



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 443 OF 2017**

JAMES OTIANG OKOTH.....1<sup>ST</sup> PLAINTIFF

MAUREEN ANYANGO OPONDO.....2<sup>ND</sup> PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

**RULING**

[1] The Notice of Motion that is before the Court for determination was filed herein on **6 November 2017** by the Plaintiffs/Applicants, **James Otiang Okoth** and **Maureen Onyango Opondo**, pursuant to **Sections 3A and 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Section 103(1) of the Land Act, No. 6 of 2012, Order 40 Rule 1(a) and Order 51 Rule 1 of the Civil Procedure Rules, 2010** for the following orders:

[a] (Spent)

[b] (Spent)

[c] That pending the hearing and determination of the main suit, an order of a temporary injunction do issue restraining the Defendant/Respondent, **NIC Bank Limited**, whether by itself, servants or agents, employees or authorized representatives from proceeding to exercise its power of sale under the **Land Act** and specifically as stated in the notice dated **7 September, 2017** as issued by **Garam Investments** of the property identified as **L.R.No. 209/20523 (I.R. 150393) (the Suit Property)** or in any other way interfering with the Plaintiffs' quiet enjoyment of the same.

[d] That the costs of the application be provided for.

[2] The grounds upon which the application was premised are that the Defendant, through **Garam Investments** had issued a Notification for Sale of the Suit Property on **14 November 2017**, which property is being used by the Plaintiffs' family as their matrimonial home. It was averred that the Defendant has refused to disclose to the Plaintiffs the basis of and the extent of their liability in terms of the principal sum owed and the applicable interest, yet the Defendant is intent on selling the property at a gross undervalue and without complying with the provisions of the **Land Act, 2012**. It was thus their contention that the planned sale is not the appropriate remedy in the prevailing circumstances and that

there is a risk of the Plaintiffs being rendered homeless should the flawed sale be proceeded with to conclusion.

[3] In the Supporting Affidavit sworn by the 1st Plaintiff on **6 November 2017**, it was averred that the Plaintiffs, who are husband and wife, are the registered owners of the Suit Property on which there stands a **Maisonette No. 489, Phenom Estate, Phase 4**, which they currently use as their matrimonial home. That, through a Charge, registered on **23 October 2013**, the property was used to secure a financial facility that was granted by the Defendant to **Light Park Services Limited**; and that upon default by **Light Park Services Limited**, the Defendant instructed **Garam Investments** to sell the property by way of public auction. A Notification of Sale was annexed to the Supporting Affidavit and marked **Annexure JOO2a**, indicating that the property had been valued at **Kshs. 22,000,000/=**.

[4] According to the Plaintiffs, the Defendant had intentionally devalued the Suit Property so as to illegally deprive them of their right to enjoy the said property as provided for in the Constitution, and that the current market value of the said property is nothing less than **Kshs. 30,500,000/=**. The Plaintiffs augmented this averment by exhibiting, as **Annexure JOO3**, a copy of the Valuation Report by **East African Realtors**, which valuation was done on or around **3 November 2017**. It was averred by the Plaintiffs that, on the basis of that valuation, numerous requests have been made in vain to the Defendant for a joint valuation. It was further the contention of the Plaintiffs that the Defendant had declined to provide them with a comprehensive statement of account in relation to the loan, including the applicable interest rate, to enable them understand the extent of their indebtedness.

[5] Lastly, it was averred by the Plaintiffs that prior to the issuance of the Notification of Sale dated **7 September 2017** and the subsequent advertisement of sale on **30 October 2017**, the Defendant had not issued them with the notice contemplated under **Section 90(1)** of the **Land Act**. Thus, it was their contention that the planned sale is not only illegal for failure to comply with the provisions of the **Land Act**, but would also be in breach of the duty of care owed to them by the Defendant to ensure that the property was sold at the best possible price.

[6] The application was opposed by the Defendant, and in this respect, reliance was placed on the Replying Affidavit sworn by the Defendant's Assistant Legal Manager, **Mr. Kenneth Mawira**, on **10 November 2017**. According to the Defendant, by a Letter of Offer dated **20 February 2014**, **Light Pack Services Ltd**, of which the Plaintiffs herein are directors, accepted a loan facility amounting to **Kshs. 14,555,743**, which was to be secured by a Charge over the Suit Property as well as the Plaintiff's personal Guarantees as directors. That the Charge was thereafter perfected by registration, after which the funds were accordingly disbursed.

[7] It was averred by the Defendant that, despite the clear provisions of the Letter of Offer and the security instruments, the Borrower defaulted in repaying the loan facility; and that despite several demands, requests and reminders to the Borrower and the Plaintiffs to rectify the default, and despite several promises and statements of undertaking to pay, the Borrower and the Plaintiffs have failed to repay the outstanding amount, which stood at **Kshs.16,759,076.33** as at **10 November 2017**. A copy of the Borrower's Statement of Account to that effect was exhibited as **Annexure "KM-4"**. In the premises, it was averred, the Bank had no alternative but to seek the realization of the security to safeguard its own interest as well as those of the other depositors.

[8] The Defendant averred that, in a bid to realize its Statutory Power of Sale, it issued the 3-months Statutory Notice to the Plaintiffs as required under the applicable law on **4 July 2016**, a copy of which was produced as **Annexure "KM-5,"** which Notice was not complied with by the Plaintiffs. Thereupon, the Bank, through its Advocates on record, issued the 40-days Notice to Sell as per the Annexure marked **"KM-6"**; which prompted the Plaintiffs to approach the Bank with a proposal for the payment of **Kshs. 14,000,000/=** as full and final settlement of the loan facility; but that the Plaintiffs again failed to keep their promise. It was thus the contention of the Plaintiff that it was then that the Bank issued instructions to the Auctioneer to issue the appropriate Redemption Notice in terms of **Annexure "KM-8"**.

[9] The Defendant exhibited the letter marked **Annexure "KM-9"** to demonstrate that it was not in good

faith that the Plaintiffs waited until **23 October 2017**, towards the end of the Redemption Notice, to make a request to the Bank through the 2nd Plaintiff, to be allowed to pay **Kshs. 4,000,000/=** on or before **31 October 2017** and for the restructuring of the loan; and even then, although the Bank acceded to the request for the payment of **Kshs. 4,000,000/=** as proposed, the 2nd Plaintiff did not keep her word. Instead, the Plaintiffs opted to file this suit. Thus, the Court was invited to impute improper motive on the part of the Plaintiffs from their aforementioned conduct and to find that they are not deserving of the Court's discretion. In particular, the Court was urged to note the Plaintiffs' admission of their indebtedness; their concession that the loan account is in arrears; and the fact that they were served with all the requisite statutory notices pursuant to **Section 90** and **Section 96** of the **Land Act**. The Court was further urged to find and hold that the property was duly valued by competent and independent valuers to ascertain its current value; and that the Defendant is accordingly within its right to sell the charged property.

**[10]** In his Supplementary Affidavit sworn and filed on **13 November 2017**, the 1st Plaintiff averred, in response to the depositions in the Replying Affidavit, that there remains a dispute on the exact extent of the Borrower's default and the extent of liability, given the variance between the amount of **Kshs. 16,759,076.33**, as set out in Paragraph 11 of the Replying Affidavit, and the sum of **Kshs. 12,343,129.86** as reflected in the Statement of Account as at **10 November 2017**. It was further averred that it is clear that the Defendant has been levying a higher interest rate of 20.33% per annum and not the contractual rate of 16% per annum; and thereby contravening the provisions of **Section 33B** of the **Banking Act, Chapter 488** of the **Laws of Kenya**.

**[11]** While conceding that they approached the Bank with a view of settling the stand-off between the Defendant and the Borrower, the Plaintiffs denied the allegations of bad faith. Thus, the 1st Plaintiff reiterated their common stand that they were never served with the requisite statutory notices, and that the failure by the Defendant to obtain a current independent valuation of the property was intentional and geared toward dispossessing them of the Suit Property; and that this was a fit and proper case for the issuance of temporary injunction as has been sought by them.

**[12]** The application was argued on **13 November 2017** and in support thereof, **Mr. Omollo**, Counsel for the Plaintiffs relied on the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 360** in support of his submission that the Plaintiffs have shown a *prima facie* case with probability of success. He urged the Court to note that, at paragraph 11 of the Replying Affidavit, the amount owing is shown as **Kshs. 15,759,076.33**, while the Statement of Account filed in support of the averments in that paragraph indicates that the amount owing was **Kshs. 12,346,129.83**; thus illustrating that there is a genuine concern about the exact amount that is due from the Borrower.

**[13]** Counsel also raised the issue of the interest rate, pointing out that while the contractual rate is reflected in the Letter of Offer dated **20 February 2014** to be 16%, the Defendant's Statement of Account shows that a rate of 20.33% was being charged by the Defendant, as shown on Page 31 of the said Statement; yet no notice of variation was given as required by **Section 33B** of the **Banking Act**. In support of these submissions, the Plaintiff relied on the cases of **George Wahinya Macharia vs. Equity Bank of Kenya Limited & Another [2006] eKLR** and **Warma Fees Limited & 2 Others vs. Co-operative Bank of Kenya Limited [2006] eKLR**.

**[14]** In support of the Plaintiff's contention that it was imperative for the requisite statutory notices pursuant to **Sections 90** and **96** of the **Land Act** to be served before any attempt at sale of the Suit Property could be made by the Defendant, Counsel relied on the case of **Francis Gathungu Kariuki vs. ICDC [2007] eKLR**. It was the Plaintiffs' submission that the Defendant could not purport to rely on notices that were issued in **2016** to support the intended sale. They further impugned the Valuation Report relied on by the Defendant contending that it is not good enough, granted the concession that the valuer only viewed the house from outside and yet purported to describe and value the house on account of internal fittings and fixtures. The Court was urged to be guided by the latest valuation provided by the Plaintiff's as an annexure to the Supplementary Affidavit, which gives a forced sale value of the property as **Kshs. 30,000,000/=**.

[15] **Mr. Mugisha**, Learned Counsel for the Defendant, on his part was of the submission that what the Plaintiffs have raised is a dispute over interest; and that the courts have held over the years that such a dispute cannot be a ground for injunction. He added that the Defendant is a reputable bank and would be in a position to refund any overpayment, if need be. Counsel further submitted that the Defendant has annexed documents to the Replying Affidavit to prove that all the requisite notices were duly served; and that thereafter the Plaintiffs approached the Bank with an offer to sell the property by private treaty, which offer was negotiated by their Counsel on record, **Mr. Omollo**. Correspondence in proof thereof were also exhibited as annexures to the Replying Affidavit.

[16] Thus, it was the submission of **Mr. Mugisha** that the Plaintiffs have all along been aware of the debt and the Bank's intention to realize the security. He further urged the Court to find that the property was valued by an independent valuer, as opposed to the Valuation Report that was sourced by the Plaintiffs. Thus, it was the submission of Counsel for the Defendant that the threshold of **Giella vs. Cassman Brown Case** (supra) has not been met by the Plaintiffs and that in any event, the Plaintiffs have not come to Court with clean hands given their conduct in connection with this loan, and in particular the fact that since the loan was disbursed, the Borrower has managed to repay only **Kshs. 1,800,000/=**.

[17] The Plaintiff's application was filed pursuant to **Section 3A** and **63(e)** of the **Civil Procedure Act**, **Section 103(1) of the Land Act**, as well as **Order 40 Rules 1(a)** of the **Civil Procedure Rules**. Where, as in this case, it is alleged that the property that is the subject matter of this suit is in danger of being disposed of, **Order 40 Rule 1(a)** of the **Civil Procedure Rules** provides for relief in the following terms:

**"Where in any suit it is proved by affidavit or otherwise 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 ... 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."**

[18] Having considered the application, the grounds raised in support thereof, the affidavits and the annexures relied on as well as the submissions made herein by Learned Counsel, there is no contestation that **Light Pack Services Ltd** (the Borrower), of which the Plaintiffs are directors, did approach the Defendant for a loan facility; or that by a Letter of Offer dated **20 February 2014**, the Defendant did put funds, to the tune of **Kshs. 14,555,743.26**, at the disposal of the Borrower. Evidently, about 69% of the funds was to be used to finance the purchase of the Suit Property. The Letter of Offer further shows that the facility was to be secured by a Legal charge of **Kshs. 14,000,000/=** over the Suit Property as well as the directors' Personal Guarantees of **Kshs. 14,600,000/=** each, and a Company Guarantee of **Kshs. 100,000/=**. The said securities were drawn and perfected, and copies thereof have been exhibited herein as annexures to the Replying Affidavit.

[19] It is apparent that, in the course of time, the Borrower defaulted in its repayments; whereupon the Defendant commenced the process of realization of the security comprised in the Charge; which is what prompted the Plaintiff's to seek the intervention of the Court. Having thus moved the Court for relief, the Plaintiffs were under obligation to comply with the conditions for the issuance of a temporary injunction, as laid down in the case of **Giella vs. Cassman Brown & Co. Ltd (supra)**, have been met. It was held thus, in that case:

**"The conditions for the grant of an interlocutory injunction are...well settled in East Africa. 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."**

[20] As to what amount to a *prima facie* case, the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others** [2003] KLR 123 expressed the view that:

**"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. 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."**

[21] This being an interlocutory application, the Court need not examine closely the merits or otherwise of the Plaintiff's case. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012**, the Court of Appeal made this point 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 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. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."*

[22] With the foregoing principles in mind, I have given due consideration to the Plaintiffs' application and noted that it comprises of three prongs, namely: that the Defendant did not serve the requisite statutory notices under **Sections 90 and 96** of the **Land Act**; that the property was not valued by an independent valuer as required by **Section 97** of the **Land Act**; and that there is a dispute over the rate of interest and the amount due. It is a requirement of the law, as set out in **Section 90(3)** of the **Land Act**, that:

**(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**

**(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters--**

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

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

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

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

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

**(3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--**

- (a) sue the chargor for any money due and owing under the charge;
- (b) appoint a receiver of the income of the charged land;
- (c) lease the charged land, or if the charge is of a lease, sublease the land;
- (d) enter into possession of the charged land; or
- (e) sell the charged land.

**(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of member of the family or community the chargee may--**

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

**(b) apply to the court for an order to--**

**(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;**

**(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.**

[23] **Section 96** of the Land Act, on the other hand provides that:

**(1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.**

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

[24] The Defendant responded to the arguments by availing copies of the requisite statutory notices served under **Section 90** and **96** of the **Land Act**, as well as **Rule 15** of the **Auctioneers Rules, 1997**. The copies are at pages 38 to 46, and 57 to 58 of the documents annexed to the Replying Affidavit. At page 38 is a copy of a Statutory Notice dated **4 July 2016** addressed to **Light Pack Services Limited** pursuant to **Section 90** of the **Land Act** as read with **Section 106(4)** of the **Land Registration Act**. It clearly shows, at paragraphs 7 and 8 that the Borrower had 3 months to rectify the default and clear the specified arrears of **Kshs. 1,233,002.80** at the time; and that sale of the charged property would be effected upon the expiry of that notice period.

[25] At page 45 of the documents annexed to the Defendant's Replying Affidavit is a Notice to Sell dated **4 November 2016** issued pursuant to **Section 96** of the **Land Act**. The notice was addressed to the two Plaintiffs, notifying them of the Bank's intention to sell the charged property. The nature and extent of the default was specified and the 40 day window for redemption clearly set out. Thereafter, by a letter dated **7 September 2017**, **Garam Investments** notified the two Plaintiffs that they had been instructed to sell the Suit Property by public auction and that the proposed sale was scheduled for **14 November 2017**. Thus, the 45 Redemption Notice was issued in accordance with **Rule 15** of the **Auctioneers Rules**. The Auctioneers' Certificate under **Rule 15(c)** of the **Auctioneers Rules** was also exhibited at page 58 of the annexures to the Replying Affidavit.

[26] Further to the foregoing, the Defendant annexed email and other correspondence between it and the Plaintiffs to show that there were protracted negotiations with a view of settling this matter amicably,

thereby confirming that the Plaintiffs had notice of the Defendant's intention to realize the security. Clearly therefore, there does not seem to be sufficient grounds for denying service. The notices were not challenged in terms of content. There is no dispute that the said notices were addressed to the Plaintiff's correct address, set out in the Letter of Offer, Charge and Guarantees.

[27] It is also noteworthy that, in an apparent acknowledgement of service of the said notices, the Plaintiffs contended that the said notices were invalid for purposes of the intended sale that was scheduled for **14 November 2017** for the simple reason that they were served in **2016**. That argument cannot be a valid argument. First and foremost from a reading of **Sections 90 and 96** of the **Land Act**, as well as **Rule 15** and of the Auctioneers Rules, it is manifest that the notices are sequential; and for good cause, namely to enable a Chargor sufficient time and space to reorganize its affairs with a view of exercising his power of redemption. Accordingly, once a valid notice has been given, there is no obligation in law for a Chargee to re-issue a notice, in the event that the sale is not conducted as initially scheduled. I would accordingly endorse the expressions of **Warsame, J** in **Executive Curtains & Furnishings Ltd vs. Family Finance Building Society [2007] eKLR** in which he made the following expressions:

**"The plaintiff was given an opportunity to redeem the charge property through the statutory notice dated 24th February, 2006. I am not aware of any law requiring the defendant to repeat or reissue the statutory notice once it is issued and served upon the borrower. The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charge property is out of the hands of the borrower."**

[28] In connection with **Section 97** of the **Land Act**, it was the contention of the Plaintiffs that the Suit Property was not valued, or valued by an independent valuer. There is however a Valuation Report whose copy was filed herein as **Annexure "KM-10"** to the Replying Affidavit. That Valuation Report is dated **25 April 2017** and the ascribed value of **Kshs. 22,500,000** cannot be said to be markedly different from the valuation of **Kshs. 30,500,000** that was commissioned by the Plaintiff's as to amount to a breach of **Section 97**, which, in any event simply states that:

**(1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**

**(2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.**

**(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-**

***(a) There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and***

***(b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).***

[29] In my view, and on a prima facie basis, the Defendant cannot be faulted on that score either, granted that, at this stage, it cannot be said for sure that the property will be sold at undervalue. To say so would be merely speculative.

[30] As to the interest rates, which appears to be the main thrust of the application the Plaintiff cited the variance between the amount of **Kshs. 16,759,076.33** given in Paragraph 11 of the Replying Affidavit and **Kshs. 12,343,129.86** as reflected in the Statement of Account as at **10 November 2017**. It was further averred that it is clear that the Defendant has been levying a higher interest rate of 20.33% per annum and not the contractual rate of 16% per annum; and thereby contravening the provisions of **Section 33B** of the Banking Act, **Chapter 488** of the **Laws of Kenya**. Inasmuch as the aforesaid allegation may be true, it is now settled that a dispute over the amount owing or the rate of interest, per se, is not a valid ground for restraining a Chargee from exercising a crystallized power of sale. In **Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725** it is opined that:

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

[31] Similarly, in **Bharmal Kanji Shah And Another V Shah Depar Devji (Supra)** it was observed 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..."**

[32] The same standpoint was taken in **Fina Bank Ltd. V Ronak Ltd, [2001] 1 EA 54** to the effect that:

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

[33] In the foregoing premises, the Court is not satisfied that a *prima facie* case has been made out herein by the Plaintiff to warrant the issuance of the injunctive order sought. In the premises, there would be no need to give consideration to the questions as to whether the Plaintiff stands to suffer irreparable harm, or in whose favour the balance of convenience tilts. In **Nguruman Limited V. Jan Bonde Nielsen & 2 Others (supra)** the Court of Appeal made it clear that:

***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***

***(a) establish his case only at a prima facie level,***

***(b) demonstrate irreparable injury if a temporary injunction is not granted, and***

***(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.***

***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages***

*recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."*

[34] In the premises, *the Plaintiff's Notice of Motion dated 6 November 2017 fails and is hereby dismissed with costs.*

*It is so ordered.*

**SIGNED, DATED AND DELIVERED AT NAIROBI 8<sup>TH</sup> DAY OF DECEMBER, 2017**

**OLGA SEWE**

**JUDGE**