



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL, ADMIRALTY AND TAX DIVISION**

**HCCC NO.438 OF 2016**

**DINESH KUMAR ZAVERCHAND JETHA-----PLAINTIFF/APPLICANT**

**VERSUS**

**GUARANTY TRUST BANK (KENYA)-----DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling relates to a Notice of Motion Application dated 26<sup>th</sup> October 2016, filed by the Plaintiff (herein “the Applicant”), and brought under the provisions of Order 40 Rule 1 and 4, Order 51 Rule 1 of the Civil Procedure Rules, 2010, section 63(e) of the Civil Procedure Act, “The Advocate Act”, and the Inherent Power of the Honourable Court. It is based on the grounds thereon and the affidavit dated the same date and sworn by the Applicant.
2. The Applicant is seeking for orders that the Defendant (herein “the Respondent”), its servants, and agents be restrained from advertising, transferring, charging, leasing, or in any manner whatsoever from dealing with Flat No. 1, Block C, situate on L.R. 991/13, Nairobi (herein “the suit property”) pending the hearing and determination of the suit. That the costs of the Application be in the cause.
3. The Applicant’s case is that at all times he was a Director of Maizena Millers Limited, (herein “the Company”). The other directors are; Avinesh Premchand Shah, Rajesh Zaverchand Jetha and Rashmikant Zaverchand Jetha. That the Company maintained a current bank account with the Respondent’s Bank which was previously known as Fina Bank Limited.
4. That the Respondent advanced loan facilities to the Company secured by a debenture over the Company assets and personal guarantees executed by the Company directors. Subsequently, in the early year of 2003, a disagreement arose between the Respondent and the Company over “charge of unlawful interest rates and of amounts wrongly debited from the account of the Company.
5. In the meantime the suit property though allegedly covered under the debenture was still registered in the name of one Manohar Kumari Vohora, and was yet to be transferred to the Applicant.
6. That as a result of the disagreement aforesaid the Applicant declined to charge the suit property in favour of the Respondent.
7. On the 28<sup>th</sup> October 2004, the Respondent placed the Company under Receivership and issued a demand letter to both the Company and the directors on 18<sup>th</sup> November 2004 demanding for Kshs 42, 625,137.41 plus interest at 10% from 12<sup>th</sup> November 2004.

8. The Respondent then filed a suit *HCC No. 379 of 2005, Fina Bank Limited vs Maizena Maize Millers Limited* seeking to recover a sum of Kshs 45,165,373 together with interest thereto, being the sum advanced to the Company and the Applicant filed a defence to the suit denying liability. Apparently, that suit is still pending as a part heard in Court.

9. In the meantime, the Applicant applied to have a caveat registered by the Respondent over the suit property removed pursuant to which the Respondent filed a suit an (O.S) *HCC 138 Of 2005, Fina Bank Limited vs Dinesh Kumar Jetha* . The suit was heard and dismissed with costs on 20<sup>th</sup> October 2005.

10. Thereafter the Respondent filed another suit *HCC No. 643 of 2005, Fina Bank Limited vs Dinesh Kumar Jetha* seeking for an order of specific performance to compel the Applicant execute a charge instrument over L.R.991/13, Riverside Drive. The suit was heard and a decision in the matter was rendered on 12<sup>th</sup> October 2008 whereby the Applicant was ordered to execute the charge documents. The applicant was aggrieved with the decision and appealed against it and he applied for copies of the proceeding which are yet to be supplied.

11. Subsequently the Respondent filed a Notice of Motion Application dated 22<sup>nd</sup> December 2012, seeking to have the Deputy Registrar execute the Charge documents over the property L.R.991/13, Riverside Drive. The Application was opposed on the ground that the property L.R.991/13, Riverside Drive is different from the suit property in the judgment delivered. The Application was heard and dismissed.

12. The Respondent then filed a fresh Notice of Motion Application dated 28<sup>th</sup> September 2012, seeking that the decree dated 4<sup>th</sup> November 2011, be amended. The Application was opposed. However on the 15<sup>th</sup> November 2012; the Court ruled in favour of the Respondent allowing the Application.

13. The Applicant being dissatisfied with the judgment and the ruling delivered, and then applied for stay of the same. The Court of Appeal heard the matter and dismissed the Appeal, but “found the Applicant had raised arguable grounds of appeal”.

14. As the Applicant was waiting for the Counsel to obtain proceedings and file the substantive appeal, the Respondent advertised the suit property in the Daily Nation of 12<sup>th</sup> October 2016 for sale, on 31<sup>st</sup> October, 2016.

15. The Applicant argues that he has not been served with any Statutory notice of the sale and upon request thereof, a notice was given to his lawyer purportedly send to; P.O. Box No. 40772, Nairobi. He avers that is a non-existent address. Similarly, there is no proof that the letters were ever sent as they are not under certificate of posting or registered post or copied to the other affected parties as required by the law.

16. The Applicant further argues that the said notice purportedly sent to his lawyer is demanding for a sum of Kshs 124,957,497.78 as owing against an amount of Kshs 25,000,000, secured by the charge. That the said amount cannot have arisen to the sum demanded in view of the provision of section 44 of the Central Bank of Kenya Act and Duplum Rule.

17. Finally the Applicant avers that the charge document is invalid for reasons inter alia that, it was drawn pursuant to the provisions of the Registration of the Land Act, which is repealed, and that the charge instrument was for a period of 44 years from 1<sup>st</sup> January 1972, which expired on 1<sup>st</sup> January 2016. That even then the suit property is his matrimonial home and if sold he will suffer irreparable loss.

18. However the application was opposed by the Respondent vide a Replying Affidavit dated 11<sup>th</sup> January 2017, sworn by Ruth Muiruri, Head of Legal of the Respondent’s Company. She deposed that, this matter arises out of various bank facilities extended to the Applicant and in particular, an overdraft facility offered vides a letter of offer dated 17<sup>th</sup> October 2000.

19. That the facilities were secured inter alia by a debenture over the assets of the Company, a legal charge over the suit property and personal guarantees of the directors of the Company. The debenture was duly prepared and registered but the charge document prepared was not registered after the Applicant declined to execute it. As a result the Respondent registered a caveat over the suit property to protect its interest. The deponent joined issues with the Applicant as what followed in relation to the filing of various suits and/or Applications as aforesaid leading to the Deputy Registrar executing a charge document on 4<sup>th</sup> November, 2015 in favour of the Respondent which was registered accordingly.

20. That the Applicant defaulted in repayment of the facility and the Respondent sent him a demand notice as a guarantor demanding the sum of Kshs 124,957,497.78 outstanding as at 18<sup>th</sup> August 2015. As the default continued the Applicant was served with the statutory notice of 90 days, dated 4<sup>th</sup> September 2015, and a further 40 days statutory notice dated 22<sup>nd</sup> March 2016 but he failed to regularise the borrower's indebtedness. The Respondent then instructed the Auctioneer to proceed with the sale by way of public auction in exercise of its statutory power of sale. The Auctioneer then sent the Applicant the 45 days notification of sale notice and advertised the property for sale thereafter.

21. The Respondent argues that the Applicant has admitted an unpaid debt of Kshs 25,000,000 advanced and that he offered the security property to secure the loan facility therefore is stopped from denying the liability. The Respondent rebutted the Applicant's averments that the Appeal filed raises reasonable grounds and has high chances of success; and argued that the application for stay of execution of the judgment having been dismissed, the Respondent has a right to sell the property.

22. On the issue of statutory notice, the Respondent maintained that the same was sent to the last known address of the Applicant as was provided by the Applicant. There was no notification to the Respondent of change of address notified.

23. That the attempts by the Applicant to impeach the charge instrument are an afterthought. That the charge document was drawn under the law in enforce at the time. It was not drawn for 44 years and even then chargee is the one who failed to sign the charge document and therefore cannot benefit from his inequitable conduct.

24. The Respondent further argued that, its remedies under the charge is cumulative and not exclusive as argued. Therefore, the filing of the suit against the borrower is no bar to the exercise of its right of sale.

25. Finally the Respondent reiterated that the Application is fatally defective as the jurat on the supporting affidavit is on a separate page and that orders sought therein are ambiguous and have been overtaken by events.

26. After filing the Application, the Supporting Affidavit and the Replying Affidavit, the Parties agreed to dispose of the Application by filing submission thereto. The same were then highlighted. I have considered the Application and the respective Affidavits alongside the submission and I find the following issues have arisen for determination;

- i) *Whether the Application is defective and ought to be struck out;*
- ii) *Whether the Respondent has a valid charge upon which to exercise a statutory power of sale;*
- iii) *Whether a valid statutory notice was served upon the applicant as required under the law;*
- iv) *Whether the respondent has complied with the provisions of section 96 Of the Lands Act, 2012;*
- v) *Whether the amount demanded is valid, due and owing;*
- vi) *What is the legal effect of the HCCC No. 379 of 2005 referred to herein;*

vii) *Whether the Respondent's power of sale has arisen; and*

viii) *Whether the order an injunction sought should be granted.*

27. I shall first consider the issue of the competence of the Application. The simple argument is that the jurat of the supporting affidavit is on a different page which makes it fatally defective and ought to be struck out. The case of; **Re: Central bank of Kenya and another Nairobi (Milimani), High Court Case Number 427 of 2000 (2002) 1 E.A .31** was cited. In the case the Court held that:

***“where the jurat in an affidavit appears on a separate page from the main text that offends the provisions of the Oaths and Statutory Declarations Act and renders the affidavit defective.***

28. Apparently, the Applicant did not respond to the Respondent's submissions on the defective Supporting Affidavit. I have looked at the said Affidavit and it is evident that the jurat is on a separate page as stated. The natural and legal consequence is that, the said Affidavit is defective and should be struck out. However following the enactment of Article 159 (2) (d) of the Constitution of Kenya which states that justice shall be administered without undue regard to procedural technicalities. I shall not strike out the Affidavit in the interest of substantive justice. However, it was very presumptuous for the Applicant to ignore the arguments of the Respondent on the same. The kind of mistakes made herein can be avoided and is curable by exercising due diligence while drafting the relevant Court documents.

29. I shall now consider the issue of whether there is a valid charge instrument upon which the Respondent can exercise a statutory power of sale. The argument advanced by Applicant is that the Charge instrument has lapsed by effluxion of time in that the interest in the suit property expired on 30<sup>th</sup> June 2016 that is, less six months before 44 years and on 31<sup>st</sup> December 2016, at the end of the 44 years.

30. The applicant relied on the case of; **Osteria Ice Cream Limited vs Junction Limited (TJL), and 2011 M/S Gusii Mwalimu Investment Co. Ltd and 2 others vs M/S Mwalimu Hotel Kisii Limited (1996) ECLR** where the Court held that “the term of the licence and lease respectively having expired there was nothing to extent, hence the Agreement between the Parties came to an end by effluxion of the time”.

31. Further reference was made to the case of; **Nakana Trading Co. Limited Vs Coffee Marketing Board (1990-1994) EA 448**, where the Court held that if contract between the Parties is in plain meaning, the Court should interpret it as such unless the document is ambiguous.

32. Finally the Applicant argued that the charge document is dated 30<sup>th</sup> April 2012, and is purportedly executed by the Deputy Registrar on 4<sup>th</sup> December 2011 well before the orders enabling the Deputy Registrar being granted on 15<sup>th</sup> December 2012. Therefore the Defendant has no valid Charge as the same was improperly executed. The case of; **Albert Mario Cordeiro & another v Vishram Shamji [2015] eCLR** was cited.

33. However the Respondent vehemently opposed the argument of invalid charge reiterating that it is an afterthought and is among a series of allegations aimed at clogging the Respondent's right to exercise its statutory power of sale. The case of **Al-Jalal Enterprise Limited vs Gulf African Bank Limited (2014) eCLR** was cited;

34. The Respondent maintained that the charge document was drawn before the enactment of the Land Act and therefore the argument that the same is invalid for having been drawn under the repealed; Registration of Titles Act is baseless. Reference was made to section 23 of the Interpretations and General Provisions Act, to argue that the repeal of the Registration of Titles Act, could not affect already existing accrued rights.

35. On the issue of the date when the charge was executed by the Deputy Registrar, the Respondent submitted that the 4<sup>th</sup> November 2011, is the date when the Court order were issued.

36. The Respondent reiterated that the charge document was not drawn for 44 years and did not expire on 30<sup>th</sup> June, 2016 as alleged. The Respondent relied on Section 80 of the Land Act to argue that it has all the right and remedies, including the statutory right of sale, so long as the Applicant is in default.

37. Further reference was made to clause 7(ii) of the charge instrument which gives the Respondent a right of sale. It was argued that “without prejudice” to the aforesaid, these provisions of clause 7(ii) defeat the Applicant’s argument that its title has terminated.

38. Finally the Respondent argued that the Applicant is guilty of seeking for an equitable remedy with unclean hands, having refused to execute the charge instrument even after the Court ordered him to do so and has since engaged the Respondent in a series of legal battles to frustrate the Respondent from selling the suit property.

39. I have considered the rival submission made on the issue of the validity of the charge instrument herein. Before I decide on the same, I wish to consider the nature and effect of a charge. A charge is a creature of equity; essentially a charge creates an equitable proprietary interest in the asset being secured. It arises when there is agreement between creditor and debtor that the creditor has an equitable proprietary interest in the secured asset as a security for a debt. In this arrangement, there is no transfer of legal or beneficial ownership or possession, merely an encumbrance on the asset. The creditor usually enforces the security without reference to Court.

40. Therefore, a lender may want to sell the property over which security has been granted and use the proceeds to pay off the secured obligations. Whether a lender can do this or not will depend on whether it has a power of sale, either under express provisions in the security document or under statute. If there is no express or statutory power of sale, a Court order will be needed to sell the property. The charge terminates when the debt is discharged.

41. I shall now revert back to the question herein: Is the charge valid? The statutory right of sale can only be founded on a valid charge instrument. The determination of this issue goes to the root of this matter. Can it then be determined at this interlocutory stage of the trial?

42. In the case of ; **Shipping Cor. of India Ltd v. Machado Brothers AIR 2004 SC 2093** the Court stated as follows:

***“that ‘interlocutory orders are in aid of final order but not the reverse. They do not survive beyond the original suit’.***

43. Similarly, I find that this issue of the validity of the charge cannot be determined at this interrogatory stage, as it is the basis of prayer (c) which is one of the main prayers in the suit. In that prayer the Applicant is seeking for an order that the charge instrument be declared null and void. This issue has to await the hearing of the main suit.

44. The other issue raised by the Applicant is in relation to the case HCCC No. 379 of 2005. The Applicant argues that “by opting to file that suit, the Respondent has lost the option of selling the suit property. That the remedies of the chargee under section 90 of the Land Act are “exclusive” and cannot be exercised simultaneously. The Applicant submitted that it has disputed the interest rate claimed by the Respondent in that the cases of; **John Gatue Nderitu vs Kenya Commercial Bank (2011) Eklr** and **David Musyimi Ndeti vs Daima Bank Limited HCCC No. 2198of 2006**, were cited to argue. It is upon the Respondent to prove that the interest rate charged is valid. As such to allowing the sale to proceed will pre-empt the findings in that suit.

45. The Respondent however opposed that argument and submitted that, the remedies of the chargee under section 90(3) Land Act are “cumulative”. That even then, the subject suit is against the principal borrower and the rights and remedies of the Respondent against the principal borrower are separate from those against the Applicant as a chargor of the suit property.

46. Further without prejudice, the allegation is sub-judice under section 6 of the Civil Procedure Act as the suit is still under determination.

47. I have considered the arguments advanced above and I find that the subject suit is still pending in Court therefore as observed by the Respondent; this Court cannot delve into issues that are a subject of dispute in that matter. If indeed the interest rate chargeable is in dispute and has been raised in the subject matter, that issue can only be determined herein. Furthermore, I find that the said suit is between different Parties from the Parties herein.

48. Indeed the relationship of the Parties herein is founded on the law of guarantees. A contract of guarantee is quite separate from the Principal Debtor's Contract for the debt. The Applicant herein is a guarantor and the guarantee is in a form of a charge over the suit property. Therefore the basis of relationship of the Parties as the chargee and chargor is the "charge property".

49. Among the remedies of the chargee against a "defaulting chargor" is the power of sale. It targets the charged property and not the chargor on his personal covenants. Therefore the chargee cannot sue the Principal Debtor and at the same time "exercise power of sale" the Guarantor's charged property. But cannot sue the Guarantor personally and at the same time sell the charged property. However, that is not the case herein. I find that the target herein is the charged property. As such the suit HCCC No. 379 of 2005 has no legal effect herein unless the Respondent has already obtained Judgment therefrom and satisfied the debt over which the Respondent is liable to pay.

50. The other issue raised is in relation to the statutory notices served. The Applicant has impugned the notice served on two grounds: that it was not properly served and that it makes reference to a sum of Kshs 25,000,000 the sum due from the principal borrower. That the Applicant's liability is Kshs 7,000,000 based on clause 8(iv) of the charge instrument. The Applicant argued that service of a valid statutory notice is a mandatory requirement under section 96 of the Land Act, and failure to comply wtherewith means that the chargor cannot exercise the statutory power of sale.

51. The Applicant cited the following cases to support the above arguments;

*(i) Gerald Oketch Onyango vs Barclays Bank of Kenya (2008) eKLR*

*(ii) Fredrick Gachuhi Ngatiri vs Housing Finance Company of Kenya Limited (2007)*

*(iii) Officequip Services Limited vs The Co-operative Bank of Kenya Limited (2005) eKLR*

*(iv) Zadrack Oyaro Achoki vs Consolidated Bank (2013) eKLR*

*(v) Desires Derive vs Britam Life Assurance Company (2016) eKLR.*

52. However, the respondent argued that the Applicant's submissions that the statutory demand is defective for mis-stating the maximum secured amount as Kshs. 25,000,000 is a mere falsehood. That a perusal of Recital 3 of the duly registered charge clearly shows that the charge was to secure a sum of Kshs 25, 000,000, therefore the notice herein is within the four corners of the provisions of section 90 of the Land Act.

53. I have perused the notice send to the Applicant dated 7<sup>th</sup> September 2015 and note that it clearly states the charge was drawn to secure "the principal sum of Kshs 25, 000,000, plus interest, commission, fees, bank charges, costs and all other money, expense and charges due under the charge." The statutory demand dated 22<sup>nd</sup> March 2016, makes reference to the notice dated 7<sup>th</sup> September 2015. The Respondent argued that the notice was posted to the Applicant's last known address that was not rebutted. I shall revert to this issue later.

54. The Applicant also submitted that the notice was not served on the spouse of the chargor as required under section 96(3) of the Land Act, as the suit property is a matrimonial home. The case of; *Jimmy*

Wafula Simiyu vs Fidelity Bank Ltd (2014)eKLR was relied on. However the Respondent dismissed the argument as among the long list of allegations put forward to defeat its statutory right of sale and termed it as baseless, without merit and an afterthought, being brought so late in the day.

55. I have gone through the documents filed and I find that there is no evidence that the Applicant's spouse was served with statutory notice. However, does failure to serve her defeat the Respondent's statutory power of sale.

56. The Applicant relied on the case of Mohammed Gulamhussein Farzal Karmali & 2 others vs C.F.C Bank Limited (2006),eKLR to argue that where an Applicant proves that the sum demanded is more than double the amount advanced they will be deemed to have established a prima facie case. I however note that the issue of interest rate charged is the subject of dispute in the suit HCCC 379 of 2005. It is better determined there.

57. Finally the Applicant submitted that section 84 of the Land Act provides for variation of the term of the charge. That the Respondent seeks to enforce a right under a charge that has expired without complying with these provisions. This again goes to the validity of the charge and will await the hearing of the main suit.

58. The final issue to determine is whether the applicant has met the conditions for grant of an order of temporary injunction. The celebrated case of; Giela v Cassman Brown & Co, Ltd (1973) E.A 360, lays the conditions as follows:

***“First, an applicant must show a 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”***

59. These principles were also recognized in the case of; East Africa Industries Ltd v. Trufoods Ltd , (1972) E.A 420 where Spry, V-P (CAEA) said:

***“A plaintiff has to show a prima facie case with a probability of success and if the court is in doubt it will decide the application on the balance of convenience. 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”***

60. The case of; Mrao vs First American Bank (CA) (2003) Eklr 125, has defined a prima facie case as:

***“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.”***

61. Has the Plaintiff/Applicant established a prima facie case, I find that in the instant case there is no dispute that the Respondent advanced the Company Kshs 25, 000,000 which was secured inter alia by a Debenture dated 26<sup>th</sup> April 2001 and personal guarantees of the directors including the Applicant. Apparently it was agreed that the Applicant would offer the suit property as a security for the sum advanced. The Applicant was to execute a legal charge over the suit property in favour of the Respondent. He did not. He argues that he was subsequently advised by his Advocate that if the principal borrower defaulted his property would be sold. He chose not to execute the charge document.

62. Be that as it were the Parties eventually ended up in Court and the Court ruled on 15<sup>th</sup> November 2012, that the Applicant execute the charge document. He did not. The Respondent then obtained an order of the Court for the Deputy Registrar to execute the charge document on behalf of the Applicant

and it was so executed.

63. The Order authorising the execution of the charge document is a valid order and still in force. Its effect is to grant the Respondent rights over the Applicant's suit property as a chargee, which rights include the statutory power of sale. Therefore the issue of whether the chargor's interest has expired by effluxion of time or whether the charge is valid or not cannot be dealt with at this stage as aforesaid.

64. The concern of the Court is whether in the Respondent in the exercise of the statutory power of sale is in breach of the law. The main issues raised as stated herein relates to invalidity of the charge, interest rate chargeable and statutory notices.

65. On the issue of the invalidity of the charge document, I associate myself with the holding in the case *Mrao Ltd V First American Bank of Kenya Ltd & 2 Others ( supra)*, where Hon Justice Kwatch JA stated at Page 125,

***“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times.... Banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters.”***

66. Be that as it may, I find that the Parties herein have been engaged in a series of suits and applications spanning over a period of 10 years. The first case HCCC No.379, having been filed in the year 2000. In fact according to the averments under paragraph 13 of the supporting affidavit that suit is still pending in court.

67. The suit HCCC No. 643 of 2005 is said to be dealing squarely with the issue of the validity charge instrument. The judgment therefrom is said to be a subject of Appeal. The question therefore remains; was the issue of invalidity of the Charge instrument ever raised, heard and/or determined?

68. In the case of Coast Brick and Mrao Ltd the Court held as follows:-

***“further the absence of past allegations raised concerning the validity or otherwise of the charge gives the impression that the current allegations are an afterthought. This issue has been addressed by the Court of Appeal since 1966 where the Court has found no sympathy for debtors who after executing valid security instruments later turn around and challenge the validity years later when the bank commences the sale of the securities. In the present case, it is unconscionable to turn and purport to use any baseless excuse to frustrate the bank from realizing its security after it has lent money to the Plaintiff.”***

69. I entirely associate myself with the sentiments expressed by the Court in these authorities that the issue of validity of a charge should be raised at the earliest. On the issue of statutory notices, I have noticed that annexed to the Replying Affidavit filed herein, is a statutory demand notice dated 22<sup>nd</sup> March 2016 and marked RM6. Attached thereto is a certificate of posting showing a parcel was sent by “Kontos of P.O. Box 60680 -00200 addressed to DineshKumar Zaverchande Jetha Box 40772-00.” I note from correspondence produced herein a letter dated 18<sup>th</sup> November 2004, produced by the Applicant and marked as “DJ8”, the postal address of the Applicant is stated as Box 40772-00 Nairobi. This in my opinion deals with the dispute as to whether statutory notices were served or not. Indeed, all the authorities cited by the Applicant clearly require that a notice be served. I am satisfied there is proof of service.

70. As regards the issue of interest rate chargeable, I find that the Courts have held that a dispute on interest rate is not a ground to defeat the chargee's statutory right of sale. In the case of Bharmal Kanji Shah and Another vs Shah Depar Devji (supra), the court held that:-

***“the Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage....”***

71. In the case of Halsbury’s Laws of England. Vol. 32 (4<sup>th</sup> Edition) paragraph 725 states as follows;

**“725 when mortgagee may be restrained from exercising power of sale**

***The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed in court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”***

72. All in all I find that in the ruling delivered by Hon. Justice J.B. Havelock on 8<sup>th</sup> March 2013, he recognised the validity of the charge document by stating as follows;

***“ I find no merit in the Defendant/Judgment Debtor’s counsel’s submission that the charge document is wrongly brought before this Court for the Deputy Registrar to execute. Although it is drawn under the provisions of the Registration of Titles Act, which has been repealed by the Land Act, 2012. I concur with Mr. Gichuhi’s submission that the point is covered by the transitional provisions of section 152 of the Land Act and section 107 of the Land Registration Act. Both 2012.”***

73. The Court went on to allow the Application seeking for an order inter alia that the Deputy Registrar of this Court do be directed to execute charge documents over Flat Number 1, Block C, Situate on Land Reference No. 991/13 Nairobi in favour of the Plaintiff. In my opinion the only remedy available to the Applicant is to pursue an Appeal against this order allowing the Deputy Registrar to execute the charge instrument, and or pursue the case between the Respondent and the principal borrower, of which the Applicant is a director. That will accord him an opportunity to deal with the issues raised herein.

74. I therefore find that the Applicant has not established a prima facie case to warrant the order of temporary injunction sought. I therefore dismiss the Application with costs to the Respondent

75. Orders accordingly

**Dated, delivered and signed in an open court on this 30<sup>th</sup> day of October 2017 at Nairobi**

**G.L.NZIOKA**

**JUDGE**

**In the presence of;**

Mr. Kiragu for Mr. Singh Gitau for the applicant

Mr. Omino for Mr. Karungo for the respondent

Teresia-----court Assistance