REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

COMMERCIAL CASE NO. 4 OF 2019

WILLOW PARK LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JAMII BORA BANK LIMITED.....1ST DEFENDANT/RESPONDENT

ANTIQUE AUCTIONS AGENCIES.....2ND DEFENDANT/RESPONDENT

CONSOLIDATED with

COMMERCIAL CASE NO. 6 of 2019

GRACE KABUI KAGONDU AND 6 OTHERS.....PLAINTIFF/APPLICANTS

VERSUS

WILLOW PARK LIMITED.....1ST DEFENDANT /RESPONDENT

JAMII BORA BANK LIMITED.....2ND DEFENDANT/RESPONDENT

ANTIQUE AUCTIONS AGENCIES.....3RDDEFENDANT/RESPONDENT

AND

COMMERCIAL CASE NO. 8 of 2019

GIDEON NGARUIYA GATHURU AND OTHERS.....PLAINTIFF/APPLICANTS

VERSUS

WILLOW PARK LIMITED.....1st DEFENDANT/RESPONDENT

JAMII BORA BANK LIMITED.....2ND DEFENDANT/RESPONDENT

AND

NAIROBI H.C COMMERCIAL CASE NO. E. 126 of 2019

GOKUL BUILDERS LIMITED.....PLAINTIFF/APPLICANTS

VERSUS

ANTIQUE AUCTIONS AGENCIES.....1ST DEFENDANT/RESPONDENT

JAMII BORA BANK LIMITED.....2ND DEFENDANT/RESPONDENT

WILLOW PARK LIMITED.....3RD DEFENDANT/RESPONDENT

R U L I N G

1. The Plaintiff/Applicant in **Commercial Case No. 4 of 2019** is **Willow Park Ltd,** the development company that is the registered proprietor of the land parcel known as **LR No. Kiambaa/Thimbigua/7186** (the suit land), on which are erected four blocks of apartments. **Willow Park Ltd** (hereinafter the Developer) obtained financing from Jamii Bora Bank (hereinafter the Bank) for the construction/ completion of the project. The loan facility to the tune of KShs.180 million was secured through a charge registered in August 2015 against the suit land. The loan was to be disbursed in tranches, and was to be repaid in 24 months. However, the repayment period was subsequently extended, initially by six months, and later by 9 months. Despite this extension, the sums loaned out remained unpaid, and after negotiations between the Bank and Developer failed, the Bank proceeded to take steps to realize the security. The Developer filed a suit and application (**Commercial Case No. 4 of 2019**) to restrain the Bank from selling the charged property by public auction pending determination of the suit .

2. **Commercial Cases Nos.6 and 8 of 2019** were brought at the same time by parties, who claim to have purchased certain units in the development from the Developer , through what is commonly known as off-plan purchase. They have sued the Bank and the Developer, asserting proprietary interest in the units allegedly purchased. These Applicants also seek to stop the sale of the charged property pending the determination of their case. For purposes of this ruling, the alleged purchasers in the two suits will be referred to as the off-plan claimants.

3. The case by **Gokul Builders Ltd** against the Bank and the Developer was initially filed at the Commercial and Tax Division of the High Court at Nairobi, as **Commercial Case No. E. 126 of 2019** but was subsequently transferred to this court. The Plaintiff/Applicant , Gokul Builders Ltd [hereafter **Gokul**], claims to have been engaged by the Developer to carry out construction works at the development. Asserting a builders lien over the development for unpaid building costs amounting to about KShs.69 million , Gokul has sued the Developer and the Bank. By its application, the **Gokul** seeks to restrain the Bank and Willow Park Ltd from selling, alienating or disposing of the suit property and development thereon pending the determination of the suit.

4. On 20th June 2019, the four suits were by consent of the parties consolidated, the lead file being **Commercial Case No 4 of 2019.** Parties filed written submissions which were highlighted during the oral hearing of the applications. Before the Court therefore are four applications by the respective Plaintiff /Applicants in the four consolidated matters.

5. The first application by the Developer was filed on 16th May, 2019 and is expressed to be brought under Sections 1A, 1B, 3A and Section 63(b) and (e) of the Civil Procedure Act, Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, Section 90 of the Land Act, *inter alia*. The main prayer seeks an interlocutory injunction to restrain the **Bank and Antique Auctions Agencies** (the Respondents) by themselves, their employees, servants and/or agents or assigns and/or any person whatsoever, acting on their behalf and/or under their mandate and/or instructions, from advertising for sale, selling, whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer, any sale concluded by auction or private treaty, taking possession, appointing receivers or administrators or exercising any power of a chargee to lease, let, charge or otherwise howsoever interfere with the Developer's ownership of and title to the parcel of land known as **Land Reference Number Kiambaa/Thimbigua/7186** (the suit Property), pending the hearing and determination of the suit.

6. The application is premised on the main ground that the Developer is the registered proprietor of the suit property, charged to the Respondent Bank to secure a loan facility, which suit property, the Respondents have unlawfully advertised for sale by public auction to recover the loan outstanding in respect of the charge.

7. **Mbiyu Koinange,** described as the Developer 's director swore the affidavit supporting the motion. He deposed that the Developer had in 2014 applied for a construction loan facility from the Bank in the sum of Kshs. 180,000/= , which loan was secured by a charge on Land Reference Number Kiambaa/Thimbigua/7186. He deposed that subsequently, the Bank agreed to restructure the outstanding loan facility by freezing the loan and keeping the amount payable at the sum of Kshs. 150,000, 000/=. He contended that due to the failure by the Bank to disburse the entire loan, and particularly , the balance of loan facility of Kshs. 18, 217, 550/= and additional Kshs. 12,000,000/= the completion of the project was frustrated. That as a consequence, purchasers were reluctant to make payments in respect of purchased units ; that the Bank despite having earlier withdrawn the 90 days' statutory notice earlier issued, had purported to issue a 45 days' notice to sell and demanded payment of Kshs. 207,784,376.03, contrary to the restructure agreement.

8. The said actions were allegedly in breach of the parties' contract and moreover, that the valuation of the suit property at Kshs. 290,000,000/= amounted to a gross undervaluation of the suit asset whose market value is Kshs. 430, 500,000/=; that the proposed sale at the former valuation was intended to defeat the Developer's statutory right of redemption. The deponent further asserted that no party will suffer prejudice if the interim prayers sought were granted but if the prayers are denied, the Developer stands to suffer irreparable damage and its suit will be rendered nugatory.

9. The Bank and auctioneer filed their replying affidavit on 27th May, 2019 through **Christine Wahome**, described as the Bank's Legal Manager. She stated that the Developer had accepted a loan facility from the bank in the sum of Kshs. 180,000,000/= which was secured by a charge created over the suit property . That the loan was payable in twenty-four monthly instalments plus interest at the rate of Kshs. 3,000,000/= per month; that the Developer failed to honour the terms and conditions of the agreement and defaulted in making payments.

10. She further deposed that the Developer subsequently approached the Bank and was indulged so that the repayment period was extended by a further nine months, but the Developer continued in default and has since failed to repay the outstanding amount of Kshs. 210,288,400.41 as at 21st May, 2019 and in the circumstances the Bank's right to realize the security to recover the amounts due had arisen;

that on 23rd July, 2018 the Bank issued the first Statutory notice which prompted the Developer to approach the Bank once more , and an agreement was reached that the Bank would accept a full and final settlement in the sum of Kshs. 150,000,000/= within 60 days; that the Developer failed to honour the agreement and the Bank thereafter issued the forty days' redemption notice of sale against the Developer.

11. The deponent contended that an injunction ought not to issue where a proper statutory notice have been served. The Bank asserted that its statutory right of sale has properly arisen in this case, and there is no justification to warrant issuance of injunctive; that the Developer has failed to show that they have a prima-facie case with any probability of success.

12. The second application was filed by **Gokul** on 9th May, 2019 . It invokes *inter alia*, Order 40 Rule 1, 2 and 51 of the Civil Procedure Rules. The main order sought is a temporary injunction restraining the Bank, Developer and Antique Auctions Agencies by themselves, their agents and their servants from selling, dealing in , interfering with , alienating or disposing of all that parcel of land known as **LR NO. KIAMBAA/THIMBIGUA/7186** and the developments therein pending the hearing and determination of the suit.

13. The application is premised on the ground that the Gokul and the Developer entered into an agreement for construction works of the development known as Willow Park Apartments by Gokul which project commenced but later stalled ; that by that date, the Developer owed Gokul a sum of Kshs. 56,904,881/= which remains unpaid.

14. The supporting affidavit was sworn by **SAMJI HALAI**. Therein, he deposed that he is a director of Gokul; that Gokul entered into an agreement for the construction works in respect of Willow Park Apartments with the Developer; that the which project stalled ; that Gokul is currently owed by the Developer in the region of Kshs. 69,000,000/=; that in view of this, it was agreed that in lieu of payment, Gokul would receive from the Developer ten units in the development, but that the Developer failed to complete the construction and handing over of the units. He deposed that Gokul has added value to the property through construction works and has an equitable interest in the suit property, arising from the unpaid sum of Kshs. 69,000,000/= and , therefore, the Bank ought not to proceed with the sale of the suit property to the exclusion of the Gokul.

15. The Bank's response was an affidavit sworn by **Christine Wahome,** the Bank's Legal Manager. She deposed that **Gokul** is a stranger to the Bank and emphasised that the Developer offered the suit property voluntarily as security for the loan advanced and a charge was registered over the said property. It was contended that there is no privity of contract between Gokul and Bank, and the latter party is wrongly enjoined in the instant suit ; that in the absence of a cause of action against the Bank and Auctioneer , the instant application should be dismissed with costs.

16. The third application was filed by **GRACE KABUI KAGONDU & 6** others (off-plan claimants) on 11th June, 2019. The main order sought is that pending the hearing and determination of the suit, the court be pleased to issue an injunction directed at the Bank and Developer to restrain them whether by themselves, their employees, agents from proceeding with the sale or auction of the suit property. The application is premised on the main ground that each of the off-plan claimants had purchased an apartment on the suit property from the Developer and as such have an indefeasible equitable/ legal right in the said property.

17. **GRACE KABUI KAGONDU** swore an affidavit on her own behalf and on behalf of her co-claimants in support of the motion. She deposed that the Developer offered to sell to each of them an interest in the apartments developed on the suit land and that having agreed to purchase their respective units, the claimants had subsequently entered into an agreement for sale with the Developer and had paid valuable consideration. She contended that the Developer has not handed over the said apartments. She averred that the Developer did not disclose to them at the time of the said agreements that there was any adverse claim over the suit property; that they were shocked to see the suit property advertised for sale by public auction; that the claimants are *bonafide* purchasers for value without any notice of any claim over the subject property; that they have an indefeasible right to their respective apartments but the Bank did not serve them with statutory notices. Lastly, she stated that the claimants have a prima *facie case* and they will suffer irreparable loss if their interests are not upheld.

18. The Bank's response through the replying affidavit by its Legal Manager**, Christine Wahome** filed on 2nd July, 2019, principally repeats the depositions in the replying affidavit filed in opposition to Gokul's application above . It was additionally deposed that the Bank had no obligation to notify the off-plan claimants through service of statutory notices upon them as there exists no contract between them and the Bank , and their application should be dismissed.

19. The fourth application was filed by **GIDEON NGARUIYA GATHURU** & 2 others (off-plan claimants) on 14th June 2019. The main order sought is that the court be pleased to issue an order of injunction restraining the Bank and Developer from dealing with the apartments erected on LR NO. KIAMBAA/THIMBIGUA/7186 and identified as numbers D16, D12, D13. The application is premised on the key ground that these claimants had executed sale agreements with the Developer for the purchase of the said units and had paid the full purchase price.

20. **GIDEON NGARUIYA** swore the supporting affidavit on his own behalf and on behalf of his co-claimants. He deposed that he and his co-claimants had accepted the Developer's offer to sell to them their respective units; that they had executed sale agreements in that regard with the Developer and made full payment of the purchase price. He contended that there is need to preserve the suit property to guard against prejudice to them as persons who had acquired rights over the suit property; thatthey were apprehensive that they might suffer irreparable damage unless the court grants their prayers.

21. Through its Legal Manager**, Christine Wahome** the Bank filed a replying affidavit on 2nd July, 2019. The affidavit repeats depositions made in opposition to Gokul's application, and that by Grace Kabui Kagondu and her co-claimants. The parties agreed to canvass the four motions way of written submissions followed by oral highlighting.

22. On behalf of the Developer, it submitted that the said applicant had demonstrated a prima facie case with a probability of success. Reliance was placed on among other, the case of **Giella vs Cassman Brown & Co. Ltd. (1973) EA.358** as to the requirements to be met before the grant of an interlocutory injunction. Counsel contended that the Bank failed to disburse the entire facility, thus frustrating the

completion of the development project which in turn occasioned reluctance from potential purchasers. That this constituted a material breach of the terms of the loan agreement. It was therefore argued that the Bank should not be allowed to derive advantage from its own default. Reliance was placed on the case of **Mea Limited v Echuka Farm Limited & 2 others(2007) eKLR** where the court held that a party cannot be allowed to circumvent his own part of the contract while at the same time seeking to obtain and sustain benefits under the same contract.

23. Also cited was the case of **Surya Holdings Limited & 4 others v ICICI Bank Limited & another (2015) eKLR** for the proposition that the bank's failure to disburse the entire loan amount in contravention of the loan agreement is a ground for the issuance of an injunction to stop its exercise of the power of sale. Counsel further contended that the Bank was guilty of manipulating the Developer's statements of accounts by lumping illegal and non-contractual interest without notice , hence the default by the Developer. The Developer called to its aid the provisions of Section 84 of the Land Act. It was further stated that the Bank did not discharge its duty of care under Section 97(1) of the Land Act as it had not obtained a proper valuation of the charged property in accordance with its statutory obligation to the Developer. The Developer cited case of **Kaniki Karisa Kaniki v Commercial Bank Limited & 2 others (2016) eKLR** where the court held that where a mortgage fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable at sale, the court will, as a general rule set aside the sale and restore to the borrower the equity of redemption.

24. Counsel submitted that the Developer stands to suffer irreparable damage which cannot be adequately compensated by way of damagesbecause of the unique nature of the charged property . In conclusion, it was submitted that the Plaintiff has established a prima facie case and that its application is merited and as such should be allowed.

25. On its part**, Gokul** submitted it had earned an equitable interest in the property on account of the contract and works undertaken and as such holds a contractor's lien over the suit property for the unpaid sum of Kshs. 69,000,000/=. In support of this argument Gokul relied on the South African case of **Fynbosland 435 CC v Torro Ya Africa (PTY) Ltd & others (1861/2011) (2011) Zanwhc 68 (15 December 2011).** Counsel contended that status quo should be maintained so conserve the substratum of the suit as no prejudice will be suffered by the Bank. He relied further on the case of **Joel Kipkurui Arap Koech v Alice Wambui Magandu & 3 others (2018) eKLR.** Finally, Gokul contended that it had incurred a lot of expenses and failure to grant the orders sought would occasion it huge losses; that the Bank cannot claim to be strangers to the role played by Gokul in improving the value of the subject matter and that the Bank ought not to be allowed to acquire an unjust enrichment.

26. The off-plan claimants in Commercial Case No. 6 OF 2019, submitted that the Bank did not issue them with the requisite statutory notices and that the sale agreements entered into between them and the Developer created an interest over the suit property in their favour , thus entitling them to the the statutory notices and in default, the Bank cannot exercise its statutory power of sale cannot. It was contended that the claimants have invested in the purchase of the apartments and therefore stand to suffer irreparable damage which cannot be compensated by damages. In this regard, they relied on the case of **Kimitei Rotich & 2 others v Board of Governors, Cheborwo Agricultural Training Centre & 4 others (2017) eKLR.** Lastly, it was contended that the balance of convenience tilted in their favour.

27. The off-plan claimants in Commercial Case No. 8 OF 2019 in their submissions emphasised their agreements with the Developer for the purchase of the units erected on the suit property, and asserted that they were *bona fide* purchasers for value without notice. Counsel quoted the decision of the Court of Appeal in **Arthi Highway Developers Limited v West End Butchery Limited & 6 others (2015)eKLR** on the doctrine of a *bonafide* purchaser for value without notice. The court was urged to find that the claimants having paid the full purchase price, acquired a purchaser's interest in the suit property.

28. Counsel contended that the Developer breached the agreements for sale and therefore the claimants are entitled to restitution of the full purchase price paid, interest plus damages. It was further submitted that the Bank did not serve upon the claimants the requisite statutory notice as persons with interest in the charged . The case of **Bamboo Holdings Limited vs National Bank of Kenya Limited (2019) eKLR** was relied upon in this regard. The Plaintiffs contend that the Bank was aware of their interests and as such ought to have served them with notices and that in any case, their interests rank higher than the Bank's in priority . They submitted that they have met the conditions for issuance of a temporary injunction as laid down in the case of **Giella vs Cassman Brown & Co. Limited (1973) EA 358** and that if the intended sale proceeds, they shall suffer irreparable damage ; that as held in the case of **Nyando Enterprises Limited v Barclays Bank of Kenya Limited (2018) eKLR** where there is breach of the law, an applicant ought not to be compelled to accept damages as recompense.

29. The Bank filed its written submissions on 23rd July, 2019, in respect of the four applications. Concerning the application filed by the Developer, Counsel urged the court to find that the Developer was issued with the requisite statutory notices. It was submitted that the injunction sought by the Developer was not based on any substantial grounds as it was in default and the Bank had the right to exercise its statutory power of sale. Citing the case of **Jopa Villas LLC v Overseas Private Investment Corporation & others (2009) eKLR** the Bank asserted that parties to contracts must face up to their legal obligations thereunder. In regard to the Developer's allegations that, it will suffer irreparable damage which cannot be compensated by an award of damages,if the sale proceeds, the Bank cited the case of **George Muritu Gathecha v Family Bank Limited (2017) eKLR** where the court stated that the borrower who voluntarily offered his property as security for a loan facility knew that in the event of default, the suit property might be sold to recover the loan. The court was urged to find that the balance of convenience tilts in favour of the Bank in light of the Developer's default.

30. In respect of the motion by Gokul, Bank submitted that it is not a party to the agreement between the said party and Developer and therefore cannot be bound by the terms of the said an agreement. It was submitted that the charge herein was executed between the Bank and Developer, Gokul not being a party thereto. On the question of privity of contract, Counsel cited the case of **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another (2016) e KLR** where it was stated that a contract cannot confer rights or obligations upon strangers to it. He contended that the Bank was a secured creditor and is wrongly enjoined in this suit. That the builder's remedy lay with the Developer.

31. In regard to the two applications by the off-plan claimants the Bank submitted that it did not execute the sale agreements produced by the claimants and therefore cannot be bound by the same. It was also contended that the Developer had never informed the Bank of the alleged sale of units to the alleged purchasers, and that in any case, the purchasers knew of the existence of the charge and should seek redress against the Developer. The Bank urged the court to dismiss all the four applications as they are unmerited.

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

33. The Court expressed itself as follows:

> **"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:**
>
> **In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:**
>
> **a) establish his case only at a *prima facie* level**
>
> **b) demonstrated irreparable injury if a temporary injunction is not granted.**
>
> **c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."**

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

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

> "**Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for** *"prima facie case"* **in civil cases in the following words**:
>
> ***"In civil cases, a*** *prima facie* ***case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."***
>
> **We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title, it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed." (**emphasis added)

36. The Developer's key complaints were that the Bank breached the charge instrument term to pay out the entire loan sum of KShs.180 million, to the Developer, in addition to its alleged manipulation of the Developer's loan account through alleged lumping of illegal and non-contractual interest. Hence, causing delays in the completion of the project and default on the part of the Developer, and further that, the Bank now proposes to sell the charged property at gross undervaluation.

37. With regard to the first complaint, the director of the Developer, **Mbiyu Koinange** deposed in his affidavit that the loan facility offered in 2015 was KShs.180, million. He deposed further that:

> **"6. THAT on or about 15th September, 2017 the Defendant (Bank) issued the Plaintiff with a further supplementary letter of offer for the loan facility indicating that the Defendant (Bank) had disbursed the sum of 141,782, 450.10 and further amended the period of repayment period and provided for additional conditions among them being:-**
>
> **i) Extracts of minutes from the Borrower containing the Board Resolution to restructure the loan facility.**
>
> **ii) The external works costing KShs.12,000,000/= shall be funded by the Bank,**
>
> **7. THAT I am aware that the Plaintiff complied with the terms of the additional letter of offer dated 15th September, 2017 and more particularly the additional condition… requiring ….. extracts of minutes containing the Board Resolution to restricture the facility wherein the Defendant agreed to restructure the outstanding loan facility by freezing the loan and**

keeping the amount payable at the sum of KShs.150,000,000/=.

8. THAT I am further aware that the Defendant failed to meet its end of the bargain by failing to disburse to the Plaintiff the sum of KShs12,000,000/= as per the additional conditions wherein it provided that the Defendant SHALL fund the external works of the project costing KShs.12,000,000/=.

9. THAT the failure by the Defendant to dispatch the balance of the loan facility of KShs. 18,217,550/= and additional Kshs. 12,000,000/= …… adversely affected the contractor's progress on construction and further led to a delay in payment of deposits by potential buyers for apartments which deposits would have gone towards servicing the loan."

38. Implied in these statements is an admission to default, which the Developer has not expressly denied before the court. Also implied is the request for restructuring of the loan by the Developer. Both these facts are reiterated in the Bank's replying affidavit. According to the said replying affidavit, the Developer had requested that the repayment period be extended, hence the two supplemental letters. A full reading of the letter of 15th September 2017 indicates that the Developer was required to continue making payments towards the outstanding loan at the rate of 2,100,000/= pm in the extended period and to clear all outstanding arears.

39. The Developer by his affidavit is silent on its obligations above, merely highlighting the term therein containing the Bank's acceptance to advance a further KShs.12 million in tranches. The Developer did not supply any evidence to contradict the various assertions in the replying affidavit concerning its alleged persistent default in repayment of sums admittedly advanced.

40. Similarly, the Developer highlights the alleged freezing of the loan at KShs.150M. *vide* the letter of the Bank dated 16th October 2018 annexed to the Developer's affidavit. The said Bank's letter appears to respond to the Developer's request contained in the letter annexed to the Replying affidavit and dated 26th September 2018 as annexure "**CW7"** . By this letter , the Developer is requesting *inter alia* that the Bank considers accepting :

"A final loan settlement amount of KShs.130,000,000/= to make it possible for the deal (with potential buyer of project to come through … Willow Park Limited has already repaid KShs.42,672,602 (principle plus interest) and therefore, the proposed settlement will bring total repayment to Kshs.172,673,602. If you compare this with the total loan disbursement of KShs.155,195,315, the Bank will not be making any loss by accepting our proposal."

41. The Developer raises no complaint therein that the Bank had failed to disburse the total loan sum. It appears that this complaint was first raised before this court. Secondly, the Developer was admitting default, one year since the extension of the repayment period *vide* the letter of 15th September 2017.

42. The Bank's letter of 16th October 2018 to the Developer is seemingly a culmination of deliberations , further to the above request by the Developer, to settle the debt at KShs.130M. By this letter the Bank stated inter alia that:

"….we confirm that the Bank is willing to accept a final loan settlement of KShs.150,000/= payable in full within 60 days from the date of this correspondence….

For the avoidance of doubt, kindly note that this concession is without prejudice to the on-going recovery action over the charged property. Should the settlement amount not be repaid within the stipulated time-frame the Bank shall proceed with the recovery of this facility."

43. Ongoing recovery process referred to the statutory notice earlier served on the Developer in July,2018 respect of a total outstanding sum of KShs.KShs. 186,265.618.24. There is no evidence that the Developer complied with the requirements to clear arrears or settle the sum of KShs.150M as contained in the two supplemental offers the Developer now keenly emphasises. Having been apparently in admitted default, the Developer could not reasonably expect the Bank to continue advancing more money, especially when it failed to meet the conditions in the supplemental letters and especially, the latest offer letter for a lumpsum settlement of KShs.150M.

44. Moreover, despite the clear terms and caveat in the Bank's letter of 16.10.18, the Director of the Developer proceeds to depose at paragraph 12 of his affidavit that:

"THAT in blatant disregard of the agreement to restructure the outstanding loan by freezing the loan and keeping the amount payable at the sum of KShs.150,000,000/=, and despite being in breach of the terms of the agreement by failing to dispatch the balance of loan amounts, the Defendants (Bank) reneged on its promise and or undertaking and instead rebuffed to withdraw the 90 days' statutory notice dated 23rd July, 2018 which was issued prior to the restructure of the loan and purporting to issue a 45 days' notice to sell, dated 12th April 2019 pursuant to the said 90 days' notice and demanded payment of KShs.207,784,376.03 contrary to the agreement entered between parties." (sic) (emphasis added)

45. It is apparent that the Developer was in arrears and had not kept its part of the bargain as per the terms of the charge instrument, supplemental or settlement letters. I tend to agree therefore with the Bank's assertion that, the claim apparently raised for the first time in these proceedings, to the effect that the Bank failed to disburse the full loan sum , seems to be an afterthought intended to camouflage the Developer's default in repaying the monies already advanced. Therefore, the facts of this case are clearly distinguishable from those in **Surya's case** which the Developer has sought to rely on.

46. In that case, the Plaintiff/Applicant had repaid the first term loan to the lender and the court found that there was no clause in the contract entitling the lender to withhold any of the loan monies. In the instant case, under clause 2B of the recitals in the initial charge

document (annexure "**CW1"** to Replying affidavit) the Bank was to grant the loan facility **"from time to time to an aggregate maximum principal amount (exclusive of interest and other charges…) of up to Kenya Shillings One Hundred and Eighty Million… (hereinafter referred to as the maximum Principal Amount) <u>or such lower limit as may for the time being and from time to time be fixed by the Bank."</u>**

A similar term is included in the Replacement charge dated 24th November 2014 (part of annexure **"CW1 "** to the Replying affidavit).

47. As regards the complaint that the Bank had unilaterally raised the contractual interest without notice to the Developer, this was not raised in the supporting affidavit or grounds in support of the motion. And as to the question whether the sum payable was to be "frozen" at KShs.150 million, there was on the face of it no such agreement as the offer to settle lapsed due to non-payment of agrred sums by the Developer. In any event, it is trite that a borrower in default cannot be allowed to use their disputation of the actual sum payable to deflect the chargee's power of sale which has properly arisen. See **Labelle International Ltd and Another v Fidelity Commercial Bank and Another [2003] 2EA 541 and Orion East Africa LLtd v EcoBank Kenya Ltd and Another [2015] e KLR.**

48. Through the supporting affidavit and submissions, the Developer also complains that the Bank has not discharged its duty of care to the Developer as required under Section 97(1) of the Land Act to obtain the best price reasonably obtainable at the time of sale. Comparing the valuation report in respect of the charged property dated March 2016 and the valuation conducted by the Bank in 2018, the Developer asserts that the latter represents a gross under valuation of the property.

49. The court has looked at the two valuation reports. The valuation report dated 29th March 2016 by **Liaison Valuers Ltd** is annexed to the Developer's affidavit as annexure **"MK 9".** The report indicated the following values :

<u>Current values</u>

Market value

KShs.345,500,00/= broken down as follows:

i) The plot (1.248 Ha) - KShs.90,000,000/=

ii) Improvements - KShs.255,500,000/=

Total - KShs.345,500,000/=

Mortgage Value – KShs.293,675,000/=

Replacement value (Insurable Interest) - KShs.210,000,000/=

Forced Sale Value - KShs.259,125,000/=

Estimated cost of materials on site – KShs.2000,000/=

iii) **<u>Projected values on completion of construction works of Phase 1A</u>**

Market value – KShs.430,500,000/= broken down as follows:

i) The plot - KShs.90,000,000/=

ii) Improvements - KSh.340,500,000/=

Total - KShs.430,500,000/=

Mortgage value – KShs.365,925,000/=

Replacement value (Insurable Interest) – KSh.265,000,000/=

Forced sale value - KShs.322,875,000/=

Estimate capital cost for the future works - KShs.340,500,000

50. The second valuation report is dated 20th December 2018 and is by **Accurate valuers Ltd** [annexure "**CW 10"** to the Bank's Replying affidavit]. The conclusion of the report contains the following values:

a) Values at current stage

Current open market value – KShs.290,000,000/= broken down as follows:

i) Land (1.248 Ha) KShs.90 million

ii) Improvements – KShs.2000,000,000/=

Total KShs. - KShs.290,000,000/=

Mortgage value - KShs.230,000,000/=

Forced Sale value - KShs.217,500,000/=

Insurance Value KShs. - KShs.200,000,000

Projected Values Upon Completion:

Open market value - KShs.360,000,000 broken down as follows :

i) Land (1.248 ha) - KShs.90,000,000/=

ii) Improvements - KShs.270,000,000/=

Total - Kshs.360,000,000/=

Mortgage value - KShs.290,000,000/=

Forced Sale Value - KShs.270,000,000/=

Insurance value - KShs.270,000,000/=

51. There is an apparent difference of KShs.55 million odd between the market value in 2016 and in 2018. Between the estimated forced sale value in 2016 and that in 2018, is a difference of about KShs. 42 million. Of course, it is not practical to expect different valuers conducting property valuation at different times to come up with exactly similar estimates, but evidently, the 2018 valuation appears somewhat conservative, the valuer stating that the valuation took into account inter alia, the economic circumstances in 2018, just as the initial report factored in the prevailing economic circumstances obtaining in 2016. The Developer has not commissioned any further valuation for comparison with the 2018 valuation.

52. The duty of the Bank under Section 97(2) of the Land Act was to ensure that a valuation was undertaken by a professional valuer prior to sale, in order to obtain the best price reasonably obtainable at the time of sale. The differences in value in this case between 2016 and 2018, without more, cannot be *prima facie* evidence of breach of the Bank's duty of care. The Applicant was obligated to establish, prima facie, that the Bank has failed to discharge its duty of care under Section 97(1) of the Land Act, by demonstrating that the impugned second forced sale valuation represents a gross under valuation of the charged property.

53. In **Zum Zum Investment Ltd v Habib Bank Limited [2014] e KLR Kasango J** where the Applicant had proffered a counter-valuation report against the lender's report Kasango J observed that:

> **"It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on (in auctioning the charged property) does not give the best price obtainable at the material time … The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale."**

54. In this instance, not even a counter-valuation report is proffered by the Developer in an attempt to prove the alleged undervaluation.As observed by the Court of Appeal in the case of **Nguruman Limited :**

> **"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."**

55. In **Orion East Africa Ltd v Eco Bank Kenya Ltd and Another [2015] e KLR** the Court of Appeal set out the circumstances in which a mortgage may be restrained from exercising its statutory power of sale. The court stated:

"The circumstances in which a mortgage may be retrained from exercising its statutory power of sale are set out in Halsbury's Laws of England, volume 32 (4th Edition) paragraph 725 as follows:

"725. When mortgage may be restrained from exercising statutory power of 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 began 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 mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

56. Consequently, the Court of Appeal upheld the decision of the trial judge that a prima facie case had not been established despite the disputed value of the mortgaged asset , and the Court further upheld the direction made at trial that notwithstanding, the mortgagee re-issue a statutory notice and re-value the suit properties to determine the forced sale value before exercising its statutory power of sale.

57. As stated in **Mrao's** case, a prima facie case is more than an arguable case. It is a case where evidence shows an infringement of a right and probability of success at the trial. The court is not persuaded in this case that the Developer has made out such a case at this stage. Nor is there any persuasive prima facie evidence that the Developer will suffer irreparable loss due to the uniqueness of the charged property. The property was offered as security for a loan which has been disbursed in terms of the charge , and has not been repaid, the Developer being in default for some time now. In the circumstances, the possibility of the alienation of the charged property in the event of default was anticipated by the Developer from the onset.

58. The value of the suit property is quantifiable and there is no evidence that the Bank is incapable of paying damages, should the suit resolve in the Developer's favour. As at 11th January, 2019 the outstanding debt stood at KShs.200,756,520.00/=. The debt may well grow to outstrip the value of the charged property. The balance of convenience tilts in favour of the Bank. In view of all the foregoing, the court finds no merit in the Bank's application filed on 16th May 2019 and will dismiss it with costs.

59. I propose to next deal with the three respective applications by all the off-plan claimants and by **Gokul** together. The same principles discussed in respect of the Developer's motion also apply to these latter applications. In the **Orion East Africa** case the Court of Appeal stated that:

"In an application for an interlocutory injunction it is good practice for the trial court to look at the whole case, not only to strength of the Applicant but also to the strength of the defence advanced by the Respondent, then make an appropriate order. In Hubbard v Vosper [1972] I ALL ER, 1023 at page 1029 Lord Denning MR, in setting aside an interlocutory injunction granted by a trial court stated:

"We are told that practitioners have been treating these cases as deciding that, if the Plaintiff has an arguable case, an injunction should be granted so that the status quo may be maintained. The judge was so told in the present case, and that is why he granted the injunction.

I would like to say at once that I cannot accept the proposition stated in those two cases. In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the *status quo* until the trial. At other times it is best not to impose a restraint on the Defendant but leave him free to go ahead."

60. In so far as the off-plan claimants and **Gokul** rely on contracts between them and the Developer, their case may only be as weak or strong as that of the Developer's against the Bank. The Bank contracted with the Developer in connection with the loan facility in the maximum sum of Kshs. 180million and a legal charge was executed and registered in August 2015. There is no dispute that all the off-plan claimants executed executory agreements in anticipation of the Developer completing the development. Although no legal title had passed to them, the off-plan claimants assert to have acquired proprietary or purchaser's interest in respective alleged units , and therefore entitled to be served with statutory notices by the Bank. Further that, they are innocent purchasers for value.

61. The court has reviewed the executory agreements, the affidavits and submissions in this regard. While it may be true that some of these alleged purchasers, especially those in **Commercial Case No.6 of 2019** may have paid substantial sums to the Developer as consideration for the promise by the said Developer to build the reserved units, the court is not satisfied, *prima facie* in the circumstances of this case , that these parties could properly make a claim that they have acquired an interest in the units promised that is superior to that of the Bank, or a right entitling them to a statutory notice under Section 96(3) of the Land Act.

62. First of all, none of their alleged interests in the land were apparently registered, not even by way of caveats or caution. Despite the Bank's challenge contained in its Replying affidavit, to tender such evidence, the off -plan claimants furnished no such evidence. There being no evidence of registration of their interests as proposed purchasers under the Land Act or the Land Registration Act against the suit property so as to give notice to the chargee, it is not clear how the Bank was made aware of these. It matters not that the Bank and Developer had in the material period retained the services of the same firm of advocates. It matters not that these claimants may have entered into executory contracts with the Developer prior to 2015 when the charge instrument was executed. As such, prima facie the court cannot see how their asserted equitable or purchaser's rights could override the legal rights of a secured creditor.

63. Indeed, it seems that at no time during the period of their engagement with the Developer did these parties conduct a search on the suit property to confirm the status of the property. Yet they allegedly continued to make payments to the Developer. In the circumstances, it is difficult to accept their assertion, firstly to entitlement to notice under Section 96 (3) of the Land Act, and secondly to being innocent

purchasers for value.

64. Section 96(3)(i) of the Land Act requires a chargee to serve notice on any other person known to have *a right to enter on and use the land or the natural resources in, on, or under the charged land,* by affixing a notice at the property. The off-plan claimants have not brought themselves within this category or any other category of persons who are entitled to be served with the statutory notice under Section 96(3) of the Land Act. In the circumstances, I am unable to accept the bold submission by counsel that the Bank had a binding legal obligation to serve upon the off-plan claimants in Commercial Case No.6 of 2019 with such notice as contemplated in Section 96(3) of the Land Act.

65. In my humble view, the *prima facie* evidence availed suggests at best that the off-plan claimants could possibly only assert an equitable interest in the units they claim to have purchased. Such equitable interest could not rank *pari passu* with the legal interest acquired by the Bank under the charge instrument, let alone override it. See **Arthi Highway Developers Ltd v West End Butchery Ltd and 6 Others [2015] e KLR.**

66. The foregoing observations apply equally to the off-plan claimants in Commercial Case No. 8 of 2018. The agreements attached to their affidavit in support of the application uncannily bear similar alterations in so far as the year of execution is concerned. With the result that one cannot tell the actual year when these were executed. I note that despite asserting that he had authority to plead on behalf of his co-claimants ,**Gideon Ngaruiya** the first Applicant, did not attach the relevant authority to plead on their behalf. Whether executed in 2016, 2017 or 2018, these agreements were made after the charge herein had been registered. There is no evidence that any of these parties carried out official searches in respect of the suit property even as they allege to have made full payment of the purchase price subsequent to their respective executory agreements. How can they assert to be innocent purchasers for value in such circumstances?

67. Interestingly, one of the claimants in Commercial Case No. 8 of 2019 is **Jaine Kariuki** , who on the face of it is one of the guarantors to the loan advanced to the Developer and cannot feign ignorance to the existence of the charge instrument. The inclusion of this claimant among the off-plan claimants, and the fact that the Developer eschewed the opportunity to respond to any of the applications by the off-plan claimants and by **Gokul** may have fueled the suspicion expressed by the Bank that these claimants were acting as proxies for the Developer, with the aim of frustrating the realization of security.

68. With regard to the claimants in Commercial Case No. 8 of 2019, they called to their aid the provisions of Section 96(3)e and (i) of the Land Act in asserting their right to service of statutory notice. Subsection 3(e) and (i) relate to lessees and sublessees of charged land or any person known to have a right to enter on and use the land or natural resources on the charged land. The claimants' agreements exhibited before the court gave them no right as would fall under these definitions.

69. They have correctly confirmed that theirs were executory agreements based on the Developer's promise to develop the units they desired to purchase and for which they allegedly gave some valuable consideration. *Prima facie*, the off-plan claimants may have a valid claim for breach of contract against the Developer, but in the circumstances of this case, they cannot impose the terms of their agreements with the Developer on the Bank, which is a third party.

70. The exact nature of their interest in the suit property will be determined fully in a full trial. At this stage however, the court has not found any basis upon which the alleged claimed rights can deflect the statutory right of sale which has arisen in the Bank's favour. In short, no prima facie case made out by the off- plan claimants in the two respective cases.

71. All the off-plan claimants assert to have paid certain monies to the Developer pursuant to their agreements. Any losses arising from the alleged breach can be compensated through damages. Thus, in as much as the court is sympathetic especially with the applicants in Commercial Case no. 6 of 2019, there is no likelihood that any injury they may suffer as a result of the suit property being sold will be irreparable. I find no merit in the applications filed on 11th and 14th June 2019 respectively and would dismiss them .

72. Moving on to the application by **Gokul**, premised on a builder's lien, it seems to me that whereas such lien, may be enforceable in appropriate cases, Gokul's claim against the Bank in this case is tenuous at best. Indeed, there is apparently no cause of action pleaded or demonstrated against the Bank. Nor any attempt made to demonstrate what right due to Gokul has apparently been infringed by the Bank in exercising its statutory power of sale.

73. The true relationship between the Developer and **Gokul** will require investigation through a full hearing. It seems that the initial contract between the parties was cancelled, and subsequently the parties agreed on a payment in-kind for works allegedly carried out on the suit property by **Gokul** , which agreement **Gokul** allegedly later unilaterally resiled from. By the said agreement **Gokul** would have received 12 units on the suit property in lieu of payment.

74. The alleged debt owed to **Gokul** by the Developer stands at over Kshs. 69 million under the initial contract. Under the contract, any disputes between the parties were to be referred to arbitration. Suffice to say that, the Bank was not a party to any of the alleged agreements between **Gokul** and the Developer, and **Gokul** has not demonstrated any existing right or interest that has been infringed by the Bank in its exercise of the statutory right in respect of the charge between it and the Developer.

75. In **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates and another [2016] eKLR** the 2nd Respondent, Nairobi Water and Sewerage Company Ltd. contested the application of the terms of an agreement made between the 1st Respondent and the Appellant to itself, arguing *inter alia* that there was no privity of contract on its part. In its decision, the Court of Appeal stated inter alia that:

> "32……..**The 2nd respondent contends that none of the agreements or contracts created an assignment and or novation against the 2nd respondent and that since incorporation, it did not at any time agree, undertake or represent in any manner whatsoever that it would take up the appellant's obligations and liabilities.**

33. In this regard Halsbury's Laws of England, 4th Edn. Vol. 9 (1) Para. 748 states:

> ***"The general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits; contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuations."***

34.We are further guided by the case of *AGRICULTURAL FINANCE CORPORATION V LENGETIA*, *1982-88 I KAR 772* which stated:

> ***"As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."***

76. It is true of the off - plan claimants as it is for **Gokul** that the contracts entered into between them and the Developer appear to be confined to these parties, and prima facie, any rights or obligations arising therefore could not in the circumstances of this case be transposed upon the Bank. The certainty of financial transactions between banks and borrowers would be severely compromised if any and every kind of third party or debtor, who transacted with the borrower howsoever, were allowed to defeat the chargee's statutory rights, especially in the realization of a security in the event of default by the borrower. For all these reasons I have found no merit in the application by **Gokul**. It is equally for dismissal.

77. In the result, all the applications for interlocutory injunction against the Bank have failed. However, in order to ensure that the best reasonably available price is obtained from any intended auction by the Bank , and in view of the disparity between the two valuation reports on record, the court directs that the Bank does procure a professional valuer other than **Accurate Valuers Limited** and **Liaison Valuers Ltd.** to undertake a fresh valuation of the charged property before proceeding with the public auction of the charged property. All costs are awarded to the Bank.

78. For the avoidance of doubt, the part of the prayers by **Gokul** and the off- plan claimants to restrain the Developer or to conserve the suit property, pending the suit , cannot issue as that would serve no useful purpose for the claimants in the present circumstances , while indeed, if granted such prayers might portend the clogging of the Bank's exercise of its statutory power of sale against the Developer. The prayer seeking to stay Commercial Case No. 4 pending determination of Commercial Case No. 6 of 2019, which was made in in the latter case has been overtaken by events as all the suits have already been consolidated.

DELIVERED AND SIGNED AT KIAMBU ON THIS 20th DAY OF DECEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

Miss Mwangi for Willow Park Ltd

Mr Mugisha for Jamii Bora Bank

Miss Wambua holding brief for Mr Thangei for the Applicants in Commercial Case No.6 of 2019

Mr Odongo for Gokul Builders Ltd. And holding brief for Mr. Marete for the Applicants in Commercial Case No. 6 of 2019

Court assistant: Nancy Mburu