REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. _12_OF 2018

MICHAEL GITERE...1ST PLAINTIFF/APPLICANT

RUTH INDOSHI LIKHAYA..2ND PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED................DEFENDANT/RESPONDENT

RULING

1. By a motion brought on notice dated 7th June, 2018, the plaintiffs herein seek the following orders:

> **1) THAT this application be certified as urgent and service be dispensed with at the first instance.**
>
> **2) THAT a temporary injunction do issue pending hearing and determination of this application restraining the defendant, its agents and/or assigns or any of them from advertising for sale, disposing of, selling or otherwise interfering with UNIT NO. 66 ON L.R NO. 10426/251 LUKENYA HILLS PARK ESTATE IN ATHI RIVER WITHIN MACHAKOS COUNTY.**
>
> **3) THAT an order of injunction do issue pending hearing and determination of the suit herein restraining the defendant, its agents and/or assigns or any of them from advertising for sale, disposing of, selling or otherwise interfering with UNIT NO. 66 ON L.R NO. 10426/251 LUKENYA HILLS PARK ESTATE IN ATHI RIVER WITHIN MACHAKOS COUNTY.**
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> **4) THAT costs of this application be paid by the Respondent.**

2. The application is based on the following grounds:

> **1) The plaintiff/applicants jointly obtained a mortgage facility Kenya Shillings Six Million, One Hundred and Twenty Thousand (Kshs. 6, 120, 000/=) only to finance the purchase of the suit property herein.**
>
> **2) It was agreed that the loan facility will be paid in monthly installments of Kshs. 103, 219/= at an interest of 14.9% per annum for a period of ten (10) years.**
>
> **3) The defendant/Respondent without any prior notice, unlawfully and illegally increased both the Interest rate to 17% per annum and the monthly repayment to Kshs.113, 960/= which increment resulted to arrears on the applicants' account.**
>
> **4) The defendant has served the 1st plaintiff/applicant with a notification of sale of the suit property which sale is scheduled to take place on 13/6/2018 but the 2nd plaintiff was never served.**
>
> **5) Both the applicants have NEVER been served with the three months' notice as by law provided by the defendant hence the right of sale has not accrued.**
>
> **6) The sale value quoted by the defendant of Kshs. 7,000,000/= is inordinately low and if the suit property is sold as scheduled, the plaintiffs will suffer irreparably.**

3. According to the Plaintiffs, on or about 15th January, 2016, they jointly took a mortgage facility from the defendant of Kshs 6,120,000/= to finance the purchase of Unit No.66 on LR No. 10426/251, Lukenya Hills Park Estate in Athi River within Machakos County (hereinafter referred to as "the suit property"). According to the plaintiffs, it was agreed that the loan facility would be paid in monthly instalments of Kshs 103,219/= at an interest of 14.9% per annum for the period of ten (10) years.

4. The Plaintiffs averred that they continued to pay the loan facility as agreed until 9/6/2016 when the defendant without any prior notice unlawfully and illegally increased both the interest rates to 17% per annum and monthly repayment to Kshs 113,960/=. According to the plaintiffs, in the defendant's letter of 9/6/16, the reasons for increasing the interest rate and monthly repayment was a purported violation of mortgage approval terms of failing to use the credit card and failing to channel salary through their account which was an erroneous observation.

5. Immediately the plaintiffs received this communication, they wrote to the defendant a letter dated 26/8/16 requesting them to review the illegally revised interest rates and monthly repayments which had been erroneously increased and they continued to pay the loan as per their initial instalment until 1/2/17 when the Defendant advised them through a letter on without prejudice basis of the same date that the interest rate had not been reviewed as requested and that the plaintiffs' account was in arrears which arrears, according to the plaintiffs, were as a result of the illegal and unlawful increment of the interest rate and monthly repayment which arrears had also attracted an interest of 10%.

6. It was averred that sometime late last year the plaintiffs arranged a meeting with the defendant's officials on the foregoing issues and the latter said they could only rectify the anomaly after the plaintiff had cleared the arrears. It was averred by the plaintiffs that they continued to pay the facility with the last deduction being effected in February, 2018.

7. However on 9/4/18, the 1st plaintiff received a notice from Purple Royal Auctioneers acting on the Defendant's instructions wherein they gave the plaintiffs 45 days to pay Kshs 6,362,030.29 purportedly owed to the Defendant which notice was accompanied by a notification of sale also dated 9/4/18. It was however contended by the plaintiffs that they were never served with the said notice and notification of sale by the auctioneers contrary to their legal advice that the Defendant ought to have served them with a three months' notice to redeem the suit property before they could proceed to issue the notification of sale.

8. The Plaintiffs however disclosed that prior to the said document being served, the plaintiffs had never received any notice from the Defendant. Further, from the notification of sale served, the value of the suit property was shown to be Kshs 7,000,000/= which value in the plaintiffs' view was inordinately low.

9. It was however averred that the said auctioneers had since publicised the suit property for public auction which was scheduled to take place on 13th June, 2018.

10. The Plaintiffs lamented that if the suit property is sold they would suffer irreparably.

11. It was reiterated on the Plaintiffs' submissions that they jointly obtained a Mortgage facility of Kshs. 6,120,000/- on 15/2/2016 to finance the purchase of the suit property herein and that it was thereafter agreed between the parties herein that the said loan facility would be paid in monthly instalments of Kshs. 103,219/- at an interest rate of 14.9% per annum for a period of Ten (10) years.

12. However, without any prior notice, the Respondent unlawfully and illegally increased both the interest rate to 17% per annum and monthly repayment to Kshs. 113,960/- which increment resulted to arrears on the applicants' account because they continued to pay as earlier agreed. The applicants further stated that they were never served with any notice prior to the notification of sale which was only served upon the 1st plaintiff and that the quoted value of the suit property is inordinately low.

13. Based on Order 40 Rule 1 of the ***Civil Procedure Rules 2010*** it was submitted that the provision is very clear on the circumstances under which temporary injunction can be granted by the Court and that the issue for determination by this Court is therefore whether or not the application in issue meets the threshold set under the above-quoted provision of the law. It was submitted that the principles for the grant of an interlocutory Injunction have long been settled by the Court of Appeal in the case of **Giella vs. Cassman Brown & Company Limited (1973) EA 358**.

14. It was contended that a *prima facie* case has been explained to mean that a serious question is to be tried in the suit and in the event of success if the injunction is not granted, the plaintiff would suffer irreparable injury but does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed.

15. In this case it was submitted that the applicants have stated in their affidavit in support of the application herein that, the interest rate was increased without any prior notice and further it was increased based on an erroneous observation as communicated by the plaintiffs *vide* their letter dated 26/8/2016. They have further stated, that they had complied with all the conditions which has been imposed by the bank prior to the legal charge. The Respondent has admitted to having increased the interest rate as evidenced by the defendant's exhibit dated 9/6/2016 in which the Respondent informs the plaintiffs that the interest rate has been revised effective on 9/6/2016.

16. The Plaintiffs relied on section 84(1) of the ***Land Act, 2012.***

17. It was submitted that from the letter of offer and acceptance, it was agreed by the parties that in the event the plaintiff fail to utilize the bundled products, the interest rate applicable shall be converted to the prevailing market rate. In this case although it has been alleged that, the plaintiffs failed to utilize the bundled products which the plaintiffs have candidly denied, in exercising their right of variation of the interest rate, the defendant failed to adhere to this provision of the law hence making the increment illegal in the circumstances. To the Plaintiffs therefore the foregoing, the increment of the interest rate was illegally and unlawfully done leading to the arrears claimed and this is an issue for determination by this Court. It was therefore submitted that the plaintiff/applicants have established a prima facie case in their favour.

18. It was further submitted that the defendant failed to follow the due procedure as provided under the ***Land Act, 2012*** in exercising its powers of sale. Section 90(1) of the said Act provides that in case there is a default on the part of the charger, the charge shall serve the charger with a three months' notice before the chargee exercised his power of sale. According to the Plaintiffs, though there are notices annexed to the Replying Affidavit dated 17/8/2017 and 5/2/201 purportedly served on the plaintiffs, service of the same is denied. Further,

although it is indicated that the purported notices were served through registered post, no certificate of postage has been annexed to prove that mode of service.

19. The Plaintiffs relied on section 96(2) of the ***Land Act*** under which they were to be served with 40 days Statutory Notice of sale before the sale takes place. However, service was only effected upon the 1st plaintiff while the 2nd plaintiff was never served as by law required.

20. It was further submitted that under section 97(2) of the ***Land Act***, the defendant ought to have ensured that a forced sale valuation is undertaken by a valuer before exercising the right of sale. In this regard, the Plaintiffs relied on the decision of **Gikonyo, J** in **Koileken Ole Kipolonka Orumos vs. Mellech Engineering & Construction Limited & 2 Others (2018) eKLR.**

21. According to the Plaintiffs, although valuation is said to have been undertaken by the defendant, the valuers have stated in their valuation that they visited the property on 6/1/2017 and prepared the report a year after. It was contended that although the Defendants have indicated the forced sale value as Kshs. 5,250,000 and market value of Kshs. 7,000,000, the forced sale value was never disclosed to the plaintiffs in the notification of sale and as such, the applicants contended that both the market value and the forced sale value are inordinately low as compared to the market price of the properties surrounding the suit property.

22. The Plaintiffs therefore submitted that if the sale proceeds based on the valuation done, the applicants will suffer irreparably because the forced sale value will not cater for the amount being claimed by the defendant and if it is sold in the market price then the proceeds will only benefit the defendant bank and the auctioneers to the applicants' detriment who have incurred so much costs in payment of the loan facility and also in the preliminary payments before the loan facility. In view of the foregoing, it was submitted that the applicants will suffer irreparable injury if orders sought herein are not granted. Irreparable injury to them means that the injury must be one that cannot be adequately compensated for in damages. To the Plaintiffs, if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be great in view of the foregoing.

23. The plaintiffs therefore submitted that they had established the set threshold for grant of Interlocutory Injunction and they contended that that the application dated **7/6/2018** is merited and it would be in the interest of justice and in all fairness that this Court allows the said application with costs.

24. The application was however opposed by the Defendant.

25. It was submitted by the defendant that as the applicants herein seek injunctive orders this court ought to take judicial notice of the fact that these are equitable reliefs in their nature. However, it is now well and settled principles on what is required for a court to issue injunctive orders. In this respect the Respondent relied on **Naftali Ruthi Kinyua vs. Thuita Gachure & Ano [2015] eKLR** as guided by the case in **Giella vs. Cassman Brown Co. Ltd [1973] EA 358** where the court stated that for the grant of the orders of injunction, a court has to be satisfied that the following conditions have been met:

a. The applicant has established a prima facie case with a probability of success;

b. The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and

c. If the court was in doubt, the application would be determined on a balance of convenience.

26. As regards the first condition it was submitted that **Lord Diplock** in **American Cynamid vs. Ethicon Limited [1975] AC 396** as considered by the aforementioned case of **Naftali Ruthi Kinyua vs. Thuita Gachure & Ano** ***(supra)*** stated as follows:

27. To the Respondent, the question to ponder is whether the applicants have managed to establish a *prima facie* case with a probability of success. In this case it was submitted that the applicants admitted that they took a mortgage facility from the respondent herein. It is also not in dispute that the mortgage facility was taken for the purchase of a bungalow number 66 erected on L.R No. 10426/251 in Athi River Lukenya Hills. The respondent herein did issue the applicants with a letter of offer dated the 7th day of July 2015 which indicated that the approved amount was the sum of Kshs. 6,120,000/= while clause 7.18 of the letter of offer clearly indicated as follows:

> ***"In the event that any of the bundled products is not utilized by the Borrower, the interest rate applicable shall be converted to the prevailing market rate."***

28. It was contended that the bundled products the applicants were supposed to utilize as part of the loan facility approval was to channel their salary through a KCB account and to use a credit card and failure to conform to the use of the bundled products, the prevailing market interest of 17% per annum would apply. To the Respondent, the above stipulation is independent of the provision of the provision provided for in paragraph 5.7 of the Letter of offer which provides as follows:

> ***The bank may from to time at its sole discretion and within the limits permitted by law revise the Margin and the applicable rate or rates of interest provided however that the bank shall give the Borrower at least thirty (30) days' notice prior to any change in the rate or rates of interest payable.***

29. According to the Respondent, the action by the respondent was not to review the interest as claimed by the applicants herein. However, the applicants are not being sincere and honest as they have not informed the Court that they did not fulfill part of the contractual obligations necessitating the prevailing market interest to apply. Both the applicants and the duly assigned attorneys of the respondent proceeded to execute the letter of offer which indicated their willingness to be bound by the terms thereof.

30. It was averred that the parties herein proceeded to cause a legal charge to be drawn and registered on the 24th December 2015 which legal charge relates to the property known as Bungalow No. 66 on Phase II erected on L.R No. 10426/251, Athi River (Lukenya Hills) and in which the principal amount is the sum of Kshs. 6,120,000.00. The legal charge under paragraph 7 provides for situations which can be deemed as events of default with Clause 7(b) thereof indicating that:

> ***"…if the Chargor fails to observe or commits any breach of the undertakings and covenants contained in this Charge any loan agreement facility letter or other agreement (as may be amended, supplemented, varied or reviewed from time to time) or obligation relating to the borrowing or if any representation, warranty or undertaking from time to time made to the Bank by the Chargor is or becomes incorrect or misleading."***

31. It was the Respondent's case that the applicants failed to observe the stipulations in the facility letter of utilizing the bundled products which a already observed necessitated the use of the prevailing market rate and that despite the advise by the respondent herein, the applicants as a matter of fact stopped servicing the loan which made their mortgage facility to be in arrears which was indicated vide the letter dated the 6th day of June 2017 as amounting to a sum of Kshs. 368,585.45/=. As a result, the respondent issued a Statutory Notice pursuant to section 90 (1), (2) & (3) of the ***Land Act*** and section 74(1) & (2) of the ***Registered Land Act*** (repealed) which statutory notices were addressed to the applicants herein giving them a period of three months to rectify their default failure to which the Respondent would exercise its right of statutory sale as stipulated in section 90(3)(e) of the ***Land Act***. It was further disclosed that the Respondent further issued a statutory notice to sell pursuant to section 96(2), (3) of the ***Land Act*** to the applicants herein which notice indicated that the extent of the default by the applicants herein was to the arrears of Kshs. 730,101.50 and the respondent informed the applicants that they ought to pay the loan arrears within a period of forty (40) days failure to which the respondent would sell the charged property. It was therefore contended that it was misleading on the part of the applicants to inform this Court that they never received any statutory notices as is required.

32. In the Respondent's view, having identified that the applicants herein were in breach of their contractual obligation, clause 8 of the legal charge provided for the bank's remedies with Clause 8(e) thereof indicating that the respondent could sell the premises as a remedy. The respondent herein thereafter gave instructions to a firm of auctioneers known as Purple Royal Auctioneers who issued a redemption notice to the applicants herein on the 9th day of April 2018 in which notice, the said auctioneers gave the applicants herein a forty five (45) day notice to redeem the property by paying the sum of Kshs. 6,362,030.29/= failure to which the premises would be sold by way of public auction. However contrary to the applicants' allegations, prior to the Respondent herein engaging the auctioneers who did the redemption notice, the Respondent had engaged the services of Adept Realtors Limited who conducted the valuation of the suit property. The report and valuation exhibited confirmed that a valuation was indeed carried out on the 6th day of January 2017 and that the market value was a sum of Kshs. 7,000,000/= while the forced sale value was a sum of Kshs. 5,250,000.00/=. It is therefore the Respondent's position that it was quite misleading for the applicants to aver that the Respondent did not conduct a forced sale valuation.

33. It was reiterated that since the applicants executed the Letter of Offer and the Legal charge, in essence, the same constituted a contract as between themselves and the Respondent and that parties are bound by the terms of a contract which they themselves executed illustrating their willingness to be bound. The Respondents therefore urged the Court to find that the applicants did not establish a case which has chances of success as the respondent wholly complied with the provisions of the law in issuing all the statutory notices as provided by the law.

34. In this case it was contended that the applicants have conceded the fact that they are in debt and all they require is time to ensure they fully repay the debt owing. They have not indicated to this Court how they intend to settle the same since it is now owing and in demand by the bank. It was the Respondent's case that the applicants have failed to establish that they have a case with chances of success in this matter.

35. As regards the issue whether the applicants stand to suffer irreparable loss which cannot be compensated by way of damages, it was contended that the applicants have failed to illustrate and/or demonstrate what irreparable loss they will suffer in the event the application is not allowed by this Court. In this case the Respondents relied on **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** and ***Halsbury's laws of England.***

36. The Respondent also relied on ***Humphrey Kilambo Mcharo vs. Kenya Commercial Bank Ltd Civil Application No. Nai. 51 of 2005*** *as considered by the court in the case of* ***Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Anor***.

37. It was therefore submitted that the plaintiffs herein would not suffer any substantial or irreparable damages if the orders sought are not granted. As a matter of fact, it is the defendant/respondent herein who continues to suffer irreparably due to failure by the applicants/plaintiffs in their failure to clear and/or service their loan. The defendant/respondent's business is and will be immensely affected as it has contractual obligations which are commercial in nature.

38. The Respondents therefore submitted that there being no doubt, there is no need to decide the application on a balance of convenience. To the Respondent as it has wholly demonstrated that the applicants herein have failed on all the three tests with regards to the grant of the orders sought the application ought to be dismissed.

39. It was further contended that as the applicants are seeking equitable orders from this Court, the said relief cannot issue because of the following:

> (i) He who seeks equity must do equity – The plaintiffs/applicants herein have not complied with the above as they have failed to remit the outstanding loan balances. This is despite having conceded to the fact that they have outstanding loan arrears, they have not even indicated how they intend to settle the same.
>
> (ii) **He who comes to equity must come with clean hands** – The plaintiffs/applicants' 'hands' are not clean. They have mis-directed this Honourable court on why the outstanding loan arrears have become immediately payable. They have also not made any efforts to settle any outstanding loan arrears which would indicate to redeem the facility.

40. Therefore due to their failure to exhibit equity, the applicants cannot come to this Court seeking equity since equity is a two-edged sword and the same ought to be used to promote justice to the parties.

41. The Respondent was therefore of the view that the plaintiffs'/applicants' application dated the 7th day of June 2018 lacks merit, and grounds have not been substantiated to warrant the grant of the orders sought therein and prayed that the said application dated the 7th June 2018 be dismissed with costs to the defendant/respondent.

Determination

42. I have considered the application, the affidavits both in support of the application and in opposition thereto, the submissions filed and the authorities relied upon and this is the view I form of the matter.

43. The principles guiding the grant of interlocutory application are now well settled. Those principles were set out in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.** Restating the said principles, **Ringera, J** (as he then was) in **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC NO. 1234 of 2002** set them out as follows:

> **(i) a prima facie case with a probability of success at the trial;**
>
> **(ii) if the Court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;**
>
> **(iii) the applicant is likely to suffer an injury, which cannot be adequately compensated in damages;**
>
> **(iv) the conduct of the applicant meets the approval of the Court of equity.**

44. The learned Judge went ahead to state that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition that she did not appear before an advocate to execute the charge and have the effects of the pertinent provisions of law explained to her.

45. It was therefore held by **Ringera, J** (as he then was) in **Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001**:

> **"The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."**

46. It was therefore held in **Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991** by the Court of Appeal stated as follows:

> **"The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory…As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."**

47. Therefore though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various

relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the ***Civil Procedure Act***, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

48. What then constitutes prima facie case? In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,** the Court of Appeal held as follows:

> **"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**

49. In this case it was alleged that without any prior notice, the Respondent unlawfully and illegally increased both the interest rate to 17% per annum and monthly repayment to Kshs. 113,960/- which increment resulted to arrears on the applicants' account. However this issue even if true may not necessarily warrant the grant of the injunction sought. In **Kenya Commercial Bank Ltd. vs. Pamela Akinyi Ochien'g Civil Appeal No. 114 of 1991,** the Court of Appeal held that:

> **"Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered Land Act Cap 300. For instance they must serve on the chargee three months' written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family…The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out. 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; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim…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 mortgage."**

50. It was therefore held that:

> **"If the relief claimed in the counterclaim in this case had been sought by substantive suit, the Bank would have been bound to prove and plead that the statutory notice had been served, whether the respondent admitted indebtedness or not. It follows that the counterclaim, though wrongly dismissed, cannot proceed it its present form, until the statute has been complied with. The court therefore considers that the counterclaim should be stayed on the lines of the second proviso to subsection (3)(c) until the counterclaim is regularised, the statutory notice has been served, and the period stated in subsection (2), namely three months, has expired."**

51. See also **Joseph Okoth Waudi vs. National Bank of Kenya Civil Appeal No. 77 of 2004.**

52. Whereas the fact that the amount is disputed is not a ground for restraining a mortgagee from exercising its power of sale, the Court appreciated that it may be restrained if on the terms of the mortgage, the claim is excessive. In this case it is the Plaintiffs' case that the Defendant varied the terms of the mortgage agreement unilaterally. It is however the Respondent's case that the variation was due to the fact that the Plaintiffs did not comply with the terms of the contract. Its case was that that the bundled products the applicants were supposed to utilize as part of the loan facility approval was to channel their salary through a KCB account and to use a credit card and failure to conform to the use of the bundled products, the prevailing market interest of 17% per annum would apply. That stipulation, it was contended, is independent of the provision provided for in paragraph 5.7 of the Letter of offer which provides for the discretion of the Respondent could at

its sole discretion and within the limits permitted by law to revise the Margin and the applicable rate or rates of interest provided that it gave the Plaintiff at least thirty (30) days' notice prior to any change in the rate or rates of interest payable. In this regard, **Pall, J** (as he then was) in the case **Muhani & Another vs. National Bank of Kenya Ltd [1990] KLR 73** stated as follows:

> "**The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale".**

53. However, section 84(1) of the ***Land Act, 2012*** provides that: -

> ***Where it was contractually agreed upon that the interest rate is variable, the interest rate of interest payable under a charge may be reduced or increased by a written notice served on the charger by the chargee,***
>
> ***a) Giving the charger at least Thirty (30) days notice of the reduction or increase of the rate of interest; and***
>
> ***b) By stating clearly and in a manner that can be readily understood, the new rate of interest to be paid in respect of the charge.***

54. The question that arises is whether the Defendant could revise the interest rate without reference to the Plaintiff even where there is allegation of breach of the contractual; terms.

55. It was further contended that the applicants were never served with any notice prior to the notification of sale which was only served upon the 1st plaintiff. Section 90(1) of the ***Land Act, 2012*** provides that:

> ***If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be 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.***

56. On the other hand section 96(1) of the same Act provides that:

> ***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.***

57. According to the Plaintiffs, though there are notices annexed to the Replying Affidavit dated 17/8/2017 and 5/2/201 purportedly served on the plaintiffs, service of the same is denied. Further, although it is indicated that the purported notices were served through registered post, no certificate of postage has been annexed to prove that mode of service. In **Nyagilo Ochieng & Another Vs. Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260** the Court of Appeal while dealing with section 74(1) of the repealed ***Registered Land Act*** held that:

> **"It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with section 74(1) of the Registered Land Act (Cap 300 Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargor's receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale. The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya. It is quite possible that such notices were sent but that fact, in the face of the denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the "villain in the matter". In the absence of proof of such posting the Court is constrained to hold that the sale by auction was void. The learned Judge fell into error and misdirected himself when he held that the notices were sent to their correct address on the supposition alone that the postal address of the appellants was P. O. Box 120, SARE…In coming to the conclusion, the Court has reached, it cannot but entertain the view that the bank ought to have been more careful in proving service of the statutory notices. Failure of such proof has resulted in an innocent purchaser for value being deprived of the title to the suit properties."**

58. Although the Defendant has exhibited a copy of the notification which on the face of it was addressed to the Plaintiffs, there is no evidence that the same was dispatched to both the Plaintiffs. Accordingly this Court cannot state with certainty the above provision was complied with.

59. It was further submitted that under section 97(2) of the ***Land Act***, the defendant ought to have ensured that a forced sale valuation is undertaken by a valuer before exercising the right of sale. The said provision provides that:

> ***A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.***

60. Dealing with the said section **Gikonyo, J** in **Koileken Ole Kipolonka Orumos vs. Mellech Engineering & Construction Limited & 2 Others (2018) eKLR** held that:

> **"…the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under Section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers".**

61. In this case it is my view and I hold that the Plaintiffs have passed the first hurdle. They have established a prima facie case with probability of success.

62. The next issue is whether they have proved that they stand to suffer irreparable injury, which would not adequately be compensated by an award of damages. The general position is that an injunction ought not to be granted if the applicants may be compensated by an award of damages. Whereas in appropriate cases, the fact that the property being is sold is a residential or family property may be considered in deciding whether or not to grant an injunction that consideration must be weighed against the fact that once a property is given as security, it becomes a commodity for sale and there is no commodity for sale to which a value cannot be attached. Otherwise financial institutions would be reluctant to extend financial accommodation to genuine borrowers whose only security is their place of abode. In other words, the fact that the property is a residential home as well is just one of the many factors that the court takes into account. In **John Nduati Kariuki T/A Johester Merchants vs. National Bank of Kenya Ltd Civil Application No. Nai. 306 of 2005 [2006] 1 EA 96** the Court of Appeal held as follows:

> **"A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged".**

63. It was however held in by **Ringera, J** (as he then was) in **Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540** that:

> **"A statutory notice which does not give the plaintiff a period of three months from the date of service to redeem the charged property as required by Section 74(2) of the RLA is defective…The chargee has no lawful power to sell the charged property for default in payment of charge debt unless and until the chargor has been served with a notice in writing demanding such payment and the chargor has failed to comply within three months of the date of service of such notice…The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice…Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the R.L.A and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly contended that the chargor's remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor…Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantums of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils".**

64. Therefore as was held in **Muigai vs. Housing Finance Co. Ltd & Another HCCC No. 1678 of 2001**, it is not an inexorable rule of law that where damages may be an appropriate remedy, an interlocutory injunction should never issue. That was the position adopted in **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** in which the Court considered the ***Halsbury's laws of England*** on what irreparable loss is and stated that:

> ***"first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."***

65. I must however point out that the requirement of the service of statutory notice was not meant to enable borrowers escape from their obligations but was meant to enable the borrowers have sufficient time within which to redeem their charged properties.

66. In the premises I grant an order of injunction restraining the defendant, its agents and/or assigns or any of them from advertising for sale, disposing of, selling or otherwise interfering with **UNIT NO. 66 ON L.R NO. 10426/251 LUKENYA HILLS PARK ESTATE IN ATHI RIVER WITHIN MACHAKOS COUNTY** pending the hearing and determination of this suit on condition that the Plaintiffs comply with

the terms of the contract entered into between themselves and the Defendant prior to the variation of the interests rates.

67. The costs of this application will be in the cause.

68. It is so ordered.

Ruling read, signed and delivered at Machakos this 28th day of November 2018.

G.V. ODUNGA

JUDGE

In the presence of:

Miss Watta for Mr Nyaata for the Plaintiff

Mr Munyao for the Defendant

CA Geoffrey