REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

COMMERCIAL CASE NO. 2 OF 2018

JULIUS MWANGI KAHARA T/A THIKA COLLEGE OF

BANKING, ACCOUNTACY AND COMPUTE STUDIES

JANET NJERI MWANGI.....PLAINTIFFS/APPLICANTS

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD

BARCLAYS BANK OF KENYA LTD.....DEFENDANT/RESPONDENTS

RULING

1. The background to the Notice of Motion filed by **Julius Mwangi Kahara t/a Thika College of Banking, Accountancy and Computer Studies** (the first Plaintiff) and his wife **Janet Njeri Mwangi** (the second Plaintiff) is as follows. The Plaintiffs were in the material period the registered proprietors of the land parcel described as **L.R No. Thika /Block 9/715** (hereinafter the suit property). In 2013 the Plaintiffs obtained a loan amounting to KShs.16,000,000/= from the Housing Finance Company of Kenya (the 1st Defendant). The said loan facility was secured by a Charge Instrument executed by both Plaintiffs and created over the suit property in favour of the said 1st Defendant and was to be repaid over a period of 20years at an interest rate of 16% p.a. Instalments were to be paid half yearly at a sum of KShs.1,341,763/= commencing with an initial instalment of KShs. 1,536,949/= which was inclusive of the half yearly instalment and insurance premium, later raised to KShs.1,625,205/= and due on 1st March 2014.

2. It appears that having paid the first two instalments the Plaintiffs account statement reflected arrears which the Plaintiffs disputed through several letters, starting from 1st December, 2014. The repayment scheme was converted into a quarterly one at the Plaintiffs' request in February, 2015 approved by the 1st Defendants in March, 2015. Under this scheme the repayment installment as proposed by the Plaintiffs was Sh. 700,000/- payable in April, July, October and January.

3. In July, 2015, the 1st Defendant reviewed the interest payable to 17% and informed the Plaintiffs that the quarterly repayments would be adjusted to Sh. 746,525/-. It seems that the Plaintiff s continued to be aggravated by what they believed to be unlawful debits in respect of fees, charges and application of non-contractual interest and levying of unjustified arrears on their account by the 1st Defendant. Nonetheless the relationship continued and in May 2016 the Plaintiffs obtained a further facility amounting to KShs.10,000,000/= and a further Charge Instrument was executed in favour of the bank. The loan itself was disbursed in July 2016.

4. However, through a letter dated 25th June, 2016, the Plaintiffs the Plaintiffs approached Barclays Bank (the 2nd Defendant) to advance to the Plaintiffs a sum of sh. 20,000,000/- and to buy off the loan then outstanding with the 1st Defendant, whose figure was stated in his letter to be sh. 24million , and in the Letter of Offer executed on 18th October, 2016 to be sh.29,8000, 000/- . The executed Letter of Variation signed on 15th February, 2017 reflects a redemption sum of sh. 31,500, 000/- which is the figure in the undertaking provided by the 1st Defendant to the 2nd Defendant. The total sum advanced by the 2nd Defendant was KShs.46,500,000/- and a charge over the suit property executed in favour of the second Defendant on 9th December, 2016 . Out of the sum advanced by the 2nd Defendant, a sum of sh. 31,500,000/- was paid out as the redemption amount to the 1st Defendant. The Plaintiffs' accounts with the 1st Defendant were eventually redeemed by March 2017.

5. The Plaintiffs had however disputed the redemption amounts subsequent to the creation of the charge in favour of the 2nd Defendant in December 2016, in consideration of the second Defendant advancing a total sum of KShs.46,500,000/= inclusive of the redemption sum payable to the 1st Defendant. This loan was to be repaid in 120 instalments commencing in August 2017. It appears that the Plaintiffs did not make any payments to the 2nd Defendant in respect of agreed installments and on February 13th, 2018, the 2nd Defendant through its lawyers issued a statutory notice under Section 90 of the Land Act, demanding payments of the accrued aggregate sum of KShs.50,634,557.

6. Consequently, the Plaintiffs on 8th May 2018 filed the instant suit contemporaneously with a motion under certificate of urgency. The live prayers in the motion seek an interlocutory injunction to restrain the 2nd Defendant from ***"selling, advertising for sale, transferring or in any way interfering with the Plaintiff's interests over"*** the suit property pending the hearing of the suit, and an order directing the Defendants to render accounts regarding their dealings with the Plaintiffs' loan accounts with the said Defendants.

7. The motion is expressed to be primarily brought under Order 40 Rules 1 and 2 and order 51 Rule 1 Civil procedure Rules and is based on 49 grounds replicated in the affidavit of the first Plaintiff, sworn in support of the motion. The affidavit contains a lengthy rendition of complaints against the 1st Defendant concerning alleged unlawful debits and charging of penalties, non-contractual Charges, fees and interest, and fraudulent manipulation of the loan account for unjust enrichment with intent to defeat the Plaintiffs' equity of redemption. The alleged cumulative effect being the 1st Defendant's demand for an excess payment of KShs.8,000,000/= at the time the Plaintiffs approached the 2nd Defendants to buy off the outstanding loan.

8. As against the 2nd Defendant the Plaintiffs allege of collusion with the 1st Defendant and breach of the Plaintiffs' express instructions to them to pay a redemption sum of KShs.24,000,000/= only to the 1st Defendant, and instead paying a sum of KShs.31,500,000/=, which action according to the Plaintiffs was illegal and unauthorized. That the 2nd Defendant subsequently coerced the Plaintiffs to execute a variation of offer letter to cover up for the unauthorized payment, the net result being that the Plaintiffs overpaid the 1st Defendant by a sum of KShs.8,000,000/= and were thus unable to complete intended construction or development on the suit property. That therefore the 2nd Defendant's demand for the payment of a sum of Kshs.50,634,557/- allegedly comprised of disputed sums contained in the unauthorized undertakings to the 1st Defendant does not lie, and the said 2nd Defendant should not be allowed to realize the security.

9. Finally, the 1st Plaintiff deposes that the Plaintiffs are victims of wrongful actions by the 1st and 2nd Defendants and deserve the court's protection as the proprietors of the suit property, having overpaid the loans, and now standing at risk of suffering irreparably unless the court grants them the prayers sought in the motion.

10. The 1st and 2nd Defendants opposed the motion by filing detailed replying affidavits. The 1st Defendant, through an affidavit sworn by its Legal officer **Joseph Lule,** attempts to counter point by point the depositions contained in the Supporting affidavit of the 1st Plaintiff. The affidavit principally attempts to justify as lawful and contractual the running of the Plaintiffs' account and to demonstrate how the debt accumulated between March 2013 to December 2016 when the 2nd Defendant, with the alleged full knowledge and authority of the Plaintiffs paid the accrued redemption sum to the 1st Defendant and redeemed the mortgage accounts which were subsequently closed.

11. The deponent asserts that during the take-over period, the Plaintiffs did not dispute the redemption sum, but that due to subsequent complaints by the Plaintiffs a meeting was held on 19th January 2018 during which the 1st Defendant provided a computation of sums payable and paid at the time of redemption. The 2nd Defendant denies the allegations of wrong doing levelled against them by the Plaintiffs and denies that it occasioned loss to the Plaintiffs.

12. For their part, the 2nd Defendants' affidavit was sworn by the Corporate Recoveries Manager**, Lucas Gikungi**. He denied that the 2nd Defendant coerced the Plaintiffs to take up a loan facility with the said Defendant asserting that, at the Plaintiffs' request, in October, 2016 the bank entered into a facility agreement with the Plaintiffs and that the 2nd Defendant approached the 1st Defendant with a request that the 2nd Defendant take over the Plaintiffs' mortgage with the 1st Defendant. That as at 30.11.16 the redemption amount stood at about KShs.29,932,315/= and attracting interest at 14% p.a. A Letter of Offer (Facility Agreement) was executed on 18th October, 2016 for total the sum of 46,500,000 of which sh. 29,800,000/- was the redemption sum.

13. That eventually the Charge Instrument over the suit property was executed by the parties as security for a facility in the sum of KShs.46,500,000/=. That subsequently an issue arose regarding the redemption sum payable as the sum in the Facility Agreement signed with the 2nd Defendant was different from what the 1st Defendant demanded as the due redemption sum. That this forced the 2nd Defendant to advise the Plaintiffs that the take-over of the banking facility depended on the Plaintiffs and 1st Defendants reaching an agreement on the monies due as redemption sum, whereupon the Plaintiffs resolved the issue by authorizing the 2nd Defendant in writing to disburse to the 1st Defendant the sum of KShs.31 million or thereabouts, and hence the Facility Agreement was accordingly varied through a variation letter in February 2017.

14. That the Plaintiffs signed the said variation letter and returned it to the bank, hence there redemption sum was varied from KShs29,932,315/= to 31, 500,000/= which latter sum was disbursed to the 1st Defendant and comprised part of the total sum of KShs.46,500,000/= disbursed to the Plaintiffs. The 2nd Defendant therefore defends its undertaking and subsequent payment to the 1st Defendant in respect of the sum of KShs.31,500,000/=. The 2nd Defendant denies causing over payment to the 1st Defendant in the sum of KShs.8,000,000/= through coercion and undue influence exerted upon the Plaintiffs, asserting that the difference between Facility Agreement sum and final redemption sum is only KShs.2 million.

15. Further, the deponent states that the 2nd Defendant is a stranger concerning the facility terms governing the loan facility between the 1st Defendant and the Plaintiffs and asserts that despite the Plaintiffs receiving monies from the 2nd Defendants as agreed in the Facility Agreements and charge Instrument, they had defaulted in making due payments despite reminders; that therefore the 2nd Defendant is entitled to exercise its power of sale to recover the outstanding sum of KShs.50.634,557.00, hence its issuance of a statutory notice under Section 90 of the Land Act, in February 2018. The 2nd Defendant asserts that the Plaintiffs have not met the conditions for the granting of an interim injunction which, if granted without continued repayments would lead to an escalation of the debt beyond the value of the security.

16. In their Replying affidavits, both Defendants directly and indirectly raised objections to the capacity of the 1st Plaintiff as described in suit papers, to bring the suit.

17. In a Further affidavit the 1st Plaintiff reiterated earlier depositions and asserted that the 1st Defendant effected illegal transactions in the Plaintiffs' loan account in breach of the contract and levied non- contractual charges and interest to unjustly enrich itself. In response to the Replying affidavit by the 2nd Defendant the Plaintiff repeated earlier depositions regarding alleged unauthorized undertaking and payment by the 2nd Defendant in respect to the redemption sums at take-over. The 1st Plaintiff describes the facility take-over transaction between the 1st and 2nd Defendant as unlawful and fraudulent. He deposes that he had countermanded the variation letter via the Plaintiffs' alleged letter of 21st February 2017. He blames the Defendants for the Plaintiffs' inability to complete intended construction on the suit property and their present debacle.

18. The Court directed that the motion be canvassed by way of written submissions. Counsel for the Plaintiffs after restating the facts relied on by his clients submitted that the 1st Defendant had fraudulently charged on the Plaintiff's account the extra sum of KShs.8,000,000/= and acting in collusion with the 2nd Defendant compelled the Plaintiffs to pay this sum during the take-over of the facility from the 1st to the 2nd Defendant, through a letter of undertaking not authorized by the Plaintiffs. It is argued that the Plaintiffs were not in breach of the terms of the loan facility extended to them by the 1st Defendant. In a demonstration of this assertion, the submissions repeat depositions in the supporting affidavits of the 1st Plaintiff.

19. As regards the take-over of the initial loan sum, the Plaintiffs emphasize the difference in the redemption sum per the registered charge (13th December 2016) and the actual sum paid at disbursement per the Letter of Variation reflecting an excess sum of KShs.2,000,000/=, which, according to the Plaintiffs is unaccounted for and in any event was in breach of the Plaintiffs' alleged letter of countermand issued on 20th February 2017.

20. Relying on the definition of a *prima facie* case in **Mrao v Fast American Bank of Kenya and 2 Others [2003] KLR 125** and the case of **Scholastica Nyaguthi Muturi v Housing Finance Company Ltd and Another (2010) eKLR,** counsel submitted that the Plaintiffs had overpaid the loans advanced and that by their alleged fraudulent and unlawful actions, the Defendants caused the accrual of interest to present amounts. In counsel's view the Applicant has established a prima facie case that the Defendants' claims are based on false figures. It was further submitted that the Plaintiffs stand to suffer irreparably, having made substantial payments to the Defendants and will not be adequately compensated by damages if they lose their life long investment if the sale of the suit property is allowed.

21. On the balance of convenience it was argued that the Plaintiffs have over paid the loans advanced and therefore are not in default and that the balance of convenience tilts in their favour as the registered proprietors of the suit property who are only victims of the Defendants' alleged fraudulent actions.

22. The 1st Defendants submissions open with a challenge to the capacity by the 1st Plaintiff as described in suit papers, counsel pointing out that the transactions material to the case were between **Julius Mwangi Kahara** and **Janet Njeri Mwangi** and that the business name "**Thika College of Banking, Accountancy and Computer Studies"** was not a party to the said transactions and there is therefore no privity of contract between the 1st Defendant and the 1st Plaintiff as described in the suit and for that reason, the claim ought to be struck out. In the 1st Defendant's view, the said Plaintiff has no *locus standi* in this cause. Moreover, the 1st Defendant takes issue with the fact that the verifying affidavit supporting this suit is not supported by the written authority of the second plaintiff as required under order 4 Rule 1(3) of the Civil Procedure Rules and ought to be struck out.

23. On the question of interest rates Charged on the material loan accounts, the 1st Defendant refers to clause 3.1.3 of the charge Instrument and asserts that the same was contractual and lawful, and that a dispute on interest levied by a bank, without more, cannot be a basis for the grant of an interim injunction. Reliance was placed on the case of **Palmy Company Ltd v Consolidated Bank of Kenya [2014] e KLR.** The 1st Defendant submitted that it complied with the legal requirement to supply statements to the Plaintiff in respect of the loan accounts and further supplied to the Plaintiffs a computation of the redemption sum in a meeting held on 19th January 2019. Thus the 1st Defendant has discharged its duty towards the Plaintiffs.

24. The 2nd Defendant's submissions are as follows. The Plaintiffs have not established a prima facie case as the Letter of Offer accepted by the Plaintiffs was for a sum of KShs.46,500,000/= which was inclusive of a sum of KShs. 29,500,000/= as redemption sum due to the 1st Defendant and a term Loan of KShs.17,000,000/=, and that the Plaintiff subsequently signed of their own volition , a variation letter to authorize the payment of KShs.31,500,000/- to the 1st Defendant as redemption sum. That no coercion and duress has been established. The 2nd Defendants relied on the decision of the Court of Appeal in **John Mburu v Consolidated Bank of Kenya [2018] e KLR** as to what constitutes duress.

25. The 2nd Defendant argues that the Plaintiffs have not demonstrated that damages would not be adequate remedy and especially because the suit property has a stated market value. Asserting that the Plaintiffs have defaulted on the obligation to repay the loan owed to them, the 2nd Defendant contends that the said Plaintiff are not entitled to the equitable remedy they seek. The 2nd Defendant urged the court to treat the transactions between the Plaintiffs and each of the Defendants as separate transactions.

26. The court has considered all the material canvassed in respect of the motion by the Plaintiffs. Two key complaints are raised in the Plaintiffs' depositions. The first relates generally to the alleged non-contractual interest charged, charges levied, and debits made on the loan account and the alleged fraudulent manipulation of the Plaintiffs' loan account by the 1st Defendant, resulting eventually in its demand for a sum of KShs.31,500,000 as redemption sum at the time of takeover by the 2nd Defendant. Regarding the 2nd Defendant, the gravamen of the Plaintiffs' complaint is that the said Defendant in fraudulent collusion with the 1st Defendant and through coercion and duress exacted upon the Plaintiffs caused the issuance of an undertaking and payment of false redemption sums to the 1st Defendant leading to an overpayment of KSh.8000,000/= to the said Defendant, and thereby exposing the Plaintiffs to loss.

27. Before delving into substantive matters, it is opportune to address the objections raised by the Defendants regarding the capacity of the

1st Plaintiff as described in this suit. A perusal of the Charge document dated 30th July 2013 shows it was executed between the 1st Defendant, on one hand, and **Julius Mwangi Kahara** and **Janet Njeri Mwangi** on the other. The document makes no reference to the 1st Plaintiff as trading under any business name. In the circumstances, the 1st Defendant's objections may have merit in so far as the claim against it is concerned as there is apparently no privity of contract between the 1st Defendant and the 1st Plaintiff as described in the suit. Reference to the 1st Plaintiff trading under a business name is contained in **Recital B** of the Charge document executed in favour of the 2nd Defendant on 9th December 2016. Order 1 Rule 9 of the Civil Procedure Rules provides that a suit shall not be defeated by reason of mis-joinder or non-joinder of parties. In the fullness of time, the court will deal with the matters in controversy and determine the rights and interests of the parties in the suit. For now, that is all there is to say on that matter.

28. Regarding the objection taken concerning the authority of the 1st Plaintiff to swear the verifying affidavit on behalf of the 2nd Plaintiff, Order 4 Rule 3 of the Civil Procedure Rules is clear. The verifying affidavit ought to have been accompanied by the 2nd Plaintiff's written authority empowering the 1st Plaintiff. The depositions contained in the 1st Plaintiffs' various affidavits to the effect that he has authority to swear on behalf of the 2nd Plaintiff, ring hollow in the absence of written authority by the said Plaintiff. Nonetheless the court has discretion under Order 4 Rule (1) sub rule (6) and Rule 7 of Order 19 to sustain offending affidavits or plaints especially where no prejudice is visited on the adverse party. In the interest of justice, the court declines to strike out the plaint and affidavits sworn by the 1 st Plaintiff but orders that the Plaintiffs do comply with the provisions of Order 4 Rule (3) Civil Procedure Rules within 14 days of this ruling failing which the verifying affidavit will be struck out.

29. Now turning to the substantive matters herein, the Plaintiffs seek an interim injunction against the 2nd Defendant and accounts from both Defendants. Through their lengthy supporting affidavit, the Plaintiffs include a litany of complaints against the Defendants. Having reviewed the parties' affidavits, annexures thereto and submissions, it is my view that, for purposes of the prayer for interim injunction, the only relevant intersection between the transactions entered into with the 1st Defendant and those relating to the 2nd Defendant happened at the take-over of the loan facility from the 1st Defendant to the 2nd Defendant.

30. For the court to grant an interim injunction against the 2nd Defendant, a prima facie case must first be established against the 2nd Defendant, followed by a demonstration of other requirements for the granting of such injunction. Thus, much of the material contained in the Supporting affidavit that dwells on alleged misdeeds of the 1st Defendant prior to the take-over only serve to obfuscate the real issues for determination at this stage. It is not in dispute that by February, 2017, the Plaintiffs' loan facility with the 1st Defendant had been effectively redeemed and the mortgage accounts closed.

31. In **Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] e KLR** the Court of Appeal restated the principles governing the grant of an interlocutory injunction as stated in the *locus classicus* on the question namely, **Giella v Cassman Brown and Co. Ltd [1973]EA 358** the Court observing that the role of the judge dealing with an application for such injunction is merely to consider whether the principles for the grant have been met. The Court of Appeal cautioned that such court ought to be careful not to determine with finality any issues arising.

32. The Court expressed its view as follows:

> **"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at lease over four decades since Giella case, they could rather be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:**
>
> **In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:**
>
> **a) establish his case only at a *prima facie* level**
>
> **b) demonstrated irreparable injury if a temporary injunction is not granted.**
>
> **c) allay any doubts as to (b) by showing that the balance of occurrence is in his favor."**

33. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established the court need not look into the question of irreparable loss or balance of convenience.

34. As to what constitutes a *prima facie* case, the Court of Appeal delivered itself as follows:-

> "**Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for** *"prima facie case"* **in civil cases in the following words**:
>
> ***"In civil cases, a** prima facie **case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A** prima facie **case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."***

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

35. So what is the infringement of right and possibility of success demonstrated by the Plaintiffs? The Plaintiffs accuse the 2nd Defendant of fraudulent collusion with the 1st Defendant to cause an over payment of KShs.8000,000/= at the take-over. Further the Plaintiffs complain that the 2nd Defendant coerced them to accede to, and or acted contrary to their instructions by giving an undertaking to pay a sum of KShs.31,500.000/= whereas the proper due sum was KShs.24,000,000/=.

36. There is no dispute that by the Charge Instrument executed with the 2nd Defendant, the Plaintiffs obtained a loan facility in the sum of KSh.46,500,000/=. The sum effect of the depositions at paragraph 24, 25 and 26 of the supporting affidavit is that the Plaintiffs had only authorized the 2nd Defendants to give an undertaking to the 1st Defendant for the sum of KShs.24,000,000/= by a letter dated 25th June 2016. The court has looked at the contents of that letter. The letter in question is a request for the 2nd Defendant to take over the "HFCK borrowing" and to advance a further loan of KShs.20,000,000/=. The total sum of the HFCK (1st Defendant's) borrowing is stated to be KShs.24,000,000/=. However, there is no express statement in the letter, which appears to be the first request by the Plaintiffs to the 2nd Defendant, that an undertaking limited KShs. 24m be issued to the 1st Defendant. On the face of it no such undertaking could practicably have been included in this first and evidently exploratory letter to the 2nd Defendant.

36. It appears that the culmination of this and subsequent exchanges with the 2nd Defendant was the issuance by the 2nd Defendant of the Letter of Offer or Facility Agreement dated 18th October 2016 which states that the debt take over sum was KShs.29,500,000/= and also included an additional term loan of KShs.17,000,000/=, both figures differing from the first request. The former sum appears to tally with the redemption advices marked as annexure **JL 16** to the 1st Defendant's Replying affidavit both dated 16.11.16.

38. The 2nd Defendant's Letter of Offer, the first in the transaction, was accepted by the Plaintiff's through an endorsement of their signatures on 19.10.16. By his supporting affidavit, the 1st Plaintiff , despite annexing the said Letter of Offer and disputing the sum of KShs.29,932,000/= did not specifically deny having signed the *Letter of Offer itself* , only asserting that the *undertaking for this sum* was made without the Plaintiffs' on concurrence. The only offer letter mentioned expressly in the supporting affidavit (paragraph 32) is the subsequent Letter of Variation in respect of which it is claimed that the Plaintiffs allegedly signed under duress. However, in replying to the Replying affidavit of the 2nd Defendant the 1st Plaintiff changed tack and without furnishing proof, purported to have objected to the first Letter of Offer, and only succumbing and executing it due to 'threats' by the 2nd Defendant to cancel the transaction.

39. The first undertaking for the sum of KShs.29 million odd is annexed to the Plaintiffs' supporting affidavit at page 135 and to the 1st Defendants' Replying affidavit as annexure **JL 17** and is dated 29th November 2016. Chronologically it comes after the Letter of Offer of October 2016 and the sums therein correspond the said Letter of Offer. The Charge executed between the 2nd Defendants and the Plaintiffs on 9th December 2016 in terms of the first Letter of Offer. The Plaintiffs do not allege any duress regarding the execution of this Charge.

40. Subsequently the parties executed a Letter of Variation on 15/2/17 reflecting the debt taken over from the 1st Defendant to be KShs.31,500,000/=. According to the Plaintiffs, they were coerced by the 2nd Defendants into signing the variation letter to cover up for the fact that the 2nd Defendants had unlawfully given an undertaking for the sum to the 1st Defendant without the Plaintiffs' concurrence. The 2nd Defendants confirm in their Replying affidavit that there was disagreement between the Plaintiffs and 1st Defendant on the redemption sum due at the time of disbursement and that they advised that if the issue was not resolved, the take-over could not proceed. That by a letter dated 8th February 2017 the Plaintiffs relented and agreed to the said sum being paid thereby paving way for the disbursement of the funds pursuant to the Letter of Variation on 15th February 2017.

41. The Plaintiff's affidavit makes no reference to the said letter of 8th February and marked **LG 4** in the 2nd Defendant's Replying affidavit in which the 1st Plaintiff stated *inter alia* that;

"Moreover they (1st Defendant) think they can and are now in a position to push us for moving the account against their will. With all the phantom debits into the account as can be seen from the foregoing, we are not surprised at them changing the figures they confirmed to you in October 2016 for some KShs 29.5 million in January 2017. Our feeling is that the worst position on that amount should be KShs. 26 million being the amount of initial amount of KShs.16 million borrowed in 2013 and the KShs.10 million further borrowing in July 2016 ....

Request

In view of the foregoing we request that you disburse to HFCK the KShs.31 million or so as per the terms of your professional undertaking, and leave us to handle the issue with them through legal channels. As you can see, it is not only the extra KShs.1 million or so that we are claiming from them, but some KShs.8 million in total."

42. Evidently, the Plaintiff were aware of their options, including that of taking legal action against the 1st Defendant but chose to proceed with the loan availed by the 2nd Defendant. Where is the duress or coercion exerted by the 2nd Defendant? The 1st Plaintiff has before this court expressed dismay that the redemption sum had grown from the October 2016 figure of KShs.29.5 million to KShs.31.5 million in January 2017, yet it seems the account was in arrears in this period. Nowhere in the letter of 8th February does the 1st Plaintiff allude to coercion by the 2nd Defendant. The tone of the letter and others written in that period to the 2nd Defendant is to the effect that the Plaintiffs had an axe to grind with only the 1st Defendant and would pursue them through a separate action. Indeed, the earliest complaint exhibited by the Plaintiffs against the 2nd Defendant on this question was written well after the loan was disbursed and after the 2nd Defendant informed them that first instalment was due.

43. This letter annexed at page 113 of the Plaintiffs' bundle is dated 1st March, 2017. Therein, in item 2 the 1st Plaintiff refers to earlier emails to the 2nd Defendant that are not exhibited herein and a letter dated **20th February 2017** authorizing payment of sh. 29million odd to the 1st Defendant. The letter proceeds to state inter alia that:

> **"3. Later on**, (meaning after 20th February) **after further discussions we via email, of 8th February, 2017 reluctantly for reasons given in the email agreed that you pay the bigger amount Of sh.31.597 million or so . Of particular note in the email was the "without prejudice" basis we agreed to this payment……**
>
> **5. You know very well that , the reluctance with which we agreed you pay the amount in 3 above, we wouldn't have agreed to any further payment on top of this…**
>
> **6. Our contract with you as per Letter of Offer was that you pay HFCK shs. 29.5 million; period. Anything further was to be paid with our consent not anything your lawyers IKM advocates are compelled to pay by HFCK."**

44. The letter severally refers to the Plaintiffs' "reluctance" towards **HFCK's** (1st Defendant) demand but nowhere in the letter does the author expressly complain of duress or coercion as against the 2nd Defendant. Moreover, the letter **LG4 dated 8th February 2017** does not contain any note to the effect that it was written *"without prejudice"*. Moreover, the letter of 1st March 2017 is silent on the Letter of Variation executed on 15th February, 2017.

45. In their affidavit in support of the Motion the Plaintiffs suggest that the second disputed undertaking preceded the Letter of Variation and had no authority from the Plaintiff as to the sums involved. The said second undertaking is annexed to the 1st Defendants replying affidavit as part of annexure **JL 17**. It is true that this undertaking dated 29th November 2016 predates the Letter of Variation. However, it does not undertake for the sum of KShs.31,500,00/= stating only at clause 4 that the 2nd Defendants, would prior to payment of the redemption amount confirm the balances outstanding with the 1st Defendants **"for purposes of taking into account the accrued interest on the Redemption amounts."**

46. This appears to be the course taken by the 2nd Defendant and subsequently in requiring that the payable redemption sums be resolved between the Plaintiffs and the 1st Defendant before proceeding further with the transaction. If indeed the 1st Defendant used coercion to obtain from the Plaintiffs the alleged undeserved sums paid over by the 2nd Defendant, such action even if proved cannot surely be visited upon the 2nd Defendant as justification for the clamping of their power of sale where it has properly arisen.

47. By their own admissions, the Plaintiffs opted to move their loan account to the 2nd Defendant and to seek further loans, based on the security held by the 1st Defendant. Logically, the take-over could not happen unless that security was released to the 2nd Defendant and by stating this to the Plaintiffs the 2nd Defendant was on the face of it stating the obvious, rather than coercing the Plaintiffs. It is not disputed that the 1st Plaintiff was an experienced banker who had worked for a significant period with the 2nd Defendant. His written communication with the two banks exhibited herein clearly demonstrates his keen understanding of financial matters.

48. Having granted authority to the 2nd Defendants *via* the letter **LG 4** and thereafter executed the Letter of Variation, the Plaintiffs' contention that they were shocked on discovering the second undertaking is not believable. Is it possible that the Plaintiffs executed three legal documents (i.e. Letter of Offer, Charge Instrument and Letter of Variation) and wrote a related authorization to the 2nd Defendant (annexure **LG4)** over a period of five months while laboring under duress? It doesn't seem so. Notably, the whole transaction was initiated by an amiable letter written to the 2nd Defendant by the Plaintiffs on 25th June, 2016 and up until the funds were disbursed, the Plaintiffs raised no objections regarding their dealings with the 2nd Defendant.

49. Faced with the evidence contained in **LG 4** the Plaintiff's response was to introduce for the first time an e-mail allegedly written to the 2nd Defendant on 27th February 2017 purportedly to retract the Letter of Variation. Of course, by this date, the payments had been affected. The said e-mail while making no reference to the Letter of Variation attaches a copy a of letter intended for the 2nd Defendants. It is significant that at the time of prosecuting the motion, the Plaintiffs had admittedly not paid any monies towards the loan, despite the extension granted by the 2nd Defendant vide letter dated 4.8.17. . Therefore, reviewing the facts of this case in light of the dicta in **John Mburu's case**, there is on the face of it no evidence of coercion or duress. The Plaintiffs in my view have not established a prima facie case with a likelihood of success.

50. On the contrary, it does appear to the court that the Plaintiffs by alleging, without any prima facie proof, the existence of a conspiracy or collusion between the Defendant banks are attempting to exploit their protracted contestation with the 1st Defendant to extricate themselves from a contractual obligation undertaken by them with the 2nd Defendants, not as victims of duress , as they have cast themselves, but as responsible and knowledgeable persons with necessary understanding and volition. Moreover, it is evident from the Plaintiffs' latest affidavit

that their dispute with the 2nd Defendant relates to reduced a sum of KShs.2 million. Even if, for the sake of argument, the proper redemption sum was assumed to be KShs.24,000,000/=, the difference in payments to the 1st Defendant would be about sh. 7million odd and the Plaintiffs would still owe a tidy sum of money to the 2nd Defendant.

51. The outstanding debt as at the date of the statutory notice in February 2018 was KShs.50,634,557.00. Since disbursement of the admitted loan sum, the Plaintiffs have not made a single instalment towards payment of the loan sum not in dispute. They are in default and cannot be allowed to use their disputation of the redemption sum payable to deflect the chargee's power of sale which has clearly arisen. See **Labelle International Ltd and Another v Fidelity Commercial Bank and Another (2003) 2 EA 541,** and O**rion East Africa Ltd v Ecobank Kenya Ltd & Anor [2015] e KLR.**

52. As regards irreparable damage, the value of the suit property is ascertainable, and besides, once a chargor offers a property as security for a loan the same becomes a ready commodity for sale by the Chargee to recover the loan advanced to the chargor in the event of default. See **Christopher Muroki v Housing Finance Company of Kenya and Another [2006] e KLR** and **Andrew .M. Wanjohi v Equity Building Society Ltd and Another [2006] e KLR.** In this case, it appeared that the Plaintiffs having enjoyed the loan facility offered by the 2nd Defendants and having defaulted on their obligation, sought to rope in the 2nd Defendants in their long running dispute with the 1st Defendant over the redemption sum, in order to escape their contract with the 2nd Defendant. The balance of convenience tilts in favor of the 2nd Defendant. The outstanding loan continues to grow and the bank's fear that the escalating amounts may soon outstrip the value of security do not appear far-fetched. In the circumstances, the court has found no merit in the prayer for an interlocutory injunction against the 2nd Defendant.

53. As regards the prayer for accounts, there is uncontroverted evidence in the 1st Defendants affidavit that the 1st Defendant performed its obligation to send statements in respect of loan accounts to the Plaintiffs at their address. Indeed, the Plaintiffs affidavit in support of the motion demonstrates that the Plaintiffs had access to their bank statements and were familiar with the various entries therein, several which they dispute. At any rate, the 1st Defendant has annexed to the replying affidavit as annexure **'JL 3'** a bundle of documents consisting the mortgage account and '**JL 20'** being a tabulated computation of the loan sums. The depositions relating to these annexures are found at paragraph 8 and 49 of the 1st Defendant's Replying affidavit and have not been controverted in the Plaintiffs' further affidavit.

54. Similarly, the statement of accounts in respect of the Plaintiffs' account with the 2nd Defendant was annexed as annexure **LG6** to their Replying Affidavit. The Plaintiffs have in any event not alleged in their affidavits that the 2nd Defendant had failed to provide account statements as required. The prayer against both Defendants for accounts therefore has no basis and is disallowed.

In the result, the court finds no merit in the entire Plaintiffs' motion which is hereby dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 17TH DAY OF APRIL 2019

.....

C. MEOLI

JUDGE

In the Presence of:-

Mr. Kamwami for 1st Respondent

Applicant – No appearance

2nd Respondent – No appearance