REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL SUIT NO. 19 OF 2018

MOSES NDEGWA GITONGA......................................PLAINTIFF/APPLICANT

-VERSUS-

HALIFAX FINANCIAL SERVICES LTD.....1ST DEFENDANT/RESPONDENT

KINDEST AUCTIONEERS...........................2ND DEFENDANT/RESPONDENT

RULING

Introduction

1. The Applicant sought the aid of this Honorable Court through a Notice of Motion application dated the 14th June 2018 and filed on the 16th June 2018 seeking the numerous injunctive remedies.

2. The Application was supported by the grounds on the face of it as well as by an affidavit sworn by the Applicant, Moses Ndegwa Gitonga on the 14th June 2018.

3. On the 18th June 2018, Hon. Fred Ochieng J issued an interlocutory injunction for 14 days only and directed that the parties avail themselves for inter-partes hearing on the 2nd July 2018. The Honourable Judge further directed that the Applicant settle the costs of the intended auction scheduled for 18th June 2018.

4. The 1st Respondent's rejoinder came by way of an affidavit sworn by one of its directors, Simon Gachomo, on the 28th June 2018 and filed on the subsequent day.

5. On the 13th July 2018, the Applicant swore an affidavit in response, it was filed on the 16th July 2018.

6. Submissions dated 23rd July 2018 were subsequently filed on even date by the Applicant.

Applicant's Case

7. In the Application dated 14th June 2018, the following reliefs were sought:

a. *Spent*

b. THAT an interlocutory injunction be granted restraining the 1st and 2nd Respondents either by themselves, their servants, workers, agents and/or employees in interfering, trespassing, auctioning, wasting, damaging, alienation, sale, removal or disposition of the property known as **TITLE NO. NGONG/NGONG/10446** or any part thereof until this application is heard and determined by this Honourable Court;

c. THAT an interlocutory injunction be granted restraining the 1st and 2nd Respondents either by themselves, their servants, workers, agents and/or employees in interfering, trespassing, auctioning, wasting, damaging, alienation, sale, removal or disposition of the property known as **TITLE NO. NGONG/NGONG/10446** or any part thereof pending the determination of the main suit;

d. THAT the chargee statutory notice issued pursuant to section 90 (2) (3) e) and the statutory notice to sell issued pursuant to

section 96 (2) (3) of the Land Act, 2012 by the 1st Respondent be revoked/rescinded/voided;

e. THAT the notification of sale issued by the 2nd Respondent be revoked/rescinded/voided and or be postponed and the 2nd Respondent be restrained from undertaking the public auction of the properly known as **TITLE NO. NGONG/NGONG/10446** which was to be held on 18th June, 2018;

f. THAT an interlocutory injunction be granted restraining the 2nd Respondents whether by themselves, their servants, workers, agents and/or employees from further advertising in any of the local daily newspapers the public auction scheduled to take place on 18 June, 2018 of the property known as **TITLE NO. NGONG/NGONG/10446** or any part thereof until this application is heard and determined by this Honourable Court;

g. THAT the court does make a declaration that the 1st Respondent breached its duty of care to the Applicant because it failed to ensure that a forced sale valuation is undertaken by a Land valuer before exercising the right of sale;

h. THAT the Applicant be granted a further 90 days within which time to undertake the re-verification of the loan account and to settle his outstanding debt with the 1st Respondent within the said period;

i. THAT the intended sale by 2nd Respondent is unlawful because of the undervaluation of the land security by the Respondents;

j. THAT the Applicant be granted the costs of this application;

k. THAT this Honourable Court do issue any such other and/or further orders as justice of the case herein may demand.

8. The Applicant averred that he is the registered owner of residential property known as **TITLE NO. NGONG/NGONG/10446** (the suit property) and that sometimes towards the end of the year 2015 he was granted a loan of Ksh 5,500,000/= by the 1st Respondent out of which he had managed to pay Ksh 3,000,000/= leaving a balance of Ksh 2,500,000/= out of the principal that was advanced to him.

9. The Applicant's case was that the 1st Respondent issued an irregular charge statutory notice pursuant to Sections 90 (1) (2) (3) (e) of the Land Act, 2012 dated 23rd October 2017 relating to properly known as **TITLE NO. NGONG/NGONG/10446.**

10. Additionally, it was averred that the 1st Respondent breached its duty of care to the Applicant because it failed to ensure that a forced sale valuation is undertaken by a Land valuer before issuing a chargee statutory notice. Consequently, the intended public auction of **TITLE NO. NGONG/NGONG/10446** which is to be held on 18 June, 2018 by the 2nd Respondent is illegal because it was based on a valuation which was way below the current open market value for a developed plot of land with two-bedroom units, two one-bedroom units and related facilities which stood at Kshs. 2, 500,000/=.

11. The Applicant averred that the purported valuation by the 2nd Respondent was 25% or below the market value at which comparable interests in land of the same character and quality is being sold in the open market in the same locality and any subsequent sale is therefore void by virtue of section 97 of the Land Act, 2012.

12. It was also averred that the Public Auction already advertised by then was unlawful because the Applicant's Spouse Joyce Wangari Ndegwa was never consulted nor given notice of the sale yet she had given consent to the charge being created in the first instance.

13. The Applicant averred that he was willing to settle the due loan amount upon verification of the amount owed as well as interest accrued thereon. However, in the instant case, the interest accrued and principal amount had exceeded the principal amount which should not have been the case.

14. In the eyes of the Applicant, he had established a prima facie case justifying the issuance of an injunction order restraining the Respondents from disposing off the suit property and that the balance of convenience tilted in his favour.

Respondent's case

15. It was the Respondent's case that by a facility letter dated 29th July, 2015, the Applicant entered into a loan facility agreement with the 1st Respondent totaling Ksh. 5,500,000/=. The 1st Respondent advanced the Applicant the said credit facility at an interest rate of 10% with repayment period of 6 months. It was averred that the facility was secured by a Charge over the suit property dated 14 th April, 2016 securing a maximum principal amount of Ksh. 5,500,000/=.

16. The Respondent averred that contrary to the Applicant's position, the consent of Joyce Wangari Ndegwa being the Applicant's spouse was maintained prior to registration of the Charge.

17. According to the 1st Respondent, on or about the month of October 2015, the Applicant without justifiable cause or reason refused, failed and/or neglected to service the loan facility. This default on the part of the Applicant prompted the 1 st Respondent to issue several reminders to the Applicant on diverse dates between 2015 and 2016 requiring the Applicant to make good the outstanding debt, which reminders the Applicant blatantly ignored and/or refused to honor. It was averred that the 1st Respondent wrote several demand letters to the Applicant requesting that the Applicant redeems himself by making payment of the amounts due on his account, which demands the Applicant blatantly ignored. The 1st Respondent contended that on 5th June, 2017, it wrote to the Applicant informing him that they would bring to site a

prospective buyer for the property since he was not performing his obligation. According to the Respondent, it is this imminent threat that prompted the Applicant to author his letter of 7th June, 2017 acknowledging the loan and promising to clear the same within 14 days.

18. As per the Respondent, the Applicant's wife wrote to the 1st Respondent on 14" June, 2017 requesting for an extension of time to settle the outstanding debt owed to the Respondent. Via a letter dated 17th June, 2017, the Respondent agreed to a 60-day extension period within which the entire amount owed was to be repaid as proposed. It was averred that despite the Applicant's promises and that of his spouse, he continued to default in repayment of the loan which was accruing interest at the default rate.

19. The 1st Respondent deponed that through a 90-day Statutory Demand Notice dated 23rd October 2017 sent by the 1st Respondents advocates on record; the Applicant was asked to settle the outstanding sum of Ksh. 12,148,135/= failure to which the 1st Respondent would be at liberty to sell the security pursuant to the Charge executed between the Parties. This statutory notice was copied to the Applicant's spouse.

20. The Respondent alleged that the Applicant ignored and/or neglected to heed to the Statutory Notice prompting the 1st Respondent to issue a 40-day Notice of Intention to Sell dated 31st January, 2018 under Section 96 of the Land Act No. 6 of 2012 which notice went unanswered by the Applicant. This prompted the 1st Respondent to instruct the 2nd Respondent to proceed and proclaim the suit property for sale in settlement of the outstanding amount.

21. It was averred that the 2nd Respondent vide a Notice dated 12 April, 2018 issued a 45 days redemption notice in keeping with Rule 15(d) of the Auctioneers Rules, 1997 and served the Applicant with the Notification of Sale indicating clearly the particulars of the impending sale.

22. It was averred that subsequently, the 2nd Respondent formally caused to be published on the 4th of June 2018 in a newspaper of nationwide circulation, an advertisement indicating that the suit property would be put to auction on Monday the 18th of June, 2018.

23. The Respondents' contended that prior to the Auction, a valuation on the suit property to ascertain the market value and the forced sale valuation was conducted thereby informing the reserve price for the auction.

24. It is the Respondent's case that the 2nd Respondent then proceeded to host the Auction on the 18 of June, 2018 and at the fall of the hammer at 11.30am the suit property was sold to the highest bidder, one Anthony Mburu Wainaina, who put in a bid of Ksh. 11,400,000/=.

25. The Respondents' maintain that the procedures followed were in strict compliance with the procedure set out under the law in exercising the statutory power of sale by a Chargee.

26. As regards the court Order obtained by the Applicant ex-parte on 18th June 2018, the Respondents contended that at the time of service of said order, the auction had been conducted by the 2nd Respondent and the suit property sold to the highest bidder rendering the Orders moot.

27. It was deponed that Equity aids the vigilant and not the indolent; while the Applicant knew all along of the impending sale of the suit property for more than a period of 180 days, he only chose to approach this honorable court at the last minute and he had not explained this inordinate delay.

28. It was further deponed that the Applicant had failed to produce in court any proof that the valuation report by the Respondents' had undervalued the suit property and hence they this was mere conjecture.

29. The Respondents' averred that the Applicant obtained the ex parte orders by misleading and concealing material facts. They alleged that it had been shown that the Applicant's spouse did give her consent to Charge the suit premises and was in the know at all material times leading to the sale of the suit premises. The Respondents' contended that the Applicants actions were a guise of asking for extension of time within which to settle his obligations through the back door.

30. It was posited that equity of redemption is lost by the Chargor upon the completion of a valid agreement for sale; which in this case was at the fall of the hammer. It is further averred that at no time did the Applicant dispute the amount claimed by the 1st Respondent. On the contrary, the Applicant blatantly ignored several demands issued to him by the 1st Respondent leading up to the sale by auction. As per the 1st Respondent, the Applicant's letter dated 7th June, 2017 was an admission of indebtedness as had been calculated by the 1st Respondent.

31. The 1st Respondent averred that it would be greatly prejudiced if the Court were to grant the orders sought by the Applicant owing to the fact that the it had incurred great financial loss and expenditure from the year 2015, including legal fees, in attempts to recover the sums owed by the Applicant.

32. According to the 1st Respondent, the Application herein did not meet the threshold for grant of injunctive Orders pending hearing and determination of the main suit. The Applicant had not shown that he will suffer irreparable damage if the injunction is not granted, since the suit property had since been sold.

33. Further, it was posited that the Applicant has also failed to establish a prima facie case with the probability of success since the Application and the Supporting Affidavit thereto contained equivocations and unfounded allegations which the 1" Respondent had dispelled.

34. The Respondents' were of the opinion that the orders as sought by the Applicant for injunctive relief against the auction, sale and transfer of the suit property were spent since the suit property had already been auctioned.

35. It is for the preceding reasons that the Respondents' urged the Court to dismiss the Application with costs.

Applicant's Response

36. In response to the affidavit dated 28th June 2018 sworn by Simon Gachomo, the Applicant swore an affidavit dated 13th July 2018. In it, he denied the Respondent's claim that he had not made any attempts to settle his indebtedness with the 1st Respondent seeing as he had paid off Ksh. 3,541,000/= as admitted by the 1st Respondent.

37. The Applicant further insisted that his wife Joyce Wangari Ndegwa did not consent to the charge registered on the suit property at any time. It was alleged that the signature that was purportedly his spouse's was a forgery as at the material time that the charge was executed, his wife was out of the country. The Applicant alleged that his spouse's Identity Card was forged as well stating that his wife's Identity Card Number is […] and not ID no. […] as shown in the legal charge document. To the Applicant, the 1st Respondent realized it gave him a loan without a spousal consent at the time they disbursed the loan. Additionally, it was alleged that the 1st Respondent had initially claimed that the spousal consent was not necessary at the time the loan was disbursed and only requested for two guarantors.

38. The Applicant went on to aver that contrary to the 1st Respondent's allegations, he had paid back Ksh. 3,541, 000/= out of the original loan of KSHS. 5.550,000/= and only fell into arrears due to financial difficulties arising from lack of survey work due to the depressed economic climate leading to the buildup of the 2017 General Election period in Kenya.

39. The Applicant denied him and his wife consenting to the sale by private treaty as alleged by the Respondent. He intimated that the sale by private treaty was a ploy by the 1st Respondent to dispose of the suit property cheaply whilst pretending to extend the time within which the loan could be repaid. Hence the Applicant decided to seek the court's intervention as the attempt to sale via private treaty rather than auction flew in the face of the provisions of the Auctioneers Act as well as the provisions of Section 96 (2) of the Land Act 2012.

40. The Applicant alleged that no evidence had been presented to show that a Public Auction ever took place outside the offices the 2nd Respondent. It was his position that the purported public auction was a sham and it never took place as the impugned sale was made via private treaty contrary to the provisions of the charge document.

41. In the eyes of the Applicant, the Respondents' should not have relied on the valuation report made by Advent Valuers on 30th January 2017 to conduct a Public Auction on 18th June 2018 as it was in contravention of Rule 11 (b) (x) of the Auctioneers Rules which stipulates that a chargee cannot rely on valuation report that is older than 12 months in setting the reserve price for the property to be auctioned.

42. On the question of service of the Court Order issued on 18th June 2018, the Applicant asserted that no sooner had the Judge made a ruling allowing a temporary injunction against the sale of the suit property than his advocate on record, Mr. Robert Mugo Mutitu, contacted the 1st Respondent's advocate via email advising that the public auction not be conducted as the court had issued orders to that effect. According to the Applicant, this email was successfully delivered at 10:53am which was before the appointed time for the auction. Further to this another email was sent at 11.15am to the 2nd Respondent informing them about the postponement of the sale by the Kajiado High Court.

43. He further stated that he had admitted to the amount owed as indicated by Respondent as Ksh 13,084.942/= because at the time he was unaware that the Respondent's calculation of interest was contrary to provisions of Sections 39(1) and 44(1) of the Central Bank of Kenya (Amendment) Act 2000. To him, the amount owed should not have exceeded Ksh. 1,960,000/= after which interest should not have been allowed to accrue as it would have exceeded the principal amount.

44. It was the Applicant's contention that the fact that the 1st Respondent induced him to admit to an irregularly computed loan account did not afford the 1st Respondent the defense of the Applicant's indebtedness to them as at the time the Applicant was ignorant of his legal protection under the in Duplum rule since he had not been given time to seek legal advice.

45. It was the Applicant's view that he had made a prima facie case against Respondents' to the effect that his claim had a high probability of success as the Respondents' had claimed punitive and unlawful interest and breached their duty of care under Section 97 of the Land Act, 2012 as well as used a defective valuation report to conduct the auction. Further to this, the 1st Respondent erred in calculating the interest payable therefore the same was unlawful and exaggerated.

46. It was the Applicant's prayer that the court grant the injunction orders sought and declare the purported Public Auction carried out by the 2nd Respondent as having been unlawfully conducted and that the same be set aside and further that the court order that an account be conducted between the parties showing the exact amount the Applicant was entitled to pay. It was intimated that upon reassessment of the loan interest, the court allows the Applicant 6 months to settle the debt.

47. It is on the basis of the foregoing that the Applicant urged the court to consider his application and allow it.

Applicant's Submissions

48. The advocate for the Applicant, Mr. Mutitu, formulated 5 issues he thought the court ought to consider in the determination of this Application to wit:

> a. Whether there was a breach of duty of care on the part of the 1st Respondent by their failure to conduct a current forced sale valuation

b. Whether there was a misrepresentation of interest payable in contrast to the unpaid principal loan.

c. Whether the Respondents' had breached the law in the conduct of the public auction

d. Whether the Respondents' had ignored a valid court order

e. Whether the Applicant had established a prima facie case.

49. On the first issue, Mr. Mutitu submitted that Section 97 (2) of the land Act creates a mandatory duty of a chargee to ensure that a sale whether by public auction or private treaty obtains the best reasonably obtainable price at the time of sale. This can only be obtained after a sale valuation is undertaken by a professional valuer. Citing **Palmy Company Limited v Consolidated Bank of Kenya Limited 2014 eKLR,** counsel submitted that the Respondents did not adduce any proof that the alleged valuation was a current valuation undertaken by a qualified valuer.

50. It was further submitted that the 2nd Respondent acting on the instructions of the 1st Respondent purported to dispose off by way of a public auction the suit property before conducting a current valuation contrary to Section 97 (2) of the Land Act as read with Rule 11 (1) (b) (x) of the Auctioneers Rules, 1997 which states that: *the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale*.

51. Counsel submitted that the Respondents had relied on a valuation report dated 30 January, 2017 to conduct a sale slated for 18th June 2018, which was more than 12 months after the valuation was conducted hence in contravention of the law. For this position, counsel cited **Albert Marco Cordeiro & Another v Vishram Shamji [2015] KLR.**

52. Counsel proceeded to tackle the issue of whether there was a misrepresentation of interest payable in contrast to the unpaid principal loan. It was submitted that the Applicant was advanced by the 1st Respondent a 6-month short term loan of Ksh. 5,500,000/= out of which he had repaid Ksh. 3,541,000/= leaving a balance of 1,959,000/= of the original principal amount at the time when his account became non-performing. The proclamation issued against the Applicant was for Ksh. 12,148,135/= as at 12th April 2018. It was submitted that the calculation of interest as against the principal owed contravened Section 44(a) of the Banking Act which incorporates the in Duplum Rule which protects borrowers whose loans have become non-performing from being charged excessive interest by banks. As stated by counsel, the rule provided that a lender cannot recover more than twice for loans that had become non-performing. Mr. Mutitu submitted that it was inconceivable how a loan default of Ksh. 1,959,000/= could have accumulated to 12,148,135/=. Counsel relied on Scholastica **Nyaguthi Muturi v Housing Finance of Kenya & Another 2010 eKLR**

53. Turning to the issue of whether the Respondents' had breached the law in the conduct of the public auction, Mr. Mutitu submitted that the 2nd Respondent did not conduct a valid public auction as regulated by law. As per counsel, this position was uncontroverted by the Respondents. It was submitted that the claim by the 1st Respondent that the public auction commenced at 11:00 a.m. and was concluded at 11:30 a.m. is not true unless the 2nd Respondent had a predetermined buyer in mind. According to Mr. Mutitu, during a public auction one would expect that the exercise is conducted in an open venue as opposed to a private office and that members of the public have uninterrupted access to such venue. This position was buttressed by **Bank of Africa Kenya Limited & Two Other (2015) eKLR** and **Scholastica Nyaguthi Muturi v Housing Finance of Kenya & Another 2010 eKLR**

54. On the Respondents' claims that the suit property was sold to an innocent purchaser for value, counsel submitted that this did not preclude the court from nullifying the sale so long as it was done in breach of the law. Counsel sought to rely on Nationwide **Finance Company Limited v Mec Industries Limited & Michael Gerald Kimani (2001) KLR**.

55. On the contention that the Respondents' had ignored a valid court order, counsel submitted that the ex-parte order stopping the sale was issued at 10.00am and by 10.30 am he had managed to extract the orders. Counsel stated that he then proceeded to scan and send the said Order via email to the Respondents' advocates which email went through at exactly 11.11am. further the 1st Respondent's advocate acknowledged receipt of the Email on the same day at 1.33 pm and requested the Applicant's advocate to be supplied with a physical copy of the Order while failing to indicate that the Public Auction had already taken place and that they had sold the property by auction at 11.30am. It was further submitted that Counsel called the Auctioneer a Mr. Wanjohi at 11.20am and was informed that the sale had already been conducted at 11a.m.

56. It was counsel's submission therefore that the Respondents' had colluded to continue with the purported sale despite having full knowledge of the existence of a valid court order. Counsel relied on **Honourable Criticos v Attorney General & 11 Others High Court Nairobi Petition 258 of 2011** to assert that knowledge of the existence of a court order supersedes personal service.

57. Regarding the question of whether a prima facie case had been established, counsel submitted that although the Applicant admitted his indebtedness to the 1st Respondent, it was the Applicant's case that the Respondent took advantage of his ignorance of the law by asking him to write letters of his admission of the debt under the pretext that the 1st Respondent would accord him more time to settle the debt while knowing very well the amount claimed was against the law relating to calculation of interest for loan defaulters and while secretly looking for a private purchasers of the property. It was submitted that this breach of law sufficed as an irreparable damage which is not compensable by an award of damages. Specifically, Mr. Mutitu submitted that the Respondents' breached the law particularly Sections 97 (1) and (2) of the Land Act and Rule 11 (1) (b) (x) Auctioneers Rules as such the Applicant was entitled to invoke the provisions of Section 97(3)(b) of the Land Act.

58. In conclusion, Mr. Mutitu submitted that the 1st Respondent procured the services of the 2nd Respondent to dispose of the Applicant's matrimonial home through a purported public auction with a predetermined bidder in contravention of the Auctioneers act. The 1st Respondent had therefore breached its duty of care as a chargor as provided for under Sec 97(2) of the Land Act. It is on this basis that

counsel prayed that the Court grant the Applicant an injunction barring the Respondents' from interfering or selling the property known as **TITLE NO. NGONG/NGONG/10446** pending the hearing and determination of the main suit and that the purported auction of the property done on 18th June 2018 be nullified.

59. On behalf of the respondents mr Odongo submitted on the issue of jurisdiction touching on the contested orders which purported to stop the auction of the suit property. His main argument being that the court in granting exparte interim orders recognized the fact that it had no jurisdiction to entertain the subject matter of the suit. In support of this legal proposition counsel relied and cited the following authorities the land mark case of **LILLIAN S 1989 KLR**, the more recent one being the decision by the court of Appeal in **Cooperative Bank of Kenya Ltd V Patrick Kangethe Njuguna and 5 others 2017 eKLR.** The gist of the later case contended Mr. Odongo is that jurisdiction of courts between ELC and High court as it relates with Mortgage contracts is settled.

60. Secondly Mr Odongo submitted that the well settled principles for grant of injunctions do not apply to the facts of this case to warrant the court exercise discretion in favour of the applicant. Mr Odongo in buttressing his submissions cited various cases. The point taken by learned counsel the cited authorities in **Giella v Cassman Brown co Ltd 1973 EA 358, American Cynamid V Ethicon Ltd 1975 AC 396 and Mrao Ltd V First American Bank of Kenya and 2 others 2003 eKLR** is to the effect that the applicant has not discharged the burden of establishing a primafacie case to warrant grant of injunction. Further Mr. Odongo argued that even if the court applies the other tests on irreparable harm that cannot be compensated by an award of damages or a balance of convenience there is no material placed before the court to support the applicant case.

Analysis and Determinations

61. I have judiciously considered both parties pleadings and evidence as well as the submissions of counsel and will now proceed to render the court's opinion on the issues at hand. Substantively, the Applicant sought an of interlocutory injunction barring the Respondents' from interfering with the suit property. The law on temporary injunctions 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. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon 3 interdependent and sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the court would decide the application on a balance of convenience. **See Giella vs. Cassman Brown & Co. Ltd [1973] EA 358 and Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR.**

63. The existence of the unpaid debt owed to the 1st Respondent by the Applicant is not in doubt, what the Applicant takes issue with in my opinion three main issues, the conduct of the Respondents' in carrying out the public auction, the interest payable on the principal sum that was borrowed and the allegation that the Respondents' ignored a valid court order. I will take into consideration each of these issues when making my finding on whether a prima facie case has been made out by the Applicant.

64. The Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123,** defined a prima facie case as:

> *"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. 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."*

65. In **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** the Court of Appeal went on to further state

> *'…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.'*

66. When considering whether an injunction granted on the basis of a prima facie case was proper, the Court of Appeal in **Total Kenya Limited v David Njane t/a Argwings Twin Service Station & 2 others [2018] eKLR** took the position below:

> *'…the case put forward by Njane and Buffalos Safaris to justify an injunction stopping the calling in of the guarantee was that there was no reconciliation of accounts with Total as required by the dealership agreement and that in any case they were claiming a colossal sum of money from Total. To entitle them to an injunction on the basis of a prima facie case with a probability of success, they had to show that under the guarantee, the disputes they were citing were capable of lawfully preventing Total from calling the guarantee. In other words, they had to show that by calling in the guarantee, Total was going to infringe on their rights under the terms of the guarantee.'*

67. From the affidavit evidence at hand, the Applicant only managed to repay 3,541,000/= of the original principal sum, leaving a balance of Ksh. 1,959,000/=, without including interest. The Applicant has then gone on to raise an issue with the amount of interest charged on the

loan amount. If the Applicant was to convince this court of his sincerity, he ought to have at least cleared the balance of the original amount that was in default then raised an issue with the manner in which the 1st Respondent had calculated interest. They did not. Instead the Applicant has approached this court rejecting the manner in which the 1st Respondent calculated interest, notwithstanding the fact that the loan agreement the parties had entered into had a term that provided for interest at the rate of 10% for 6 months. My position on this matter is that an in-depth discussion of the interest rates as charged by the 1st Respondent is a matter that should be a preserve of the main suit and I hereby find so.

68. In any case, on the question of a dispute on interest being a ground for the granting of an injunction, I subscribe to the position in **Bharmal Kanji Shah and Another V Shah Depar Devji** where it was opined 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…"*

69. Furthermore, in **Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725** it is stated:

> *"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."*

Drawing from the reasoning above, if at all the Applicant's is forthright on their willingness to pay the loan sum, he ought to deposit in court the amount of Ksh. 1,959,000/= being the balance of the original loan amount and then proceed to litigate on the interest charged

The instrument governing the mortgage contract provides that upon default in payment of the principal sum or any one installment the entire loan then owing becomes due and payable. In the present case payment of the loan demanded was due. It has not been shown that the interest agreed between the lender and borrower has been paid to date and the only dispute is the excess levies and interest far beyond the scope of the loan agreement.

70. Moving on to the question of the propriety of the public auction conducted on the 18th June 2018, I will be succinct in my remarks. Allegations and counter allegations have been made by counsel as the conduct of the impugned auction. However, to delve into the veracity of either parties' averment at this interlocutory stage will be, in my humble opinion, tantamount to engaging in a mini trial. As such, I decline to do so at this preliminary stage and augment my position with the ruling in the **Nguruman case(supra)** where the Court, faced with a similar temptation, resisted the urge stating '…*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…*'.

71. On the question of the court order issued by Ochieng J on the 18th June 2018, my position is that my Honourable colleague did not have jurisdiction to grant the said orders. It is indeed trite law that upon being seized with the knowledge that it has not the jurisdiction to entertain a matter as brought forth before it, it must immediately down its tools. See **Owners of the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1.**

72. The matter was brought before an Environment and Land Court yet it was a question that ought to have been canvassed at the High Court seeing as it was concerned with a dispute between a chargee and a chargor. This position is one held by the Court of Appeal in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others Civil Appeal No. 83 of 2016 [2017] eKLR** where it opined:

> *'40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.*
>
> *41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under **Section 13** of the **ELC Act** ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court…*
>
> *When* the applicant approached the court for a remedy for temporary injunction he had the burden to proof that the court had the jurisdiction to entertain the claim. It is clear and well established in law that personal and subject matter jurisdiction cannot be conferred by judicial fiat. I hold the view that jurisdiction is at the heart of any judgement rendered by a court and that any orders made for want of jurisdiction remain void ab initio.
>
> *Th*e fact that the applicant was issued with a court order stopping the sale of the property did not amount to the basic issue that the court had the authority to decide the question in the first instance.

73. Armed with the foregoing, I therefore find that the Court Order issued on the 18th of June 2018 by Ochieng J was irregular and any directions that emanated from it moot.

74. The motion and submissions by the applicant counsel took many forms including impugning the sale on grounds of valuation of the

property before sale in public auction. According to Mr. Mutitu the auctioneer had not obtained the recent value of the suit land before embarking on the sale which to him does prejudice the applicant interest. On this issue am of the conceded view that a mortgagee sale properly advertised and sale process properly conducted by an Auctioneer should not be vitiated for lack of a recent valuation report. From the rival submissions by both counsels we are not told that the mortgagee has breached his duty of care to take reasonable steps to obtain the best price for the property reasonably obtainable.

75. Taking into consideration my position as rendered above, I cannot find that the Applicant has indeed established a prima facie case with a probability of success. Having found that the Applicant has not established a prima facie case, I need not delve into whether or not irreparable damage will be caused. That being said, I am of the opinion that the Respondent has a right to claim the monies it had loaned out and is within its right to do so by realizing its security against the Applicant. If found to be in the wrong, I find no reason why damages would not suffice to satisfy the Applicant. To me, the balance of convenience tilts towards the Respondent.

Disposition

76. In the premises, having found no merit to the Applicant’s application dated the 14th June 2018, the same is dismissed. In the alternative the applicant has leave of this court to deposit with the Registrar of the High Court the quantum of the debt he thinks he actually owes the first defendant as a condition precedent for grant of interlocutory injunction within 30 days from today’s date pending the hearing and determination of the suit. Costs of this application be borne by the applicant. Leave to appeal granted.

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

....

REUBEN NYAKUNDI

JUDGE

<u>Representation</u>

Present in court Mr. RTD Judge Mutitu for the applicant

Mr. Odongo for the respondent