REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJAIDO

CIVIL CASE NO. 7 OF 2018

KINGS GROUP OF SCHOOLS LIMITED.....1ST PLAINTIFF

MARY NYAWIRA CHOMBA.....2ND PLAINTIFF

-VERSUS-

KENYA WOMEN MICROFINANCE BANK LIMITED.....DEFENDANT

RULING

By a plaint filed on 5th April 2018 and an amended plaint filed on 7th June 2018, the plaintiffs/applicants instituted these proceedings against the defendant seeking orders of injunction restraining the defendant/respondent, its agents, workmen and servants from: offering for sale, or in any way interfering, transferring, disposing off, alienating, wasting or in any manner dealing with land title number Kajaido/Kiputiei-North 22309 and Kajiado/Kiputiei-North 23249; a declaration that all notices issued by the defendant in the purported exercise of its statutory power of sale are null and void for non-compliance with the mandatory provisions of law; a declaration that the defendant issues fresh notices in compliance with the provisions of the Land Act, 2012; that the defendant reschedules and recalculates the loan amount owing in line with the interest rate capping law; as well as any other or further relief as the honourable court may be pleased to grant and costs of the suit.

There does not appear to exist much controversy on the factual background to the dispute. The facts shortly restated are as follows.

The 1st plaintiff is a Limited Liability Company incorporated in Kenya under the Companies Act Cap 486 Laws of Kenya. The 2nd Plaintiff is the proprietor/registered owner of the suit property herein.

The 1st Defendant, **KENYA WOMEN MICROFINANCE BANK LIMITED**, is a limited liability Company registered as such under the Companies Act Cap 486 and the Banking Act Cap 488 Laws of Kenya.

The application was supported by the affidavit of 2nd Plaintiff sworn on 7th June 2018.

The Plaintiffs /Applicants Case

The plaintiff witness MS Mary Nyawira Chomba in her testimony gave background information that: On or about 24th February 2016, Kings Group of Schools (the 1st Plaintiff), the Borrower, obtained a loan facility from the defendant in the sum aggregated Kshs. 40, 000, 000/= for purposes of developing the school (suit property). To that effect, the 2nd guaranteed the said loan and secured the same using the suit property. In July 2016, the defendant advanced a further loan facility to the Plaintiffs in terms of principal increase to make a cumulative sum of Kshs. 47,000,000/=.

Both parties are in agreement that some payments were made in satisfaction of the debts. There is also no dispute regarding the fact that there was default on the part of the 1st Plaintiff, with the 1st Plaintiff at some point seeking a reschedule of the instalments citing the reasons that the political status in the country at that time was not favouring the business. In a letter dated 12 March 2018 to the defendant, the plaintiffs suggested to dispose of the suit property so as to clear the outstanding loan obligations with the bank. The plaintiffs further averred that pending the said sale, they proposed to pay the sum of Kshs. 500,000= monthly starting end of March 2018 for the next 6 month or seeking a loan facility from another financial institution to ensure the loan amount was fully paid.

The plaintiffs' case as argued by Messers Kibatia & Co. Advocates may be retrieved from the supporting affidavit of the 2nd Plaintiff (Marry Wairimu Chomba) dated 5th April 2018 as well as from the Amended Plaint dated 8th June 2018.

The Plaintiffs' acknowledge having obtained or received banking facility from the Defendant Bank. The loan was secured by a charge over land title Kajiado/Kiputiei-North 23309 and Kajiado/Kiputiei 23249 (herein referred to as "the suit property"). The said suit property

belonged to the 2nd Plaintiff with the name mentioned above.

The plaintiffs stated that they wrote numerous times to the Defendant/Respondent requesting for a reschedule of the instalments citing political status at that time which had caused them to fail to meet their loan repayment obligations. According to the Plaintiffs', the Defendant responded demanding payment of arrears and it never addressed the issue of rescheduling the instalments.

It was the Plaintiffs' testimony that in October 2017, the defendant issued a statutory notice dated 10/10/2017, under section 90 of the land Act, 2012 demanding the payment of arrears amounting to Ksh.6, 547, 578, 05/= as at 8th February 2018. The plaintiff admits it is arrears; it however, disputes the sum shown by the Defendant aforementioned above. According to the Plaintiffs, the debt ballooned instead of shrinking, which was evidence of usurious interest rates levied by the Defendant. The Plaintiffs contended that the Defendant overcharged interest to the tune of 3. 575, 506, 23/=.

The Plaintiffs averred that the Defendant was in breach of its contractual terms in various ways which include: Applying a higher rate of interest than is allowable under the law thereby effectively overcharging the amount of interest; Failure to reschedule the loan to comply with interest rates capping regulations, and Failing to consider proposals made by the Plaintiffs and therefore prejudicing its ability to regularize the loan account by making any amounts that have fallen due.

Dispute on sum owed and interest charged

The Applicants/Plaintiffs' disputes the sum demanded by the Defendant as arrears arguing that it's unclear on how it charged interest on the 1st Plaintiff's loan account.

The Plaintiffs placed reliance on Clause 1(e) of the letter of offer dated 22nd October 2015, defines interest to mean ***"the rate of interest that the bank shall at its sole discretion, charge within the limits of the law."***

In the same respect, the Plaintiff quoted Clause 5.1 of the said letter of offer which provides as follows;

> ***"The borrower shall pay interest to the bank at a variable rate of KBRR plus a margin of 9.38% on a reducing balance. The margin of 9,38% comprises of: i) administrative overhead, ii) financial tax (deposit insurance premium, iii) credit risk premium, iv) profit margin, v) cost of funds in excess of KBRR. KBRR is reset by CBK and it is currently 9.87%...."***

The Plaintiffs also placed reliance on section 33A of the Banking Amendment Act, Cap 48 which states that;

"33B (1) A bank or a financial institution shall set –

> ***(a) The maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the base rate set and published by the Central Bank of Kenya; and***
>
> ***(b) The minimum interest rate granted on a deposit held in interest earning in Kenya to at least seventy per cent, the base set and published by the Central Bank of Kenya.***
>
> ***(2). A person shall not enter into an agreement or arrangement to borrow or lend directly or indirectly at an interest rate in excess of that prescribed by law.***
>
> ***(3). A bank or financial institution which contravenes the provisions of subsection (2) commits an offence and shall, on conviction, liable to a fine of not less than one million shillings, or in default, the Chief Executive Officer the bank or financial institution shall be liable to imprisonment for a term not less than one year."***

Further reliance was placed on the circular dated 3rd March 2017 which the Plaintiffs believed to have been addressed to the CEO's of commercial Banks, Mortgage Finance Companies and Microfinance banks. The said circular reads:

> ***"In view of the adoption of the new law on capping interest rate, the Central Bank of Kenya decided to suspend the KBRR framework."***

The Plaintiffs humbly submitted that the new interest rate referred to in the circular aforementioned is the Banking (Amendment Act) Act, and communication was made to the CEOs of Microfinance backs for reasons that the Amendment did affect Microfinance Banks. They further submitted that the communication in the circular dated 3rd March 2 017 in regards to interest rate capping was meant for financial institution including the Defendant. The Plaintiffs went on to argue that the Defendant illegally continued to apply the regime suspend by the Central Bank of Kenya thereby wrongly calculated interest on the Plaintiffs loan to the detriment of the Plaintiffs.

The Plaintiffs further fortified their argument by relying on Bank Report and Tabulation Report by the Senior Credit Risk Manager, being Defendant's Exhibit 5, which states as follows:

> "***The interest for the loan has continued to be 20.25% on a reducing as per the initial offer…"***

According to the Plaintiffs in their submissions, the above statement is grossly erroneous. They went further to mention that the initial offer

had interest rate set at 9.87% to make a total of 19.25% which the Defendant ought to have charged and not 20.25%.

Furthermore, the Plaintiffs produced an expert report by Mr Onono of IRAC which did a recalculation of the interest applying the rate of 19.25% as per the initial offer of 22nd October 2015 running from the period between 04/03/2016 to 05/07/2016 and graduates to the rate of 21.25% from 12/07/2016 when a principal increase following the loan amount the cumulative amount of Ksh. 47,000,000/= and the recalculation statement concludes that the total interest overcharged amounted to Kshs. 3, 572, 506.23/-. In summation, the Plaintiff reiterated that indeed the interest charged was not as per the law and the defendant overcharged interest.

The other bone of contention by the Applicants/Plaintiffs is that the Notification of Sale of the suit premises as given is manifestly unlawful and contrary to the provision of the Land Act specifically section 90 and 96. The Plaintiffs urged the court to declare the said notices null and void. Section 90(1) provides that: -

> ***"if the 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 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 the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.***
>
> ***According to 90(2) of the said Act, the notice to be served shall adequately advise the chargor of:***
>
> ***a. The nature and extent of the default by the chargor;***
>
> ***b. If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three (3) months, by the end of which the payment in default must have been completed.***
>
> ***c. (Not relevant to these circumstances)***
>
> ***d. The consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and***
>
> ***e. The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.***
>
> ***And 90(3), provides that if the chargor does not comply within two (2) months after the date of service of the notices under subsection (1), the chargee may:***
>
> ***a. sue the chargor for any money due under the charge,***
>
> ***b. appoint a receiver of the income of the charged land,***
>
> ***c. lease the charged land, or if the charge is of a lease, sublease the land,***
>
> ***d. enter into possession of the charged land; or***
>
> ***e. Sell the charged land***

The Applicants/Plaintiffs' counsel submitted that it is mandatory under section 90 of the Land Act that the Defendant informs the Plaintiffs of the extent of default if any. In the Plaintiffs' view, the correct extent of default could only be communicated if the interest chargeable was correctly calculated to arrive at the amount in default.

As the regards the right of sale under section 90(3) (e), the Plaintiffs/Applicants counsel submitted and stated that the same can only be exercised if proper notices have been sent to the chargor. Reliance was placed on **David GI tome Kuhuguka vs Equity Bank Limited (2013) eKLR** where it was held that where a chargee failed to issue a notice that strictly complied with the provisions of section 90 (2) (b) of the Land Act, then such a notice could not be deemed to be valid.

In advancing their argument, Plaintiffs' counsel further quoted section 96 (2) of the land Act which provides that:

"A chargee shall, ***(2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."***

According to the Plaintiffs, counsel the Valuation Report that Defendant produced in court cannot be relied upon since it was conducted in 2015 hence it the plaintiffs view, it does not give a true reflection of the current status of the charged property as the loan was obtained for the purposes of developing the suit property. The Applicants/Plaintiffs however, produced a valuation report which shows that the valuers inspected the suit properties on 1st September 2017 indicating the values of the charged properties to be:

Kajiado/Kiputiei North/22309 at Kshs. 60,000,000/= and Kajiado/Kiputiei North at Ksh. 62, 500, 000/=. Therefore, it was the Plaintiffs' counsel submissions that the defendant is not entitled to exercise its right to sell, urged the court to declare that fresh notices be issued in accordance with the law and that a fresh valuation which reflects the true value of the charged property be conducted.

Lastly the Plaintiffs contended that the defendant by charging interest through an ambiguous and unexplainable rate to the detriment of the Plaintiffs was undoubtedly in breach of the loan agreement terms.

The Defendant's Case

The Defendant/Respondent's case is very straight forward and may be appraised from the opposing affidavit of Bernard Rotich, the Legal Counsel of the Respondent/Defendant dated 13th April 2018, its amended defence dated 20th June 2018 and written submissions dated 23rd July 2018. According to the Defendant, by a letter of offer dated 22nd October 2015, which was dully accepted and signed by the 1st Plaintiff, the Defendant Bank advanced to the Plaintiffs a facility in the sum of Kshs. 40, 000, 000/=. The applicant took out an additional facility in terms of a principal increase amounting to 7,457,136.18/=. In his affidavit Mr Rotich depones that the loan agreement lays down the conditions which must be fulfilled on the facilities granted to the plaintiff. Further the defendant adduced evidence from Kenneth Kariuki Wambua who works as the Senior Credit Risk Manager with duties to do with all customer credit facilities including that of the plaintiffs. The gist of Kenneth Kariuki testimony is in answer to the plaintiff concern on interest and other charges on the loan and overdraft subject matter of this suit. While making reference to various circulars more specifically from Central Bank Kenneth testified that the securities in question were perfected with interest rates, commission charges and levies duly negotiated were all agreed between the plaintiffs and the defendant. As it turned out stated the witness the KBRR through Banking Circular No 4of 2016 only set the base rate which Banks would use to price their loans. Regarding capping of interest Kenneth Kariuki told the court that the rule did not apply to Micro Finance Banks whose business is governed by the Micro-Finance Act ,2016.

LEGAL ANALYSIS

Whether the defendant is entitled to exercise its statutory right of sale.

Under this limb, the Plaintiffs/Applicants contested the validity of the notices of sale of the suit property by saying that it was defective and therefore invalid as they do not comply with the provisions of the Land Act specifically sections 90 and 96. Further the Plaintiff argued that the Defendant failed to perform its mandatory statutory obligations to the Plaintiffs as it failed to inform the Plaintiffs the extend of default.

In the Plaintiffs/Applicant's view and submission; the extend of default can only be communicated if the interest chargeable is correctly calculated to arrive at the correct amount of default. In that regard, it was the Plaintiff's view that the right to sell as provided under section 90(3) (e) of the Land Act, 2012 can only be exercised if proper notices have been served with the chargor. In support of their argument, the Plaintiffs placed reliance on ***David Gitome Kulunguka v Equity Bank Limited (2013) eKLR*** where the Court held that if a chargee fails to issue a notice that strictly complies with the provisions under section 90(2)(b) of the Land Act, then such a notice cannot be deemed to be valid.

In the same respect, the Defendant in its submissions did not state much with regard to this bone of contention. In its view it is trite that courts are hesitant to interfere with the financer's exercise of its powers to recover loans/ debts from delinquent borrowers. Reliance was placed on the case by ***Honourable Justice Lenaona (as then was) in Machakos HCCC No. 215 of 2008 Jopa Villas v Private Investment Corporation & 2 others, quoted in Nyeri HCCC No. 10 of 2016 Brade Gate Holdings Limited & another v Jamii Bora Bank Limited (2016) eKLR*** which states as follows;

> ***"i am clear in my mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced.... Our courts must uphold the sanctity of lawful commercial transactions."***

Further reliance was placed on the case of ***Ibrahim Seikei T/A Masco Enterprises v Delphis Bank (2004) eKLR, Kisumu HCCC No. 160 of 2003, the Honourable Justice Warsame*** states that;

> ***"We must protect the intention of the parties so that every party adheres to his contractual duty to the other. The Appellant was advanced the money on the strength of the security he provided to the bank and had an obligation to repay the monies as per the agreed terms. Banks do not give monies as a gratuity or love for human kind ... I cannot issue an injunction against a party wanting to exercise its statutory power of the sale merely because the amount is in dispute."***

In that regard, the Defendant dubbed the present suit as a "non-starter" and urged this Honourable Court not to allow itself to be misused by the Plaintiffs as a shield to shirk its contractual obligations.

I now consider the contention that the statutory notice was defective an invalid. The notice in contention was issued on 8th February, 2018. It was directed to the borrower, being the 1st Plaintiff herein. The said notice was issued in terms of section 90 of the Land Act, 2012. The Plaintiffs in their submissions contested the issuance of the said and labelled it invalid and defective for the reason that according to the Plaintiff it did not stipulate the correct amount paid or amount that the Plaintiffs are in default.

The effect of a statutory notice issued in terms of section 90(2) of the Land Act, 2012 is that it triggers the security realization process, which leads to the chargee ultimately exercising its remedies enshrined under section 90(3) of the said Act. The notice is issued pursuant to a default or breach of any of the covenants under the charge. There is no prescribed format promulgated as yet by the Cabinet Secretary in charge of Lands and Housing as he is mandated under section 90(5) hence different formats of the notice have emerged leading to a veritable maze where challenges and questions on what truly constitutes a valid notice are numerous. See ***Cieni Plains Company Limited & 2 others v Eco bank Kenya Limited (2017) eKLR.***

The law as regards issuance of statutory notice by chargee is clearly set out under section 90 of the Land Act, 2012 which lays down the requirements of a valid statutory notice. Section 90 provides that;

"90. Remedies of a chargee

(1) 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.

According to section 90(2) the notice to be served shall adequately advice the chargor of;

" (a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies."

Section 90(3) provides that if the chargor does not comply within two (2) months after the date of the notice the chargee may;

"(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;"

Section 90(1) in my view lays down the circumstances under which the statutory notice is issued by the chargee to chargor. Clearly as provided for under the aforementioned section, a statutory notice is issued where there is default of payment in performance of the expressed and implied covenants in a charge. A notice must be served to the chargor by the chargee in writing clearly stating the payment of any amount owing or performance and observance of the agreement as the case may be. This notice is mandatory on the part of the chargee thus it is mandatory that the chargee, as the law requires under the sections, issues the requisite statutory notice notifying the chargor of the intended sale of the charged property by auction.

In light of the above and in the present case both the Defendant and the Plaintiffs confirmed that the Plaintiffs obtained financial facilities from the Defendant which was secured by the suit property. Further, the Plaintiffs in their submissions, Plaint and supporting affidavit admitted having failed to service the loan according to the terms set out in the charge. It was as a result of the said default that the Defendants properly and in accordance with section 90(1), served the Plaintiff with a statutory notice demanding for the Plaintiffs to clear the outstanding amounts / arrears.

However, it is important that the said statutory notice comply with the aspects enshrined under section 92(2) which lays down the aspects to be included in the aforesaid notice. In ***Cieni Plains Company Limited & 2 others v Eco bank Kenya Limited (2017) eKLR (supra)*** it was stated *inter alia* that;

"As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non-observance of a covenant in the charge, then the notice is to state what the chargor is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under section 90 is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor."

The general purpose of the notice is majorly to protect the chargor. This was stated in the case of **First Choice Mega Store Limited v Eco bank Kenya Limited [2017] eKLR**

" [37] …The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the

chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notifications of such action and an opportunity to redeem his property.

[38] It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective rights of both the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in* Royal Bank of Scotland Plc v Etridge [2002] 2 AC 733, [2], *the law "must afford both parties a measure of protection". The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence reasonable confidence that it may at an appropriate time enforce the security is also protected.

[39] A purposive construction of section 90 is necessary. Section 90 must thus be read and understood with the open fact that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favoured given that it is the same section that triggers the application of a chargee's rights and remedies."

In the current case before this Honourable court, the Plaintiffs faulted the statutory notice in question on grounds that it did not contain the correct figure of the amount in default. In my view it is clear that the Plaintiffs herein dispute the exercise of statutory power of sale on the basis that the amount owing and interest charged is in dispute. Where there is substantial compliance with section 90(2), enough to put the chargor on notice of the chargee's ultimate intentions if the notice is not to suggest that even where there is patent non- compliance, the court will ignore that fact. Every case ought to be considered on its own merits and unique circumstances especially at interlocutory stage.

In this case, looking at the statutory notice dated 8th February, 2018 that was served to the Plaintiffs by the Defendant in accordance with section 90 of the Land Act, all the aspects enshrined under section 90(3) as read with section 90(2), the chargee's obligations were perfectly informed. The statutory notice contains all the necessary aspects outlined under section 90(2). In my view there was indeed substantial compliance in so far as statutory notice is concerned. The 1st Plaintiff did not deny having defaulted repayment of the loan and that means even before the disputes as regards sum of interests owing is put into consideration, there is apparent failure on the part of the 1st Plaintiff to repay even the principal amount outstanding. Therefore, in my view the contentions with regard to the correct sum in default and the interest chargeable is a subsidiary issue in this matter which does not hold much water. I view it that the Plaintiffs do not stand on any steady ground as far as the contention to the statutory notice is concerned. I have seen a copy of the notice which is in full compliance of the law.

The notification of sale has also been subject of contest by the Plaintiffs' submissions. The Plaintiffs again, argued that the notices cannot be valid due to the fact that there is unsettled disputes concerning the correct extent of default and the disputes over interest chargeable. As I mentioned earlier, the Plaintiffs' argument does not hold much water.

Section 96 of the Land Act provides as follows;

" 96. Chargee's power of sale

(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."

It is trite that where the notice required to be served in forms of section 96 of the Land Act is not given to the lessee or chargor and who have recognized interests in land, that failure to notify them goes into the core of the validity of the issuance and service of the notification for Sale.

The Notification for Sale under section 96(2) quoted above is mandatory and it is part of the protection of the equity of redemption provided under section 89 of the Land Act, 2012.

In the instant case, upon the expiry of the 3-month notice, the Plaintiffs were therefore served with 40days notification of sale informing them of the Defendant's intention to sale the suit property/ charged property. According to the evidence on record, the statutory notice was dated 8th February 2017 and a notice of sale 27th April, 2018. Indeed, the 3 months' period given to the Plaintiff to rectify or clear the amount in default had undoubtedly lapsed hence the chargee/ Defendant in exercise of his statutory power to sell the charged property served the Plaintiffs with a notification of sale which was to last for 40 days. When the 40 days expired, the chargee was undoubtedly vested with the power to proceed and sale the charged property.

Having thoroughly traced the above process, there is no doubt that the Defendant duly discharged its obligation of informing the Plaintiff of its intention to sale the charged land in accordance with the provisions of sections 90 and 96 of the Land Act, 2012.

DUTY TO VALUE PROPERTY

The question to ponder is whether the Defendant discharged its duty in forms of section 97 of the Land Act to ensure valuation of the suit property was undertaken by a qualified valuer. It is not in doubt that the general purpose of valuation is envisaged under section 97(2) of the Land Act, 2012 and is twofold; to wit, to obtain the best price reasonably obtainable at the time of sale thus protecting the right of the chargor to the property. It is also meant to ensure best and reasonable price which is comparable to interests in land of the character and quality is part of the right to property itself and to prevent unscrupulous chargee from selling the charged property at a price which is

peppercorn or not compatible to the interests in the property in terms of character and quality.

The chargor's duty under section 97(2) of the Land Act is of serious legal requirement which entitles to him to apply to court under section 97(3)(b) of the Land Act to have any sale based on such breach to be declared void and the court on the required proof, should declare such sale void. That is the onerous nature of the duty. However, the question is, did the Defendant as the chargee satisfy the requirement of section 97(2) of the Land Act? According to the evidence on record, produced for purposes of this case, the defendant produced a valuation report dated 13th April 2018. I have taken note of the fact that the inspection date of the same valuation report was 25th November 2015. The Plaintiffs contested that the valuation report produced does not reflect the current status of the charged property. The Plaintiffs' view is that since the purpose for which the Plaintiff obtained the financial accommodation was to develop the school hence the value of the property ought to have increased. On the other hand, the Plaintiffs produced a report dated 6th September, 2017 showing the current value by Advent Valuers as follows; Kajiado/Kaputiei North/ 22309 at ksh.60, 000,000 and Kajiado/Kaputiei North/ 23249 at ksh.2, 500,000.

It is the court's finding is that indeed the valuation report produced by the Defendant cannot be relied upon as the true and current value of the suit property as it is clear that the property was inspected in 2015. On the other hand, it is my view that the Plaintiffs' valuation report cannot be relied upon for the simple reason that it was done without the Defendant's involvement hence the court may not assume that it was done objectively.

From what i have attempted to outline above, it seems to me that the principles to be observed by the court in deciding whether the mortgagee in exercising statutory power of sale and the obligation to obtain market value or best price of the property has been laid to rest in **Hallsbury Law of England 4th edition at 659** which reads as follows:

> *"Duty of mortgagee on exercise of power of sale: a mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor. He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent. He can decide if and when to sell on the basis of his own interests. He owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price. This duty cannot be replaced or supplemented by liability in negligence. It can however, be excluded by agreement.*
>
> *If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the ground of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale or if it would be inequitable as between the mortgage and the purchaser for the sale to be set aside. However, if the mortgagee does not sell with proper precautions, he will be charged in taking the accounts with any loss resulting from it".*

These principles are relevant to the facts of this case. The Plaintiffs' Counsel seems to advance the argument that the failure by the Defendant not to avail the current valuation report is prejudicial to their interests. What we are not told is that by the mortgagee proceeding to advertise for sale the suit property with the 2015 the valuation report or another which might be carried out before the actual sale he has acted fraudulently or recklessly.

At the outset the mortgagee has even a higher legal interest than the mortgagor for the very reason of the duty of care to obtain the best price to cover the debt and any surplus be reimbursed to the mortgagor. In this case, the Plaintiffs have not demonstrated that in the defendant exercising the statutory power of sale he has not acted in good faith or taken steps to obtain value for the property either be market value or best price in the circumstances.

While conceding that there is a need for a current valuation report of the property in issue, that alone, does not vitiate the exercise of the power of sale conferred by the law. What the court said in **Palmy Co. Ltd V Consolidated Bank of Kenya Ltd 2014 eKLR** the owners of proving that a mortgagee is guilty of discharging the duty of care on under value or absence of valuation of the suit property pursuant to section 97 (2) of the Land Act rests with the Plaintiff.

Although section 97 (2) of the Act is obligatory, the valuation in its tenor and intent is to guide the mortgagee to obtain the proper price of the suit land at the time of the auction. I take cognisance of the fact that more often than not sale by public auction is dependent materially on market forces and independent competitive biddings received by the auctioneer.

This ground therefore, on the aspect of absence of the current valuation report submitted by the Plaintiffs also fails.

WHETHER THE DEFENDANT IS IN BREACH OF THE LOAN AGREEMENT TERMS

The Plaintiffs alleged that the Defendant acted in breach of the loan agreement by having charged the interest through an ambiguous and unexplainable rate much to the detriment of the Plaintiffs. The Defendant opposed the Plaintiff's argument in its submissions. It argues that clause 7 of the Top Up facility letter dated 25th May 2016 expressly indicates that the total monthly instalment payable is ksh.998, 517. The Plaintiffs willingly executed and accepted the said offer and proceeded to access the said money. The Defendant further argued that in terms of the agreement between the parties the Defendant was supposed to disburse the facility amount and the Plaintiffs would remit the monthly payments punctually as and when they fell due. During the continuance of the facility the Plaintiffs defaulted in repayment. *(See statements of account indicating the default).* The Defendant therefore submitted that the statements of account indicate that indeed the Plaintiffs have been in perennial default and hence indebted to the Defendant.

It was the Defendant's averment that the Plaintiffs are well aware that the default in timely remittance of the monthly payments resulted in an increase in the amount due to accrued interests and penalty charges on the facility. According to the Defendant, parties are bound by the terms of the agreement and that is trite law that it is not the duty of the courts to rewrite contracts for parties.

It was therefore the Defendant's averment that a party should never be allowed to take advantage of the other party. Further, the Defendant

argued that the Plaintiffs are seeking to walk away from their obligations with the sole intention of defeating the Defendant's interest notwithstanding the fact that the Defendant's monies as financier was been used by the Plaintiffs. The humble submission of the Defendant was that the Plaintiffs are indebted to the Defendant for the amount outstanding.

It is plainly obvious that the maxim of HE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS is applicable to the facts of this case.....

Fortunately, the defendant having performed its part of the contract the ability to fulfil the rest of the conditions shifted to the plaintiffs. The circumstances in this case, is as epitomized by the court in the case of **Nakan Trading Co. Ltd V Coffee Marketing Board 1990-1994 EX 448** on the issue of breach of contract where the court held that:

> *" in a contract a breach occurs when one or both parties fails to fulfil the obligations imposed by the terms since the contract between the parties were reduced into writing. The duty of the court is to look at the documents and determine whether it applies to the existing facts."*

From the evidence placed before this court, it was never in dispute that the Plaintiffs were in breach of an essential term of the contract in that they failed to meet repayment obligations of the law when it became due and demanded. The moment the Plaintiffs went into arrears and on being asked to regularize failed to do so she was guilty of the breach of the fundamental term in the mortgage contract.

WHETHER THE INTEREST CHARGED WAS AS PER THE LAW

I have looked at the letter of offer dated 22nd October 2018 which was duly accepted and executed by the Plaintiffs. Clause 5.1 of the letter aforementioned *(page 3 of the Defendant's bundle of documents filed on 30th April 2018*) states as follows'

> ***"Interest was to be paid by the Plaintiffs to the bank at a variable rate of KBRR plus a margin of 9.38% on reducing balance. KBRR reset by CBK was at the rate of 9.87%. In that respect the total interest payable by the Plaintiff as agreed in the letter of offer was 19.25%."***

In the second letter of offer which relates to the top up facility dated 25th May 2016 which consolidated the first loan facility and the second one to make an aggregate of ksh.47, 000,000 also provided for interest at clause 5.1. That means the interest provided under the first loan agreement stopped being operational for the reason that the two facilities were consolidated into one facility which had its own new terms. The interest was then payable as per the new agreement.

In terms of the second letter of offer, the Plaintiffs were to pay interest to the bank at a variable rate as prescribed by CBK and it was 9.87% plus a margin of 21.25%. The interest was to be payable monthly in arrears on the dates when the instalments of the principal amount were due and was to be compounded in the event of not being punctually paid with the monthly instalments.

In light of the above, it is clear beyond any doubt that the interest was neither ambiguous nor unexplainable as it was expressly provided for in the agreement. Therefore, it is the court's finding that indeed the interest chargeable was calculated as per the loan agreements and within the realms of the law.

As to whether the interest was charged as per the law, I wholly associate myself with the Court of Appeal in the case of ***Fina Bank Ltd. V Ronak Ltd (2001) 1 EA 54*** where it was stated that dispute on accounts was no basis for grant of an injunction. More specifically, it considered disputes on interest charged where it held at page 68 that:

> ***"as the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates its sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly, the respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis."***

In my view and according to evidence on record, the Defendant and the Plaintiffs had a loan agreement with the terms and conditions regulating the relationship clearly outlined and the interest in question expressly stipulated therein. I also noted that the said agreements were duly signed and executed by both parties as a sign of consent in respect of the contents of those agreements. The defendant honoured his part of the bargain in due performance of releasing the loan amount to the plaintiff as per the agreements. It is therefore my view that the court has no jurisdiction to interfere with the terms of a contract that the parties have freely agreed upon.

Whether or not Interest rate capping applies to microfinance institution.

The simple answer is that micro finance institutions are governed by the Microfinance Act no 19 of 2006.They operate in a slightly different legal regime than conventional banks. The interest rates by microfinance institutions despite the regulation by central Bank of Commercial Banks has remained higher beyond the current policy on interest capping.

Despite the view taken by Mr Onono an expert on financial forensics on loan accounts and tariffs charged it follows that he cited no provisions of the law that Microfinance institutions are required to comply with the law on interest under the Banking Act.

Speaking for myself in respect to this case the mortgagee in recalling the debt is not required to distinguish between the principal amount and interest charged during the subsistence of the mortgage contract. It is clear that its entire debt which is factored in exercising the statutory power of sale. In the case of **Andrew M. Wanjohi v Equity Building Society & Another 2006 eKLR** the court articulated the mortgage

contract in the following passage: *"By offering the suit property as security the chargor was equating it to a commodity which the charge may dispose of, so as to recover his loan altogether with interest thereon."*

Do the Plaintiffs have a case to entitle them a relief of permanent injunction against the Defendant?

In answer to the above questions both counsels invited the court to consider the following: Ms. Kimacia advanced the argument that there are sufficient facts to enable this court grant a permanent injunction to stop the sale of property referenced as LR Kajiado Kaputiei/North 23249 and 22309 to require the mortgagee reschedule and recalculate the amount owing in line with the interest rate capping law.

On her part Ms. Maina for the Defendant main argument in answer to the Plaintiffs' counsel submissions was that the principal amount of more than Kshs. 52,233,550.43 had become payable together with interest. Further Ms. Maina confidently submitted and urged the court to find that even if the 3,329,680 million variation in interest was to be credited to the loan account of the mortgagor the mortgage money will still be outstanding and due for payment.

In my view the substance of the complaint raised by the Plaintiffs can be said to be covered in the judgement of Crossman J in the case of **Warring v London and Manchester Co. Ltd 1935 CH 310** where he said as follows:

> *"The contract is an absolute contract, not conditional in any, and the sale is expressed to be made by the company as mortgage. If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid into court proceedings then, if the company had continued to take steps to enter into a contract for sale, or had purported to do so, the plaintiff would, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgement, perfectly clear (subject to what has been said to me to-day) that the mortgagee (in the present case, the company) can be restrained from competing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside".*

To sum up my view the plea of injunction if granted to the plaintiffs would amount to allowing them to have a second bite at the cherry. This being the legal position is covered in Hallsbury Laws of England 4th Edition 1980 paragraph 725 where it is stated that: *"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagee has begun redemption action, or mortgagor objects to the manner in which the sale is arranged."*

The importance of this claim is that a legal mortgagee does exist between the plaintiffs and the defendant. As regards overcharging of interest and other penalties without evidence that it is in breach a fundamental clause of the contract would not to me invalidate the notice issued of intention to exercise the statutory power of sale.

The default complained of in terms of the quantum due ought not to reach the level of a mathematical precision formulae for purpose of the notice. It is sufficient if the notice adequately prescribes the amount the plaintiff is in default and is required to settle with the mortgagee. It must be remembered that in a contract reduced into writing minor clerical errors as to numbers and values should not be used to invalidate the statutory notice to realize the security.

In the above circumstances and for the reasons I have endeavoured to give the overwhelming weight of authorities cited shows the remedy of injunction sought by the plaintiffs would occasion injustice to the mortgagee by restraining it from exercising statutory power of sale which has arisen. A permanent injunction cannot be granted without evidence to support an existing legal or equitable remedy on the part of the plaintiffs.

I am satisfied that the suit as filed lacks merit and it's hereby dismissed with costs to the defendant. Leave to appeal is allowed.

Dated, Delivered and Signed in open court this 29th September, 2018.

……

R. NYAKUNDI

JUDGE

Representation

Ms. Kimacia for the Plaintiff – present

Mr. Kiplagat for Mr. Maina for the Defendant - present