REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 672 OF 2006

NANCY ELIZA MUTHONI GIKONYO.....PLAINTIFF

-VERSUS-

HOUSING FINANCE COMPANY OF KENYA.....1ST DEFENDANT

RUPINDER SINGH SEHMI.....2ND DEFENDANT

LIFELINE TRADERS.....3RD DEFENDANT

RULING

[1] The Plaintiff's application dated **18 July 2016** was filed pursuant to **Sections 1A and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 40 Rules 1** and **10** and **Order 50 Rule 1** of the **Civil Procedure Rules** for the following orders:

[a] Spent

[b] Spent

[c] That an order do issue preserving the suit property thereby stopping the Defendants either by themselves or through their agents, servants employees and/or representatives or any other person or entity from selling, disposing off, charging further, subdividing and/or interfering in an manner with the suit property pending the hearing and determination of the main suit; and that the order be enforced by the Officer Commanding Station (OCS), Runda Police Station.

[d] Spent

[e] That the costs of the application be borne by the Defendants.

[2] The application was supported by the Plaintiff's affidavit annexed thereto, sworn on **18 July 2016** and the grounds set out on the face of the application. The background of the application, as can be gleaned from the Supporting Affidavit, is that the Plaintiff and her husband, one **Kuria Gikonyo,** as proprietors of **Land Reference No. 7785/311-Runda (Original Number 7785/10/309),** charged the same, on **22 August 1995**, to the 1st Defendant for a loan of **Kshs. 3,000,000/=.** The loan was to be repaid in monthly instalments of **Kshs. 66,398/=.**

[3] It was further averred that between **1995** and **2004**, the facility was well and diligently serviced; but that in **September 2004**, upon learning that he had paid a total of **Kshs. 8,448,000/=, Mr. Kuria Gikonyo** stopped the monthly payments and questioned the upward variation of interest rate by the 1st Defendant without his knowledge or consent. Accordingly, on **31 July 2006**, the 1st Defendant, served **Mr. Kuria Gikonyo** with a statutory notice under **Section 69** of the **Transfer of Property Act, 1882** evincing its intention to enforce its Statutory Power of Sale. It was this notice that prompted the Plaintiff to institute this suit.

[4] The suit was initially filed by **Mr. Kuria Gikonyo,** as **Machakos High Court Civil Case No. 97 of 2006: Kuria Gikonyo vs. Housing Finance Company of Kenya**, in which an interim injunction was granted, but which lapsed thereafter after the Plaintiff's erstwhile Counsel failed to apply for the extension thereof. In the course of time, the suit was by consent, transferred to the Commercial & Tax Division, Nairobi; and while it was pending hearing, the 1st Defendant sold off the suit property to the 2nd Defendant by private treaty at **Kshs. 18,000,000/=,** and paid the excess of the purchase price in the sum of **Kshs. 11,000,000** to **Mr. Kuria Gikonyo**. Thereupon the 2nd Defendant instructed the 3rd Defendant to secure vacant possession of the property by evicting the Plaintiff's family therefrom. The eviction is said to have taken place in **January 2008**, and thereafter on **17 July 2008, Mr. Kuria Gikonyo** went missing and has remained missing todate.

[5] Sometime in the year **2012**, **Nancy Eliza Muthoni Gikonyo**, applied for leave to replace **Mr. Kuria Gikonyo** as the Plaintiff, and to file an Amended Plaint to that effect; which application was allowed. Thereafter, the court file went missing, which is what precipitated the reconstruction in the form of the current file. She endeavoured to avail critical documents that comprise the original file, including a typed copy of the court proceedings from **2 October 2006** to **8 April 2008**; on the basis of which she urged the Court to restrain the Defendants by way of injunction, from disposing of the suit property pending the hearing and determination of this suit.

[6] In reply to the application, the 1st Defendant relied on the affidavit of one of its Legal Officers, **Martin Machira**, sworn on **31 August 2016,** contending that the best cause of action would be to proceed with the hearing of the substantive suit for disposal on the merits. The 1st Defendant restated the history of the case and in particular averred that:

> **[a]** On **27 March 2007, Waweru, J** declined to reinstate the status quo orders that had been issued herein as the same had already lapsed, and no other interim orders affecting the suit property had been made;
>
> **[b]** Title had already passed to the 2nd Defendant in 2008 as admitted by the Plaintiff herein; and therefore that the Plaintiff cannot seek orders purporting to interfere with a third party's right to deal with his property.
>
> **[c]** The Plaintiff's claim that the 2nd Defendant, who holds the title to the suit property is in default, thus exposing the suit property to the risk of disposal, is unsubstantiated as no evidence has been produced, and therefore cannot be relied on by the Court to grant the orders sought.
>
> **[d]** The Plaintiff has already prayed for compensation at the current market value of the main suit, which prayer would wholly compensate her losses (if any); and therefore she does not stand to suffer irreparable loss or damage as alleged.

[7] The 2nd and 3rd Defendants were similarly opposed to the application. The 2nd Defendant, **Rupinder Singh Sehmi**, relied on his Replying Affidavit sworn on **22 September 2016**, in which he averred that he was not served with the Plaintiff's application for substitution and contended that the Plaintiff came on record unprocedurally, since the Advocates then on record for the Plaintiff were **R.M. Matata & Company** Advocates and not **Oduor Henry John Advocates** who filed the said application. It was further the contention of the 2nd Defendant that on or about **24 April 2007** he made an offer to the 1st Defendant to purchase the suit property, which offer was accepted on **21 May 2007**, and the property was

accordingly sold and transferred to him on or about **25 July 2007** at **Kshs. 18,000,000/=;** the balance of which was paid to **Mr. Kuria Gikonyo** to the tune of **Kshs. 11,000,000/=.** He added that he thereafter treated the Plaintiff and her family as tenants and that he was within his legal rights to levy distress for rent and have them evicted as he did.

[8] In addition to the foregoing, the 2nd Defendant averred that if indeed he charged the property to obtain a loan facility, there was no evidence of default on his part and there was nothing to show that the property was in any danger of being sold. He urged the Court to find that the Plaintiff has not come before it with clean hands; and that the application is ill-founded, fraudulent, frivolous, vexatious and devoid of merit, and ought to be dismissed with costs.

[9] On behalf of the 3rd Defendant, a Replying Affidavit was sworn by **Stephen Nyamu Mbijiwe**, who is the Auctioneer trading under that name. He averred that he received instructions from the 2nd Defendant on or about **5 September 2007** to levy distress for rent upon the Plaintiff after the ownership of the suit property changed and the rents became due and outstanding. That, on the same day, they proceeded to the suit property and issued the Plaintiff with a proclamation and a 14 days' notice to offset the outstanding amounts, which at the time stood at **Kshs. 540,000/=.** He added that after 14 days, the Plaintiff having not made any payments or at all to offset the amounts owed, or approached them with a view of settling the matter, they proceeded with the sale of the items proclaimed and forwarded the proceeds thereof to the 2nd Defendant. According to the 3rd Defendant, if the Plaintiff had any legitimate complaints about the sale of her property then the best course of action would have been to file a complaint with the Auctioneers Board or a chose in action to pursue compensation. He urged for the dismissal of the Plaintiff's application, contending that the 3rd Defendant has no connection therewith.

[10] The application was disposed of by way of written submissions pursuant to the directions issued herein on **25 January 2017**. The Plaintiff's written submissions were filed on **20 February 2017**, in which Counsel restated the substance of the Plaintiff's case and set out the issues raised by her to be the following:

> **[a]** that the suit property was never valued before sale, and that the 1st Defendant acted in bad faith;
>
> **[b]** The previous courts negligently failed to preserve the suit property to the detriment of the Plaintiff;
>
> **[c]** The mistakes of the previous advocates ought not to have been visited on the former Plaintiff;
>
> **[d]** The 1st Defendant charged an exorbitant rate of interest that is not only illegal but also kept reviewing it unilaterally, thus clogging the Chargor's equity of redemption;
>
> **[e]** The Plaintiff's eviction was unlawful, illegal and malicious;
>
> **[f]** The transfer of the suit property was illegal and unlawful.

[11] The Plaintiff's submissions were fashioned after the heads aforementioned and Counsel relied on various authorities in support thereof, including the cases of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** and **Celina Kananono Kamakia vs. Paul Muthengi Njau [2016] eKLR,** among others. In the 1st Defendant's written submissions, which were filed herein on **9 March 2017**, only two issues were raised, namely: Whether the orders sought by the Plaintiff are enforceable against the 1st Defendant; and whether the Plaintiff has established a prima facie case with probability of success to warrant the issuance of the orders sought against the 1st Defendant. The case of **Giella vs. Cassman Brown & Co. Ltd** (supra) was also cited by the 1st Defendant, among other cases, in support of its arguments.

[12] The 2nd and 3rd Defendants filed joint written submissions dated **16 January 2017**; which submissions were focused on the following issues:

[a] Whether the Court has jurisdiction to grant the orders prayed for;

[b] Whether the Plaintiff has the requisite locus standi to prosecute the application;

[c] Whether or not the application is an abuse of the process of the Court;

[d] Whether the Plaintiff has a prima facie case with a probability of success;

[e] Whether the Plaintiff will suffer irreparable harm if the orders sought are not granted.

[13] I have perused and considered the application, the affidavits filed herein in respect thereof as well as the written submissions filed by Learned Counsel. The application is for interlocutory injunction pending the hearing and determination of this suit and made under **Order 40 Rules 1** of the **Civil Procedure Rules,** which provides that:

> **Where in any suit it is proved by affidavit or otherwise--**
>
> **(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongly sold in execution of a decree; or**
>
> **(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."**

[14] Accordingly, the principles set out in the renowned case of **Giellavs Cassman Brown and Company Limited [1973] E.A 358**, come into play with a view of ascertaining whether this is a matter that falls within **Rule 1** of **Order 40** aforementioned; namely, the Court must be satisfied that the applicant has established, firstly that she has a *prima facie* case with a probability of success; secondly that she stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and, if the Court is in doubt, it will give consideration to the balance of convenience. As to what amounts to a *prima facie* case, the Court of Appeal in the case of **Mrao –vs- First American Bank (K) Ltd** had this to say**:**

> **"…So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. 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."** (Per Bosire JA)

[15] From the material placed before the Court, there appears to be no dispute that the initial Plaintiff, **Mr. Kuria Gikonyo** charged the suit property to the 1st Defendant for a loan of **Kshs. 3,000,000/=;** or that upon default in servicing the facility, the 1st Defendant issued the requisite statutory notices with a view of exercising its Statutory Power of Sale. It is further not in contestation that although a *status quo* order was made by the Court on **17 October 2006** this order was not extended thereafter; and that no interlocutory order of injunction was ever granted in the manner sought by the initial Plaintiff, with the result that the suit property was sold by private treaty for **Kshs. 18,000,000/=** and title transferred to the 2nd Defendant on or about **25 July 2007** during the pendency of the suit.

[16] There is further no dispute that, having recovered the sums due to it on the mortgage, the 1st

Defendant forwarded the balance of the proceeds of sale to the tune of **Kshs. 11,882,514.30** to **Mr. Kuria Gikonyo**. Uncontroverted evidence to that effect was exhibited in the form of **Annexures RSS-5, RSS7** and **RSS-8** to the 2nd Defendant's Replying Affidavit. Moreover, it is indubitable that the 2nd Defendant was given physical possession of the suit property way back in **2007**. Thus, it was against the foregoing uncontroverted evidence that the Plaintiff filed a Further Amended Plaint dated **20 December 2012** praying for Judgment against the Defendants jointly and severally for:

> **[a]** An Order permanently restraining the Defendants from selling that parcel of land known as and situate at **L.R. Nairobi/Block 77851/311 Runda;**
>
> **[b]** An order permanently restraining the Defendants from trespassing upon and/or interfering with the Plaintiff's quiet possession of **Land Parcel No. L.R. Nairobi/Block 77851/311, Runda;**
>
> **[c]** A declaration that the purported Charge created on the aforesaid parcel of land on **22 August 1995** is null and void and that all monies paid in excess of **Kshs. 3,000,000/=** be refunded to the Plaintiff.
>
> **[d]** A declaration that the sale and subsequent transfer of **L.R. Nairobi/Block 77851/311 Runda,** by the 1st Defendant to the 2nd Defendant was/is equally unlawful and a legal nullity.
>
> **[e]** An order further declaring the act of the 3rd Defendant of attaching and carrying away the Plaintiff's household goods without giving notice as required by the law null and void and a further order compelling the said 3rd Defendant to reinstate to the Plaintiff their household goods without any conditions whatsoever.
>
> **[f]** An order in the alternative that the 2nd and 3rd Defendants do compensate the Plaintiff for the value of the household goods they carried away from the Suit Property;
>
> **[g]** An order in the alternative that the 1st and 2nd Defendants do compensate the Plaintiff for the current value of the suit property.
>
> **[h]** Any other order that the Court deems fit to grant.

[17] In the premises, the question to pose, for purposes of Prayer (3) of the Plaintiff's Notice of Motion dated **18 July 2016**, is whether the Plaintiff has demonstrated a *prima facie* case showing that she has a legal right which has been infringed by the Defendants, and which calls for a rebuttal by them. In making this determination, it is instructive to bear in mind the standard of proof laid down by the Court of Appeal in **Nguruman Limited Vs Jan Bonde Nielson & 2 OthersCourt of Appeal No. 77 of 2012** in which it was stated thus:

> **"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."**

[18] One of the grounds relied on by the Plaintiff to show that she has a prima facie case is to be found in paragraphs 12 to 20 of her Supporting Affidavit, wherein she blamed the Court for failing to appreciate the history and urgency of the application dated **4 April 2007**, in failing to extend the *status quo* order, and thereby exposing the suit property to sale by the 1st Defendant. It is however my view that the Trial Judge at the time had the discretion to make the decisions he made and that if, for any reason, the Plaintiff

was dissatisfied therewith, then the proper avenue for redress would have been for her or her husband to file an application for review or to prefer an appeal therefrom. It does not further the Plaintiff's cause for her to revisit those grievances in the pretext that they comprise a *prima facie* case for purposes of Order 40 Rule 1 of the Civil Procedure Rules. The same applies to the contentions in respect of the complaints against the Plaintiff's erstwhile Advocates; as well as the representations by the 2nd Defendant that the Plaintiff's substitution was not done in accordance with the law; these being as they are, matters that were decided by a Court of competent concurrent jurisdiction.

[19] More importantly, the Plaintiff having conceded that the sale did take place and that the property was transferred to the 2nd Defendant and vacant possession given, it appears that the prayers in the Plaintiff's Further Amended Plaint to permanently restrain the Defendants from selling that parcel of land known as and situate at **L.R. Nairobi/Block 7785/311 Runda;** to permanently restrain the Defendants from trespassing upon and/or interfering with the Plaintiff's quiet possession of **Land Parcel No. L.R. Nairobi/Block 7785/311, Runda**; and for a declaration that the purported Charge created on the aforesaid parcel of land on **22 August 1995** is null and void, have been overtaken by events. In the same vein, the application for interlocutory injunction, premised on those prayers, is untenable. The purpose of the injunctive order sought was to restrain the sale, which has taken place. It is a cardinal principle that equity does not act in vain, a point well elucidated by the Court of Appeal in the case of **Eric V. J. Makokha & Others -Vs- Lawrence Sagini & Others [1994] eKLR** thus:

> **"There is one other reason on which the order of injunction granted in that case could be questioned. An application for injunction ... is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."**

[20] I do note that at paragraphs 45 of the Supporting Affidavit it was deposed thus by the Plaintiff:

> **"THAT recently, I learnt that the 2nd defendant obtained a loan to pay for the suit property when the 1st Defendant illegally transferred to him as aforesaid. Nonetheless, he has been defaulting repayment of the loan for some time now and the lender has threatened to sell and/or dispose off the suit property to recover its loan. See exhibit "NEMG-22A" in proof of the fact that he took a loan to buy the suit property."**

[21] The documents marked **Annex NEMG-22A** are a Notice of Motion dated **17 December 2007**, a Certificate of Urgency and a Supporting Affidavit filed on behalf of the 2nd Defendant in this suit seeking orders that the Plaintiff be ordered to deposit in Court **Kshs. 200,000/=** per month being the rent for her occupation of the suit premises until vacant possession was given. Quite apart from the fact that those documents do not speak to the status of the property as at **18 July 2016** when the instant application was filed, there is absolutely nothing therein to show that the 2nd Defendant was in default in his loan repayment. All he stated in his affidavit in support at paragraph 7, which was replicated in the Certificate of Urgency and the grounds set out in the Motion was:

> **"THAT I took a loan in order to purchase the suit property and it is not just for me to continue repaying the same yet I don't have possession of the suit property nor do I obtain any benefits from it."**

[22] Accordingly, the Plaintiff has failed to demonstrate that the property is in any peril of being sold by any financier. In any event, the mere fact that the 2nd Defendant admittedly used the property as collateral for a loan would be of no avail to the Plaintiff in so far as her application for injunction is concerned; granted that, title having passed to the 2nd Defendant, any complaint pertaining to the sale or threats of that kind, would lie with the 2nd Defendant as the current registered owner and no other. In any case, such

an order would only lie against the 2nd Defendant's financier, a third party who is not a party to the instant application. Also pertinent is the undisputed fact that the Plaintiff's husband was paid the balance of the sale proceeds, thus bringing to a close the exercise of the Chargee's Statutory Power of Sale; and accordingly extinguishing the Chargor's right of redemption. Where this is the case, **Section 99(4)** of the **Land Act**, which was in force as of **December 2012** when the Plaintiff's Further Amended Plaint was filed, is explicit that:

> **"A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."**

[23] In the light of the foregoing, it is my considered finding that the Applicant has not made out a *prima facie* case in the sense envisaged by the definition given in **the Mrao Case** aforestated. That being the case, it would be unnecessary to consider the second principle laid down in **the Giella Case**, namely whether he stands to suffer irreparable loss for which damages may not be adequate recompense. This is because, as was laid down in **the Nguruman Case**:

> **"It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially…if prima facie case is not established, then irreparable injury and balance of convenience need no consideration…"**

[24] In the result, it is my considered finding that the Applicant's application dated **18 July 2016** is totally lacking in merit and it is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2017

OLGA SEWE

JUDGE