restructuring the loan. As a result, the Defendant Bank decided to recover the outstanding loan amount by invoking its statutory power of sale granted to it by both the loan agreement and the law.

What is in dispute herein is whether or not the statutory notices where properly issued and served to the relevant stakeholders and in accordance with the law. The allegations that the defendant interest rates were varied and whether or not the Respondent duly valued the suit property.

As regards the issue of statutory notices, the plaintiff contends that the statutory notice and the Notification of Sale were not served with them as required by the law hence the purported auction by the Defendant is null and void. In the same respect, the 2nd Plaintiff has demonstrated in his further affidavit filed on 5th May, 2015 that he relocated from Kangemi Estate to Ngong in the year 2005 and ceased to use the postal address purported to be used by the Defendant in sending notices. The Plaintiffs have categorically denied having received the said notices. they are of the view that the onus of proof in the circumstances resides with the Defendant Bank to show acknowledgement of the said documents which they have failed. It was submitted that the defendant has not complied with Section 90(2) of the Land Act, 2012.

The Defendant on the other hand contends that issued notices dated 23rd January 2013 and 10th October 2013 (annexed on the Defendant's replying affidavit dated 2nd March 2015 and marked as J1-6A and J1- 6B) notifying the Plaintiffs' of its intention to exercise its statutory power of sale. According to the Defendant, despite the notices, the Plaintiffs Neglected to regularise their loan account and thus the Defendant proceeded to exercise its statutory power of sale.

Section 90 of the Land Act, 2012 (Laws of Kenya) provides as follows: -

> *1.* ***If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.***
>
> ***2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—***
>
> ***a. the nature and extent of the default by the chargor;***

b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

d. the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

Section 90(3) provides that if the chargor does not comply within two (2) months after the date of the notice the chargee may;

"(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;"

Section 90(1) in my view lays down the circumstances under which the statutory notice is issued by the chargee to chargor. Clearly as provided for under the aforementioned section, a statutory notice is issued where there is default of payment in performance of the expressed and implied covenants in a charge. A notice must be served to the chargor by the chargee in writing clearly stating the payment of any amount owing or performance and observance of the agreement as the case may be. This notice is mandatory on the part of the chargee thus it is mandatory that the chargee, as the law requires under the sections, issues the requisite statutory notice notifying the chargor of the intended sale of the charged property by auction.

In the instant case, there is no doubt whatsoever that the Defendant's action of serving the Plaintiffs with statutory notice was necessitated by the dismal failure of the plaintiff to repay the loan as the Plaintiffs had defaulted on two occasions. Hence this court finds that the defendant's right to exercise its statutory power of sale had accrued.

It is paramount that statutory notices comply with the aspects specified in section 92(2) of the Land Act, 2012. In the respect, I wish to associate myself with the case of ***Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited (2017) eKLR (supra)*** it was stated *inter alia* that;

"As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non-observance of a covenant in the charge, then the notice is to state what the chargor is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under section 90 is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor."

Applying the foregoing to the matter at hand, I have seen a statutory notice dated 10th October 2013 annexed to the Defendant's Replying affidavit and marked as "J1-6A" pursuant to the provisions of section 90 (2) of the Land Act, 2012. The said notice did evince the nature and extent of default, it also indicates the amount the Plaintiff was required to pay to rectify the default and it also include the notification that the Plaintiff would proceed of exercise any of the remedies referred to in the said section in accordance with the procedures provided for in the sub-part. The case of ***David Gitome Kuhiguka vs Equity Bank Limited [2013] eKLR*** suggest that the provisions of section 90(2)(b) of the Land Act must be strict complied with. In the premises, the contents of the statutory notice issued by the Defendant to the Plaintiffs cannot be faulted.

The effect of the issuance of the mandatory statutory notice is well spelt out in the case of ***First Choice Mega Store Limited v Ecobank Kenya Limited [2017] eKLR***, which is majorly to protect the chargor. It was stated thus: -

" [37] …The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notifications of such action and an opportunity to redeem his property.

[38] It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective

rights of both the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in* Royal Bank of Scotland Plc v Etridge [2002] 2 AC 733, [2]*, the law* "must afford both parties a measure of protection*". The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence reasonable confidence that it may at an appropriate time enforce the security is also protected.

[39] A purposive construction of section 90 is necessary. Section 90 must thus be read and understood with the open fact that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favoured given that it is the same section that triggers the application of a chargee's rights and remedies."

Therefore, the effect of a statutory notice issued in terms of section 90(2) of the Land Act, 2012 is that it triggers the security realization process, which leads to the chargee ultimately exercising its remedies enshrined under section 90(3) of the said Act.

The Defendant also serviced with Plaintiffs' with the 40 days' Notification of Sale pursuant to section 96(2) which the Plaintiffs' denied having received the same. Section 96 of the Land Act provides as follows: -

"96. Chargee's power of sale

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

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."

The law is that the notice required to be served in terms of section 96 cited above is given to the lessee or chargor and chargor and who have recognised interests in land.

That failure to notify them goes to the core of the validity of the issuance and service of the same. Notification of sale is mandatory as it is a way of protecting the equity of redemption provided for under section 89 of the Land Act, 2012.

In the instant case, I find that the same was dully served since it was served on the 20th February, 2014 and that is after the three months' statutory notice had lapsed. The 45-day notice of redemption was also dully served with the plaintiff on the 25th November 2014. *(A copy of the same is marked as J1-&)*.

The question to ponder is whether or not the said noticed were served and delivered to the intended recipients. The 2nd Defendant demonstrated that he relocated from Kangemi Estate to Ngong in the year 2005 and ceased to use the postal address used by the Defendant Bank in sending the notices.

In view of the above contention, I wish to note that the loan agreement subject to these proceeding was executed in May 2011 and that is roughly seven years after he had relocated to Ngong. This goes to show that the 2nd Plaintiff concealed a material fact upon entering into the loan agreement with the Defendant Bank. He ought to have disclosed that fact to Defendant. Thus in my view, if that is true, the 2nd Defendant Bank is guilty of non-disclosure or concealment of material facts hence he cannot be allowed to get off the hook with such an argument as the same would be allowing him to benefit from his own mischief.

The Defendant Bank produced proof of postage which shows that indeed the Notices where served to the addresses provided by the Plaintiff upon execution of the loan agreement. If there was any change of postal addresses post to that, the Plaintiffs ought to have communicated the same to the Defendant Bank as the law obliges them to do so. Therefore, Plaintiff's contention that he did not receive the notices on or soon after the dates depicted in in the various notices cannot hold water. In ***Enoka Watako Makokha v Co-operative Bank of Kenya* [2015] *eKLR***, the Court of Appeal held that service of notice by registered post is effective service. In the case of **Peter Kuria Munyuira Vs. Housing Finance Company of Kenya Limited & Another HCCC No. 457 Of 2006,** Warsame J. *(as he then was)* said;

"A notice sent through registered post takes effect after the collection of the registered mail of the chargor from the Postal Corporation of Kenya. It is therefore incumbent upon the chargee to ensure the registered mail sent through any process is received and there must be evidence of receipt and the date it was collected or received by the addressee".

In ***Nyangilo Ochieng v Fanuel Ochieng of 1996*****,** it was held that production of proof of posting is sufficient to discharge the burden of proving service of notice. The Defendant Bank discharge this onus. In the premises, I find that all the relevant the notices in contention herein were dully served with the Plaintiffs. Their argument that they never received the same is just an afterthought.

As regards the issue of valuation, the Plaintiff's contention is that the suit property was undervalued. The question to ponder is whether the Defendant Bank discharged its duty in forms of section 97 of the Land Act to ensure valuation of the suit property was undertaken by a qualified valuer. It is not in doubt that the general purpose of valuation is envisaged under section 97(2) of the Land Act, 2012 and is twofold; to wit, to obtain the best price reasonably obtainable at the time of sale thus protecting the right of the chargor to the property. It is also meant to ensure best and reasonable price which is comparable to interests in land of the character and quality is part of the right to property itself and to prevent unscrupulous chargee from selling the charged property at a price which is peppercorn or not compatible to the interests in the property in terms of character and quality.

Further, Chargor's duty under section 97(2) of the Land Act is of serious legal requirement which entitles to him to apply to court under section 97(3)(b) of the Land Act to have any sale based on such breach to be declared void and the court on the required proof, should declare such sale void. That is the onerous nature of the duty. However, the question is, did the Defendant as the chargee satisfy the requirement of section 97(2) of the Land Act?

The Defendant Bank produced a Valuation Report dated 15th August 2014, annexed on the Defendant Bank's replying affidavit dated 2nd March 2015 and marked as "J1-9". I note that the valuation report in question was prepared in 2014 which is roughly five years ago. The value of property since then might have fluctuated heavily and to avoid speculation around this issue, I suggest that the parties herein endeavour to engage the services of a qualified independent valuer for preparation of an up to date joint valuation as the one available might have been rendered obsolete by time.

On the allegation that the Defendant Bank Charged the Plaintiffs illegal levies of charges and interest, the Plaintiffs' contends that the applicant was not given an explanation as to how within the span of seven months in the year 2012, interest alone arose to Kshs.700, 000/=.

According to the Defendant, the law is that he who alleges must prove and the plaintiffs failed to prove that interest rates were varied. I wish to state that disputes touching on the interest payable have a bearing to the loan agreement that the parties entered into.

In this case, the Plaintiffs only mentioned that illegal interest was charged and offered no proof before court, of how the interest was computed illegally to substantiate that fact.

Further, I wish to associate myself with the Court of Appeal in the case of ***Fina Bank Ltd. V Ronak Ltd (2001) 1 EA 54*** where it was stated that dispute on accounts was no basis for grant of an injunction. More specifically, it considered disputes on interest charged where it held at page 68 that:

> ***"As the charge documents which were in evidence before the High Court expressly reserved, in favor of the Appellant, the right to charge interest at variable rates its sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly, the respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis."***

In ***Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725*** it is opined that:

> ***"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 mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."***

Similarly***, in Bharmal Kanji Shah and another V Shah Depar Devji (Supra)*** it was observed that:

> ***"…the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage…"***

In the premises, the Court is not convinced that a *prima facie* case with a probability of success has been made out herein by the Plaintiffs to warrant the issuance of the injunctive order sought. In the premises, there would be not need to give consideration to the questions as to whether the Plaintiff stands to suffer irreparable harm, or in whose favour the balance of convenience tilts.

In ***Nguruman Limited V. Jan Bonde Nielsen & 2 Others (supra)*** *the Court of Appeal made it clear that:*

> ***"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. 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 view of the foregoing, I wish to put something into perspective as far as this matter is concerned. The evidence on record suggest that the loan in question was dispatched to the Plaintiffs in May 2011 and by the end of 2012, the Borrower had already defaulted repayment of the same.

It is important to note that the Defendant Bank was kind enough to allow negotiations for restructuring of the loan to accommodate the financial constraints of the Borrower and in July 2012 restructure was agreed upon and the Plaintiffs were given up to fifty months to liquidate the loan. They defaulted to repay the loan facility soon thereafter.

Having said that, I hold the view that the Plaintiffs have always been well aware of not only the default but also its consequences. Neither are they denying having failed to service the loan six to seven years ago. This means that the last time that borrower honoured his obligation to repay the amount owed to the Defendant Bank was in 2012 which is roughly seven years ago. Since then, they never made an attempt to repay the loan as agreed upon in the charge or at least the principal amount on the basis they believed the interest charged was disputable. I strongly hold the position that the Plaintiff came to the court of equity with dirty hands. The maxim of law that best suits the instant case asserts that *"he who seeks equity must do equity, and he who comes to equity must come to court with equity"*. An injunction is an equitable remedy and he who comes to equity must come with clean hands and must seek to do equity. In ***Francis J.K Ichatha v Housing Finance Company of Kenya, civil application No. 108 of 2005*** the court of appeal stated as follows: -

> ***"A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from, his own wrong, for the plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity…."***

It is indeed unacceptable in law to grant an injunction to the Plaintiffs who have failed to honour their obligation to repay the amount owing in seven years but still have guts to come to the Court of equity with all the confidence in the world to try and stop or restrain the Defendant Bank from exercising its statutory power of sale. In the premises, I find it just and fair that the plaintiff having admitted owing a substantial amount of money to the Defendant Bank, should pay the Defendant the said amount.

I also note that the Plaintiff have been riding on a temporary injunction that was granted under the provisions of order 40 of the Civil Procedure Rules upon its application to the ELC in 2015 pending the hearing and determination of the main suit. My perusal of the Plaint it seeks a permanent injunction against the Defendant Bank to restrain it from dealing with the suit property in any manner. I wish to rely on the provision of Order 40 rule 6 which provides for the lapse of a temporary injunction. It stipulates as follows:

> ***"[Order 40, rule 6.] Lapse of injunction. 6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."***

In light of the above cited provision of law, the injunction that the Plaintiff were granted lapsed in 2016 since the main suit was not heard and determined with twelve months from the date of its issuance. Its roughly three years from the date the same expired and the Defendant Bank have been sleeping of its right to recover its monies from the plaintiffs'. The above Order was crafted in a manner that envisions instances where cases may not be heard and determined expeditiously. The instant case is such a typical example of a case were the wheels of justice were extremely slow and as a result, the Defendant Bank was highly prejudiced because there was need for it to recover its monies within a reasonable period of time and as the nature of its business demands.

In the premises, the Plaintiff's Notice of motion dated 10th February 2015 fails and is hereby dismissed with costs.

It is so ordered.

Dated signed and delivered in open Court at Kajiado this 28Th day of March 2019.

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R. NYAKUNDI

JUDGE

<u>Representation</u>

Mr. Naikuni holding brief for Nyakiangana for the Plaintiff/Applicant – Present

Mr. Muriu, Mungai Advocates for the Defendant/Respondent