REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 331 OF 2017

STAR TRAVEL & TOURS LIMITED .....1ST PLAINTIFF/APPLICANT

STAR TRAVEL & SUPPLIES LTD .....2ND PLAINTIFF/APPLICANT

JOAN GATHONI NGUGI .....3RD PLAINTIFF/APPLICANT

VERSUS

CHASE BANK (K) LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 10th August 2017, brought under the provisions of; Order 40, Rules 1 & 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and all enabling provisions of the law.

2. The Applicant is seeking for orders as here below reproduced:-

> *(i) That pending the hearing and determination of the suit herein, an interlocutory injunction order do issue to restrain the defendant either by itself, its agents and/or servants from advertising for sale or interfering, alienating or otherwise howsoever dealing with the securities herein, namely;-*
>
> > *a. Apartment No. 6F being I.R. No. 10030 on L.R. No. 5/44 Maruti Plaza Apartments, Westlands, Nairobi County;*
> >
> > *b. L.R. No. Nairobi/block 113/415, Lucky Summer Estate, Embakasi, Nairobi County*
> >
> > *c. That the Auctioneers costs and other charges occasioned by the illegal redemption notice herein dated 5th July 2017, be settled by the Defendant*
> >
> > *d. That in any event, the costs of this application be awarded to the Plaintiffs/Applicants*

3. The application is premised on the grounds on the face of it and an affidavit dated 10th August 2017, sworn by Joan Wanjiru Ngugi, the 3rd plaintiff and/or the managing director of; the 1st and 2nd plaintiffs.

4. She deposed that, the banker- customer relationship between the 1st plaintiff and the defendant started on 17th August 2009. Subsequently, the 1st plaintiff applied for and was granted over draft facilities, in the sum of; Kenya shillings one million five hundred thousand (Kshs. 1,500,000). On 14th June 2011, the 1st Plaintiff was granted a further term loan of; Kenya shillings six million five hundred thousand (Kshs. 6,500,000).Similarly, on 17th June 2013, the 2nd plaintiff was granted by the defendant financial facilities in the form of; a letter of credit – cum-term loan in the sum of; US dollars one hundred and ninety three thousand nine hundred and seventy eight (USD 193,978) and a term loan of; Kenya shillings nine million nine hundred thousand (Kshs. 9,900,000), to clear the debt in the current account. All the facilities were payable within a period of twelve (12) months.

5. That on 13th November 2013, the 1st plaintiff, requested the defendant to convert and consolidate the existing overdraft and the term loans in the sum of; Kenya shillings thirty five million one hundred and seventy six thousand two hundred and seventy nine (Kshs. 35,176,279.00) and US dollars one hundred thousand five hundred and four USD 100,504) into a term loan repayable in one hundred and twenty (120)

months. The 3rd Plaintiff then executed a charge over the apartment; No. 6F being I.R. No. 10030, on L.R. No. 5/44 Maruti Plaza Apartments, Westlands, Nairobi County and L.R. No. Nairobi/Block 113/415, Lucky Summer Estate, Embakasi Nairobi County (herein "the suit properties) in favour of the defendant, to secure the financial facilities.

6. The Applicants however aver that, on 5th July 2017, the defendant, through its agents and/or servants, M/s Antique Auction Agencies, served the 3rd plaintiff, with a forty five (45) days redemption notice, of the intention to realize the securities. It is alleged that the notice was served, before the defendant effected personal service upon the3rd defendant, of the three (3) months statutory notice of sale, as required under section 90 and service of the forty (40) days notification of sale under section 96, Land Act (herein "the Act".

7. The Applicants argue that even then, had it in notable that, the redemption notice makes demand for payment of the sum of; US dollars six hundred and fourteen thousand five hundred and eighty five and twenty four cents (USD 614,585.24) as at 30th June 2017, whereas in the demand letter dated 7th August 2017, makes reference to the amount due in the sum of US dollars three hundred and twelve thousand eight hundred and sixty eight and forty six cents (USD 312,868.46). The amount differing drastically within a period of less than two (2) months.

8. That as a result, the applicants instructed; Mr. Wildred A. Onono, the managing consultant of Interests Rates Advisory Center Ltd (IRAC), to thoroughly scrutinize and reconcile the bank statements of the 1st and 2nd plaintiffs operated the defendant. That the report IRAC report dated 1st August 2017, indicated an cumulative overcharge of; Kenya shillings seventeen million (Kshs. 17,000,000), demanded herein.

9. The Applicant avers that, equity of redemption is totally extinguished and certainly not exercisable in the light of; the litany of errors and illegal missteps by the defendant. That equity does not suffer a wrong without a remedy. Therefore the defendant cannot and should not benefit from its own mistake.

10. It is averred that, despite a demand for a review of the accounts, the defendant has refused to indulge the applicant and insists on proceeding with the realization of the suit properties. Therefore an order of injunction should issue. The 3rd applicant is ready to offer an unconditional undertaking as to damages.

11. However the defendant filed a replying affidavit dated 5th December 2017, sworn by its legal officer, Mr. Kevin Kimani, who deposed that, on or about 8th April 2008, the 3rd plaintiff; Joan Gathoni Ngugi, approached the defendant for a term loan facility of; Kenya shillings four million (Kshs. 4,000,000), (herein "the first loan facility") which was disbursed and secured vide a first legal charge over property L.R. No. 13453/49 for Kshs. 2,500,000. Subsequently, on 14th May 2010, the 2nd plaintiff approached the defendant for loan facility (herein "the second loan facility) and the defendant disbursed a term loan of Kenya shillings million five hundred thousand (Kshs. 2,500,000).

12. The second loan facility was to be secured by the following;-

(a) A further legal charge registered over the suit property L.R. No. 13453/49 registered in the name of Reuben Kibue Thiong'o for a sum of; Kshs. 1,500,000 (Kenya shillings one million five hundred thousand);

(b) Executed personal guarantees and indemnity from the directors of the 2nd plaintiff namely the 3rd plaintiff and Loise Njeri Ngugi for Kshs. 2,500,000 (Kenya shillings Two Million, five hundred thousand);

(c) An executed personal guarantee and indemnity from Reuben Kibue Thiong'o for a sum of; Kshs. 2,500,000 (Kenya shillings two million five hundred thousand);

(d) An executed corporate guarantee and indemnity from the 1st plaintiff for a sum of; Kenya shillings two million five hundred thousand (Kshs 2,500,000).

13. That, it was a term of the second loan facility that it would be repaid in equal installments over a period of three (3) months, with the first installment falling due, thirty (30) days from the date of disbursement of the loan facility.

14. That on 14th June 2011, the 1st Plaintiff obtained a further loan facility (herein "the third loan facility") for Kenya shillings six million five hundred thousand (Kshs. 6,500,000) which facility was disbursed on the strength of a further charge over property LR No. 13453/49.

15. Subsequently, the 2nd plaintiff approached the defendant on 12th June 2013, for a further loan facility being; letters of credit cum term loan in the sum of; US dollars one hundred and ninety three thousand nine hundred and seventy eight (USD193,978) and term loan of Kenya shillings nine million nine hundred and eighty two thousand four hundred and thirty (Kshs. 9,982,430) (herein the "fourth loan facility"), which was granted and disbursed on the strength of first legal charge over property LR No. Nairobi/Block 113/415 Pipeline, Kware Estate.

16. That it was agreed under clause 3 of the letter of offer dated 12th June 2013, that the letters of credit cum term loan was repayable repaid within a period of sixty (60) days from the date of disbursement, while the term loan was repayable within twelve (12) months, the first installment falling due within, thirty days (30) days after the disbursement of the loan facility

17. That, on or about 13th November 2013, the 1st plaintiff requested for a further loan facility (herein "the fifth loan facility) in the sum of; Kenya shillings thirty five million one hundred and seventy six thousand two hundred and seventy four, (Kshs. 35,176,274) and US dollars one hundred thousand five hundred and four (USD 100,504).

18. This loan facility was secured by the following:-

(a) A first legal charge registered over property known as LR No. Nairobi/Block 113/415 Pipeline, Kware Estate registered in the name of the 3rd Ppaintiff

(b) A first legal charge registered over property apartment No. 6F erected upon LR No. 5/44,Maruti Plaza apartments, Jipe Close, Lavington estate in Nairobi registered in the name of the 3rd plaintiff;

(c) Executed personal guarantee and indemnity from each of the directors of the 1st plaintiff namely the 3rd plaintiff and Loise Njeri Ngugi.

19. That clause 4 of the letter of offer dated 13th June 2013, provided that, the fifth loan facility was repayable within one hundred (120) equal monthly installments, from the date of disbursement.

20. It is averred that, the Applicants in blatant breach of the agreements defaulted and/or neglected to make repayments of the loans amounts in accordance with the terms of the agreements and prompted the defendant to issue a demand notice after the accounts fell in arrears. Subsequently, or about 26th January 2017, after the demand letter elicited no response, the defendant issued the applicants with the first statutory notice, informing them, as to the nature and extent of default and their rights as how to rectify the default.

21. However, there was no response to the statutory notice and the defendant issued the second statutory notice which expired without rectification. It averred the said statutory notices were served upon the applicants through registered post which service was sufficient under the provisions of the law. Further, due to the failure to rectify default, the defendant instructed the Auctioneers referred to herein to issue a forty five (45) days Redemption notice dated 5th July 2017 and it was issued.

22. The defendant further argue that, interest charged on the loans accounts has been correctly, properly and legally charged and the by the applicants' allegations that, their accounts have been mismanaged are not only frivolous but also lack basis. That even then, the issue of interest cannot defeat the defendant's accrued rights under the Act.

23. Finally the defendant averred that, the applicants properties were properly valued by Acumen Valuers Limited and on various occasions and instances, the plaintiffs have jointly and severally acknowledged their indebtedness to the defendant by executing the various letters of offers with regard to the loan facilities previously disbursed to them. Yet they continue to be in arrears and have not taken concrete steps to redeem the properties or to clear outstanding arrears. Therefore the application should be dismissed with costs.

24. However, the Applicants filed a supplementary affidavit dated 31st August 2018, sworn by Joan Gathoni Ngugi, conceding to the particulars of the loan facilities granted to the applicants as stated in the replying affidavit. However she reiterated that, without any shade of doubt, the redemption notice dated 5th July 2017 is defective, null and void for want of compliance with Sections 90 and 96 of the Act. Further the it contradicts the statutory notice in that, the latter alludes to a loan of; Kenya shillings eight eighty million (Kshs. 88,000,000) and an overdraft of; US dollars three hundred and two thousand (USD 302,000) as at 8th May 2017, while the former alludes of a loan of; Kenya shillings one hundred and forty six million six hundred and thirty six thousand four hundred and thirty six and eighty nine cents (Kshs. 146,636,436.89) and an overdraft of US dollars six hundred and fourteen thousand five hundred and eighty five (USD 614,585) as at 30th June 2017 barely one month later, which is an obvious and inexplicable mistake on the part of the Defendant and contrary to the contrary to the "in duplum" rule enacted in the Banking Amendment Act, 2006.

25. That further and regrettably, the defendant fail to acknowledge that, the 1st, 2nd and 3rd loans were actually paid up in full and the relevant securities released to the plaintiffs. Equally, the 4th loan was a letter of credit facility taken by the 2nd plaintiff to service a Kengen order and the money was paid on 3rd December 2013, by Kengen.

26. Be that as it were, the parties agreed to dispose of the application vide written submission. I have considered the same alongside the averments made in support and opposition to the application. I find that the Applicants are basically seeking for an injunction order to restrain the defendant from disposing of the suit properties.

27. The law on grant of an order for injunction has been settled. In the celebrated case of; *Giella vs. Cassman Brown & Co. Ltd[1973] EA 358*, the court held that:-

"The conditions for the grant of an interlocutory injunction are now, I think, 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."

28. As to what constitute a prima facie case the Court of Appeal in the case of; ***Mrao Limited v First American Bank Limited & 2 Others, [2003] KLR 125***, stated 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 or 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."

"…But as I earlier endeavored to show, and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the Applicant's case upon trial"

29. To revert back to this matter, the Applicants aver that, they have established a prima facie case on the basis of the fact that, the defendant has not serve the requisite statutory notices and the notice to sell the suit properties, therefore due to the non-compliance, the defendant cannot realize the securities. Further the amount claimed and in particular the interest charged is in dispute. To the contrary, the defendant insist that the requisite notices were send through registered post and the amount claimed are properly calculated and due.

30. The law on service of statutory notice is stipulated under the provisions of; section 90(1) of the Act, as follows:-

> "*if the 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 performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the charge may serve the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."*

31. Further, the provisions of section 90(2) of the Act, require that the notice, should indicate the nature and extent of the default by the chargor and if the default consists of the non-payment of any money due under the charge, then the chargor must notified that, the amount must be paid, in not less than three (3) months, to rectify the default and/or by the end of which the payment in default must have been completed. The notice must also state the consequence, if the default is not rectified within the time specified in therein, being that the chargee will proceed to exercise any of the remedies referred to under the section, in accordance with the procedures provided for under that sub-section. The elaborate requirements, emphasis the importance of the statutory notice and stamps the chargor's right to the same and/or right of redemption.

32. The applicants relied on the case of; *Nyangilo Ochieng & Another vs Kenya Commercial Bank, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996) eKLR*, to argue that, once the chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that, such notice was in fact sent. Therefore, in the absence of proof of service of the notices herein, then defendant has not discharged this burden of proof.

33. Further the power of sale has not crystallized and any act done by the defendant to dispose of the suit property amounts to an illegality as stated in the case of; *Nicholas Ruthiru Gatoto vs Ndarugu Merchants & 2 Others (2014) eKLR*. In the same vein the applicants argued that, the defendant did not issue them with the forty day notice to sell under section 96(1) and (2) of the Act. That section provide that:-

> "*(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 of sale of 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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell."*

34. To support this position the applicants relied on the cases of; *Act Fast Security Limited vs Equity Bank (2014) eKLR* and *Albert Mario Cordeiro & Another vs Vishram Shamji (2015) eKLR.*

35. However, the defendant replied to the applicants submissions and argued that the applicants have not met the threshold laid down in the case of; *Giella Vs Cassman Brown* ***(1973) EA 358***. That in the case of; *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR* the court stated that:-

> "*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.…..…*
>
> *The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."*

36. The defendant further submitted that, it is undisputed that the applicants are in arrears of; Kenya shillings one hundred and forty six million six hundred and thirty six thousand four hundred and thirty six and eighty nine cents (Kshs. 146, 636, 436. 89) and US dollars US dollars six hundred and fourteen thousand five hundred and eighty five (USD 614, 585.24) as at 30th June 2017 and the loans were secured by various securities as stated and neither is the default disputed therefore in no circumstance can the plaintiffs be said to have a prima facie case. They are undeserving of the remedy of an interlocutory injunction and that the applicants can be adequately compensated by grant of damages in the event the court finds that they have suffered loss, as the value of the charged property can be ascertained and any loss or injury suffered or occasioned can be remedied by an award of damages.

37. The defendant relied on the case of; ***Andrew M. Wanjohi-Vs -Equity Building Society & 7 another [2006] eKLR*****,** where the Court held that, b**y offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon.**

38. The case of; *Isaac O. Litali vs Ambrose W. Subai & 2 Others HCCC No. 2092 of 2000* was also cited where the court stated that:-

> "*I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful. I say so for nothing is clearer in a contract of charge than that default in payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form security. And needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate*

quantum of damages."

39. The defendant further cited the case of; ***John Nduati Kariuki T/A Johester Merchants -Vs-National Bank of Kenya Limited (2006) 1 EA 96*****, where the court held that:**

> *"A bank has no money of its own and it is axiomatic that it uses funds to trade with. The applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged."*

40. Finally the defendant relied on the case of; *Maithya -vs-Housing Finance Co. of Kenya & Another [2003] 1 EA 133 at 139* where it was stated that:-

> "*Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. ... Loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the Respondent cannot pay damages should it become necessary."*

41. The defendant submitted that, it is a reputable institution with sound financial base and would adequately compensate the applicants in terms of damages for any injuries or loss occasioned. In that regard, the case of; *Maithya -vs-Housing Finance Co. of Kenya & Another [2003] 1 EA 133 at 139* was relied on.

42. The defendant argued that the balance of convenience tilts in favour of the defendant since the plaintiffs have admitted that they defaulted on repayment of the loan and has made no effort to redeem the debt. The cases of; ; ***Francis J.K. Ichatha –Vs- Housing Finance Company of Kenya, Civil Application No. 108 of 2005*** and; ***Andrew M. Wanjohi -Vs -Equity Building Society &7 Another [2006] Eklr*** were cited in which the courts held that " he who seeks equity must do equity". That if the defendant is restrained from selling the suit property, the **debt may outstrip the value of the suit property.**

43. The Respondent submitted that the dispute on accounts has no basis for grant of an injunction and relied on the case of; ***Fina Bank Ltd. v Ronak Ltd,[2001] 1 EA 54*** where it was observed that:-

> ***"…As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. ."***

44. Further reliance was placed on the passage from; Halsbury's Laws of England, Vol. 32 (4th Edition) at paragraph 725, where it is stated that:-

> ***"When mortgagee may be restrained from exercising power of sale, 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''.***

45. To revert back to the facts of this case, I find as regards the issue of service of statutory notices, the defendant has annexed to the replying affidavit, a letter dated 13th October 2016, addressed to the directors of the 1st applicant entitled; "recall of outstanding balance of; Kenya shillings, Kenya shillings seventy nine million seven hundred and seventy five thousand and thirty and twenty three cents (Kshs. 79,775,030.23) and US dollars two hundred and eighty one thousand three hundred and forty eight and twenty cents (USD 281,348.20) as at 13th October 2016. The 1st applicant was given a notice of three (3) months from the date of the letter, to pay the amount plus all interest accrued or the defendants would be at liberty to pursue any remedies available to them. This letter is copied to the 3rd applicant as a guarantor and/or a chargor. Attached to the letter is a statement of the 1st applicant's bank account as evidence of the alleged arrears.

46. The defendant has also produced another letter dated 26th January 2017, which is entitled "notice of exercise of statutory power of sale over apartment number 6F situate, on property and LR. 5/44, demanding for immediate payment of; Kenya shillings eighty six million one hundred and eighty nine thousand and sixty five and sixty two cents(Kshs. 86,189,065.62) and US dollars two hundred and ninety one thousand two hundred and seventy seven and seventy four cents (USD 291,277.74) giving the applicants a notice of ninety (90) days from the date of service of notice, to pay the sum sought or the property be realized. A further letter dated 8th May 2017, addressed to the 3rd applicant in relation to title number Nairobi/Block 113/415 is stated to be a notice to sale and is send by registered post indicating that, unless a sum of; Kenya shillings eighty eight million nine hundred and fifty six thousand nine hundred and twelve and ninety seven cents (Kshs. 88,956,912.97) and US dollars three hundred and two thousand nine hundred and fifty six (USD 302,956) is paid, the defendant would sell the charged property by auction or private treaty after the expiry of forty (40) days from the date of service of the notice. These notices were allegedly send by registered post, to the 1st applicant's, post office box number is 48225-00100 the same as the 3rd applicant's post office box number.

47. I Further note that the 3rd applicant states in an affidavit in support of the application herein she simply deposes at paragraph 8 thereof that, "on 5th July 2017, without personal service of the three (3) months statutory notice of sale under Section 90 and the service of the forty (40) days notification of sale under Section 96, Land Act" the defendant instructed the Auctioneer to sell the property. However, after the

defendant produced copies of statutory notices referred to hereabove, and certificate of postage, the applicants did not through the supplementary affidavit dated 31st January 2018, sworn by the 3rd applicant refute or rebut the same and/or adduce evidence that, the notices were not effectively served upon them. The applicants did not even dispute their alleged post office number indicated in the subject notice.

48. In fact the letters of offer of the banking facilities dated 8th April 2008, 14th May 2010, 14th June 2011 13th November 2013, indicate that the postal address of the 1st and 3rd applicants is the same address of P. O. Box number 48225-00100. The same address is also used in the deed of guarantee and indemnity, signed by the 3rd applicants. Finally the same address has also been acknowledged by the 3rd applicant in the affidavit she swore headed "affidavit of marital status" where she deposes that, her post office box number is; 48225-00100 Nairobi. The said affidavit is among the annexures produced by the defendant attached to the original charge in respect of apartment number CF situate on property LR 5/44. I am therefore convinced unless otherwise proved during the hearing of the main suit that the subject notices were effectively served.

49. The other issue in dispute relates to the amounts indicated in the forty five (45) days redemption notice dated 5th July 2017 and the demand notice issued vide a letter dated 7th August 2017. The Defendant did not expressly address this issue but simply averred in the replying affidavit that, interest has been correctly, properly and legally charged and that the issue of interest does not defeat their accrued right under the Act. In my considered opinion, any disputes as to repayment of any principle sum advanced and interest that has accrued thereon, is an issue of reconciliation of statement of accounts and requires that evidence be adduced at the trial to enable the court appreciate, whether the facilities advanced have been repaid or not.

50. The Applicants have produced a report from IRAC which allegedly established that they have overpaid the facilities advanced by over a sum of; Kenya shillings seventeen million (Kshs. 17,000,000). The defendant did not address itself to the content of this report. Be that as it were, the veracity of the same can only be tested during the hearing of the main suit. Similarly, the applicants averred at paragraph 9 of the supplementary affidavit that, the first, second and third loans have been fully repaid and the securities in relation to the same released to them, and so has the loan security for the sum of; US dollars one hundred and ninety three thousand nine hundred and seventy eight (USD 193,978) granted to the 2nd Applicant to service a Kengen order. These averments have not been rebutted by the defendant.

51. However, it is unclear as to whether, the fourth loan granted in the sum of; Kenya shillings nine million nine hundred and eighty two thousand four hundred and thirty (Kshs. 9,982,430) and the loan in the sum of; Kenya shillings thirty five million one hundred and seventy six thousand two hundred and seventy four (Kshs. 35,176,274) and US dollars one hundred and thousand five hundred and four (USD 100,504) have been fully repaid. This will require evidence at the trial.

52. As a result and or based on the facts above, it is clear that, this matter can only be fully settled through a full hearing; however, the defendant cannot be restrained from the exercise of its statutory power of sale simply because there is a dispute as to the amount claimed. On the other hand, where the applicant has shown that, the amount being sought for is not clear and the defendant has not seized the opportunity to respond by serving the applicants with a detailed statement on how the sum claimed has been arrived at, it will only be in the interest of justice that, the sale of the suit property be stayed on conditions that will serve the interest of both parties.

53. In this regard, and to enable the court make further orders, on the interim basis pending the hearing and conclusion of this suit, I make the following orders;

(a) within seven (7) days of the date of this order, the respondent will serve the applicants with a detailed statement of account showing all the loans that were advanced to the applicants, and the status thereof, in particular whether they have been fully repaid and/or they are in arrears;

(b) if they are in arrears, the statements shall indicate the amount of the arrears, and how it has arisen; and

(c) the statement should clearly indicate when the loan was due for full repayment, the last date of the expected payment; and the date of default (if any)

(d) upon service of the statement on the applicants, they shall within seven (7) days thereof file their response addressing the same issues as stated above;

(e) both statements shall be filed in court within the stipulated period; and

(f) if any of the parties defaults in compliance with these directive, the other party is at liberty to apply; and

(g) the costs of this application shall abide the outcome of the main suit.

54. The matter will be mentioned on a date to be agreed on by the parties for further orders.

55. Those are the orders of the court.

Dated, delivered and signed in an open court this 29th day of May 2019

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Kyalo for the Plaintiffs/Applicants

Mr. Akelo for the Defendant/Respondent

Dennis ……..Court Assistant