**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 100 OF 2017**

**FRED FAIRMAX MUTALI MUTSAMI & LILIAN KAGWIRIA**

**MUTSAMI T/A SPIRAL SAFARIS............................PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK LIMITED…................DEFENDANT**

**RULING**

**[1]** The Notice of Motion dated **10 March 2017** was filed herein under Certificate of Urgency by the Plaintiff pursuant to the provisions of **Sections 3** and **3A** of the **Civil Procedure Act**, **Chapter 21 of the Laws of Kenya, Order 40 Rules 1** and **Order 51 Rule 1** of the **Civil Procedure Rules** and all enabling provisions of the law. It seeks orders that:

> **[a]** Spent
>
> **[b]** Spent
>
> **[c]** An injunction be issued restraining the Defendant, its agents, servants or anyone claiming under them or on its behalf from selling, disposing of, by way of auction and in any manner whatsoever Land Reference No. LR. S/KABRAS/CHEMUCHE/1261,S/KABRAS/BUSHU/2978 and KJD/KAPUTIEI-NORTH/40257 (hereinafter the Suit Property) pending the hearing and determination of this suit.

**[2]** The application was premised on the grounds that the Defendant has fraudulently instructed auctioneers to auction the Plaintiffs' land at **Kshs. 29,630,845.92** while the loan balance was yet to be fully determined, and without taking into account previous payments made by the Plaintiffs towards settling the loan balance. It was further contended that the Defendant had loaded the Plaintiffs' loan account with unknown arrears and interest, thereby increasing the account by astronomical figures; and that unless restrained, the Defendant was likely to sell the Suit Property before these issues are inquired into by the Court, to the Plaintiff's prejudice.

**[3]** The application was supported by the affidavit of **Lilian Kagwiria Mutsami,** annexed thereto, sworn on **10 March 2017**, in which it was averred that the Defendant agreed to advance a loan to the two Plaintiffs, trading as **Spiral Safaris,** which the Plaintiffs have been servicing for some years now; and that whereas the Defendant had instructed auctioneers to sell the charged property, no current valuation was done in respect of the Suit Property. Valuation Reports were annexed to the Supporting Affidavit to demonstrate that the value of the charged property has since appreciated; and that to proceed with the proposed sale would be to sanction a fraudulent process whose purpose is to impoverish the Plaintiff.

**[4]** It was further averred on behalf of the Plaintiffs that they were never served with any Statutory Notice; and that much of the arrears accrued due to reasons beyond their control, including failure by their debtors to service their obligations. The Plaintiffs therefore asked for an opportunity to regularize their account with the Defendant.

**[5]** The application was opposed by the Defendant and an affidavit in reply filed herein on **15 May 2017**, sworn by the Defendant's Debt Recovery Officer, **Lwanga Mwangi**. He confirmed that, at the Plaintiffs' instance and/or request, the Defendant extended a banking facility to the Plaintiffs in the aggregate sum of **Kshs. 25,000,000/=.** The Letter of Offer dated **21 October 2014** was exhibited as **Annexure "LM1"** to the Replying Affidavit. It was further confirmed by **Mr. Mwangi** that the facility was secured by a Legal Charge dated **11 February 2015** over the Suit Properties; and that in breach of the express terms of the loan facility, the Plaintiff defaulted in making punctual payments as and when they fell due thereby accruing an amount of **Kshs. 4,432,111.67** in arrears as at **25 May 2016**. Consequently, the Defendant, in accordance with the provisions of **Section 90** of the **Land Act, 2012**, issued a Statutory Notice to the Plaintiff's dated **25 May 2016**, which

was followed by the Notice to Sell under **Section 96(2)** of the **Land Act.** Copies of the said notices were annexed to the Replying Affidavit as **Annexure "LM3"** and **Annexure "LM4",** and it was the averment of the Defendant that the notices were duly served and acknowledged by the Plaintiffs vide their letter dated **23 October 2016** (marked **Annexure "LM5");** and that the Plaintiffs even promised to settle the arrears by **10 December 2016**, but did not keep that promise.

**[6]** It was thus the averment of **Mr. Mwangi** that after the expiry of the period specified in the Notice to Sell, the Defendant instructed **Dalali Traders Auctioneers** to serve the Redemption Notice and proceed to dispose of the Suit Property by public auction as by law required. It was averred that the Redemption Notice dated **12 January 2017** having been accordingly issued and served by the Auctioneers as per **Annexure "LM6"**, it was evident that the Plaintiffs were served with all the requisite notices and that the Bank's right to exercise its Statutory Power of Sale had crystallized. It was further pointed out that as at **12 April 2017,** the outstanding amount had risen to **Kshs. 37,936,451.91;** and that it was neither in the Plaintiffs' interest nor the Defendant's for the payment to be delayed any further.

**[7]** The Plaintiffs filed a Further Affidavit in response to the Defendant's averments in the Replying Affidavit. In the Further Affidavit, sworn by **Lilian Kagwiria Mutsami** on **22 May 2017,** it was averred that the Defendant had not addressed the issue of valuation of the Suit Property. Annexed as **Annexure "LMK1"** to the Further Affidavit, was a current Valuation Report of the Suit Property. The Plaintiffs reiterated that while they admit their indebtedness to the Defendant, no amount of damages would be adequate compensation if the Defendants were to sell the Suit Properties at an undervalue on the basis of an unverified loan amount, unjustified interest and bank charges.

**[8]** The application was canvassed by way of written submissions, which were highlighted on **8 December 2017**. Having given due consideration to the application, the affidavits filed herein in respect thereof as well as the written and oral submissions made by Learned Counsel in the light of the parties' pleadings, there is no doubt that the Defendant extended a banking facility to the Plaintiffs at their request, aggregating to **Kshs. 25,000,000/=.** There is no dispute that the said facility was secured by a Legal Charge over the three parcels of land, namely Land Reference No. **LR. S/KABRAS/CHEMUCHE/1261, S/KABRAS/BUSHU/2978 AND KJD/KAPUTIEI-NORTH/40257** that comprise "the Suit Property" for purposes of this Ruling. Further, the Plaintiffs have not disputed the fact that it was on account of their default in servicing the loan that the Defendant commenced the process of realizing its Statutory Power of Sale. Indeed at paragraphs 9, 10, 11 and 12 of the Supporting Affidavit, the Plaintiffs admitted that due to economic slump it was not possible for them to make the loan repayments as required.

**[9]** In its Replying Affidavit, the Defendant demonstrated that, as at **25 May 2016** when the three months' Statutory Notice to remedy default was given pursuant to **Section 90** of the **Land Act** vide the letter of even date exhibited as **Annexure LM3** to the Replying Affidavit, the Defendant's Statutory Power of Sale had crystallized, for **Section 90(1)** of the **Land Act** envisages that:

> **"If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."**

**[10]** According to the Defendant, the Plaintiffs failed to adhere to the said notice, and accordingly, it proceeded to issue or cause to be issued the 40 day Notice to Sell pursuant to **Section 96** of the **Land Act** and the Redemption Notice under **Rule 15** of the **Auctioneers Rules** before the Suit Property was advertised for sale. The Plaintiffs, on the other hand contend that **no notices were issued** and that **no current valuation** was obtained by the Defendant and/or its agents as required by **Section 97** of the **Land Act,** before the Suit Property was advertised for sale. Accordingly, and as laid down in **<u>Giella vs. Cassman Brown & Co. Ltd [1973] EA 358</u>**, the basic issues for my determination are whether the Plaintiffs have made out a *prima facie* case with probability of success; whether they have demonstrated that they stand to suffer irreparable harm unless the orders sought are issued; and finally where the balance of convenience tilts.

**[11]** One of the leading authorities on what amounts to a prima facie case is **<u>Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125</u>**, in which **Bosire, JA** proffered the following definition:

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

**[12]** Guided by the above principles, I have given due attention to the Plaintiffs' case including the submissions made herein on their behalf. The main issues raised thereby are:

**[a]** That they were not served with the requisite Statutory Notices;

**[b]** That no current valuation was undertaken by the Defendant as required by **Section 97** of the **Land Act**;

**[c]** That there is a dispute over the amount owing.

**[13]** And in considering these issues, I have taken caution from the expressions of the Court of Appeal in ***<u>Nguruman Limited V. Jan Bonde Nielsen & 2 Others</u>*** ***(supra)*** *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."**

**On Whether the Plaintiffs were served with the requisite Statutory Notices:**

**[14]** It was the contention of the Plaintiffs, at paragraph 16 of the Supporting Affidavit, that the Defendant did not serve them with the requisite Statutory Notices before the Suit Property was advertised for sale. However this contention was refuted by the Defendant by annexing to its Replying Affidavit copies of the Statutory Notices served by it in accordance with the requirements of **Sections 90** and **96** of the **Land Act.** The first notice is the one dated **25 May 2016**, marked **Annexure LM3**. It shows that it was addressed to the Plaintiffs and that it was sent by registered post and certificate of posting to their postal address in **Nakuru**. There is no dispute that the said notice otherwise complies with the requirements of **Section 90(3)** of the **Land Act.**

**[15]** The Defendant's **Annexure LM4** further confirms that the Defendant did issue and serve the Statutory Notice required by **Section 96(2)** of the **Land Act** vide its letter dated **27 September 2016**. The Notice, apart from making reference to the earlier 90 day notice, was explicit that:

**"...after the expiry of forty (40) days from the date of service of this notice we shall proceed to exercise any of the remedies referred to under Section 90(3) of the Land Act and provided for in the Charge, so as to recover the entire outstanding amount owed to us plus interest which continues to accrue thereon at the rate provided in the Charge until the amount is received in full..."**

**[16]** It was the Defendant's uncontroverted evidence that the notice was similarly sent to the Plaintiffs by Registered Post and under Certificate of Posting to the same **Nakuru** address as well as via email; and that receipt was duly acknowledged by the Plaintiffs vide their letter dated **23 October 2016** (marked **Annexure LM5** to the Replying Affidavit). That letter reads as follows in part:

**"We refer to your letter/notice No. DRU/Retail/Spiral Safaris/NS/16 dated 27th September, 2016 regarding the above subject matter.**

**We sincerely apologize for this unfortunate scenario. It was and has never been our intention to default in loan repayment. It is our unequivocal contractual obligation.**

**However, as we had pleaded before, we are determined against all odds to repay these arrears and thereafter regularize the initial loan repayment regime...in the interim, we have for the last three weeks been at the Coast endeavouring to dispose some of our beach properties (land), so that we kick start actualization of our pledge, cognizant that processes of property disposal can be extremely tedious.**

**It is in the light of the foregoing that we besiege [perhaps beseech] you to defer the contemplated action against us until 10th December 2016 within which period we shall have fulfilled our promise..."**

**[17]** From the foregoing response, there can be no doubt that the Plaintiffs were duly served with the Statutory Notices contemplated under **Sections 90** and **96** of the **Land Act**; and any attempt to argue, as did the Plaintiffs Counsel, that they had changed their address would be completely untenable in the circumstances. In any case, there was no tangible proof of any such change of address for the Court to determine its effective date vis-a-vis the date of the two notices. Moreover, it is now trite that it suffices for a Chargee to show that the notices were posted to the Chargor's last known address. In **Nyagilo Ochieng & Another vs. Phanuel B. Ochieng & 2 Others [1996] eKLR,** the Court of Appeal pronounced itself on this point thus:

**Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.**

**[18] Section 3(5)** of the **Interpretation and General Provisions Act**, provides that:

**"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."**

There being no proof to the contrary by the Plaintiffs, service herein is deemed to have been made of the **Section 90** and **Section 96** Notices.

**[19]** As for the Redemption Notice, which was issued by **Dalali Traders Auctioneers** under **Rule 15** of the **Auctioneers Rules**, there appears to be no dispute that service thereof was effected on the Plaintiffs and that it was in response thereto that the Plaintiffs approached the Court for its intervention. Indeed copies of the Auctioneers' notice as well as the sale advert were annexed to the Plaintiffs' Supporting Affidavit and marked **Annexure "LMK1".** Clearly therefore, there is ample evidence that the Defendant complied with the requirements of the law and served the requisite Statutory Notices.

**[20]** Regarding the Plaintiff's argument that the Kajiado property is their matrimonial home, it is now trite that once a piece of property has

been charged, it becomes a commodity for sale notwithstanding any sentimental attachment thereto. Thus I fully endorse and adopt the words of **Ringera J.** (as he then was) in **Isaac Litali Vs. Ambrose W. Subai & 2 Others NBI HCCC No. 2092 OF 2000 (UR**) thus:

> **"...the Plaintiff has in his pleading and affidavit made a mountain out of the fact that he has developed the land in question into a home and its sale would therefore occasion pain and loss which cannot adequately be compensated in damages... I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful...For nothing is more clear in a contract of charge than that default in the payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form of security."**

**On Whether there was failure by the Defendant to comply with Section 97 of the Land Act**:

**[21] Section 97** of the **Land Act** provides as follows:

> **(1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**
>
> **(2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.**
>
> **(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-**
>
> > **(a) There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and**
> >
> > **(b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).**

**[22]** Not much turns on the contention by the Plaintiffs that the aforementioned provision was not complied with, granted that the property was indeed valued before sale and a forced sale value ascertained. It has not been alleged that the forced sale value is less than 25% of the market value. Hence it would be speculative for the Plaintiffs to argue that the intention of the Defendant is to dispose of the Suit Property at an undervalue. In any event, and as was conceded by Counsel for the Defendant, the auction of **22 March 2017** having been halted by the Court, the Bank will no doubt have to undertake a new valuation before exercising its right of sale.

**On the Dispute as to Accounts:**

**[23]** The Plaintiffs complaint, in the main, was that the Defendants were poised to sell the Suit Property at **Kshs. 29,630,845.92** yet the loan balance was yet to be ascertained on account of failure by the Defendant to supply them with copies of the Statements of Account. It was further their contention that not all the payments made by them had been taken into account. The Plaintiffs further challenged certain charges which had been loaded onto the account by the Defendant contending they are not only fraudulent, but also inexplicably astronomical. These allegations were, however, refuted by the Defendant whose contention was that the Plaintiffs had been supplied with the Statements of Account, copies of which were annexed to the Replying Affidavit as **Annexure "LM7".** Indeed, the Plaintiffs have annexed the Statements of Account to their Supporting Affidavit.

**[24]** As to whether the Defendant was entitled to charge interest, the Letter of Offer at **Clause 4** thereof recognizes that:

> **"Interest on the term loan I & II will be charged monthly in arrears at a fixed rate of 16% p.a. for a minimum period of twelve (12) months on reducing balance basis or on such other basis as may be determined by us from time to time. We reserve the right to vary the interest rate and/or the basis of computation thereof, upon notice, at our sole discretion.**
>
> **Interest shall accrue from day to day, will be calculated on the basis of the actual number of days elapsed in a 365-day year, will be debited to your account with us monthly in arrears and will be compounded in the event of not being punctually paid with monthly rests. The statement of the Bank as to the rate mode or amount of interest payable shall be in the absence of manifest error be conclusive."**

**[25]** Similarly the Charge Instrument is explicit at **Clause 2(a), (b) and (c)** that interest would be charged and that the Bank would be entitled (save for any limitation imposed by law) to charge interest from time to time at different rates for different facilities and to vary such rates. I did not hear the Plaintiffs to be saying that the variations were not done in accordance with the law. Hence, having thus covenanted, the Plaintiff cannot be heard to fault the Defendant for loading penalty interest and other charges on the loan account. Indeed, in **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112** the Court of Appeal expressed itself thus on the matter:

> **"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.**

**As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):**

**"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".**

**[26]** The Plaintiff, having conceded default was well aware that the entire facility would become due and payable on demand, inclusive of penalty charges. Moreover, it is now settled that a dispute over the amount owing or the rate of interest, *per se*, is not a valid ground for restraining a Chargee from exercising a crystallized power of sale. Hence, in **Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725** it is opined that:

**"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."**

**[27]** Similarly, in **Bharmal Kanji Shah And Another V Shah Depar Devji (Supra) it was observed that:**

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

**[28]** The foregoing being my view of the matter, I am not satisfied that a *prima facie* case has been made out herein by the Plaintiffs to warrant the issuance of the injunctive order sought. In the premises, there would be not need to consider the question as to whether the Plaintiff stands to suffer irreparable harm, or in whose favour the balance of convenience tilts. In ***Nguruman Limited V. Jan Bonde Nielsen & 2 Others*** ***(supra)*** *the Court of Appeal held that:*

*"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

**(a) establish his case only at a prima facie level,**

**(b) demonstrate irreparable injury if a temporary injunction is not granted, and**

**(c) allay any doubts as to (b) by showing that the balance *of convenience is in his favour.***

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

**[29]** In the premises, the Plaintiff's Notice of Motion dated **10 March 2017** fails and is hereby dismissed with costs.

*It is so ordered.*

**SIGNED, DATED AND DELIVERED AT NAIROBI 16TH DAY OF FEBRUARY, 2018**

**OLGA SEWE**

**JUDGE**