



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL AND ADMIRALTY DIVISIONAT NAIROBI

CIVIL CASE NO.316 OF 2016

CIENI PLAINS COMPANY LIMITED.....1st PLAINTIFF

ANTHONY NJOROGE WAINAINA.....2nd PLAINTIFF

IRENE NYAKINYUA NJOROGE.....3rd PLAINTIFF

VS

ECOBANK KENYA LIMITED.....DEFENDANT

RULING

Introduction

1. This is a motion. The Plaintiffs filed it on 4 August 2016.
2. The Plaintiffs launched the suit in ultimate reaction to statutory notices issued by the Defendant to the 2nd and 3rd Plaintiff's on 11 April 2016. The statutory notices were intended to prompt the realization of the securities issued in favour of the Defendant by the Plaintiffs to secure advances made to the 1st Plaintiff at the Plaintiffs' request in or about 2013.
3. The Motion is prolix (the prayers run some four typed pages). In short, the Plaintiffs seek temporary orders pending determination of the suit to restrain the Defendant from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, taking possession, appointing receivers or administrators or exercising any power of a chargee to lease, let, charge or otherwise howsoever interfere with the Plaintiffs' ownership of and title to all those parcels of land known as Land Reference No. 5118/22, Land Reference No. 36/111/63, Title No Nyeri/ Naro Moru/1174/, Title No. Gakawa / Githima Block 3/ Mikumbune /148 and Title No. Gakawa / Githima Block 3/ Mikumbune /149 (together "the subject property"). The Plaintiffs also seek orders to restrain the Defendant and its agents from exercising its rights of appointment of receivers or administrators or managers to take over and control or run the 1st Plaintiff's business or in any way exercising any of the remedies provided under the Insolvency Act 2015 and also to restrain the Defendants from listing the Plaintiffs as loan defaulters with any licensed credit reference bureau. Thirdly, the Plaintiffs seek an order that pending determination of the suit all further registration or change of registration in the ownership, right , title and interest in the subject property be prohibited.
4. The Plaintiffs also seek orders to generally restrain the Defendant from exercising its rights and

remedies as a chargor and a positive injunction directed at the Defendant to withdraw any notifications touching on the Plaintiffs sent to any credit reference bureau by the Defendant. Finally, the Plaintiffs also seek orders compelling the Defendant to render a true, proper and accurate account to the court and also to the Plaintiffs.

5. The application was supported by the affidavit of 2nd Plaintiff sworn on 3rd August 2016 and opposed by the Defendant through the affidavit of Elizabeth Hinga sworn and filed on 16 August 2016.

Background

6. There does not appear to exist much controversy on the factual background to the dispute.

7. The facts shortly restated are as follows.

8. The 1st Plaintiff is a general merchant and realtor. It was incorporated in 2001 in accordance with the laws of Kenya. Its directors include the 2nd and 3rd Plaintiffs. In 2013 the 1st Plaintiff obtained credit facilities from the Defendant, a licensed banking institutions. The facilities aggregated Kshs 240,000,000/= and was made up of a term loan, revolving letters of credit, short term loans and an overdraft facility. By way of security, the 1st Plaintiff created a first fixed and floating debenture over its assets in favour of the Defendant. Additionally, the Defendant also caused to be registered third party legal charges over the subject property owned by the 2nd and 3rd Defendants as well as over all that property known as title number Naru Moru/ Block 2/ Muriru/ 805. This property was later disposed of with the Defendant's consent. The Defendant also obtained personal guarantees executed by the 2nd and 3rd Plaintiffs. While the all asset debenture secured the sum of Kshs. 240,000,000/=, the legal charges were for various amounts ranging from Kshs 1,200,000/= to Kshs 31,000,000/=. All the securities were executed and perfected, with all the requisite consents obtained.

9. The facilities were apparently varied with the consent of the all parties. The first variation was in March 2014. The Defendant agreed to a partial release of some movable assets under the Debenture and in return the 2nd Plaintiff agree to execute and cause to be registered Chattels Mortgages over his chattels.

10. Then in April 2015, at the request of the 1st Plaintiff and in keeping with the banking practice the Defendant again agreed to the Plaintiffs request and reviewed the 1st Plaintiff's facilities. The credit facilities as reviewed now aggregated Kshs. 221,542,442/14 (made up as follows: term loan- kshs.11,542,442/14,Overdraft- Kshs 75,000,000/=, letters of credit and short term loans- Kshs.135,000,000/=). The bank was to continue holding the same securities for the reviewed facilities.

11. In December 2015, there was yet another review with the Defendant agreeing to extend to the 1st Plaintiff a bank guarantee facility of up to Kshs.10,000,000/= with the 1st Plaintiff agreeing to provide additional security by way of an even counter indemnity of Kshs.10,000,000/=.

12. Both parties are in agreement that some payments were made in satisfaction of the debts. Both parties are also in agreement that there was default on the part of the 1st Plaintiff, with the 1st Plaintiff at some pointing seeking to transfer the banking facilities to another banking institution and the guarantors moving to dispose of one of the securities to reduce the debt.

13. On 11 April 2016, however the Plaintiff issued a statutory notice under section 90 of the Land Act, 2012. The notice which was directed to the 2nd and 3rd Plaintiffs and copied to the 1st Plaintiff, demanded the payment of Kshs 103, 522,033/97. It was not heeded. Then on 18 July 2016, the Defendant through its agents issued a redemption notice to the Plaintiffs. An amount of Kshs. 166,745,816/83 was now demanded. The notice was not heeded and instead, the Plaintiffs launched the instant suit.

The Plaintiffs' case and submissions

14. The Plaintiffs' case, as argued by Mr. Gichuki Kingara, may be retrieved from the founding affidavit of the 2nd Plaintiff as well as from the Plaintiff.

15. Briefly, the Plaintiffs acknowledge having received banking facilities from the Defendant but contend that payment has been made. The Plaintiffs contend that the initial Kshs 240,000,000/= aggregate facility was fully repaid and another advance aggregating Kshs 221,542,442/14 made, which latter facility was unsecured but was illegally and unlawfully tacked in and consolidated together with the previous advances which were secured.

16. The Plaintiffs further acknowledge that in April 2016, the Defendant issued a statutory notice to the 2nd and 3rd Plaintiffs demanding the payment of Kshs 103,522,033/57 to which the Plaintiffs reacted and paid Kshs 60,000,000/= but then three months later the Defendant demanded the redemption amount of Kshs 166,745,816/83. According to the Plaintiffs, the debt ballooned instead of shrinking, which was evidence of usurious interest rates levied by the Defendant.

17. Referring to the cases of **Giella v Cassman Brown & Company Ltd [1973] EA 358** and **Mrao Ltd v First American Bank Kenya Limited & 2 Others [2003] KLR 123**, the Plaintiffs contended that they have a prima facie case with a likelihood of success in view of the various breaches and violations of the Land Act 2012 by the Defendant. The Plaintiffs pointed that the Defendant had acted contrary to sections 82, 84 and 85 of the Land Act in 2015, when it reviewed the facilities. The Plaintiffs also contended that Defendant had failed to comply with the provisions of both section 90 and section 96 of the Land Act as to the issuance and service of a statutory notice and hence the statutory notice upon which the Defendant sought to establish a right of sale was defective and invalid. Additionally, the Plaintiff visited the Land Control Act (Cap 302) and contended that the security documents were invalid as the Defendant had failed to obtain the requisite land control board's consent.

18. In arguments before the court, Mr. Kingara particularly pointed to section 6(3) of the Land Control Act and submitted that the securities held by the Defendant were invalid and illegal as no consent had been applied for and obtained from the local land control board yet the transactions were controlled transactions. Counsel referred to the cases of **Joseph Mathenge Kamitu v Joseph Wainaina Karanja & Another [2015]eKLR** and **David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014]eKLR** for the proposition that a controlled transaction was void if the local land control board's consent was not obtained as provided for by statute. Consequently, counsel insisted that the additional borrowings could not be used to create Further Charges in the absence of the land control board's consent.

19. Then making a copious reference to sections 82, 84 and 85 of the Land Act, Mr. Kingara submitted that the statute provided that where there was an increase or a reduction in the borrowing and thus a variation of the amount secured by any charge instrument, a formal memorandum had to be prepared executed by the parties and registered then appended to the charge. In the instant case, counsel proceeded, no memorandum had been prepared or executed by either the Plaintiffs or the Defendant and thus the additional borrowings were never secured. Counsel referred to the case of **Stephen Melly & 2 Others v Ecobank Kenya Limited & Another [2016]eKLR** for the proposition that such a violation of statute meant the security documents were void. Counsel then added that as the original borrowing had been paid in full, the subsequent lending was unsecured and the Defendant could not purport to exercise any statutory power of sale.

20. To stress home the point that if the validity of documents was questioned then they could not form the basis of a statutory power of sale Mr. Kingara referred the court to the cases of **Anthony Athanas Ngotho t/a Ngotho Architects v NIC Bank Limited** and **John Mbugua v Cooperative Bank of Kenya Limited**.

21. The Plaintiffs also attacked the validity of the statutory notice and contended that it was defective and invalid. Firstly, the Plaintiffs' counsel pointed out that there was no amount owing under the security as the tacking and consolidation was illegal. Secondly, Mr Kingara pointed out that the statutory notice was not compliant with sections 90(2) and 96(3) of the Land Act as the notice had not only failed to serve the

principal debtor with the notice but also failed to notify the Plaintiffs of their right to seek relief in court and also that the notice had not been served upon the chargor's tenants and spouse(s). Counsel relied on the case of **Simon Njoroge Mburu v Consolidated Bank Limited [2014]eKLR** for the proposition that non-observance of section 90(2) of the Land Act meant that the notice was invalid and inoperative. Counsel also relied on the case of **David Ngugi Ngaari v Kenya Commercial Bank Ltd [2015]eKLR** for the proposition that failure to serve a principal debtor with a notice was fatal to the statutory right of sale. For completeness, counsel also referred to the case of **Kisimani Holdings Ltd & Another v Fidelity Bank Ltd** for the proposition that a notice that refers to monies other than those owed under a charge is fatally defective.

22. It was also the Plaintiffs' case that the Defendant had continued to charge and levy illegal, unconscionable and usurious interest and penalties, which led to the accounts being tinkered with and a resultant clog on the Plaintiffs' equity of redemption. This, Mr. Kingara contended, entitled the Plaintiffs to an injunction in the event of the Defendant's attempts to realize the security.

23. For completeness, Mr. Kingara added that damages would never be adequate to compensate the Plaintiffs if the subject property was sold, as the subject property was unique and peculiar.

24. Counsel then urged the court to apply the common law doctrine of *lis pendens*. He submitted that the doctrine which had received wide acceptance in Kenya both under the old land law regimes as well as the current real property law. According to counsel, the doctrine of *lis pendens* was applicable to the instant case pursuant to section 106 of the Land Registration Act, No 3 of 2012.

Defendant's case and submissions

25. The Defendant's case was straightforward and may be rehashed from the opposing affidavit of Elizabeth Hinga. Mr. Allen Gichuhi argued the Defendant's case.

26. The Defendant's case is that the Plaintiffs were not before the court with clean hands as there was admitted default in the repayment of the facilities advanced. The 1st Plaintiff was dubbed a "recalcitrant debtor" who was not entitled to seek any refuge in equity. Mr. Gichuhi pointed out that the Plaintiffs had admitted to obtaining the banking facilities of up to Kshs 240,000,000/= and that they had only paid the amount of Kshs 25,000,000/= and another Kshs. 18,500,000/= whilst the interest accrued was Kshs 31,500,000/=, leaving a debt of Kshs 170,063,131/64 still outstanding. Counsel pointed out that there was evidence of both admission and default as well as an attempt by the Plaintiffs to transfer the debt to a third party bank. On the basis of such default and admission counsel stated that the Plaintiffs could not establish a prima facie case against a chargee. For this proposition counsel relied on the cases of **Mrao Ltd v First American Bank Kenya Limited & 2 Others [supra]** and **Orion EA Ltd v Ecobank Ltd & Another [2015]eKLR**.

27. Mr. Gichuhi also urged that the Plaintiffs had to be denied the remedy of injunction for having polluted the stream of justice by not disclosing their indebtedness to the Defendant.

28. According to the Defendant, it had fully complied with the law and all its securities were valid. The Defendant pointed out that there was no need for the land control board's consent as one had been obtained and the allegation by the Plaintiff was merely speculative and unproven. Mr Gichuhi pointed to section 56 of the Land Registration Act to show that the registered securities were fully compliant and a presumption had to be made to like effect until proven otherwise. Additionally and placing reliance on the case of **Coast Brick & Tiles v Premchand [1966] EA 154**, counsel stated that a challenge to the validity of securities had to be raised early and not long after the facility had been utilized and was now being demanded.

29. On the issue of tacking and consolidation, the Defendant insisted that the right to tack and consolidate had been expressly reserved in the registers of the subject property and the Plaintiff could tack any additional advances as the securities created were continuing securities. The Defendant faulted the Plaintiffs for not exhibiting any evidence of repayment.

30. With regard to the statutory notice, the Defendant contended that the notice was good and valid for all purposes. Counsel pointed out that the notice had been served upon the principal debtor and that lack of service upon the spouse(s) did not vitiate the notice. In this respects Mr. Gichuhi pointed to and relied on section 104 of the Land Act and also the case of **Milimani Motors (K) Limited v Kenya Commercial Bank Limited [2014]eKLR** where the court held that even where a notice is defective or service inadequate, the court will where justice demands give a chargee the green light to exercise its statutory power of sale.

31. Mr. Gichuhi further submitted that there was no evidence of penal interest or usury but rather the charge documents revealed that the Plaintiffs had agreed to and allowed a variation of the interest rates and the Defendant could not be faulted for charging the contractual interest. In any event, added counsel, dispute as to interest only led to dispute as to accounts which could not form the basis of interfering with the Defendant's accrued statutory power of sale.

32. Then referring to the cases of **Approtech Services Limited v Savings & Loans Ltd [2001] LLR 1498** and **Al-Jalal Enterprises Ltd v Gulf African Bank Ltd [2014]eKLR**, counsel for the Defendant urged that the doctrine of *lis pendens* could not be invoked to interfere with suits involving mortgages and charges as that would simply stall commercial transactions. Counsel also pointed out that with the repeal of section 52 of the Indian Transfer of Property Act 1882 in 2012, the doctrine also ceased to have its place in Kenya. Moreover, Mr. Gichuhi added, the doctrine would not apply to properties previously registered under the repealed Registered Land Act (Cap 300) like the subject property.

Analysis and Determination

33. I have read through the founding as well as the opposing affidavits. I have also read the Motion itself and considered the parties respective submissions. The core issue is whether the Plaintiffs are entitled to the interlocutory orders sought.

34. I must immediately point out that with regard to injunction applications, the law is relatively clear. The considerations as laid out in the case of **Giella v Cassman Brown & Co Limited (supra)** nearly one half of a century ago still hold sway.

35. By way of a rehash, the claimant is expected to establish a prima facie case with a probability of success and not just an arguable one. He must then also show that he was likely to suffer irreparably if the injunction is denied and where, in doubt, the court is to apply the balance of convenience by ascertaining where the greater hardship would lie if the injunction was granted or denied: see **Mrao Ltd v First American Bank of Kenya Ltd & Others [supra]**.

36. I also hasten to add that the Court of Appeal in *Mrao* also did make it clear that when it comes to injunctions sought to restrain mortgagees and chargees from realizing their security additional care and consideration of the circumstances of the transaction is very relevant with the focus being on whether the payment of the debt is being made and further that a dispute as to the amounts due was not good enough reason to halt the realization process even if the dispute had been occasioned by alleged illegal and contested interest.

37. Additionally, while the grant of temporary injunctions is intended to prevent the ends of justice from being abused: see **Bonde v Steyn [2013] 2 E A 8**, temporary injunctions are equitable remedies and the principles of equity will apply including the fact that the court will closely look at the conduct of the applicant. It must also not be lost that at this stage of the proceedings; the court must not make any definitive and conclusive findings of law or fact. Rather the court should be contented with a finding that on the basis of the material before the court there is need to have the rights apparently infringed further interrogated and protected. The party accused of wrong doing is then to be called to account. The court has nonetheless to sway away from holding a mini trial: see **Nguruman Limited v Jan Nielsen Bonde & 2 Others CACA No 72 of 2012**.

38. I can now return to and repeat the narrative.

39. It is not in controversy that the Defendant granted to the 1st Plaintiff at its request financial accommodation in the form of an overdraft, letters of credit and term loan facilities on the basis of non possessory securities, including the 2nd and 3rd Plaintiffs' property. The Defendant obliged in 2013. The amounts were advanced. The Plaintiffs agreed to repay the amounts advanced on demand. The parties also agreed that the amount advanced could be repaid through installments. Drawdowns and repayment modes were agreed upon. Interest rates chargeable were also agreed upon. The facilities were apparently reviewed a year and a half later at the written request of the 1st Plaintiff. The securities were however not reviewed re-casted or revisited save for the release of certain movable assets under the debenture which were duly replaced. There was also an additional security in the form of a counter indemnity guarantee, which the Defendant demanded when the Defendant in 2015 issued a new facility in the form of a Kshs 10 million cover guarantee.

40. Drawdowns were consistently made by the 1st Plaintiff but later the 1st Plaintiff defaulted in the repayments. The Defendant insists that not all the amount drawn was repaid. The Plaintiffs say the full amount was repaid. It is unclear whether the facility reviews meant additional advances or simple restructure of the debts then outstanding and of the facilities accessible to the 1st Plaintiff. It is however clear that the 1st Plaintiff accessed credit on terms, from the Defendant over a two year period till the Defendant pulled the plug. The Plaintiff admittedly then sought to transfer its securities as well as the facilities to another banking institution but the Defendant made this conditional on its facilities being fully repaid.

41. The Plaintiff has attacked the Defendant's approach to the transaction and stated that since there were additional advances the original securities could not be utilized to secure payment as that was never the intention of the third party guarantors who pledged their properties and further that in any event the properties were subject to the provisions of the Land Control Act (Cap 302). Thus, any transaction involving the land was controlled for purposes of the said Act and the requisite Land Control Board consent had to be obtained.

42. I have perused through the various facility letters executed by the Plaintiffs. I have also looked through the all asset and floating debenture issued by the 1st Plaintiff and dated 24 February 2014 as well as the other collateral security.

43. I need not labour the point that a controlled transaction becomes void and so do any transactional documents registered where a Land Control Board's consent is necessary but is not obtained: see **Mucheru v Mucheru [2002] 2 EA 456**. There will only subsist a defacto agreement with no legal effect : see **Jacob Gichuki Minjire v Agricultural Finance Corporation CACA 61 of 1982**.

44. In the instant case, the amount that was to be secured was to aggregate Kshs 240,000,000/=. The nature of the facilities (composite term loan, short term loans and overdraft) basically entail a situation where draw-downs can be consistently made and repaid and apparently that is what the parties ventured into. There is no outright evidence of additional lending over and above the secured amount which would have dictated the creation of further charges and thus fresh consents by the relevant land control boards.

45. I have also perused through the charge documents held by the Defendant and created by the 2nd and 3rd Plaintiffs. They are third party charges created by way of guarantee. Prima facie, they are continuing securities which allowed the 1st Plaintiff to obtain facilities from the Defendant from time to time with the reliance on the same securities. Section 82(1) of the Land Act allowed the parties to so contract subject to any priorities which is not in issue in the instant case. Further and more specifically, all the charge documents also provided that no payment would be deemed as discharging the liabilities of the Plaintiffs until the Defendant would have received all the amounts the security was intended to secure. Effectively, it would appear that none of the securities was to be merged or deemed to have been merged by the fact of any payments made towards clearing the debt outstanding.

46. On the affidavit evidence before me, I am not prima facie convinced that there was need to obtain any other consent from the relevant land control board as argued by the Plaintiffs. Besides, from the affidavit

evidence before me, I am also at this stage not convinced that there was indeed any reduction or increase or intention to increase or reduce the amounts secured for purposes of section 84(2) of the Land Act.

47. I will now consider the contention that the statutory notice was defective and invalid.

48. The notice in question was issued on 11 April 2016. It was directed to the chargors and copied to the borrower, being the 1st Plaintiff. The notice was stated to have been issued under section 90 of the Land Act. Counsel for the Plaintiffs contended that under section 90 of the Land Act, the notice ought to have been issued to the 1st Plaintiff and also served upon the spouses of the chargors and that the Defendant had failed to do so. The Plaintiff also faulted the statutory notice for not containing a clause informing or reminding the chargors of their right to seek relief from the courts.

49. A statutory notice issued under section 90(2) of the Land Act, triggers the security realization process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3). The notice is issued where there is default or breach of any covenant under the charge. There is no prescribed format promulgated as yet by the Cabinet Secretary in charge of lands and housing under section 90(5) of the Land Act. Different formats of the notice have thus emerged leading to a veritable maze where challenges and questions on what truly constitutes a valid statutory notice are numerous.

50. I must state that there is however need to ensure that the notice is compliant with section 90(2) which provides for matters to be included in the notice.

51. 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.

52. There is no requirement that the statutory notice under section 90 be served upon either the principal debtor or a spouse as was contended by Mr. Kingara. Any spouse who gave her/his consent to the charge being created is however to be served with a notice of intention to sell pursuant to the provisions of section 96(3) of the Land Act which also dictates that any tenants or lessees be also served with such a notification. This notice is issued after the expiry of the ninety days stated in the statutory notice.

53. It is no doubt true that the general purpose of a notice under section 90 is majorly to protect the chargor. As was stated by this court in **First Choice Mega Store Limited v Ecobank 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 notification 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 favored given that it is the same section that triggers the application of a chargee’s rights and remedies.’

54. Thus even though section 90 appears couched in mandatory terms, its object and purpose can never be ignored. Where there is substantial compliance with the section, enough to put the chargor on notice of the chargee’s ultimate intentions if the notice is not heeded, then such substantial compliance will be deemed to have countenanced any alleged deviation, especially at an interlocutory stage. This is however 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 the interlocutory stage.

55. *In casu*, the affidavit evidence does not reveal patent non compliance with the statutory provisions. There is indeed substantial compliance in so far as the statutory notice is concerned. There is also apparent evidence of default on the part of the 1st Plaintiff. The 1st Plaintiff has not denied the statutory notice. I view it that the Plaintiffs do not stand on any steady ground as far as the challenge to the statutory notice is concerned. I also view it that it is not enough to simply state that a statutory notice is defective. Rather, a party needs to do more. He has to show the defect and exhibit the prejudice occasioned or likely to be occasioned.

56. It was also the Plaintiffs’ submission that the Defendants had unilaterally charged illegal and unconscionable interest, which equated usury and thus simply clogged the right of redemption. Interest is ordinarily levied and charged in commercial lending transactions as a mode of compensation for the money being kept away from the lender. There is however an equitable jurisdiction with the court to relieve parties from any penal interest. This jurisdiction exists where it is shown that the amount charged or to be charged as interest does not constitute a genuine compensatory relief but actually vitiates the original bargain by for example prohibiting redemption of any security: see **Samaki Industries (K) Limited v Bullion Bank Limited & Another HCCC 485 of 1999 (unreported)**.: It is a generally acceptable principle that for this jurisdiction of the court to be invoked it must be shown that the interest levied was exorbitant, extravagant and unconscionable.

57. In the instant case, the Plaintiffs have not shown on a prima facie basis how the rate charged was exorbitant or extravagant. The Plaintiffs appear to have adopted a rather abstract approach and ignored to show or attempt to show that the rate and amount charged was imposed *in terrorem* or as punishment for wrongdoing. To the contrary what has emerged from the affidavit evidence tendered is that the parties agreed to the rates to be charged.

58. I would in the circumstances and at this stage be reluctant to start setting standards for the parties by holding that the Defendant had adopted a usurious approach. My view for now is that the parties ought to be held to their bargain. Needless to add, claims of unlawful interest being levied form part of dispute on accounts and amount due and should not be reason to interfere with a chargee’s rights to realize any security where money is still due.

59. It leaves me with the quibble of *lis pendens*.

60. The doctrine of *lis pendens* often expressed in the maxim *pendente lite nihilin novature* (during litigation nothing should be changed): see **Blacks’ Law Dictionary 9thed**, was until May 2012 part of our statute law. With regard to real property, section 52 of the now repealed Indian Transfer of Property Act 1882 provided that during the pendency in any court having authority in Kenya of any suit in which the

right to immovable property was directly and specifically in question, the immovable property was not to be transferred or dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order that would be ultimately made, except with the authority of the court and on terms.

61. The *lis pendens* doctrine was originally a doctrine of common application to both the courts of law and equity. It rested on the principle that every suit would simply be defeated once property was disposed of and the claimant forced to bring a new suit against the new owner only for the latter to dispose of the new suit and the claimant to start all over again: see Turner LJ in **Bellamy v Sabine [1857] 1 De J 566**. No suit in a case where the subject matter as constantly being transferred would ever be successfully prosecuted.

62. As I understand it, the doctrine of *lis pendens* is based on justice, equity, expediency and good conscience. It is based on sound policy. The concept of the rule of law anticipates fine and fair adjudication. The law does not allow or encourage litigants to give rights which are still under dispute to others who are not litigants and in the process prejudice fellow litigants. Thus according to the 10th edition of G.C Bharuka's treatise **Mulla on the Indian Transfer of Property Act**, the doctrine is intended to avoid conflicts between parties to a suit and innocent purchasers and also to stop those who want to circumvent the courts jurisdiction by removing the subject matter from the court's grasp. The aim is accomplished by enforcing the decree against any person who acquires property the subject of litigation: see **Bharuka (supra)**.

63. There is no doubt that the doctrine pre and post 2012 has been the subject of discourse and interpretation in many cases locally. Madan J (as he then was) in **Mawji v United States International University & Another [1976]eKLR** held that the doctrine was applicable to Kenya by virtue of section 52 of the Indian Transfer of Property Act 1882. Then there was **George Neil Baird & Another v Fredrick Kinyua & Another HCCC No 4819 of 1991 (unreported)** where the court nullified not only a charge that was created during the pendency of a suit but also set aside a sale by public auction undertaken under the said charge and a second charge created subsequent to the sale by public auction.

64. Post 2012, in **Anne Njeri Mwangi v Cooperative Bank of Kenya Limited [2013]eKLR** the court held that the doctrine was applicable from the moment a suit was initiated. This position was re-affirmed by the Court of Appeal in **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015]eKLR** where despite appreciating the applicability, a *carte blanche* application of the doctrine was however not advocated. I must hasten to add that in the instant case, both counsel also made reference to case law where the doctrine has either been applied or not applied locally.

65. Though case law point to the position that the doctrine for its aim and purport is generally acceptable in Kenya, I must point out that the repeal of the Indian Transfer of Property Act and the rather intentional approach by the legislature to leave this doctrine out of the new land law statutes was pretty telling. The legislature, in my view, left the application of the doctrine to the good judgment and discretion of the court. It was not to be statute conferred or controlled. In my view, the mere filing of a suit alone should not of itself now lead to the applicability of the doctrine.

66. Various questions would thus arise as to the applicability of the doctrine. For instance, may the doctrine be used as a shield at an interlocutory stage as has been sought by the Plaintiffs rather than as a sword to attack any transfer after the determination of the suit and issuance of a decree? Does it apply to suits where the statutory power of the chargee is under challenge?

67. Mr. Kingara for the Plaintiffs contended that the doctrine could be invoked thanks to section 106 of the Land Registration Act which section transited rights and interests acquired from the repealed statutes like the Indian Transfer of Property Act. My brief answer is that the section 106 of the Land Registration Act applies to rights which actually vested as of 12 May 2012 and before the old land law statutes were repealed. The *lis pendens* doctrine where applicable can only confer a right once a suit is filed and not earlier. As of 2012, no suit involving the subject property herein had been filed.

68. As to the applicability of the doctrine to the instant proceedings which involve the contest as to whether a chargee may exercise his statutory power of sale and dispose of the subject property, I must point out that there is now a clear paradigm when it comes to purchasers of charged property. The statute affords them protection. Section 99 of the Land Act shields the purchaser almost absolutely save where he has participated in fraud. Instead, the purchaser is not to be robbed of any acquisition simply because the sale was irregular or improper or out of dishonest conduct, which is what the doctrine of *lis pendens* seeks to fight. Indeed, section 99 proceeds to state that the party prejudiced by the sale is to be compensated through damages. I do not at this stage see how the doctrine may override a statutory provision. Prima facie consequently, I would hold for now that the doctrine has no place to the current circumstances or to properties sold by a chargee.

69. The totality of the circumstances of this case placed along the set principles for the issuance (or denial) of an injunction is what ought to dictate whether the applicant is entitled to the interlocutory orders sought. It should not be a simple reason that there is a pending suit concerning the subject property.

70. With regard to the prayer for the accounts to be furnished, even though a solid ground was not laid for the same, I am unable to see any prejudice that the Defendant will suffer if I was to make an order for accounts. I also did not hear the Defendant to oppose the application for accounts. The Plaintiffs would certainly be entitled to the same. I would allow the prayer for accounts

Disposal

71. My final views, in the circumstances of this case and by way of disposal are as follows.

72. It would not be proportionate to deny the Defendant the right to dispose of the subject property by way of a public sale. The right has both admittedly and apparently accrued. I have not been satisfied that the Plaintiffs have a prima facie case with a likelihood of success and I do not consequently need to interrogate whether they would suffer irreparably if there is no injunction. I decline to restrain the Defendant from exercising its powers under the securities pledged to it by the Plaintiff.

73. I find the application wanting on the requisite merits and dismiss it with costs to the Defendant, even though the Plaintiff only met with minimal success. I also order the Defendant to furnish to the Plaintiffs, through the Plaintiffs' counsel a detailed statement of accounts of all the transactions the subject of this suit within 21 days of today.

74. Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of April 2017.

J.L.ONGUTO

JUDGE