REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL SUIT NO. 13 OF 2018

EMPEUT RESORT LIMITED.....1ST PLAINTIFF/APPLICANT

RAPHAEL MAINKA OLE SEYA.....2ND PLAINTIFF/APPLICANT

-VERSUS-

TOURISM FINANCE CORPORATION.....1ST DEFENDANT/RESPONDENT

GALLANT WORLDWIDE AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

Introduction

1. The proceedings in this matter begun when the Applicants' filed a plaint on the 16th May 2018 seeking a permanent injunction against the Respondents' precluding them from disposing of, alienating or otherwise interfering with the Applicants' ownership of L.R. NO. 9923/194 and NGONG/NGONG/5171 hereinafter the '*Suit Properties*'.

2. Contemporaneously, the Applicants' filed under a Certificate of Urgency an Application dated 15th May 2018 seeking for orders to wit:

a. Spent

b. Spent

c. THAT upon hearing this Application inter parties, this Honourable Court be and is hereby pleased to issue an interim order of injunction to prevent the respondents either by themselves, their agents, servants, employees and/or nominees from selling by public auction, transferring, alienating and/or interfering in whatsoever manner with the Applicants' land parcels to wit: L.R NO. NGONG/NGONG/5171 and L.R NO. 9923/194/KAJIADO, pending hearing and determination of the suit herein.

d. THAT the costs of this Application be provided for in any event.

3. On the 17th August 2018, the Applicants', under Certificate of Urgency, filed an Application dated 16th August seeking injunction orders restraining the Defendant/Respondents, their servants, agents, assigns or any other person acting on their behalf from selling by public auction, disposing, transferring, alienating and/or in any other way interfering with the Applicants property known as LR No. 9923/194 KAJIADO pending the ruling of this Honorable Court slated for 5th October, 2018. The Applicants' in that application also sought costs.

4. The Application dated 15th May 2018 was buttressed by the grounds on its face as well as by an affidavit sworn by the 2nd Applicant on even date.

5. The Respondents' opposed the Application dated 15th May 2018 by way of an affidavit sworn on 7th June and filed on 8th June 2018 by Michael Koross, the Chief Credit Officer of the 1st Respondent.

6. Pursuant to leave granted by the court on the 24th July 2018, a further affidavit sworn by the 2nd Applicant and dated 30th July 2018 was filed on the same day.

7. The Application dated 15th May 2018 was canvassed by way of written submissions.

8. The Applicants filed submissions dated 30th July 2018 on even date.

9. The Application by the Applicants dated 16th August 2018 is supported by an affidavit sworn by David Muthama on the same date. This Application was followed by submissions dated the 28th August 2018.

10. I shall dispense with both Applications together.

Background

11. Through a letter of offer dated 9th December 2010, the 1st Respondent agreed to advance the 1st Applicant a loan facility to the tune of Ksh. 30,000,000/= at an agreed interest rate of 9% per annum which facility was to be repaid over a ten(10) year period including a six (6) month moratorium.

12. In order to secure the loan, on 14th February 2011, the Applicants entered into two legal charges in respect of L.R NO. NGONG/NGONG/5171 and L.R NO. 9923/194/KAJIADO with the 1st Respondent.

13. As it were, the Applicants fell into arrears with regards to the repayment of the loan facility advanced by the 1st Respondent and the series of events as outlined below culminated in the filing of the instant application.

The Applicants' Case

14. The Applicants averred that at all times they remained the registered owners of the suit property. It was their contention that by a letter of offer dated 9th December 2010, the 1st Respondent agreed to advance to the 1st Applicant Company a loan facility in the sum of Kshs. 30,000,000/= at an agreed interest rate of 9% per annum which facility was to be repaid within a term of ten (10) years including six (6) month moratorium. Pursuant to this letter of offer, the Applicants entered into two (2) legal charges in respect of L.R NO. 9923/194/KAJIADO and NGONG/NGONG/5171 respectively with the Defendant.

15. It was the Applicants' assertion that as a result of a series of international travel advisories against travel into or through the Country, the tourism sector experienced a slump that resulted in enormous unforeseen loss on the part of the 1st Applicant due to diminished business. The Applicants asserted that despite the foregoing, the 1st Respondent issued letters to them threatening to report them the Credit Reference Bureau for failure to satisfy the loan.

16. While conceding indebtedness toward the 1st Respondent, the 1st Applicant averred that on diverse dates between the years 2016 and 2017, it made payments totaling to Kshs. 6,140,000/= in a bid to reduce its loan obligations to the Respondent.

17. It was the 2nd Applicant's assertion that upon seeking audience with the Respondent's credit officers, he was handed a bunch of demand notices and notifications of sale which had purportedly been sent to the Applicants by registered post but were returned undelivered.

18. In the Applicants' view, the valuation reports by M/s Seasail Limited both dated 6.2.2017 which formed part of the attempted sale grossly undervalued the properties by indicating the market value of L.R NO. 9923/194 and NGONG/NGONG/5171 as Kshs.50,000,000/= and Kshs.30, 000,000/= respectively.

19. According to the Applicants, the correct valuation for the suit property was the one conducted by Hillscape Valuers Limited dated 10.4.2018 which valued L.R NO. 9923/194/KAJIADO and NGONG/NGONG/5171 at Kshs. 85,000,000/= and Kshs. 27,000,000/= respectively.

20. It was averred that the Notification of sale of the suit premises as given by the 2nd Respondent was manifestly unlawful and contrary to the provisions of the Land Act and more specifically Sections 90 and 96.

21. It was further averred that the Applicants, through the firm of M/s Kago, Muthama Co. Advocates vide a letter wrote to the Respondent indicating to them that their intended actions were irregular and unlawful for failure to abide by the legal regulations relating to public auctions.

22. Consequently, an averment was made that the whole process that culminated in the attempted sale of the suit property was fraught with failure to comply with mandatory statutory requirements as set out in the Land Act and the relevant enabling laws.

23. The Applicants posited that they had taken cognizance of the fact that the 1st Respondent had arbitrarily altered the interest rate without any prior notice to them contrary to Section 84 of the Land Act.

24. The Applicants admitted to having received correspondence from the 1st Respondent on 10.4.2018 giving conditions which they were not in a position to comply with within the given time.

25. The Applicants then went on to aver that unless the Orders sought in the Application dated 15th May 2018 were granted, the 1st Applicant stood to suffer irreparable loss and damage which may not be quantified by an award of damages. In closing, it was the Applicants' view that the Respondents would not suffer any prejudice if the Orders sought were granted.

26. With regards to the Application dated 16th August 2018, it was the Applicants' case that the 2nd Respondent acting on instructions from the 1st Respondent had irregularly and unlawfully advertised for public auction of all that land known as KAJIADO L.R. No. 9923/194 vide Daily Nation Newspaper dated 13th August, 2018.

27. The Applicant averred that the suit property was part of the subject matter in this suit which is pending ruling on an Application dated 15th May, 2018. As such, the Applicants' claimed that the Application dated 15th May 2018 may be rendered nugatory unless the interim injunctive orders sought were granted. They went on to add that the Respondents' would not suffer any prejudice if the Orders sought therein were granted.

The Respondents' Case

28. The Respondents averred that even before applying for the loan the Applicants knew very well that the same was to be fully paid regardless as the 2nd Applicant signed the contract/ agreement which included the terms and conditions which were reasonable. It was averred that the Applicants were misleading the Honorable court in trying to blame the Corporation for the travel advisories which are normally issued by foreign countries and not by the 1st Respondent.

29. The Respondents agreed with the Applicants' assertions with regard to the disbursement of the loan facility amounting to Kshs 30,000,000 as well as the creation of a legal charge over the suit property to securitize the loan facility. According to the Respondent, the Applicant was expected to start servicing the facility in November 2011 by making a monthly payment of Ksh. 263,158/-

30. The Respondents further averred that it was untrue that the Applicants had been honouring their obligation since as per the loan statement, the Applicants had an outstanding loan amounting to Kshs 43,986,129/= as at April 2018 having paid Kshs 9,999,984.00 as the last installment in October 2017. It was further averred that as of June 2014, the Applicants account was already in arrears of Ksh 12,722,597.

31. The Respondent denied sending threatening letters to the Applicants and posited that the letter referred to in the Applicant's Supporting Affidavit was a Public Auction Notice from the 2nd Respondent. Further, the Respondent posited that the without prejudice letter dated 5th September, 2016 was a letter notifying the Applicant to clear the outstanding amount in default.

32. The Respondents averred that the allegation that they had undervalued the suit property was misplaced. According to them, the valuation by the Hillscape Valuers Ltd dated 14/5/2018 which valued the said properties at KSh 85,000,000/- and KSh 30,000,000/- for L.R NO. 9923/194 and Ngong/Ngong/5171 respectively was uncontested.

33. It was averred that the Notification of sale of the suit premises as given by the 2nd Respondent was in accordance to Section 90 of the Land Act and was lawful.

34. According to the 1st Respondent, the Applicants failure to make good the payments to clear the loan facility advanced to them which was to be cleared within period of 10 years had greatly prejudiced their operations.

35. It was averred that on diverse dates between March 2017 and May 2017, the Applicants sought to negotiate a loan restructuring in their favour in a bid to stop the 1st Respondent from redeeming the loan. The culmination of the negotiation was that the 1st Respondent agreed to terminate the process on several conditions, key among them that the Applicant does make payment of 50% of the then outstanding loan facility arrears and penalties which stood at Kshs 14, 455, 264/. If the Respondent is to be believed, the preceding conditions were only given after the 2nd Applicant wrote to the 1st Respondent seeking more time to pay the arrears on a 'without prejudice' basis letter dated 27th April, 2017 suggesting that the Applicants would make an outright payment of 50% of the arrears and penalties accrued for the duration that they had been in default. This was not done. However, as a result of the above negotiations the 1st Respondent wrote to the 2nd Respondent to stop the pending sale of the parcels of land.

36. It was averred that despite the above, the Applicant went ahead and failed to pay the amounts agreed to in the restructuring and/or adhere to any or all of the terms breaching the restructuring agreement.

37. The Respondents averred that the 2ndApplicant claiming that the 1st Respondent issued him with notices which were returned unclaimed is a misrepresentation as the 1st Respondent has always sent correspondences through the said address which is the last known registered address of the Applicant. Further, it was a duty of the Applicant to notify the 1st Respondent of any change of address under Paragraph 9 (a) of the Loan agreement in page 4 and 5 which was never communicated to the 1st Respondent.

38. In any case, the Respondents posited, the 2nd Applicant knew the letters were returned unclaimed and thus he demanded to be issued with them when he visited to request for more time to repay the loan after the 1st Respondent had engaged the services of the 2nd Respondent.

39. The Respondents' position was that Section 84 of the Land Act was never contravened by the 1st Respondent as service via registered post is an effective means of service under the laws of Kenya.

40. As per the 1st Respondent, Clause 4 of the Letter of Offer for loan facility dated 9/12/2010 reserved the power of the 1st Respondent to review the interest rate of the loan, a fact that was well within the knowledge of the Applicants. Going further, it was averred that Section 84(1) (a) 86 (b) of the Land Act, provides that where it is contractually agreed upon that the rate of interest is variable, the rate may be increased or reduced by a written notice served upon the Chargor which notice dated 24th March, 2017 was issued to the 2nd Applicant.

41. It was averred that the 1st Respondent instructed the firm of Messr Cootow & Associates Advocates, who wrote to the Applicant the mandatory statutory notices to wit; a Notice of intention to sale giving the Chargor 90 day's statutory notice dated 28/04/2016 and a Notice of intention to sale giving the Chargor 40 day's subsequent notice dated 9/08/2016.

42. Following the failure to comply with the above notices, it was averred that instructions were issued to the 2nd Respondent to execute the Chargee's Statutory power of sale vide letter dated 26/09/2016. An averment was made that the 2nd Respondent having been dully instructed, issued and served the 2nd Applicant with a 45 days Notification of sale dated 20/3/2017.

43. It was averred that the 1st Respondent after issuing the numerous instructions to the 2nd Respondent to sell the suit property, the 2nd Respondent went even further and issued a courtesy notification of sale which was ignored.

44. It was posited that having issued all the requisite notification as provided for under the Land Act and the Auctioneers Act, the 2nd Respondent went ahead and advertised the auction as is required under the Law through the Daily Nation of 29th March 2018 at page 61.

45. In view of the above, it was the 1st Respondent's position that it had indeed followed the law to the letter and as such the attempted averments by the Applicants were a desperate attempt at misleading the court.

46. It was posited that the 1st Respondent has always acted within the confines of law and even extended an olive branch to the Applicants by suspending its intention to exercise its statutory power of sale under the Charges and Loan agreement to allow for a loan structuring and give the Applicants a chance to settle the loan.

47. It was posited that the validity of the charges has not been contested by the Applicants who had on the other hand admitted their indebtedness to the 1st Respondent hence they were obligated to settle the debt without any further delays.

48. It was the Respondents view that the issuance of the orders prayed for would not only affect the operations of the 1st Defendant but also be a great injustice as it was acting well within its rights under the Law and the validity of the Charges was not contested.

49. According to the Respondents, they had complied with the mandatory statutory provisions and conducted the attempted sale in a manner consistent with the provisions of the Land Act and Auctioneers Act.

50. In closing, it was averred that the Application dated 15th May 2018 ought to be dismissed with costs to the Respondents.

The Applicants' Submissions

51. On the Application dated 15th May 2018, in his submissions, Mr Muthama counsel for the Applicants formulated three issues for determination to wit:

a. Have the plaintiffs/Applicants satisfied the laid down principals to warrant the grant of an Injunction?

b. If the answer to the above is affirmative, are the Applicants therefore entitled to the reliefs sought herein in the interim?

c. Have the Defendants/Respondents raised anything that warrants that this Honorable Court decline the prayers sought therein?

52. Relying on the case of **Naftali Ruthi Kimani vs Patrick Thuita Gachure & Another (2015) eKLR**, Counsel for the Applicants restated the principles laid down for the granting of injunctive reliefs established in the *locus classicus* case **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

53. Learned counsel went on to submit that the 1st Respondent is a Development Financial Institution that derives its authority from Section 75 to 86 of the Tourism Act 2011 and it should be differentiated from a Commercial bank whose authority is derived from the Banking Act.

54. Peculiarly, Counsel then submitted that there were two aspects in the Applicants case; whether the 1st Respondent failed to follow the laid down procedures with regard to notice as envisioned in section 90 of the Land Act and whether the 1st Respondent acted *ultra vires* in arriving at the decision to auction the plaintiff/Applicants parcel of land aforementioned.

55. It was then submitted that the 2nd Applicant did not receive the statutory notices sent by the 1st Respondent. Counsel went on to submit that it was the responsibility of the Respondents' to ensure that the notices to the had been received by the Applicants and that the failure to do so was in contravention of the law as regards to the issuing of statutory notices.

56. Counsel continued his submissions propounding that the decision to auction the Applicants' property went against all the principles under which Development Financial Institutions are created for. He urged the Court to consider the fact that NGONG/NGONG/5171 is a matrimonial property which is the dwelling house of the 2nd Applicant and his family.

57. On the basis of the foregoing, Counsel submitted that the Applicants had met the threshold set out in law to warrant the issuance of the interim orders sought.

58. For the Application dated the 16th August 2018, Counsel restated his submissions in the Application dated 15th May 2018 concerning the grant of temporary injunctions, citing **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

Analysis and Determinations

59. Having carefully considered the Applications, the grounds raised in support thereof, the affidavits and the annexures relied on as well as the submissions made herein by Learned Counsel, I shall now proceed to make my findings.

60. To my mind, the pertinent question this Court ought to restrict itself to is whether the Applicants' case meets the threshold set out by law for the granting of temporary injunctions.

61. The substantive law on this matter is **Order 40 Rule 1(a)** of the Civil Procedure Rules 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."

62. In the first instance I agree with the general principle of law on interlocutory injunctions as formulated by **Lord Diplock in the case of The Siskena (1977) 3 AER pg. 824** where he held as follows:

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on 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 by 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 not include a final injunction."

63. In the case of **Kenleb Cons Ltd V New Gatitu Service Station Ltd & Another [1990] KLR 557 Justice Bosire JA** as he then was put the position in Kenya more clearly in the following passage that:

> "To succeed in an application for injunction, an applicant must not make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction".

64. It is to the foregoing legal proposition that we will endeavor to establish whether the applicant claim satisfies the principles for the grant of an injunction.

65. The principles established in **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** for the granting of interlocutory injunctions are now well settled in Kenyan law. In Giella, 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.**"[**Emphasis mine]**

66. While discussing the conditions pertinent to the granting of an Order of injunctive relief, the Court of Appeal in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** opined thus:

> "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."

67. Citing 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 reiterated the requirement that the three conditions for granting an injunction ought to be considered sequentially. Essentially, the Court said, the conditions for irreparable damage and balance of convenience ought not be considered if a *prima facie* case has not been established. The foregoing leads me to the first limb of my determination, that is, whether the Applicants have established a *prima facie* case.

68. In **Mrao Ltd v. First American Bank of Kenya Ltd& 2 Others [2003] eKLR, Bosire, JA** defined a prima facie case 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."

69. 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."

70. Bearing in mind the anterior extract, it is important that while considering the unique circumstances of this instant application, due care is given that I do not delve into the intricacies of the case as that is a preserve of the substantive suit.

71. That being said, it is not in dispute that the 1st Respondent through a letter of offer dated 9th December 2010 advanced the 1st Applicant a loan facility amounting to Ksh. 30,000,000/=. This was to be repaid over a ten (10) year period including a six (6) month moratorium at an agreed interest rate of 9% per annum. It is also not in dispute that in order to secure the loan, on 14th February 2011, the Applicants' entered into two legal charges in respect of L.R NO. NGONG/NGONG/5171 and L.R NO. 9923/194/KAJIADO with the 1st Respondent.

72. Further, both parties agree that as per the valuation report dated 14th May 2018 the properties L.R NO. 9923/194/KAJIADO and L.R NO. NGONG/NGONG/5171 stood valued at Ksh. 85,000,000 and Ksh. 27,000,000 respectively.

73. Taken as a whole, the foregoing discourse paints a different picture than what the Applicants' would have us believe. The indebtedness of the Applicants' is uncontroverted. They have not challenged at any juncture the amounts claimed by the 1st Respondent while at the same time admitting that they failed to meet their obligations as encapsulated in the Letter of Offer dated 9th December 2010. Under the law from where this court stands, there is no indication that there is in existence a right of the Applicants' that has been violated or is threatened with violation capable of being protected by this court.

74. In my view if the interlocutory injunction was to be granted by this court it could lead to an abuse of the court process for the mortgagor would be kept out of his undoubted rights provided for in the legal charge.

75. From the affidavit evidence and annexures in support of the motion it seems to me that there are no exceptional circumstances which go to the core of the privity of contract between the mortgagor and mortgagee to give rise to an exercise of discretion by this court to grant the equitable remedy in favor of the applicant. I have in mind questions as to the validity of the mortgage contract or certain provisions implied by the statute which gives the mortgagee the power of sale having been violated.

76. For the Applicants, it would seem the bone of contention is the manner in which the Respondents have gone about in trying to realize the debts owed to them. To my mind, this is an issue that ought to be adequately canvassed during the main trial and not at this interlocutory stage.

77. Consequentially, armed with the antecedent arguments, this Court is satisfied that the Applicants have failed to establish a *prima facie* case that must be treated seriously as espoused in the **Giella V Cassman (Supra) & American Cyanamid Case** which sets out the principles by which this court should be guided in the exercise of its discretion. In determining whether there is a serious issue to be tried this court has had the advantage of the reality from the pleadings and the affidavit evidence on record. Having found that the Applicants have not put forth a *prima facie* case, this Court need not burden itself with the other two limbs with respect to the granting of injunctive Orders, that is irreparable damage and balance of convenience. For this stance, the Court wholly associates itself with the Court of Appeal's decision in **Nguruman (supra)** to wit:

> "... 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 ..."

78. In my opinion, the case law I have examined for purpose of this application nothing short of actual payment of the amount due and owing is regarded as sufficient cause to injunct the mortgagor from recovering the mortgage debt. I hold the strong view that despite the averment to the contrary by the applicants there is no doubt as to the existence of the power of sale and the validity of the mortgage. It is essential even at the interlocutory stage an applicant challenging the mortgage contract to even demonstrate that he has made an effort to redeem the

security and pay the amount found to be due as from the latest statement of accounts. Though the applicant might have an arguable claim it is not of a nature that controverts the dispute on both the principal and the interest having remained unpaid for a considerable length of time. This issue alone weighs against grant of an interlocutory injunction.

79. It is for these reasons and the ones advanced elsewhere in this ruling that I do dismiss both applications dated 15th May 2018 and 16th August 2018 with costs to the Respondents.

80. In the alternative, the dimension I take on the facts of this case is that there ought to be a deposit into court of the disputed amount by the applicants before they can exercise their rights of litigation under the mortgage contract.

81. Secondly, this Court is of the opinion that should the Applicants' be desirous of prosecuting the substantive suit to its logical conclusion, they should deposit to the court the amount owed to Respondents' as security pending the outcome and determination of the main suit.

82. Leave to appeal granted in any event.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 30TH DAY OF AUGUST 2018

REUBEN NYAKUNDI

JUDGE

Representation

- Mr. Muthama for the Plaintiffs /applicants – present
- Ms. Karanja for the Respondents – present
- Court Assistant – Mr. Kiarie