REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 15 OF 2018

PINE COURT MALINDI LIMITED……..……1ST PLAINTIFF/APPLICANT

MUMBU ESTATES LIMITED……...…...…..2ND PLAINTIFF/APPLICANT

VERSUS

IMPERIAL BANK OF KENYA

(Under Receivership)…..….....…….1ST DEFENDANT/RESPONDENT

KENYA DEPOSIT INSURANCE

CORPORATION…….....……...…….……2ND DEFENDANT/RESPONDENT

TROPHY AUCTIONEER..…...…….…….3RD DEFENDANT/RESPONDENT

CORAM: Mr. Mwagambo for the Applicants

Mr. Ngoya for the Respondents

RULING

Introduction

The Plaintiff/Applicants instituted a suit by a Plaint dated 5th December 2018 and contemporaneously filed a Notice of Motion application brought under Article 40 of the Constitution of Kenya 2010, Order 40 Rule 1, 3 and 4; and Order 51 Rules 1 and 3 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Application was coupled with the sworn affidavit of Arnold Muema dated 5th December 2018 all brought under a Certificate of Urgency. The Application, which is the subject of this Ruling, prayed for the following Orders:

a. THAT this application be certified as urgent and service thereof be dispensed with and it be heard ex parte in the first instance.

b. THAT this Honourable Court be pleased to grant leave to the plaintiffs to institute this suit against the Defendants.

c. THAT upon granting of Prayer 1 above; pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to issue a temporary injunction restraining the 1st ,2nd and the 3rd Defendants/Respondents, jointly and severally, whether by themselves, their servants, agents employees, officials or any other person whomsoever from trespassing, offering for sale, disposing, selling, transferring or in alienating in any way suit property Plot Number 729(Original Number 582/2).

d. THAT pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction restraining the 1st,2nd and the 3rd Defendants/Respondents, jointly and severally, whether by themselves, their servants, agents employees, officials or any other person whomsoever from trespassing, offering for sale, disposing, selling, transferring or in alienating in any way suit property Plot Number 729(Original Number 582/2).

e. THAT the costs of this application be provided for.

The Respondents responded to the Applicants' motion by an affidavit in reply sworn by David Kiptoo, the Assistant Manager, Risk and

Resolution Department in the Kenya Deposit Insurance Corporation on the 10th January 2019.

The Applicants then filed a further affidavit sworn by Arnold Muema on the 12th March 2019.

The matter was canvassed through written submissions with the Applicants filing theirs dated 12th March 2019 and the Respondents' dated 19th May 2019.

The Plaintiffs/Applicants' Case

The Applicants' case was advanced by Arnold Muema, a director of both applicant companies' herein. He averred that on or about the 20th of July 2012, the 1st Applicant took a construction loan facility from the 1st Respondent in the sum of Ksh. 100,000,000/- disbursed in Sterling Pounds hence being a sum of 800,000 GBP. That the GBP 800,000 loan was secured again a property known as Plot Number 729(Original Number 582/2) hereinafter the 'suit property' situated in Malindi registered under the name of the 2nd Applicant. The loan was granted to the 1st Applicant with a moratorium period of 10 months therefore, the loan repayments were to commence sometime in July 2013.

It was further averred that the Applicants and the 1st Defendant ('the Bank') signed a deed of assignment of debt dated 20th July 2012 in which it was agreed that the rental income of the 1st Applicant would be used as continuing security of the repayment of the loan. It was further averred that the shareholders of the Applicants had another company with similar shareholding; Les Nicolle's Lodge in the United Kingdom to which it was agreed would service the loan.

The deponent averred that unfortunately on the 14th of July 2013, one of the directors of the 1st Applicant, Anthony Hill, who held majority shares of the 1st Applicant passed away.

It was contended that the Bank extended the moratorium period until the determination of the estate of the said Anthony Hill was concluded in relation to his shareholding.

The Applicant's contention was that after the death of the principle director and whereas the facility continued to attract interest, the Bank declined to advance the Plaintiffs further funds for the development of the property and day to day running thereby grinding the operations of the plaintiff and putting it further into debt.

According to the Applicants, the succession matter of the said Anthony Hill was lengthy and finally concluded early in the year of 2015.When the succession matter concluded, the shareholding of Anthony Hill in the Applicants devolved to his beneficiaries in accordance with the consent of mode of distribution of the estate. Thereafter, due to internal conflict with the said dependants; the Deponent averred that he gave up his shares in the UK Company and remained a shareholder in the 1st Applicant. As a result of the foregoing it was averred, the 1st Applicant was denied/rid of funds that were being utilized to service the loan.

According to the deponent, sometime in August 2015, the 1st Applicant approached the Bank who agreed to accept payments of Ksh 600,000 for three months due to the financial constraints of the 1st Applicant caused by the loss of funds from the UK company that had been since supporting the loan.

It was averred that on or about October 2015 when the Bank went into receivership, the 1st Plaintiff/Applicant held discussions with the 2nd Defendant/ Respondent (KDIC) and officials of the Bank and it was agreed that the 1st Applicant to continue remitting payments of Ksh. 800,000 per month towards the repayment of the loan.

If the deponent is to be believed, due to the heated political climate in the country in the year 2017, the Plaintiffs' business suffered financially and it struggled keeping up with the repayments of the loan. Consequently, it was averred that the Applicants and the KDIC held a meeting on the 30th July 2017 where it was agreed that the 1st Applicant would continue remitting Ksh. 800,000 per month towards the repayment of the loan. According to the deponent, despite the said agreement to remit Ksh 800,000 per month, the KDIC on the 29th December 2017 issued the Applicants a statutory notice of sale demanding payment of GBP. 1,391,210.13/-.

The case was advanced that on the 11th of October 2018, the 3rd Defendant/Respondent ('the Auctioneers') acting under instructions of the KDIC issued the Applicants a notice claiming that the outstanding sum on the loan was GBP 1,528,601.22/- That the aforesaid notice further indicated that unless the alleged debt of GBP 1,528,601.22/- was paid, the suit property was scheduled to be auctioned on the 19th December 2018.

It was averred that the alleged debt of GBP 1,528, 601.22 of which GBP 728,601.22 amounted to interest and penalties alone was not only unjust but an unlawful enrichment. That the interest and penalties amounting to GBP 728,601.22, more than half of the principal loan amount of GBP 800,000 was irregular, illegal, unfounded in law and not justified in any event. The deponent contended that as KDIC had agreed to accept reduced payments of Ksh. 800,000/- per month, it was therefore inequitable to go back on the said representation.

A case was then made that the Applicants had engaged other financiers to take over the existing facility from the Bank and for good effect a bundle of correspondences between the 1st Applicant with Chase Bank and I &M Bank was attached.

It was then contended that the Plaintiffs' business had improved as a result of the reduced political tension and they were ready to remit the rental income directly to KDIC as continued security of the loan in accordance with the terms of the deed of assignment entered between the

Applicants.

It was further contended that the intended auction scheduled to take place on the 19th of December 2018 by the Auctioneers was imminent and unless urgent orders were issued, the Applicants stood to suffer substantial loss which could not be compensated by way of damages. That without the orders sought, the main suit would be rendered nugatory and it was only fair and in the interest of justice that the orders sought are granted to preserve the suit property pending the hearing and determination of this suit.

In a further affidavit sworn on 12th March 2019, the deponent reiterated fully his earlier position, this time only adding that KDIC had exceeded the statutory limit of 18 months to act as the Official Receiver of the 1st Respondent Bank and by continuing to do so was unlawful. He further contended that it is evident from the Plaintiffs' application that they had satisfied the requisites to be granted an injunction in this matter pending the hearing and determination of the application and the suit; the extortionate penalties unlawfully applied on principal loan amount, the conduct of KDIC denying accepted reduced payments then admitting later in their replying affidavit, the statutorily barred limit of acting as an official receiver by the 2nd Respondent being overlooked and the fact that the Plaintiffs' would not be put back to the same position they were in should they succeed in this suit established that the plaintiffs do have a genuine arguable case. It was further reiterated that unless the prayers sought were issued, the Applicants stood to suffer substantial loss which could not be compensated by way of damages.

The Respondent' Case

The response the Plaintiffs' Application was made by David Kiptoo, the Assistant Manager, Risk and Resolution Department in the Kenya Deposit Insurance Corporation, on behalf of the Respondents'. He averred that the Bank was on 13th October 2015 placed in receivership by the KDIC and continued to be under receivership to date.

The deponent averred that by a Letter of Offer dated 2nd June 2012 the Bank, following an application made through the directors of Pine Court Malindi Limited the 1st Plaintiff/Applicant, and on the basis of a Personal Guarantee & Indemnity to be issued by Anthony Reginald Hill and Arnold Timothy Muema and a Charge/Mortgage to be issued by the Chargor, Mumbu Estate Limited the 2nd Plaintiff, the Bank agreed to make available to the 1st Plaintiff Project Finance Credit Facilities in the sum of Kenya Shillings 100,000,000.00 /- to be disbursed in equivalent amount in GBP.

It was further averred that the purpose of the said facilities was the construction of a four story office block and apartments with basement parking in Malindi. That the Bank approved the provision of the facilities subject however to a number of conditions, amongst them being execution by the Plaintiffs of a Right of Set Off Letter/Agreement in favour of the Bank, the payment of variable facility interest at the rate of 10% per annum and default interest at the rate of 5% per annum over and above the facility rate of interest and the preparation and perfection of other prescribed securities.

It was averred that subsequently, the Borrower, the Guarantors and the Chargor executed the Right of Set-Off Letter/Agreement and other securities by which they expressly agreed, inter alia, that the Bank would, in the event of a default by the Borrower, realize the charged suit property and apply the proceeds thereof in satisfaction of the liabilities due to the Bank from the Borrower.

The deponent averred that on 20th July 2012, the directors of both the 1st Plaintiff and the 2nd Plaintiff passed Board Resolutions to create a First Legal Mortgage over Plot Number 729 (LT 34 Folio 190/2 File 2772) located in Malindi in favour of the Bank to secure the Project Finance Credit Facilities in the sum of Ksh. 100,000,000.00 /-.

It was further averred that following the execution of the Letter of Offer by the 1st Plaintiff and the Bank, the execution of the Right of Set-Off Letter/Agreement by the 1st Plaintiff, her Guarantors, the 2nd Plaintiff, a Charge/Mortgage Instrument dated 20th July 2012 was also prepared, executed by the parties and perfected.

It was further averred that the Plaintiffs', in addition to the Mortgage Instrument, also executed Deed of Assignment dated 20th July 2012 in favor of the Bank. Further, a Deed of Personal Guarantee and Indemnity by Anthony Reginald Hill and Arnold Timothy Muema dated 20th July 2012, was also issued in favour of the Bank by the Guarantors of the 1st Plaintiff.

The deponent contended that against the securities constituting of the First Legal Mortgage over Plot Number 729 (LT. 34 Folio 190/2 File 2772), the Right of Set Off, the Deed of Assignment and the directors Deed of Personal Guarantee and Indemnity issued by Anthony Reginald Hill and Arnold Timothy Muema, the Bank proceeded to disburse the sum of Ksh. 100,000,000.00 /- being the agreed equivalent in GBP. 800,000.00 /as at the date of disbursement to the 1st Plaintiff.

An averment was made that by agreement of the parties, the facilities were to be repaid in equal consecutive monthly instalments comprising of both the loan principal amount plus interest as applicable within a maximum period of ninety six (96) months. The monthly instalments were to begin immediately after the expiry of a 10 month moratorium from the date of the loan draw down/disbursement.

However, the deponent charged, from October 2015, the 1st Plaintiff, in breach of the agreements existing between the parties, stopped making the scheduled payments to the Bank. Arising from the default, the Bank wrote to the 1st Plaintiff, the Guarantors and to the Chargor by a letter dated 19th July 2017 notifying them of the default and requiring them to regularize the 1 Plaintiff's Accounts.

The Bank's demand notwithstanding, it was contended that the 1st Plaintiff's default persisted. As at 31st July 2017, the 1st Plaintiff was indebted to the bank in the sum of GBP. 1, 169,420.47/-. Further, on 03rd August 2017, with the outstanding charge debt then standing at GBP. 1,179,998.64 /, the Bank, in accordance with the provisions of **Section 90 (1) (2) and (3) e of the Land Act No. 6 of 2012,** issued the

plaintiffs with a 90 day Statutory Notice before Sale.

According to the deponent, the statutory notice period however lapsed without the plaintiffs repaying the Bank. On 29th December 2017, with the total outstanding charge debt by then standing at GBP. 1,391,210.13 / the Bank pursuant to Section 96 (2) of the Land Act No. 6 of 2012, issued the Plaintiffs with a 40 Day Statutory Notice to Sell.

It was averred that the 40 Day Statutory Notice period also lapsed without the Plaintiffs repaying. Consequently, the Bank's statutory power of sale arose. On 11th October 2018, with the outstanding charge debt then standing at GBP. 1,528,601.22/- and with the Plaintiffs having completely failed to repay the Bank, the Bank then instructed Messrs. Trophy Auctioneers to proceed with the sale of the charged property. On 17th October 2018, in execution of the Bank's instructions, the Auctioneers served the 45 Day Notice of Exercise of Statutory Power of Sale and Notification of Sale of the Suit Property.

It was further averred that notwithstanding service of the Notification of Sale by the Auctioneers, the 1st Plaintiff failed to take any steps to redeem the charged suit property. Consequently, the Auctioneers proceeded to advertise the charged suit property for sale by way of public auction.

Next, the deponent in reference to the Applicants contention that the Bank declined to advance the plaintiffs further funds for the development of the property and the day to day running of the business thereby grinding the operations of the 1st Plaintiff to a halt and rendering it unable to service the debt averred that these allegations had no basis and were strongly contested. He charged that the Bank was under no obligation to advance further funds to the plaintiff outside the initial contract as well as post the default. Secondly, he averred that the Bank, via its letter dated 6th November 2013 requested the 1st Plaintiff to provide an updated form CR 12 showing the replacement of Anthony Reginald Hill in the company which the Plaintiff failed to provide on time.

It was contended that the contents of paragraph 10, 11, 12 and 13 of the Applicants Supporting Affidavit had no bearing so far as these proceedings relate as they touch on the internal affairs of the Plaintiffs. That in any event, the paragraphs show the Plaintiffs' failure to service the loan was caused by their own internal affairs, or alternatively, due to lack of funds.

The Respondents contended that the contents of paragraphs 14, 15, 16 and 17 of the plaintiffs' Supporting Affidavit together with the annexures thereto clearly showed that the 1st Plaintiff was in constant default and that the Bank continued to indulge it despite the Bank being in receivership and facing financial difficulties itself. Still the 1st Plaintiff continued to default on new arrangements on the mode of payment.

It was averred that the Bank only issued a Statutory Notice of Sale after the 1st Plaintiff completely ignored and/or failed to honour the promise to pay Ksh. 800,000- towards satisfaction of the debt that had by then grown to stand at GBP 1,391,210.13/-

It was contended that while the Bank issued the Plaintiffs with a Chargee Statutory Notice to Sell on 29th December 2017, the Bank gave the 1st Plaintiff a grace period of almost one year for it to make overdue payments and service the debt on the freshly agreed terms. The 1st Plaintiff, however, subsequently completely failed to make the agreed payments, which in turn necessitated the Bank to instruct its Auctioneers on 11th October 2018 to proceed and issue a Notification of Sale.

The contention was made that it was expressly agreed in the Offer Letter dated 02nd June 2012 under Clause Five (5) that the facility variable interest rate would be 10% per annum on a reducing balance. Further, it was also agreed that the default rate of interest would be 5% per annum over and above the existing lending rates. That evidently, it was the Plaintiffs' delay in making the scheduled monthly payments and persistent default that has not only elongated the payment period from the initial 96 months as agreed, but also attracted further interest charges as well as default interest charges thereby leading to the overall substantial interest expense due to the Bank.

It was averred further that, from the Plaintiffs/Applicants pleadings, their central claim against the Bank was a dispute as to penalties and interest charges payable. It was averred that disputes over accounts of whatever nature were not a basis for the court to grant an injunction order. This principle was more relevant in a situation such as the plaintiffs' case where the default was not only self-evident, but is also admitted.

The Respondents charged that the contemplated engagement of another financier to take over the facilities in future did not entitle nor allow the Plaintiffs to default and continue to default on the Bank's facilities at present. According to the Respondents, there was no credible evidence before the court that the alleged political tension led to the Plaintiff's business slow down as claimed. Further, there was also no evidence that reduced political tension had led to improvement in the Plaintiffs' business. It was averred that in any case, the 1st Plaintiff had also not made any payments towards servicing the debt in light of the alleged improved business.

The Deponent averred that it was trite law that an applicant who seeks an order of injunction had to satisfy the Court that he had a prima facie case with a high probability of success and that he would suffer irreparable injury which could not be compensated by way of damages in case the injunction is not granted, and if the court was in doubt as to the two prerequisites above, the court shall determine the matter on a balance of probabilities.

If the deponent is to be believed, given the plaintiffs' circumstances, it was clear that they had not established a genuinely arguable case at all because they had acknowledged receiving the substantial credit facilities, defaulting on the obligation to repay the said facilities, renegotiating the terms of re-payment and subsequently further defaulting on them too with the default still continuing to persist to date. It was in the circumstances, therefore inconsequential to consider the principles of irreparable injury and balance of convenience. Nonetheless, the Respondents asserted, whatever loss the Applicants may suffer was quantifiable in monetary terms. The value of the suit property was quantifiable and determinable. Consequently, it was averred that the Plaintiffs would not suffer any irreparable harm or damage if injunctive

orders sought pending suit were not granted.

In addition, it was asserted that since the central complaint by the Plaintiffs against the Bank was premised on the interest expense, an award of damages would be an adequate remedy in the unlikely event that the Bank was found to have wrongly sold the suit property. Further and in any event, the scale of convenience heavily tilted towards the Plaintiff repaying off the loan arrears to the Bank through the proceeds realized from the sale of the suit property so as to pre-empt the loan facilities outstripping the value of the said property due to further interest and default interest charges.

On the basis of the foregoing, it was averred that the instant application was totally lacking in merits and should be dismissed with costs to the Respondents.

The Plaintiffs/Applicants' Submissions

Mr Mwagambo for the Plaintiffs identified one issue for determination being whether the prayers of temporary injunction sought by the Plaintiffs are merited pending the hearing and determination of the application and the suit.

Counsel begun his analysis by relying on **Giella vs Cassman Brown Co. Ltd 1973 EA 358** where the principles of injunctions were identified as whether the applicant had established a prima facie case with probability of success; whether the applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and if the court was in doubt, the application would be determined on a balance of convenience.

Arguing under the head of whether the Applicants had established a prima facie case with probability of success, Mr. Mwagambo after rehashing the circumstances under which the loan was procured by the Applicants submitted that the alleged outstanding amount of 1,528,601.22 GBP as per the statutory notice issued by KDIC on 11th October 2018 was over and above the principal amount of 800,000 GBP; the interest alone amounted to 728,601.22 GBP and this was not only unjust but an unlawful enrichment. It was submitted that the Defendants in their statement of defence argued that in the loan facility agreement, the 1st Plaintiff/ Applicant agreed that variable facility of the interest would be 10 % per annum and that the default rate of interest would be 5% per annum over and above the aforesaid facility rate of interest.

It was submitted that the principal loan amount of Ksh 100,000,000 equated to 800,000 GBP as the same was to be serviced by the UK Company. However; the exchange rate of the GBP had considerably increased over the years. The debt amount claimed by the Defendants of 1,528,601.22 GBP equated to Ksh 198,000,000 almost double the amount borrowed and may increase depending on the day to day rates. It was therefore submitted that the right of the 1st Respondent Bank to vary the interest rates from time to time was not unfettered. The Plaintiff/Applicants were now being demanded to pay back an amount doubling what they borrowed. The alleged debt outstanding the loan with which the interest doubles the amount borrowed is arbitrary and unjust enrichment. Reliance was placed on **Margaret Njeri v Bank of Baroda (Kenya) Limited (2014) eKLR.**

Next, counsel for the Applicants submitted under the head of promissory estoppel. On this it was submitted that upon the death of the majority shareholder of the 1st Applicant; Anthony Hill, the 1st Respondent bank agreed to extend the moratorium period until the determination of his shareholding was concluded by the probate court. The succession matter was finalized early in the year 2015. However, due to internal conflicts of the beneficiaries of the estate the remaining shareholder of the 1st Applicant gave up his shares in the UK company hence the funds that had been supporting the loan were now depleted. Due to these financial constraints, sometime in August 2015, the 1st Plaintiff convened a meeting with the Bank who agreed to accept reduced payments of Ksh 600,000 for three months. Sometime in October 2015 the Bank was placed under receivership and upon discussions with KDIC as the official receiver, it was agreed that the 1st Plaintiff make payments of Ksh 800,000 towards the repayment of the loan.

It was further submitted that in 2017 the 1st Plaintiff being in the hospitality industry, its business was impacted adversely by the uncertainty of the general elections and it again struggled to keep up with the payments of the loan. This ended up culminating in a further meeting with the KDIC on the 30th of July 2017 where it was agreed that the 1st Plaintiff would continue remitting the reduced payments of Ksh 800,000. However, it was submitted, in December 2017, the 2nd Respondent went back on their representation to accept reduced payments by issuing the Plaintiff/ Applicants a statutory notice of sale on the 29th December 2017 demanding the repayment of the whole loan.

Counsel submitted that there was no evidence of any objection to that agreement by KDIC as their conduct as 5 months had lapsed before they issued the statutory notice of sale in December 2017. Further that in their replying affidavit, the Respondents' admitted their being fresh terms despite having denied so in their defence. It was submitted that the Defendants in their statement of defence admitted that the meeting in July 2017 did indeed take place and with the subsequent payments of Ksh 800,000 confirmed acceptance of the same by KDIC. On this limb of his argument, Counsel placed reliance on **Nairobi County Government v Kenya Power and Lighting Company Limited [2018] KLR.**

Regarding the validity of KDIC as the official receiver of the Bank, it was submitted by Mr. Mwagambo that per the provisions of **Section 53 of the Kenya Depositors Insurance Act,** the 2nd Respondent having been appointed in October 2015 had clearly exceeded its mandate under the law as an official receiver of the 1st Respondent. Therefore, it was submitted, the statutory notice of sale issued by KDIC and its instructions to the Auctioneers to auction the suit property were invalid. Upon the expiry of the 12 months the KDIC could act as official receiver, there was no justification for the extension of its appointment. Nevertheless, it had been over 18 months since its appointment hence its mandate as the official receiver had expired by law.

As to whether the Applicants stood to suffer irreparable loss that could not be compensated by an award of damages, it was submitted that unless the prayers sought were granted, the Plaintiffs' stood to suffer irreparable loss that could not be compensated by way of damages. No monetary compensation could cure the harm or put conditions back the way they were if the suit property was auctioned by the Defendants.

This point was buttressed by reference to **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR.**

It was submitted that having established that the Applicants had a prima facie case, monetary compensation in this instance would be inadequate as it was incapable of putting the Plaintiffs in the same position as they were. Therefore, an order for temporary injunction was adequate and fulfilled the principle laid out in Giella vs Cassman Brown Co.

Mr. Mwagambo proceeded to address the Court on balance of convenience submitting that this tilted in favour of the Plaintiff/Applicants. If the injunction orders were not granted and they won the case, they stood to suffer irreparable harm. In other words, they risked a greater loss than the Respondent if the auction went on. They would be incapable of being put back in the same position as the suit property would have been disposed of. Further reliance was placed on **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR.**

In Conclusion, the Applicants submitted that the instant Application and the orders for injunction sought had merit. That they had satisfied the principles as laid out in Giella vs Cassman to be granted the equitable reliefs sought. That they had demonstrated that the Plaintiff/ Applicants had a prima facie case with a probability of success, the irreparable harm that shall be occasioned to them that cannot be compensated by an award of damages should they succeed in their case and the balance of convenience in this instance tilted in their favour. It was therefore prayed that the orders as sought in the Application be allowed as prayed.

The Respondents' Submissions

Mr. Ngoya on his part urged that this being principally an injunction application, the applicant had to satisfy the Court that it meets the three (3) limbs required for injunctive orders to issue as set out by the Court of Appeal for East Africa in **Giella Versus Cassman Brown (1973) E.A 358**.

It was submitted that the first condition the Court had to consider was whether the Plaintiffs had established a Prima Facie case with a probability of success. For a definition of what constituted such a case, reliance was placed on **Mrao Versus First American Bank of Kenya Limited & 2 Others (2003) KLR 125 and Michael Gitere & another v Kenya Commercial Bank Limited [2018) KLR.**

Counsel submitted that the Plaintiffs had not established a genuine and arguable case. According to Counsel, the root cause of the current proceedings was that, whereas the Bank contended that the customer was indebted in the sum of GBP. 1,528,601.22/- comprising of the loan amount, interest on the loan amount, penalties on default and interest on penalties on default by virtue of breaching the terms of its facilities by defaulting on the payment of the covenanted instalments, the customer, on the other hand maintained that the accrued interests and penalties were unlawful and could not be justified. It was noted that the borrower did not deny receiving the credit facility nor defaulting on repayment of the said facility.

According to Mr. Ngoya, the central question that arose in determining whether the plaintiffs had established a prima facie case with a probability of success was whether the interests and penalties that accrued owing to the borrowers' continuous and repeated default can be justified by the bank. This could be answered by answering the peripheral questions of what was the contractual interest rate of the facility, what was the contractual default rate of the facility and what was the contractual penalty for defaulting on the facility?

In answering the aforementioned questions, it was submitted that it was not in dispute that the Bank approved the said Credit Facilities subject to a condition that, the Borrower agreed to a variable facility rate of interest at 10% per annum and that the default rate of interest at 5% per annum over and above the aforesaid facility rate of interest. Additionally, the facilities were to be repaid in ninety-six [96] equal monthly instalments with a 10-month moratorium from the date of drawdown/ disbursement.

It was further submitted that while the borrower alleged that the Bank declined to advance it further funds for the development of the property and the day to day running of the business thereby grinding its operations to a halt and rendering it unable to service the debt, the reality was that the Bank was under no obligation to advance further funds to the plaintiff outside the initial contract as well as post the default. Secondly, in an attempt to find a way of assisting the borrower, the Bank, via its letter dated 06th November 2013, requested the borrower to provide an updated form CR-12 showing the replacement of Anthony Reginald Hill in the company which the borrower failed to provide on time. Even further, while the Bank issued the borrower with a Chargee Statutory Notice to Sell on 29th December 2017, the Bank gave the Plaintiff a grace period of almost one year for it to make overdue payments and service the debt. The borrower, however, subsequently completely failed to make the agreed payments, which in turn necessitated the Bank to instruct its Auctioneers on 11th October 2018 to proceed and issue a Notification of Sale.

It was submitted that during all this period of default by the borrower, the facility continued to attract interest at the agreed rate contained in the Offer Letter dated 02nd June 2012 under Clause Five (5) and which facility interest rate would be 10% per annum on a reducing balance and a further default rate of interest at 5% per annum over and above the existing lending rates.

The submission was made that evidently, it was the borrower's delay in making the scheduled monthly payments and persistent default that not only elongated the payment period from the initial 96 months as agreed, but also attracted further interest charges as well as default interest charges thereby leading to the overall substantial interest expense due to the Bank.

On this basis, it was the Bank's contention that the issue of the interest rates was agreed on between the parties, it was agreed that the facility would be made available to the borrower at a facility interest rate of 10% per annum on a reducing balance and in the event of default by the borrower, a default rate of 5% over and above the existing lending rates would be charged.

It was submitted that as it could be deduced from the borrower's loan account statements, the Bank charged interest rate on the facility at 10% as had been contractually agreed in the offer letter. Upon default, the Bank began charging the 5% default interest rate above the existing lending rates. Once the borrower kept consistently and repeatedly defaulting, both the interest on the facility and the interest and

penalty on default kept accruing such that as at 11th October 2018, the customer's total indebtedness to the Bank stood at GBP. 1,528,601.22 /- comprising of the loan amount, interest on the loan amount, penalties on default and interest on penalties on default.

Mr. Ngoya asserted that the borrower had not adduced any substantial evidence to show that the bank calculated the interest illegally or otherwise. On the other hand, the Bank has adduced the borrowers Bank statements evidencing how the calculations on interest were done by the Bank, clearly showing that they were done in accordance with the Act.

It was submitted that it was trite law that it is not up-to courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. The primary task of the court is to construe the contract and any terms implied in it. Further, the Borrower had not claimed there were no terms in relation to the interest charged or the default rate in the offer letter, nor had the borrower claimed that no information was rendered to the Applicant. Therefore, for the borrower to invite this court to make a determination that the interest rates and penalties that were charged by the Bank were unlawful and cannot be justified was absurd considering the interest rates and default rates were charged as per the agreed rates in the offer letter. This then would amount to inviting the court to re-write the terms of the contract between the borrower and the Bank.

Further to the above, it was also the Bank's contention that at the time the Bank advertised the suit property for Sale by way of public auction, its Statutory Power of Sale had arisen. The Bank, in accordance with the provisions of **Section 90 (1) (2) and (3) e of the Land Act No. 6 of 2012** issued the Plaintiffs with a 90-day Statutory Notice before Sale dated 03rd August 2017.

After the 90-day Statutory period lapsed, the Bank pursuant to **Section 96 (2) of the Land Act No. 6 of 2012,** issued the Plaintiffs with a 40-day Chargee Statutory Notice to Sell dated 29th December 2017 and which redemption period allowed under the said Notice also lapsed without the Plaintiffs repaying the Bank. Subsequently, the Bank's statutory power of sale therefore arose and the Bank advertised the suit property for Sale.

It was submitted that on the basis of the foregoing, it was clear that the plaintiffs had not established any reasonable case against the Bank with a probability of success. No arguable case has been demonstrated to exist against the Bank by the Plaintiffs.

Relying on the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** it was submitted that five conditions must exist for a mandatory injunction to be issued. These were: existence of special circumstances, demonstration of a clear case by the applicant, the act done by the Respondent is a simple and summary one which can easily be remedied, the defendant attempted to steal a march against the plaintiff and the court has to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.

It was submitted that the Applicants had not discharged the burden of demonstrating any special circumstances that exist in this matter. That having failed to demonstrate a genuine and arguable case, the plaintiffs could not be said to have a clear case. Thirdly, the allegation of unlawful interest rates that could not be justified was not a simple and summary one which could be remedied with the stroke of the pen. This would call for viva voce evidence from both parties which will had to be vigorously tested through cross examination. Fourthly, Mr. Ngoya asserted that the Applicants had not demonstrated how the Bank stole a match against them. Conversely, the Applicants were guilty of stealing a match against the Bank by benefiting from loan facilities from the bank and later refusing to repay. For a higher degree of assurance to attach to the Court that at the trial it would appear that an injunction had rightly been granted, the foregoing four conditions had to be satisfied. Since none of the four conditions exist in this matter, it was submitted that the high degree of assurance had not been demonstrated by the plaintiffs and the same did not attach to the Court.

It was hence submitted that having failed to get past the hurdle of establishing a prima facie case, the Plaintiffs' application called for an outright dismissal.

The Court was then addressed on the issue of irreparable loss and it was the Bank's case that the Plaintiffs would not suffer irreparable loss that cannot compensated by way of damages. According to Counsel, thus far, the Bank had only set in motion debt recovery procedures against the customer. The Bank demanded the outstanding loan amount from the Plaintiffs via a letter dated 19th July 2017. When the customer failed to regularize its loan account, the Bank served the customer with a Chargee Statutory Notice pursuant to **Sections 90(1) (2) (3) (e) of the Land Act, 2012** by way of a letter dated 3rd August 2017.

However, it was asserted, the period of the Statutory Notice lapsed without the plaintiffs repaying the Bank. Subsequently, on 29th December 2017, with the total outstanding debt by then owed to the Bank standing at GBP. 1,391,210.13/-, the Bank pursuant to **Section 96 (2) of the Land Act No. 6 of 2012**, issued the plaintiffs with a 40-day Chargee Statutory Notice to Sell. The 40 Day Notice redemption period allowed under the said Notice also lapsed without the plaintiffs repaying the Bank and subsequently, the Bank's statutory power of sale therefore arose.

Counsel went on stating further that on 11th October 2018 with the Plaintiffs having completely failed to repay the Bank, the Bank then instructed Messrs. Trophy Auctioneers to proceed and issue a Notification of Sale. On 17th October 2018, in carrying out their instructions, the Auctioneers served upon the plaintiffs a 45 day Notice of Exercise of Statutory Power of Sale and a Notification of Sale of the Suit Property.

Counsel pointed out that even after the Auctioneers had served the Plaintiffs with a Notice of Exercise of Statutory Power of Sale, the 1st Plaintiff failed to take any steps to rectify the default by repaying the Bank. Consequently, the Auctioneers proceeded to advertise the suit property for sale by way of public auction.

The Respondents contended that thus far in the debt recovery process, the Bank had abided by all the prerequisites that may lead exercise of its Statutory Power of Sale over the security. It was also pointed out that the Plaintiffs had not challenged the steps taken by the Bank in the

debt recovery process. On this particular account, there was no legal basis for the Court to impede the Banks debt recovery procedures.

From the Respondents point of view, the Plaintiffs' contention was that if the charged properties are eventually sold, they would lose valuable properties and suffer irreparable loss. It was asserted however that the realization of security could not in any way occasion a loss which damages cannot remedy. If the court determined the suit in favor of the Plaintiffs, the Bank was in a position to compensate them in damages and such compensation would adequately repair the loss. It could not be gainsaid that the Bank was an economic powerhouse in the region, it could not therefore be envisaged that it would fail to compensate the plaintiffs. The Bank had the resources to compensate the Plaintiffs in the event that the court determined the suit herein in their favor. Reliance was placed on **Amos Wangeera Njoroge & 9 others v Serah Wamuyu Muriuki & another [2014] eKLR**.

It was further submitted that the value of the suit property was quantifiable in monetary terms. Therefore, in the unlikely event that the suit was determined in favour of the plaintiffs, the Bank could compensate any monetary loss suffered by the Plaintiffs as a consequence of the sale of the suit property by the Bank. Reliance was placed on **Sambai Kitur & another v Standard Chartered Bank & 2 others [2002] eKLR.**

Counsel urged the court to dismiss the Plaintiff application on the strength of the argumnts that they had neither established a prima facie case nor demonstrated that they would suffer irreparable loss. Even so, Mr. Ngoya went further to submit on the third principle for grant of an injunction.

It was submitted that the balance of convenience tilted in the Bank's favour. According to Counsel, it was common knowledge that as default persists, the amount due continues swelling to unconscionable and outrageous proportions to the extent of outstripping the value of the security. The potential possibility of the outstanding debt outstripping the value of the security threatens the business efficacy of securities. The fact that realization of the security at that point would not be enough to settle the debt takes away the substratum of securities. In those circumstances, the balance of convenience will tilt toward refusing the relief sought.

It was further submitted that as no irregularity and/or impropriety could be visited upon the Bank, and none had been demonstrated, the Bank had a right to invoke its debt recovery procedures. The scale of convenience therefore heavily tilted towards allowing the Bank to enforce its securities. The Plaintiffs' remedy, if any, quite clearly lay in repaying the outstanding loan amount.

In addition, it was submitted in the unlikely event the interlocutory injunctive orders are granted and extended, the Bank which operates on deposited funds by its customers, would suffer the most inconvenience as the rights of those depositors would be infringed yet they were not party to these proceedings. For this, Counsel called to his aid the case of **John Nduati Kariuki T/A Johester Merchants vs National Bank of Kenya Ltd Civil Application No. Nai. 306 of 2005 [2006] EA 96.**

It was reiterated that the Bank as at 11th October 2018 was owed an aggregate of GBP. 1,528,601.22 /-. The said debt continued to accrue further interests, costs and other charges covenanted and prescribed by applicable laws till the date of repayment in full of aggregated amount owed and due to the Bank. If the Bank was restrained, the Charge Debt would outstrip the value of the security consequently leaving the Bank with unsecured outstanding's and the Borrower and the Chargor with outstanding residual balances to be paid.

Citing **John Edward Ouko v National Industrial Credit Bank Ltd [2013] KLR** it was submitted that it was clear that the plaintiffs had not established a legal right that had been breached by the Bank, had not established that they shall suffer irreparable damage if the injunctive orders sought pending suit are not granted and had also not established that the balance of convenience is tilted in their favour. In contrast, the Bank's statutory right to realize her securities had been infringed and continued to be infringed if the restraining injunctive orders pending Application and Suit made on 11th December 2018 are not discharged and/or vacated.

It was contended that courts have persistently held that the more default is allowed to persist, the more the balance of convenience tilts in favor of the lender. It was unfair for a defaulting borrower to be allowed to continue defaulting at the expense of the lender. Mr. Ngoya submitted that this being a court of equity should not allow defaulters to flourish while threatening the economic survival of lenders The survival of lenders hinges on the willingness of borrowers to repay the money lent. Protection of defaulters has the propensity of driving lenders out of business. Reliance was placed on **Mrao Limited vs-First American Bank of Kenya Limited.**

The final issue the court was addressed on was whether disputes over accounts of whatever nature can be a basis for the grant of injunctive reliefs in favour of a defaulting party. On this, it was submitted that it was trite law that disputes over accounts of whatever nature could not be a basis for the grant of injunctive reliefs in favour of a defaulting party especially where the default is not only self-evident but also expressly admitted. Mr. Ngoya buttressed his point by making reference to **Julius Mainye Anyega v Ecobank Kenya Limited (2014) KLR**.

Citing the conditions upon which the loan was advanced, it was submitted that the plaintiffs went against these afore-stated conditions, thus they could not and had not denied the principal amount of Ksh. 100,000,000/- was and still is bound to accrue further interests in view of the plaintiffs persistent and continuous default of the loan repayment. These conditions and the Letter of Offer dated 02nd June 2012 represented the intention of the parties herein, in effect instituting a contractual obligation on both the Bank and the Borrower. Reliance was placed on **Charles Alex Njoroge v National Bank of Kenya Ltd & another [2015] eKLR.**

It was the Plaintiffs claim that the interest and default rates were inflated by the Bank was spurious, idle and a ploy to mislead this Court that the Bank had not acted in good faith in her attempt to recover her debt.

It was submitted that the Plaintiffs conduct in this matter was as important as the injunctive reliefs it sought from this Court of equity, hence such misleading averments by the Plaintiffs defeat the prayers sought in this Application.

It was submitted that the Plaintiffs had no genuine and arguable case to validate the grant and extension of the injunctive reliefs sought in the

Notice of Motion Application dated 5th December 2018.

In conclusion, the Counsel for the Respondents' urged the Court to dismiss the Notice of Motion dated 05th December 2018 with costs awarded to the Bank.

The Law, Analysis and Determinations

The Parties' feverishly presented their cases through their affidavit evidence as well as the extensive submissions by the respective advocates, Mr. Mwagambo for the Applicants and Mr. Ngoya for the Respondents. I in turn have been sagacious in my analysis of the emerging issues therein. The instant Application relates to the grant of temporary injunctive relief pending the hearing and determination of this suit.

The substantive law on this matter is **Order 40 Rule 1(a) of the Civil Procedure Rules 2010** which provides:

> ***"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."***

It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicants have established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted. These principles were established in **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** where the court stated:

> **"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

In **The Siskina (Owners of the Cargo Lately On Board) vs Distos Compania Naviera SA: HL 1979 [1979] AC 210,** Lord Diplock said:

> ***"A right to obtain an interlocutory judgment is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment of the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."***

While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** observed 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) ally any doubts as to (b) by showing that the balance of convenience is in his favour.***
>
> ***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."***

Drawing positive inspiration from the **Nguruman case (supra),** the Court of Appeal in **Total Kenya Limited v David Njane t/a Argwings Twin Service Station & 2 others [2018] eKLR** restated the requirement that the three conditions for granting an injunction ought to be considered sequentially. In essence, the Court reasoned that the conditions for irreparable damage and balance of convenience ought not to be considered if a prima facie case had not been established.

Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicants have established a prima facie case. A prima facie case was defined in **Mrao Ltd v. First American Bank of Kenya Ltd& 2 Others [2003] eKLR**, where Bosire, JA

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 a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

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

> ***"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.

The following set of facts regarding the circumstances under which the Plaintiffs acquired credit facilities from the 1st Respondent are not in dispute. By a Letter of Offer dated 2nd June 2012 the Bank, following an application made through the directors of the 1st Plaintiff/Applicant, and on the basis of a Personal Guarantee & Indemnity to be issued by Anthony Reginald Hill and Arnold Timothy Muema and a Charge/Mortgage to be issued by the Chargor, the 2nd Plaintiff, the Bank agreed to make available to the 1st Plaintiff Project Finance Credit Facilities in the sum of Kenya Shillings 100,000,000.00 /- to be disbursed in equivalent amount in GBP which equated to GBP. 800,000.00/- at that time. That the Bank approved the provision of the facilities subject however to a number of conditions, amongst them being execution by the Plaintiffs of a Right of Set Off Letter/Agreement in favour of the Bank, the payment of variable facility interest at the rate of 10% per annum and default interest at the rate of 5% per annum over and above the facility rate of interest and the preparation and perfection of other prescribed securities. The Borrower, the Guarantors and the Chargor executed the Right of Set-Off Letter/Agreement and other securities by which they expressly agreed, inter alia, that the Bank would, in the event of a default by the Borrower, realize the charged suit property and apply the proceeds thereof in satisfaction of the liabilities due to the Bank from the Borrower. It is also not in dispute that on 20th July 2012, the directors of both the 1st Plaintiff and the 2nd Plaintiff passed Board Resolutions to create a First Legal Mortgage over Plot Number 729 (LT 34 Folio 190/2 File 2772), the suit property, located in Malindi. Following the execution of the Letter of Offer by the 1st Plaintiff and the Bank, the execution of the Right of Set-Off Letter/Agreement by the 1st Plaintiff, her Guarantors, the 2nd Plaintiff, a Charge/Mortgage Instrument dated 20th July 2012 was also prepared, executed by the parties and perfected. It is not disputed that, in addition to the Mortgage Instrument, the Applicants also executed a Deed of Assignment dated 20th July 2012 in favor of the Bank. Further, a Deed of Personal Guarantee and Indemnity by Anthony Reginald Hill and Arnold Timothy Muema dated 20th July 2012, was also issued in favour of the Bank by the Guarantors of the 1st Plaintiff.

It was further not disputed that by agreement of the parties, the facilities were to be repaid in equal consecutive monthly instalments comprising of both the loan principal amount plus interest as applicable within a maximum period of ninety six (96) months. The monthly instalments were to begin immediately after the expiry of a 10 month moratorium from the date of the loan draw down/disbursement.

However, in my understanding, the Applicants took issue with the amount of interest charged and owing claiming it was too high to the extent of almost doubling the principal amount hence amounted to unlawful and unjust enrichment. It was also a bone of contention for the Applicants that the 2nd Respondent went back on an alleged representation that they would extend the moratorium period for loan repayment upon death of one of the shareholders of the Applicant companies and accept reduced loan repayments. It was also averred that the mandate of KDIC to act as the official receiver had expired.

In response, the Respondents charged that the interest amounts had piled up due to failure by the Applicants to meet their financial obligations. That the issue of the interest rates was agreed on between the parties, it was agreed that the facility would be made available to the borrower at a facility interest rate of 10% per annum on a reducing balance and in the event of default by the borrower, a default rate of 5% over and above the existing lending rates would be charged. That at the time the Bank advertised the suit property for Sale by way of public auction, its Statutory Power of Sale had arisen. The Bank, in accordance with the provisions of **Section 90 (1) (2) and (3) e of the Land Act No. 6 of 2012** issued the Plaintiffs with a 90-day Statutory Notice before Sale dated 03rd August 2017. After the 90-day Statutory period lapsed, the Bank pursuant to **Section 96 (2) of the Land Act No. 6 of 2012,** issued the Plaintiffs with a 40-day Chargee Statutory Notice to Sell dated 29th December 2017 and which redemption period allowed under the said Notice also lapsed without the Plaintiffs repaying the Bank. Subsequently, the Bank's statutory power of sale therefore arose and the Bank advertised the suit property for Sale.

The Applicants indebtedness to the Respondents has not been denied. The principal loan amount advanced was Ksh 100,000,000 equated to 800,000 GBP. In contrast, the debt amount claimed by the Respondents as at 11th October 2018 was GBP 1,528,601.2/-. As far as the issue of interests go, my position is that a dispute as to the amount of interests owing is not a basis upon which an interlocutory injunctive relief may be based. This position is similar to the one taken in **Air Travel & Related Studies Ltd v Equity Bank (Kenya) Ltd Civil Application Nai 272 of 2017 [2017] eKLR** wherein the Court of Appeal stated:

> ***"14. Even if we were to find there is a single arguable point, the law as it stands is that disputes on the loan amount and interest cannot be a basis for granting an injunction restraining the exercise of power of statutory sale when it arises. It is not in dispute that the applicant has defaulted in the repayment of the loan amount. Ringera J, (as he then was) in the case of Thathy vs. Middle East Bank (K) Ltd & another [2002] 1 KLR 595 aptly stated that: -***

> ***"Since it is settled law that a dispute as to the amount owed would not of itself be a ground for injuncting the mortgagee from exercising its statutory power of sale, whether the accounts were supplied (as sworn by the bank) or not supplied (as sworn by the plaintiff's attorney) would not have a decisive bearing on whether or not to grant an injunction as prayed." Emphasis added***

Similarly, ***Halsbury's Laws of England, volume 32 (4th edition) at paragraph 725:***

> ***"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged."***

Additionally, in **Bharmal Kanji Shah And Another V Shah Depar Devji [1965] EA 91** 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…"***

The Court of Appeal in **Fina Bank Ltd. V Ronak Ltd, [2001] 1 EA 54** on its part reasoned:

> ***"…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. 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."***

Regarding the allegation that KDIC went back on its representations to the Plaintiffs that it would accept reduced payments, it is my finding that the Plaintiffs' evidence fell short of proving this. There is no evidence to support this as the letters availed by the Plaintiff did little to show that the Bank had made such representations to them. The Respondent's on their part while admitting discussions regarding the restructuring of the loan agreement occurred, they are asserted that despite these negotiations the Applicants made no effort to regularize their default. The Statement of accounts produced by the Bank supports this position. As such, the question of promissory estoppel does not in my view arise in these proceedings.

As to whether the 2nd Respondent's position as the official receiver of the 1st Respondent was regular, sufficient evidence was adduced by KDIC showing that the Central Bank of Kenya had extended its tenure as the receiver manager. This too therefore, is not the shade that will provide shelter to the Applicants.

I am satisfied that at the time the Bank advertised the suit property for Sale by way of public auction, its Statutory Power of Sale had arisen. The Bank had in accordance with the provisions of **Section 90 (1) (2) and (3) e of the Land Act No. 6 of 2012** issued the Plaintiffs with a 90-day Statutory Notice before Sale by the letter dated 03rd August 2017. Further to this, once the 90-day Statutory period had lapsed, the Bank pursuant to **Section 96 (2) of the Land Act No. 6 of 2012,** issued the Plaintiffs with a 40-day Chargee Statutory Notice to Sell dated 29th December 2017. This redemption too lapsed without the Plaintiffs regularizing their default.

On the basis of the above, I find that the Applicants have not demonstrated the existence of a prima facie case. On this limb alone, the Application dated 5th December 2018 fails.

For avoidance of doubt however, I will undertake to examine whether had the Applicants established a prima facie case, they stood to suffer irreparable loss. The general principle of law in this regard is that the court of equity would only grant interlocutory injunctive relief where an award of damages for injury or harm is said to be inadequate. The court in the **American Cyanamid Versus Ethicon Limited 1975 1ALL ER 504** re-stated the principle in the following language on inadequacy of damages:

> ***"If damages in the measure recoverable are common law could be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff claim appeared to be are at that stage".***

In **Halsbury's Laws of England, 3rd Edition volume 21, paragraph 739 page 352** irreparable injury is defined as:

> ***"Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question."***

The prevailing state of affairs in the instant suit are that the interests and penalties on loan advanced to the Applicants continue to accrue while from the evidence on the record, little effort has been made to settle the outstanding amounts. The Applicants submitted that were they to lose the suit property, this loss could not be adequately compensated by an award of damages. My view is diametrically opposite. When the Applicants put up the suit property as security, the implied, and explicit as per the loan agreement, understanding was that in the event of a default on the credit facility, the suit property would divest to the 1st Respondent Bank in satisfaction of the loaned amount. The suit property itself could easily be quantified by a liquidated value. Therefore, to this court, the contention that the loss of it could not be adequately satisfied by an award of damages is sentimental at best and a misplaced notion overall. Mr. Ngoya referred this Court to the case

of **Amos Wangeera Njoroge & 9 others v Serah Wamuyu Muriuki & another [2014] eKLR** which aptly summed up the instant scenario in the following words:

> ***"Once property is offered as security for a loan to a Bank, such property becomes a commercial property which can be offered in the market for sale in case of default in the repayment of the loan and a chargor would be hard-pressed to justify that damages would not be adequate remedy to compensate the chargor in the event of what would be considered and/or found to be an irregular sale by way of realization of the security by the charge. In such cases, an award of damages would be an adequate remedy."***

The preceding discourse has to my mind allayed any doubts as to whose favour the balance of convenience tilts. The Applicants have so far not demonstrated that they have the capability to repay the loan amount accrued thus far. The Respondent bank would face the real danger of not being able to recover the amounts due by virtue of the accruing amounts outstripping the value of the suit property. I align myself with the position of the Court in **Andrew M. Wanjohi vs Equity Building Society & Another [2006] eKLR** wherein it was stated that:

> ***" In my considered view if the 1st and 2nd defendants were restrained from selling off until the suit was heard and determined , there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st and 2nd defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property was sold, the plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd defendants would be able to compensate the plaintiff. In contrast, the stoppage of the intended sale by the charger would result in the continued growth of debt and thus exposing them potentially substantial irrecoverable losses. I therefore find that provided the charge complies with all other legal requirements, he should be permitted to realise the security."***

As I conclude, I would like to echo the sentiments voiced by my Learned Colleague Kasango J in **John Edward Ouko v National Industrial Credit Bank Ltd Civil Suit No. 99 of 2013 [2013] eKLR** wherein she stated:

> ***"The Plaintiff is not entitled to the injunction he seeks in view of the Court's finding above. The Court having found that the Plaintiff has failed to show a prima facie case with probability of success if then an injunction was granted it would encourage the Plaintiff and others like him to avoid paying their just debts. This was a statement made in the case MRAO (supra) where the Court stated-***
>
> ***"If Courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters".***

There is no merit in these submissions for the court to exercise discretion to grant an equitable remedy of injunction. The loan in this contract was secured by a registered legal charge signed by the parties governing the mortgage. It is in the mortgage deed which provides one of the terms to be repayment of the debt in equal instalments for 96 months. By the aforesaid legal charge the defendant power of sale to recall the principal amount together with interest as specified in the contract became due and owing which triggered the instant motion. The view taken by Lord Diplock in **Siskena** (supra) though addressing the England situation the test of granting interlocutory injunction apply in equal measure within our jurisdiction.

Bringing all these factual and legal issues to the fore in the light of this particular case as a mortgage contract the transaction executed and completed while the defendant disbursed the loan to the plaintiff, that action was fait accompli. It is therefore evident from the authorities which I have been able to examine and referred to recognise that nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. What I am being asked to do by the applicant is to deprive the mortgagee of his right to realise the benefit of the security without any settlement of the loan amount.

The upshot is that the temporary injunctive relief that had been granted to the Applicants is vacated and Notice of Motion dated 5th December 2018 is dismissed. The costs shall be borne by the plaintiff.

It is so ordered.

SIGNED, DATED AND DELIVERED AT MALINDI THIS 25TH DAY OF JULY 2019.

…….

R NYAKUNDI

JUDGE.