



**Taib v Hussein; First Community Bank Limited (Interested Party) (Civil Suit E060 of 2023) [2023] KEELC 22007 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22007 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT E060 OF 2023  
LL NAIKUNI, J  
DECEMBER 5, 2023**

**BETWEEN**

**HASSAN SWALEH TAIB ..... PLAINTIFF**

**AND**

**IBRAHIM SHERO HUSSEIN ..... DEFENDANT**

**AND**

**FIRST COMMUNITY BANK LIMITED ..... INTERESTED PARTY**

**RULING**

**I. Introduction**

1. The applications before this Honorable Court for hearing and determination are the Notice of Motion application dated 9<sup>th</sup> June, 2023 and 21<sup>st</sup> June, 2023 brought under a certificate of urgency. The Application dated 9<sup>th</sup> June, 2023 was brought by Hassan Swaleh Taib, the Plaintiff. The Defendant, Ibrahim Shero Hussein filed the Notice of Motion application dated 21<sup>st</sup> June, 2023 (hereinafter referred to as “The Plaintiff” and “The Defendant” for ease of reference).
2. Upon service, each of the Respondents herein filed their replies and the Applicants further affidavits where appropriate from the filed applications. At the same time, the Interested party also filed their replies. Although the Honorable Court will deal with these applications separately but simultaneously and in the long run deliver an omnibus Ruling from the distinct issues raised hereof.

**II. The Plaintiff’s case on the Notice of Motion application dated 9<sup>th</sup> June, 2023**

3. The application by the Plaintiff was brought under the provisions of Articles 10 and 40 of *the Constitution*, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, No. 6 of 2012; Sections 98 and 99 of the *Land Act*, 2012, Sections 24, 25 and 26 of the *Land Registration Act*, No.



3 2012 and Orders 40 and 51 Rule 1 of the Civil Procedure Rules, 2010. It sought for the following orders:-

- a. Spent.
  - b. Spent.
  - c. That Officer Commanding Mombasa Central Police Station does enforce compliance with the Orders and enforce security against trespass of parcels of land known as Mombasa/Block XLVII/39 and Mombasa/Block XLVII/40.
  - d. That a temporary order of injunction do issue restraining the Respondent, his servants, security guards, agents, employees or any other person from interfering with the Plaintiff's proprietary rights, trespassing or in any other manner of interfering with Plaintiff's quiet possession or dealing with parcels of land known as Mombasa/Block XLVII/39 and Mombasa/Block XLVII/40 pending the hearing and determination of the Suit.
  - e. That a mandatory injunction do issue restraining the Respondent, his servants, security guards, agents, employees or any other person from interfering with the Plaintiff's proprietary rights, trespassing or in any other manner of interfering with Plaintiff's quiet possession or dealing with parcels of land known as Mombasa/Block XLVII/39 and Mombasa/Block XLVII/40 pending the hearing and determination of the Suit.
  - f. That the costs of this Application be provided for.
  - g. That this Honourable Court be pleased to make such further or other Orders as it may deem just and expedient in the circumstances of this Suit.
4. The application by the Plaintiff is premised on the grounds, testimonial facts and averments made out under the 38 Paragraphed Supporting Affidavit of Hassan Swaleh Taib the Plaintiff herein together with seventeen (17) annexures marked as "HST 1 to 17" annexed hereof. The Applicant averred that:
- a. Vide the Certificates of Titles issued on the 15<sup>th</sup> March, 2023, he was registered as the absolute proprietor of parcels of land known as Mombasa/Block XLVII/39 and Mombasa/Block XLVII/40 (Hereinafter referred to as "The Suit Properties"). Annexed in the affidavit and marked "HST – 1" are copies of the Title documents evidencing the same.
  - b. On the 24<sup>th</sup> February, 2023 he signed the Transfer documents through the First Community Bank Limited, the Interested Party herein and the same was registered by the Mombasa Land Registry. Annexed in the affidavit and marked as "HST – 2" are copies of the Transfer evidencing the same.
  - c. On 24<sup>th</sup> February, 2023 valuation of suit properties was conducted for purposes of assessing the stamp duty payable as a result of the Transfer dated 24<sup>th</sup> February, 2023. Annexed in the affidavit and marked as "HST – 3" are copies of the Valuation Forms and the Application for registration evidencing the same.
  - d. He promptly remitted payment of the stamp duty to the Kenya Revenue Authority and he was issued with acknowledgment payment slip and thereafter requested the registration of Transfers, annexed in the affidavit and marked as "HST – 4" are copies of the documentation evidencing the same.
  - e. Pursuant to the Certificates of Official Search carried out on the 15<sup>th</sup> March, 2023, it was ascertained that he was the legal and registered owner and therefore he enjoyed the protection



of all fundamental rights and freedoms enshrined under Chapter 4 of *the Constitution* of Kenya, 2010. Annexed in the affidavit and marked as “HST – 5” copies of the Official searches evidencing the same.

- f. On 22<sup>nd</sup> March, 2023 the First Community Bank, the Interested Party herein through the Law firm of Messrs. Mulondo and Company Advocates forwarded the original completion documents to him as required in law. Annexed in the affidavit and marked as “HST – 6” are a copy of the Letter evidencing the same.
- g. By dint of the provision of Section 24 of the *Land Registration Act*, 2012, the registration and issuance of Certificates of Titles vested upon him the absolute ownership of the suit properties together with all rights and privileges and he was entitled to exercise proprietary rights including right of use and possession. The gravamen of the instant Suit was premised on an Advertisement Notice by Nairobi Connection Services Auctioneers that advertised a public auction to be held on the 21<sup>st</sup> February, 2023.
- h. He came across the said Advertisement Notice in the local dailies, directing that an intended sale of the parcels of suit properties was to be conducted at Kameta Enterprise Auctioneers offices, behind Nyali School in Kameta Building. Annexed in the affidavit and marked as “HST – 7” was a copy of the Notice evidencing the same. He developed an interest to purchase the parcels of the suit properties and he therefore visited the said parcels of land to ascertain the veracity of the advertisement, at which point he discovered that the said parcels of land had been previously advertised for sale in the Standard Newspaper on the 16<sup>th</sup> August, 2022.
- i. Further, upon discovering that the chargee of the suit properties was the First Community Bank Limited, the Interested Party herein. He visited its offices to conduct due diligence and he was supplied with a copy of the valuation report dated 20<sup>th</sup> February, 2023 that valued the forced sale value at a sum of Kenya Shillings Sixty One Million Five Hundred Thousand (Kshs. 61,500,000.00/=). Annexed in the affidavit and marked as “HST-9” is a copy of the valuation report evidencing the same. On the 21<sup>st</sup> February, 2023, at 11.00 am through his agent Mr. Asad Hassan, he was able to participate in the public auction held at Kameta Enterprise Auctioneers offices, located behind Nyali School in Kameta Building.
- j. As at 21<sup>st</sup> February, 2023 there neither was an order nor a restriction prohibiting the impending public auction served upon First Community Bank Limited, the Interested Party herein and Nairobi Connection Services Auctioneers, the Auctioneers who conducted the sale of parcels of the suit properties.
- k. He was an innocent purchaser for value and further that the Auctioneer was duly licensed to conduct the sale of the suit properties as upheld by the court in the case:- “Shah & Another – Versus - Shah & Another (2023) KEELC 15728 (KLR)”. Annexed in the affidavit and marked as “HST – 10” a copy of the auctioneers license evidencing the same.
- l. He emerged the highest bidder at the colossal sum of Kenya Shillings Sixty Two Million (Kshs. 62,000,000.00) and he made a payment of a sum Kenya Shillings Fifteen Million Five Hundred Thousand (Kshs. 15,500,000.00/=) at the fall of the hammer being the 25% of the purchase price pursuant to the conditions of sale issued by Nairobi Connection Services Auctioneers. Annexed in the affidavit and marked as “HST – 11” was a copy of the payment receipts evidencing the same. Consequently, Nairobi Connection Services Auctioneers issued him with a Certificate of Sale dated 21<sup>st</sup> February, 2023 declaring him the purchaser of parcels of the suit



properties together with the building and improvements thereon. Annexed in the affidavit and marked as “HST – 12” was a copy of the certificate of sale evidencing the same.

- m. The Defendant’s right of redemption stipulated in the provision of Section 89 of the [Land Act](#), No. 3 of 2012 extinguished at the fall of the hammer as held by the court in the case of:- “Bomet Beer Distributors Limited & another – Versus - Kenya Commercial Bank Limited & 4 others [2005] eKLR”.
- n. To assert his rights, the First Community Bank Limited vide the letter dated 27<sup>th</sup> February, 2023 forwarded to him a copy of the charge dated 25<sup>th</sup> January, 2019 and the Certificate of titles duly encumbered to affirm that the Defendant had charged the suit properties. Annexed in the affidavit and marked as “HST – 13” copies of the letter evidencing the same. As a security for a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000.00) advanced, encumbrances were registered against the Respondent’s title. Annexed in the affidavit and marked as “HST – 14” are copies of the charge and title deeds evidencing the same.
- o. At all material times, the Defendant had never been in occupation on the Suit properties as there was an incomplete building erected on the said parcels of land as evidenced by bundle of photographs annexed in the valuation report dated December 2018. Annexed in the affidavit and marked as “HST – 15” was a copy of the valuation report evidencing the same. It is not in dispute that the Defendant sought a loan of a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000.00/=), it was also not in dispute that the Defendant defaulted in servicing the loan as agreed necessitating the First Community Bank to conduct valuation on the incomplete structures erected on the suit properties.
- p. There was no duty cast in law for conducting diligence on the procedure of a bank to carry out statutory sale but nevertheless vide letters dated 31<sup>st</sup> May, 2023 and 7<sup>th</sup> June, 2023 he requested for the requisite Notices made to the Defendant as required in law. Annexed in the affidavit and marked as “HST -16” are copies of the letters evidencing the same. The First Community Bank Limited vide Notices dated 11<sup>th</sup> February, 2022 and 16<sup>th</sup> May, 2022 complied with the provisions of Sections 90 and 96 of the [Land Act](#), 2012. Annexed in the affidavit and marked as “HST – 17” are copies of the Notices evidencing the same. The Nairobi Connection Services Auctioneers issued a 45 days’ notice dated 29<sup>th</sup> June, 2022 in compliance with the Auctioneers Rules. Annexed in the affidavit and marked as “HST – 18” was a copy of the Notice evidencing the same.
- q. Pursuant to provisions of Section 99 of the [Land Act](#), 2012 protected him from any impropriety or irregularity that may attach to the sale by public auction. Once a property had been knocked down and sold in a public auction by a Chargee in exercise of its statutory power of sale, the equity of redemption of the Charger was extinguished. The only remedy for the charger who was dissatisfied with the conduct of the sale was to file suit for general or special damages as held by the court in the case of:- “Simon Njoroge Mburu -Versus-Consolidated Bank of Kenya Ltd [2014]eKLR”. The law itself provides that any injury to a Chargor by way of irregular exercise of the power of sale by a Chargee or auctioneer, shall be compensated by an award of damages as held by the court in “Joyce Wairimu Karanja – Versus- James Mburu Nguire & 3 others [2018] eKLR”.
- r. Once a property was offered as security it by that very fact becomes a commodity for sale. There was no commodity for sale whose loss cannot be compensated in damages as held by the court in “Bii – Versus - Kenya Commercial Bank Ltd [2001] KLR 458”. He had invested a colossal sum of Kenya Shillings Sixty Two Million (Kshs. 62,000,000.00) at a time the country was



experiencing economic hardship and worldwide inflation but he was unable to enjoy the use of parcels of the suit properties. The balance of convenience tilted in his favour as he purchased the suit properties in good faith at the public auction conducted on the 21<sup>st</sup> February, 2023 and it would be inequitable and against principles of natural justice to keep him away from the suit properties. The Defendant would not suffer any prejudice if the Orders sought in his instant Application were granted.

- s. It was in the interest of justice that this Application be allowed as this Honourable Court had discretionary powers to grant the Orders sought in the instant Application. Further, this Application should be allowed as the Defendant would continue to interfere with his proprietary interest in the suit properties. Unless the Orders sought were granted by this Honourable Court, he shall suffer prejudice and immense loss of his right of access, occupation and use of the suit property.
- t. Additionally, the Defendant's actions would continue to cause him irreparable damage with a likelihood of infringing on his right to own property.

### **III. The Replies by the Defendant to the Plaintiff's application dated 9<sup>th</sup> June, 2023**

- 5. The Defendant, while opposing the Plaintiff's application dated 9<sup>th</sup> June, 2023 filed a 21 Paragraphed Replying Affidavit sworn by Ibrahim Shero Hussein and dated 17<sup>th</sup> July, 2023 together with six (6) annexures marked as "ISH 1 to 6" annexed thereto. He averred as follows:-
  - a. He is the Defendant herein and being conversant of the facts herein therefore competent to swear this Affidavit.
  - b. At all material time he was the registered owner of property known as the suit properties until when he was served with documents indicating that his property had been unprocedurally transferred to the Plaintiff/Respondent herein. Annexed hereto was a true copy of the Title Deeds marked as "ISH-1a and 1b" respectively.
  - c. He applied for a loan facility with the Interested Party herein vide a Letter of Offer dated 20<sup>th</sup> September, 2021 where the Interested Party advanced a sum of Kenya Shillings Fifty Million (Kshs.50,000,000/=) and further advanced a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/=) Annexed hereto is a true copy of the Letter of Offer marked as "ISH-2".
  - d. The said loan facility was secured by a charge over the suit properties registered under him.
  - e. On 22<sup>nd</sup> February, 2023 he got a notification in form of a bank statement which intimated that the suit properties had been allegedly sold by way of public auction with no further details thereon. Annexed hereto was a true copy of the Statement marked as "ISH - 3.
  - f. Upon inquiry on the same he was informed that the Suit Properties charged to the Interested Party to secure a loan advanced to him seem to have been secretly subjected to an unprocedural and unlawful auction and was in danger of being interfered with in any manner in the circumstance that do not accord with various provisions of the Law.
  - g. Subsequently, he proceeded to file a suit at the High Court in Mombasa - Civil Suit No.E020 of 2023 seeking injunction orders to prevent a breach of what was his sacrosanct rights of redemption and preserve the substratum of the suit properties upon which Interim orders of Injunction were issued in his favour. Annexed hereto was a true copy of the Order dated 28<sup>th</sup> February, 2023 and Affidavit of Service marked as "ISH - 4a & b".



- h. The said matter was still active in court with high chances of success and a ruling in respect to the application was scheduled for 19<sup>th</sup> September, 2023.
- i. On 14<sup>th</sup> June, 2023, he was notified by his caretaker that the Plaintiff herein visited the property in company of police officers and forcefully arrested him and proceeded to take possession of the properties. He was later served with court documents indicating that the Plaintiff had filed a suit herein against him and the Bank as an Interested party.
- j. The Deponent was apprehensive that despite the Plaintiff being aware of the case questioning the excise of Statutory Sale by the Interested Party pending determination and Status Quo orders being in place, the Plaintiff had proceeded to carry out further interfere with the said properties subsequent to him forcefully and unlawfully taking possession. Annexed hereto was a bundle of the Photographs marked as “ISH - 5.
- k. He was worried that if the Plaintiff was allowed to continue to deal in the properties by developing and/or in any manner interfering with the current state of affairs, the applicant stands to suffer irreparable damage in the event that the ongoing suit in High Court Civil Suit No. E020 of 2023 was determined in favour of the Applicant.
- l. He had been further instructed his Advocates to file a Notice of Motion Application for Contempt of Court orders in High Court Civil Suit No. E020 of 2023 as against the Interested party who failed to comply with the Orders issued by the Court therein. Annexed hereto was a true copy of the Notice of Motion Application marked as “ISH –
- m. He was advised by his Advocates on record that it would be against the principle of fair administration of Justice if the Plaintiff would be allowed to continue dealing and enjoying the property and that it was only prudent that the status quo be maintained and all parties be barred from dealing and/or interfering with the suit property in any manner.
- n. He was further advised by his Advocate on record that unless the orders being prayed were granted, the two suits one before the High Court and the one before this honourable court would be as good as predetermined before according the him a fair hearing and the Plaintiff and the Interested party shall have stolen a match by virtue of the Defendant's right to Redemption as foregoing.
- o. The Deponent was additionally advised by my Advocates on record that should the said Auction sale of the suit properties yielding to the Plaintiff's Claim herein be faulted and/or found as maliciously and unlawfully instituted, the same shall only serve to clog and/or fetter inalienable Equity of Redemption in respect of the said property, whilst gravely violating constitutionally-guaranteed Right To Property, the end result being that the Plaintiff would have substantively interfered with the said properties.
- p. Therefore unless averted by this Honourable Court, he was apprehensive that the Plaintiff might proceed deal with the suit property by way of developing, selling or interfering with it in any way would occasion irreparable loss and damage to him self, in compensable by any award of damages.
- q. It was only in the interest of Justice, Fairness, Equity, Constitutionalism, the Rule of Law and Rules of Natural Justice that this application ought not be allowed as prayed;



#### IV. The Replies by the Interested Party to the Plaintiff's application dated 9<sup>th</sup> June, 2023.

6. The Interested Party while in support of the application dated 9<sup>th</sup> June, 2023 by the Plaintiff/Applicant, filed a 26 Paragraphed Replying Affidavit sworn by CLARIS OGOMBO dated 14<sup>th</sup> July, 2023 together with 16 annexures marked as "FCB – 1 to 16" annexed hereto. The Deponent averred in a lot of details as follows:-
- a. The Deponent was an adult of sound mind working as the Interested Party's Legal Manager, conversant with the facts of this case and duly authorized to swear this affidavit on its behalf.
  - b. The Interested Party issued to the Defendant a Letter of offer dated 27<sup>th</sup> February, 2018 for a Diminishing Musharaka Sale and Lease Bank facility of Kenya Shillings Fifty Million (Kshs. 50, 000, 000.00/=) being working capital - construction finance, for a term of sixty (60) months subject to the terms and conditions contained therein.
  - c. The Defendant duly executed the Letter of Offer Annexed and marked as "FCB – 1" was a copy of the said Letter of Offer.
  - d. It was a term of the Letter of Offer that the facility would be secured as a continuing security for all moneys obligations and liabilities certain or contingent due, owing or incurred by the Defendant to the Interested Party by a First Charge of the aforesaid amount.
  - e. The Charge was backed up by the security of the suit properties herein.
  - f. On 21<sup>st</sup> February, 2019 the Charge having been prepared and duly executed was registered accordingly and the finances released to the Defendant.
  - g. Subsequently further to another application made by the Defendant, the Interested Party issued the Defendant a Letter of Offer dated 23<sup>rd</sup> November 2019 for a second Diminishing Musharaka Sale and Lease Back facility of Kenya Shillings Seven Million (Kes. 7,000,000.00) being working capital-construction finance, for a term of twenty-four (24) months subject to the terms and conditions contained therein, which Letter of Offer the Defendant duly accepted. Annexed hereto and marked as "FCB - 3" was a copy of the Letter of Offer dated 23<sup>rd</sup> November 2019.
  - h. On or around 8<sup>th</sup> April 2020, the Defendant wrote to the Interested Party seeking a grace period of three to six months with respect to his monthly instalments under the two facilities. This request was duly accepted by the Interested Party by way of a letter dated 23<sup>rd</sup> April 2020, and the defendant was granted a moratorium of three (3) months on the principal and profit amounts under the two facilities. The Defendant was further notified that he would be required to pay the profit for the three (3) months, and that he would be required -upon expiration of the moratorium period – to pay the principal and profit amounts monthly until the facilities were fully settled. Annexed hereto and marked as "FCB - 4" were copies of the Defendant's letter dated 8<sup>th</sup> April 2020, and the Interested Party's letter dated 23<sup>rd</sup> April 2020.
  - i. Subsequently, the Defendant defaulted on the terms of the various financing obligations owed to the Interested Party in that the Defendant defaulted on the payment of the sum of Kenya Shillings Thirty-Six Million One Hundred Forty-One Thousand One Hundred Thirty-Three Cents Eleven (Kshs. 36,141,133.11) as at 24<sup>th</sup> August 2021, leading to the Interested Party issuing a Statutory notice to the Defendant under the provision of Section 56 (2) of the [Land Registration Act](#), and the provision of Sections 90 and 96 of the [Land Act](#). Annexed hereto and



marked as “FCB - 5” was a copy of the Interested Party’s Statutory Notice dated 24<sup>th</sup> August 2021.

- j. Thereafter, the Defendant then applied to restructure the two facilities, consequent to which the Interested Party issued the Defendant with a letter of Offer dated 20<sup>th</sup> September, 2021, which the Defendant’s facilities were restructured subject to the terms and conditions contained therein, and which Letter of Offer the Defendant duly accepted. Annexed hereto and marked as “FCB - 6” was a copy of the Interested Party’s Letter of Offer dated 20<sup>th</sup> September, 2021.
- k. The Defendant once again fell into default on the terms of the various financing obligations to the Bank under the Charge registered over the Suit Properties in that the defendant was in default of the payment of the sum of Kenya Shillings Thirty-Six Million Five Hundred Ninety-Six Thousand One Hundred Forty-Three Cents Twenty-Nine (Kes. 36,596,143.29) as of 11<sup>th</sup> February 2022, which amount was exclusive of the default damages, recovery fees and charges to be and/or already incurred.
- l. Consequently, the Interested Party duly issued to the defendant a statutory notice of ninety (90) days, dated 11<sup>th</sup> February 2022 under section 56(2) of the [Land Registration Act](#), 2012, and sections 90 and 96 of the [Land Act](#), 2012, notifying the Defendant that unless the Interested Party received from the Defendant an acceptable proposal for payment and/or unless the Defendant remedied the default, the Interested Party would, after the expiry of ninety (90) days from the date of receipt of the Notice, be entitled to exercise its statutory power of sale. Annexed hereto and marked as “FCB - 7” was a copy of the 90-day Statutory Notice dated 11<sup>th</sup> February 2022, together with a Certificate of Postage in respect thereto.
- m. Following the above, the Interested Party then duly issued the Defendant with a statutory notice of forty (40) days dated 16<sup>th</sup> May 2022 under section 56(2) of the [Land Registration Act](#) 2012, and section 90 and 96 of the [Land Act](#), 2012, notifying the Defendant that, unless the Interested Party received from the Defendant an acceptable proposals for payment and/or unless the Defendant remedied the default, the Interested Party would, after the expiry of forty (4) days from the date of receipt of the Notice, be entitled to exercise its statutory power of sale upon expiry of a Notice to sell and upon issuance and service of the said Notice upon the Interested Party. Annexed hereto and marked as “FCB - 8” was a copy of the 40-day Statutory Notice dated 11<sup>th</sup> May 2022, together with Certificate of Postage in respect thereto.
- n. In the meantime, the Interested Party issued instructions to Messrs. Adomag Valuers & Associates to advise on the current market value, mortgage value, forced sale value and insurance value of the Properties, and the sake valuers duly issued the interested Party a Valuation Report dated 20<sup>th</sup> February 2023. Annexed hereto and marked as “FCB - 9” was a copy of the Valuation Report dated 20<sup>th</sup> February 2023.
- o. The Defendant failed to remedy his default within the timelines provided, and consequently the Interested Party proceeded to issue instructions dated 28<sup>th</sup> June 2022 to Messrs Nairobi Connection Services Auctioneers (hereinafter the “Auctioneers”), to proceed to sell the Suit Properties by way of public auction to recover the amount of Kenya Shillings Thirty-Five Million Six Hundred and Ninety Thousand Eight Hundred Forty Cents Seventy-Five (Kshs. 35, 690, 840.75) as of 28<sup>th</sup> June 2022. Annexed hereto and marked as “FCB-10” is a copy of the Interested Party’s letter of instructions to the Auctioneers dated 28<sup>th</sup> June 2022.



- p. Vide a letter erroneously dated 29<sup>th</sup> June 2021, the Auctioneers notified the Interested Party that the relevant (statutory) notice had been sent to the Defendant by way of email, informing the Defendant that at the expiry of the forty-five (45) days from the date of the Notification of Sale, the Suit Property would be sold by way of public auction not earlier than fourteen (14) days after the first newspaper advertisement unless the amount of Kshs. 35,690,840.75 together with costs of the Notification which would in the meantime have been paid. Annexed hereto and marked as “FCB - 11” was a copy of the Auctioneer’s letter erroneously dated 29<sup>th</sup> June 2021 together with the Notification of Sale.
- q. By way of a letter dated 16<sup>th</sup> August 2022, the Auctioneers notified the Interested Party that they had duly advertised, in The Standard Newspaper edition of 16<sup>th</sup> August 2022, the sale of the Suit Properties by way of public auction to be held on 31<sup>st</sup> August 2022. Annexed hereto and marked as “FCB-12” was a copy of the Auctioneer’s letter dated 16<sup>th</sup> August 2022 and a copy of the advertisement published in The Standard newspaper edition of 16<sup>th</sup> August 2022.
- r. By way of a letter dated 1<sup>st</sup> September 2022, the Auctioneers notified the Bank that the public auction in respect of the Suit Properties was held on 31<sup>st</sup> August 2022 and that the same had found three interested bidders. However, the said interested bidders wanted a copy of the plan of the building. As such, no sale materialized on the said 31<sup>st</sup> August 2022. Annexed hereto and marked as “FCB-13” was a copy of the Auctioneer’s letter dated 1<sup>st</sup> September 2022.
- s. Subsequently, by a further letter dated 22<sup>nd</sup> February 2023, the Auctioneers notified the Interested Party that the Suit Properties were re-advertised in The Standard newspaper edition of 6<sup>th</sup> February 2023 for sale by way of public auction to be held on 21<sup>st</sup> February 2023. The sale by public auction duly proceeded on 21<sup>st</sup> February 2023, in which one Mr. Hassan Swaleh Taib (the Plaintiff herein) emerged as the highest bidder with a bid of Kenya Shillings Sixty Million (Kshs. 62,000,000). Annexed hereto and marked as “FCB - 14” was a copy of the Auctioneer’s letter dated 22<sup>nd</sup> February 2023.
- t. The Interested Party duly received the auction sale price of Kshs. 62,000,000.00 on or around 22<sup>nd</sup> February 2023, and consequently, by way of a letter dated 27<sup>th</sup> February 2023, the Interested Party released to the Plaintiff the original Title Deed in respect of the Suit Properties, together with the original Charge dated 25<sup>th</sup> January 2019, for his safe-keeping. Annexed hereto and marked as “FCB -15” and “FCB -16” were copies of the Bank’s letter dated 27<sup>th</sup> February 2023 and Facility Repayment Schedule showing zero balance after the proceeds from the Auction were applied.
- u. The Deponent was advised by their Advocates on record that the Interested Party in exercising its remedy of statutory power of sale of the suit Properties under the Charge dated 25<sup>th</sup> January 2019, duly complied with the provisions of Section 90 and 96 of the Land Act 2012.
- v. He was similarly advised by their Advocates that despite being afforded every opportunity to reedy his default, the Defendant failed, neglected and refused to exercise his equity of redemption in respect of the Suit Properties prior to the exercise of the Interested Party of its statutory power of sale.
- w. He was also advised by our advocates on record, which advice I verily believe to be true, that the Defendant has been indolent in seeking relief for the acts of the Interested Party resulting in the extinguishing of the Defendant’s equity of redemption, having had every opportunity



to seek such relief from as far back as February 2022, and as such the Defendant is guilty of laches and is undeserving of equitable relief from this Honourable Court of equity.

- x. He was advised by our advocates on record, that in view of the matters averred to hereinabove, the Plaintiff has disclosed a prima facie case as against the Defendant; and further that the Plaintiff has demonstrated that the loss or injury likely to be occasioned if the orders in the Application are not granted cannot be remedied by way of monetary damages. He thus verily believe that the balance of convenience in this matter tilted in favour of the grant of the Orders sought in the Plaintiff's Notice of Motion application.
- y. It was the interest of justice and fairness for orders sought vide the Notice of Motion Application dated 9<sup>th</sup> June 2023 be granted with costs.

#### **V. The Defendant's case in the Notice of Motion application dated 21<sup>st</sup> June, 2023.**

- 7. The application by the Defendant was premised under the provision of Sections 3, 3A, and 63(e) of the Civil Procedure Act Cap. 21 Laws of Kenya and Order 40 Rules 1(a) and 2 of The Civil Procedure Rules. It sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That this Honourable Court be pleased to issue an interlocutory Order of Injunction restraining the Respondent whether by himself, his agents, servants and/or employees from dealing, developing, selling, or in any other way interfering with the current state of the Property known as property Mombasa/Block XLVII/39 and Mombasa/Block XLVII/40 pending the hearing and determination of this Suit.
  - e. That an order restraining OCS Central Police Station or any other police officers in the Republic of Kenya from interfering and/or providing security to the Respondent herein while developing, dealing or interfering with the suit property until the application is heard and determined.
  - f. That costs of this Application be provided for.
- 8. The application by the was premised on the grounds, testimonial facts and averments made out by the 19<sup>th</sup> Paragraph of Ibrahim Shero Hussein together with four (4) annexures herein. The Applicant averred that:-
  - a. The Defendant entered into a financial arrangement with the interested party wherefore the Interested Party agreed to advance a loan to the applicant in the sum of Kenya Shillings Fifty Two Million (Kshs. 57,000.000/=).
  - b. On 22<sup>nd</sup> February, 2023 the Interested Party proceeded to have the Suit Properties charged to the Interested Party to secure a loan advanced to the Defendant which seemed to have been secretly subjected to an unprocedural and unlawful Auction. The Suit Properties charged to the Interested Party to secure a loan advanced to the Defendant seem to have been secretly subjected to an unprocedural and unlawful auction and were in danger of being interfered with in any manner in the circumstance that do not accord with various provisions of the Law.



- c. Subsequently, the Defendant proceeded to file an Notice of Motion Application dated 27<sup>th</sup> February, 2023 in High Court Civil Suit No. E020 of 2023 seeking Temporary Order of Injunction restraining the Interested Party whether by themselves, their agents, servants and/ or employees from attaching, repossessing, selling, auctioning or in any other way alienating the suit properties pending the hearing of the Application “inter partes.
- d. The said suit is still active in High Court and with high chances of success and the same was pending ruling in respect to the said Application slated for 19<sup>th</sup> September, 2023.
- e. Despite the Plaintiff being aware of High Court Civil Suit No. E020 of 2023 challenging the excise of Statutory power of Sale by the Interested Party pending determination and Status Quo orders being in place, he had proceeded to forcefully evict the Defendant agents from the said properties and the Defendant was apprehensive that the Plaintiff may proceed to interfering with the said suit properties.
- f. The Defendant was worried that if the Plaintiff was allowed to continue to deal in the property either by further developing and/or in any manner interfering with the current state of affairs, the Defendant stands to suffer irreparable damage in the event that the ongoing suit in Civil Suit No. E020 of 2023 was determined in his favour.
- g. It was only in the interest of Justice, Fairness, Equity, Constitutionalism, the Rule of Law and Rules of Natural Justice that this application be allowed as prayed;
- h. No prejudice shall be suffered should the instant Application be allowed as prayed.

#### **VI. The Replies by the Plaintiff to the Defendant’s application dated 21<sup>st</sup> June, 2023**

- 9. The Plaintiff while opposing the application dated 21<sup>st</sup> June, 2023 by the Defendant, filed a Replying Affidavit sworn by Hassan Swaleh Taib the Plaintiff herein together with marked as “HST 1 to 17” annexed hereof. The Plaintiff averred that:
  - a. He was a male adult of sound mind and the Plaintiff herein well versed and conversant with the facts and matters in controversy hence competent to make and swear this Replying Affidavit.
  - b. He had read the Notice of Motion Application dated 21<sup>st</sup> June,2023 together with the annexed Supporting Affidavit sworn by Ibrahim Shero Hussein where necessary he had sought guidance of his Advocates on record in interpreting and understanding the same and he accordingly swore this Affidavit in opposition thereto.
  - c. He was advised by his Advocates on record that the Defendant’s Notice of Motion Application was ill-belated, an afterthought and brought in bad faith to deny him from enjoying his proprietary rights and interests vested in the suit properties.
  - d. The suit properties had already been sold, transferred and registered in his names and the Orders sought by the Defendant in his Application was not tenable as the Application had been overtaken by events and he averred that this Honourable Court could not satisfy itself by making Orders which could not be enforced or grant an Injunction which would be ineffective for practical purposes. Annexed hereto and marked as “HST – 1” was the transfer documents.
  - e. He was the bonafide purchaser and beneficial owner of the suit properties which purchase commenced by way of a public auction conducted within the strictures of the law and which transaction was finalized by way of transfer from the previous owner to himself and



subsequently the suit properties being duly registered in my names. Annexed hereto and marked as 'HST - 2' was copies of the Title Documents evidencing the same).

- f. Pursuant to the Certificate of official search conducted on the 15<sup>th</sup> March, 2023, it was ascertained that he was the legal and registered owner and therefore he enjoyed the protection of all fundamental rights and freedoms enshrined under Chapter 4 of *the Constitution* of Kenya, 2010. Annexed hereto and marked as 'HST - 3' was copies of the Official Searches evidencing the same.
- g. The sale of the suit properties by the Interested Party through a public auction was procedural and legal as all due notices and procedures had been complied with and the realization of the suit properties by the Interested Party was in exercise of its statutory power of sale as provided under the provision of Section 96 of the *Land Act*. Annexed hereto and marked as 'HST - 4' were copies of the Statutory Notices evidencing the same).
- h. By virtue of Sections 24 as read together with Section 26 (1) of the *Land Registration Act*, 2012, the registration and issuance of the Certificate of Titles to him by the Land Registrar holds as conclusive evidence of proprietorship as am deemed the absolute and indefeasible owner and therefore entitled to vacant and undisturbed possession in further exercise of my legal right to the suit properties as established under Article 40 of *the Constitution* of Kenya, 2010.-
- i. At the time of processing Titles in respect to all that of the suit properties, the Defendant never raised any objection and neither were there any Stay Orders barring him from acquiring and being issued with Certificate of Titles by the Land Registrar.
- j. He was not aware and had never been a party to the proceedings in respect to High Court Civil Suit No. E020 of 2023 if any filed by the Defendant herein and aver that the Defendant was undeserving to the Orders sought in his Instant Application and ought to be dismissed as it was an abuse of the Courts process intended to derail me from developing the suit properties herein.
- k. His acquisition of the Suit properties was within the tenets of the Law as the Interested Party herein complied with the provisions of Section 90(1) of the *Land Act* as read with Sections 96(1) and 98 thereof and no evidence has been availed to this Court to establish that the said provisions were contravened hence he reiterated that the sale was legally and procedurally conducted.
- l. Further, the Defendant was aware that by virtue of offering the Suit properties as security for a loan facility advanced to him by the Interested Party herein, the same was subject to the risk of being disposed of by the Interested Party should he default on paying the debt secured.
- m. The Deponent was advised by his Advocates on record that pursuant to the provisions of Section 99 of the *Land Act*, 2012, that he was legally protected from any impropriety or irregularity that may attach to the sale by public auction.
- n. He was further am advised by his Advocates on record that an injunction could not issue to prevent what had already happened as he had erected a gate and started developing the suit property to exercise his right of use and possession. Annexed hereto and marked as "HST – 5" were photographs evidencing the same.
- o. The Defendant's Application never established a prima facie case as he was no longer registered as the owner of the suit properties as per the official search which was now registered in his



names and he did not exhibit any current right or interest in the suit properties capable of being protected or preserved by the Orders sought in the Instant Application.

- p. In view of the foregoing, he averred that the Defendant's Application was unmerited as the same never established a prima facie case with the probability of success and neither had he demonstrated to this Honourable Court how he stood to suffer irreparable loss as his proprietary rights in respect to the suit properties were long extinguished and was guilty of laches.
- q. He swore this Affidavit to oppose the Defendant's Application as the suit properties subject of the Injunction Application had been transferred and registered in his names and in the interest of justice he urged the Court to dismiss the Application with costs.

## **VII. Replies by the Interested Party to the application dated 21<sup>st</sup> June, 2023**

10. The Interested Party while opposing the application dated 21<sup>st</sup> June, 2023 by the Defendant, filed a Replying Affidavit sworn by CLARIS OGOMBO dated 14<sup>th</sup> July, 2023 together with annexures marked as "FCB – 1 to 18 annexed hereto. The Deponent averred in a lot of details as follows:-
  - a. He was an adult of sound mind, working as the interested Party's Legal Manager, conversant with the facts of this matter and duly authorized by the Interested Party, thus competent to swear this affidavit on behalf of the Interested Party.
  - b. He had read had explained to me by our advocates on record the Defendant's Notice of Motion dated 21<sup>st</sup> June, 2023 together with the Defendant's Supporting Affidavit sworn contemporaneously thereto and wish to respond to the same as follows hereunder.
  - c. Further to an application made by the Defendant, the Interested Party issued to the Defendant a Letter of Offer dated 27<sup>th</sup> November 2018 for a Diminishing Musharaka Sale and Lease Back facility of Kenya Shillings Fifty Million (Kshs. 50,000,000.00) being working capital-construction finance, for a term of sixty (60) months subject to the terms and conditions contained therein, which Letter of Offer the Plaintiff duly accepted. Annexed hereto and marked a "FCB - 1" was a copy of the Letter of Offer dated 27<sup>th</sup> November, 2018.
  - d. It was a term of the Letter of Offer dated 27<sup>th</sup> November 2018 that the facility would be secured, as a continuing security for all moneys obligations and liabilities certain or contingent due owing or incurred by the Defendant to the Interested Party, inter alia by a First Legal Charge of Kenya Shillings Fifty Million (Kshs. 50,000,000.00/=) over all the suit properties.
  - e. Pursuant to the above, a Charge over the suit Properties was duly registered against the properties on 21<sup>st</sup> February, 2019, and the same entered in the Encumbrances Section of of the register of each Suit Property as Entry Number Seven (7). Annexed hereto and marked as "FCB - 2" was a copy of the Charge dated 25<sup>th</sup> January, 2019, and the Title Deeds in respect of the Suit Properties showing the Defendant's interest duly noted thereon.
  - f. Subsequently thereto, further to another application made by the Defendant, the Interested Party issued to the Defendant a Letter of Offer dated 23<sup>rd</sup> November 2019 for a second Diminishing Musharaka Sale and Lease Back facility of Kenya Shillings Seven Million (Kshs. 7,000,000.00) being working capital-construction finance for a term of twenty-four (24) months subject to the terms and conditions contained therein, which Letter of Offer the Defendant duly accepted. Annexed hereto and marked as "FCB - 3" was a copy of the Letter of Offer dated 23<sup>rd</sup> November 2019.



- g. On or around 8<sup>th</sup> April 2020, the Defendant wrote to the Interested Party seeking a grace period of three to six months with respect to his monthly instalments under the two facilities. This request was duly accepted by the Interested Party by way of a letter dated 23<sup>rd</sup> April 2020, and the Defendant was granted a moratorium of three (3) months on the principal and profit amounts under the two facilities. The Defendant was further notified that he would be required to pay the profit for the three (3) months and that he would be required – upon expiration of the moratorium period – to pay the principal and profit amounts monthly until the facilities were fully settled. Annexed hereto and marked as “FCB - 4” were copies of the Defendant’s letter dated 8<sup>th</sup> April 2020, and the Interested Party’s letter dated 23<sup>rd</sup> April 2020.
- h. Subsequently, the Defendant defaulted on the terms of the various financing obligations owned to the Interested Party in that the Defendant defaulted on the payment of sum of Kenya Shillings Thirty-Six Million One Hundred Forty-One Thousand One Hundred Thirty-Three Cents Eleven (Kshs. 36,141,133.11) as at 24<sup>th</sup> August 2021, leading to the Interested Party issuing a statutory notice to the Defendant under the provision of Section 56 (2) of the [Land Registration Act](#), and Sections 90 and 96 of the [Land Act](#). Annexed hereto and marked as “FCB - 5” were copies of the Interested Party’s Statutory Notice dated 24<sup>th</sup> August 2021.
- i. Thereafter, the Defendant then applied to restructure the two facilities, consequent to which the Interested Party issued the Defendant with a Letter of Offer dated 20<sup>th</sup> September 2021, in which the Defendant’s facilities were restructured subject to the terms and conditions contained herein, and which Letter of Offer the Defendant duly accepted. Annexed hereto and marked as “FCB - 6” was a copy of the Interested Party’s Letter of Offer dated 20<sup>th</sup> September 2021.
- j. The Defendant once again fell into default on the terms of the various financing obligations to the Bank under the Charge registered over the Suit Properties in that the Defendant was in default on the payment of the sum of Kenya Shillings Thirty-Six Million Five Hundred Ninety-Six Thousand One Hundred Forty-Three Cents Twenty-Nine (Kshs. 36,596,143.29) as of 11<sup>th</sup> February 2022, which amount was exclusive of default damages recovery fees and charges to be and/or already incurred.
- k. Consequently, the Interested Party duly issued to the Defendant a statutory notice of ninety (90) days, dated 11<sup>th</sup> February, 2022, under section 56(2) of the [Land Registration Act](#), 2012, and section 90 and 96 of the [Land Act](#), 2012, notifying the Defendant that unless the Interested Party received from the Defendant an acceptable proposal for payment and/or unless the Defendant remedied the default, the Interested Party would, after the expiry of ninety (90) days from the date of receipt of the Notice, be entitled to exercise its statutory power of sale. Annexed hereto and marked as “FCB-7” was a copy of the 90-day Statutory Notice dated 11<sup>th</sup> February 2022, together with a Certificate of Postage in respect thereto.
- l. Following the above, the Interested Party then duly issued the Defendant with a statutory notice of forty (40) days, dated 16<sup>th</sup> May 2022, under section 56(2) of the [Land Registration Act](#), 2012, and section 90 and 96 of the [Land Act](#), 2012 notifying the Defendant that, unless the Interested Party received from the Defendant an acceptable proposal for payment and/or unless the Defendant remedied the default, the Interested Party would, after the expiry of forty (40) days from the date of receipt of the Notice, be entitled to exercise its statutory Power of Sale upon expiry of Notice to Sell and upon issuance and service of the said Notice upon the Interested Party. Annexed hereto and marked as “FCB - 8” was a copy of the 40-day Statutory Notice dated 11<sup>th</sup> May 2022, together with a Certificate of Postage in respect thereto.



- m. In the meantime, the Interested Party issued instructions to Messrs. Adomag Valuers & Associates to advise on the current market value, mortgage value, forced sale value and insurance value of the Properties, and the said valuers duly issued the Interested Party a Valuation Report dated 20<sup>th</sup> February, 2023. Annexed hereto and marked as “FCB - 9” was a copy of the Valuation Report dated 20<sup>th</sup> February 2023.
- n. The Defendant failed to remedy his default within the timelines provided and consequently the Interested Party proceeded to issue instructions dated 28<sup>th</sup> June 2022 to Messrs Nairobi Connection Services Auctioneers (hereinafter the “Auctioneers”), to proceed to sell the Suit Properties by way of public auction to recover the amount of Kenya Shillings Thirty-Five Million Six Hundred Ninety Thousand Eight Hundred Forty Cents Seventy-Five (Kshs. 35, 690, 840.75) as of 28<sup>th</sup> June 2022. Annexed hereto and marked as “FCB-10” was a copy of the Interested Party’s letter of instructions to the Auctioneers dated 28<sup>th</sup> June, 2022.
- o. Vide a letter erroneously dated 29<sup>th</sup> June 2021, the Auctioneers notified the Interested Party that the relevant (statutory) notices had been sent to the Defendant by way of email, informing the Defendant that at the expiry of the forty-five (45) days from the date of the Notification of Sale, the Suit Properties would be sold by way of public auction not earlier than fourteen (14) days after the first newspaper advertisement unless the amount of (Kshs. 35,690,840.75/=) together with costs of the Notification which would in the meantime have been paid. Annexed hereto and marked as “FCB-11” is a copy of the Auctioneers’ letter erroneously dated 29<sup>th</sup> June 2021 together with the 45-day Notification of Sale.
- p. By way of a letter dated 16<sup>th</sup> August 2022, the Auctioneers notified the Interested Party that they had duly advertised, in The Standard newspaper edition of 16<sup>th</sup> August 2022, the sale of the Suit Properties by way of public auction to be held on 31<sup>st</sup> August, 2022. Annexed hereto and marked as “FCB-12” was a copy of the Auctioneer’s letter dated 16<sup>th</sup> August 2022 and a copy of the advertisement published in The Standard newspaper edition of 16<sup>th</sup> August 2022.
- q. By way of a letter dated 1<sup>st</sup> September 2022, the Auctioneers notified the Bank that the public auction in respect of the Suit Properties was held on 31<sup>st</sup> August 2022 and that the same had found three interested bidders. However, the said interested bidders wanted a copy of the plan of the building. As such, no sale materialized on the said 31<sup>st</sup> August 2022. Annexed hereto and marked as “FCB - 3” was a copy of the Auctioneer’s letter dated 1<sup>st</sup> September 2022.
- r. Subsequently, by a further letter dated 22<sup>nd</sup> February 2023, the Auctioneers notified the Interested Party that the Suit Properties were re-advertised in The Standard newspaper edition of 6<sup>th</sup> February 2023 for sale by way of public auction to be held on 21<sup>st</sup> February 2023. The sale by public auction duly proceeded on 21<sup>st</sup> February 2023, in which one Mr. Hassan Swaleh Taib (the Plaintiff herein) emerged as the highest bidder with a bid of Kenya Shillings Sixty Million (62,000,000). Annexed hereto and marked as “FCB-14” was a copy of the Auctioneer’s letter dated 22<sup>nd</sup> February 2023.
- s. The Interested Party duly received the auction sale price of Kenya Shillings Sixty Two Million (Kshs. 62,000,000.00/=) on or around 22<sup>nd</sup> February 2023, and consequently, by way of a letter dated 27<sup>th</sup> February 2023, the Interested Party released to the Plaintiff the original Title Deed in respect of the Suit Properties, together with the original Charge dated 25<sup>th</sup> January 2019, for his safe-keeping. Annexed hereto and marked as “FCB-15” and “FCB-16” are copies of the



Bank's letter dated 27<sup>th</sup> February 2023 and Facility Repayment Schedule showing zero balance after the proceeds from the Auction were applied.

- t. He was aware that on or around 27<sup>th</sup> February 2023, the Defendant herein commenced proceedings in Mombasa High Court Civil Case No. E020 OF 2023, Ibrahim Sherro Hussein vs. First Community Bank Limited, seeking various reliefs. Contemporaneously with the filing of the Plaintiff therein, the Defendant also filed a Notice of Motion application dated 27<sup>th</sup> February 2023 seeking various interlocutory injunctive reliefs. Annexed hereto and marked as "FCB-17" were copies of the Plaintiff and Notice of Motion, both dated 27<sup>th</sup> February 2023, and filed in Mombasa H.C.C.C. No. E020 of 2023.
- u. He was aware that the High Court of Kenya (Kizito J.) in Mombasa H.C.C.C. No. E020 of 2023 issued an interim order of injunction restraining the Interested Party from attaching, repossessing, transferring or in any other way dealing with suit properties, pending the inter parties hearing of the Notice of Motion dated 27<sup>th</sup> February 2023. Annexed hereto and marked as "FCB-18" and "FCB - 16" were a copy of the Orders dated 27<sup>th</sup> February 2023 given in Mombasa H.C.C.C. No. E20 of 2023.
- v. He was also advised by their Advocates on record, that the Interested Party in exercising its remedy of statutory power of sale of the Suit Properties under the Charge dated 25<sup>th</sup> January 2019, duly complied with the provisions of Section 90 and 96 of the Land Act, 2012.
- w. He was similarly advised by their Advocates on record, that the Interested Party in exercising its remedy of statutory power of sale of the Suit Properties under the Charge dated 25<sup>th</sup> January 2010, duly complied with the provisions of Sections 90 and 96 of the Land Act, 2012.
- x. He was similarly advised by their Advocates on record, that despite being afforded every opportunity to remedy his default, the Defendant failed neglected and or refused to exercise his equity of redemption in respect of the Suit Properties prior to the exercise of the Interested Party of its statutory power of sale.
- y. He was also similarly advised by their Advocates on record, that that the Defendant's equity of redemption was extinguished upon the fall of the hammer during the auction held on 21<sup>st</sup> February 2023.
- z. The Deponent was further advised by their Advocates on record, that by failing to disclose that the Defendant was in default of his repayment obligations under the terms of the facilities advanced to him by the Interested Party, the Defendant had approached this Honourable Court with unclean hands, and has failed to fulfil his duty of absolute material disclosure.
- aa. He was also advised by their Advocates on record that by failing to disclose that the Interested Party duly issued the requisite statutory notices the Defendant had approached this Honourable Court with unclean hands, and had failed to fulfil his duty of absolute material disclosure.
- ab. He was also advised by their Advocates on record, that the Defendant had been indolent in seeking relief for the acts of the Interested Party resulting in the extinguishing of the Defendant's equity of redemption, having had every opportunity to seek such relief from as far back as February 2022, and as such the Defendant was guilty of laches and was undeserving of equitable relief from this Honourable Court of equity.



- ac. He was advised by our advocates on record, that in view of the sale by public auction of the Suit Properties on 21<sup>st</sup> February 2023, the instant Notice of Motion had been overtaken by events, and in the event that this Honourable Court would be so minded as to grant the reliefs sought in the said Application, the same would be granted in vain since the Interested Party had already released the documents of title to the purchaser in the auction, prior to the Interested Party being made aware and or being served with the pleadings in the instant matter.
- ad. He was also advised by our advocates on record, that in view of the matters averred to hereinabove, the Defendant had not disclosed a prima facie case as against the Plaintiff; and further that the Defendant had not demonstrated that the loss or injury likely to be occasioned if the orders in the Application are not granted cannot be remedied by way of monetary damages he thus verily believe that the balance of convenience in this matter tilts in favour of not granting the Orders sought in the Defendant's Notice of Motion Application dated 21<sup>st</sup> June 2023.
- ae. He thus verily believe that it was in the interests of justice, fairness, equity, constitutionalism, the rule of law and the rules of natural justice for the orders sought vide the Defendant's Notice of Motion Application dated 21<sup>st</sup> June 2023 to be dismissed with costs.

## **VII. Submissions**

- 11. On 18<sup>th</sup> July, 2023 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 9<sup>th</sup> June, 2023 and the application dated 21<sup>st</sup> June, 2023 be disposed of by way of written submissions and all the parties complied. On 12<sup>th</sup> October, 2023 a ruling date was reserved on Notice by Court accordingly. Pursuant to that, by the time the Court was penning down the Ruling it had only received the submissions by the Interested Party. For the rest parties, despite all efforts made by Court to reach them was all fruitless. All in all, the Court found this rather unusual. Hence, the Ruling has been prepared on the merit of the case.

### **A. The Written Submissions by the Interested Party**

- 12. On 1<sup>st</sup> December, 2023 the Learned Counsel for the Interested Party, the Law firm of Messrs. Busaidy Mwaura Ouma and Company Advocates filed their written Submissions dated even date. Mr. Busaidy Advocate commenced the submission by providing Court with a brief introduction and some brief facts of the matter. He stated what was before this Honourable Court for determination was the Plaintiff's Notice of Motion Application dated 9<sup>th</sup> June 2023 (hereinafter the "Plaintiff's Application") filed under a Certificate of Urgency of even date. The same is supported by the Affidavit of one Hassan Swaleh Taib, the Plaintiff herein (hereinafter "Plaintiff's Supporting Affidavit") sworn contemporaneously thereto. The Plaintiff's Application sought for the orders as already set out herein.
- 13. Also for determination before this Honourable Court was the Defendant's Notice of Motion Application dated 21<sup>st</sup> June 2023 (hereinafter the "Defendant's Application") filed contemporaneously under a certificate of urgency and supported by the sworn Affidavit of even date of Ibrahim Shero Hussein, the Defendant herein (hereinafter the "Defendant's Supporting Affidavit"). The Defendant's Application sought for orders as stated out herein before. In response to the Plaintiff's Application, the Interested Party filed and served its Replying Affidavit of 14<sup>th</sup> July 2023 sworn by a Claris Ogombo, the Interested Party's Legal Manager. In opposition to the Defendant's Application of 21<sup>st</sup> June 2023, the Interested Party filed and served its Replying Affidavit of 24<sup>th</sup> July 2023 sworn by the same Claris Ogombo.



14. As a brief background, the Learned Counsel held that the instant suit originated from the Plaintiff's Plaint dated 9<sup>th</sup> June 2023, filed simultaneously with the Plaintiff's Application. The reliefs sought in the Plaint were, inter alia, declaratory and permanent injunctive orders do issue against the Defendant restraining the Defendant, his servants, security guards, agents, employees and any other person from interfering with the Plaintiff's proprietary rights, trespassing or from interfering in any other manner with the Plaintiff's quiet possession or dealing with all those suit properties.
15. The Defendant, in his Supporting Affidavit, stated that vide a Letter of Offer dated 20<sup>th</sup> September 2021, he applied for a loan facility with the Defendant, where the Defendant advanced a sum of Kenya Shillings Fifty Million (Kes. 50,000,000.00) and further advanced a sum of Kenya Shillings Seven Million (Kes. 7,000,000.00) which facilities were secured by a Charge over the Suit Properties. The Defendant then alleges, that he has at all times performed his obligations as a borrower, and that sometime in February 2023, he received notification of an amount credited to his account, and on inquiry he was informed that it was transfer from an auction of the Suit Properties.
16. The Defendant thus claimed to be apprehensive that the Interested Party had proceeded to initiate the process of "illegally selling" the Suit Properties, and purported not to have been served with any document in accordance with sections 90 and 96 (2) of the Land Act, 2012. As a result, the Defendant filed the Application dated 21<sup>st</sup> June 2023 seeking interim injunctive orders against the Plaintiff.
17. On the other hand, it was the Interested Party's case that further to an application made by the Defendant, a loan facility was issued to the Defendant by the Interested Party vide a Letter of Offer dated 27<sup>th</sup> November 2018 in the sum of Kenya Shillings Fifty Million (Kes. 50,000,000.00) for a term of sixty (60) months subject to the terms and conditions contained therein, which Letter of Offer the Defendant duly accepted. Refer to Interested Party's annexure marked as "FCB-1" for a copy of the Letter of Offer dated 27<sup>th</sup> November 2018.
18. It was a term of the Letter of Offer dated 27<sup>th</sup> November 2018 that the facility would be secured, as a continuing security for all moneys obligations and liabilities certain or contingent due, owing or incurred by the Defendant to the Interested Party, inter alia by a First Legal Charge of Kenya Shillings Fifty Million (KShs. 50,000,000.00) over the Suit Properties. Pursuant to these terms, a Charge over the Suit Property was duly registered against the properties on 21<sup>st</sup> February 2019, and the same entered in the Encumbrances Section of the register of each Suit Property as Entry Number Seven (7). Refer to annexure "FCB-2" of the Interested Party's Replying Affidavit dated 24<sup>th</sup> July 2023 for a copy of the Charge dated 25<sup>th</sup> January 2019, and the Title Deeds in respect of the Suit Properties showing the Defendant's interest duly noted thereon.
19. Thereafter, the Defendant made another application to the Interested Party for a further loan facility. This was issued to the Defendant vide a Letter of Offer dated 23<sup>rd</sup> November 2019 for a second sum of Kenya Shillings Seven Million (Kes. 7,000,000.00) for a term of twenty-four (24) months subject to the terms and conditions contained therein, which Letter of Offer the Defendant duly accepted. This facility was also to be secured by way of the Charge registered against the Suit Properties. Refer to annexure "FCB-3" of the Interested Party's Replying Affidavit dated 24<sup>th</sup> July 2023 for a copy of the Letter of Offer dated 23<sup>rd</sup> November 2019.
20. Subsequently, the Defendant defaulted on the terms of the various financing obligations owed to the Interested Party leading to the Interested Party issuing a statutory notice dated 24<sup>th</sup> August 2021 to the Defendant under section 56(2) of the Land Registration Act, 2012, and sections 90 and 96 of the Land Act, 2012. Refer to Interested Party's annexure marked as "FCB-5" for a copy of the Interested Party's statutory notice dated 24<sup>th</sup> August 2021. Following the above-mentioned statutory notice, the



Defendant then applied to restructure the two facilities, consequent to which the Interested Party issued the Defendant with a Letter of Offer dated 20<sup>th</sup> September 2021, in which the Defendant's facilities were restructured subject to the terms and conditions contained therein, and which Letter of Offer the Defendant duly accepted. Refer to the Interested Party's annexure marked as "FCB-6" in the Replying Affidavit for a copy of the Letter of Offer dated 20<sup>th</sup> September 2021.

21. The Defendant once again fell into default on the terms of the various financing obligations to the Bank secured by the Charge registered over the Suit Properties in that the Defendant was in default of payment of the sum of Kenya Shillings Thirty-Six Million Five Hundred Ninety-Six Thousand One Hundred Forty-Three Cents Twenty-Nine (Kes. 36,596,143.29), exclusive of default damages, recovery fees and charges, as at 11<sup>th</sup> February 2022.
22. Consequently, the Interested Party duly issued the Defendant with a statutory notice of ninety (90) days, dated 11<sup>th</sup> February 2022, under section 56 (2) of the *Land Registration Act*, 2012, and sections 90 and 96 of the *Land Act*, 2012, notifying the Defendant that unless the Interested Party received from the Defendant an acceptable proposal for payment and/or unless the Defendant remedied the default, the Interested Party would, after the expiry of ninety (90) days from the date of receipt of the Notice, be entitled to exercise its statutory power of sale. Refer to annexure "FCB-7" to the Interested Party's Replying Affidavit for a copy of the 90-day statutory notice dated 11<sup>th</sup> February 2023, together with a Certificate of Postage in respect thereto.
23. The Interested Party then duly issued the Defendant with a statutory notice of forty (40) days, dated 16<sup>th</sup> May 2022, under section 56 (2) of the *Land Registration Act*, 2012, and sections 90 and 96 of the *Land Act*, 2012, notifying the Defendant that unless the Interested Party received from the Defendant an acceptable proposal for payment and/or unless the Defendant remedied the default, the Interested Party would, after the expiry of forty (40) days from the date of receipt of the notice, be entitled to exercise its statutory power of sale upon expiry of a Notice to Sell upon issuance and service of the said Notice upon the Interested Party. See Interested Party's annexure "FCB-8" to the Replying Affidavit for a copy of the 40-day statutory notice dated 16<sup>th</sup> May 2023, together with a Certificate of Postage in respect thereto.
24. The Defendant failed to remedy his default within the timelines provided, and so the Interested Party proceeded to issue instructions dated 28<sup>th</sup> June 2022 to Messrs Nairobi Connection Services Auctioneers to proceed to sell the Suit Properties by way of public auction to recover the amount of Kenya Shillings Thirty-Five Million Six Hundred Ninety Thousand Eight Hundred Forty Cents Seventy-Five (Kshs. 35,690,840.75) as at 28<sup>th</sup> June 2022. Subsequently, the Suit Properties were advertised in The Standard newspaper edition of 6<sup>th</sup> February 2023 for sale by way of public auction to be held on 21<sup>st</sup> February 2023. The sale by public auction duly proceeded wherein the Plaintiff herein emerged as the highest bidder with a bid of Kenya Shillings Sixty-Two Million (Kshs. 62,000,000.00). See annexure to Interested Party's Replying Affidavit dated 24<sup>th</sup> July 2023 marked as "FCB-12" for a copy of the Auctioneer's letter dated 16<sup>th</sup> August 2022 and a copy of the advertisement published in The Standard newspaper edition of 16<sup>th</sup> August 2022.
25. The Interested Party duly received the auction sale price of Kenya Shillings Sixty-Two Million (Kshs. 62,000,000.00) on or around 22<sup>nd</sup> February 2023, and consequently, by way of a letter dated 27<sup>th</sup> February 2023, the Defendant released to the purchaser the original Title Deeds in respect of the Suit Properties, together with the original Charge dated 25<sup>th</sup> January 2019, for his safe-keeping. See annexure to Interested Party's Replying Affidavit dated 24<sup>th</sup> July 2023 marked as "FCB-15" and "FCB-16" for copies of the Bank's letter dated 27<sup>th</sup> February 2023 and Facility Repayment Schedule showing zero balance after the proceeds from the auction were applied. The Learned Counsel averred



that flowing from the above, it was their submission that the issues that distilled themselves for determination by this Honourable Court were broadly four (4) as follows:

26. Firstly, whether the Plaintiff and the Defendant had each satisfied the principles for grant of an interlocutory injunction, in their respective Applications, The Learned Counsel argued that it was well established law that in considering an application for interlocutory injunction such as that of the Plaintiff and Defendant, the court shall be guided by the conditions set out in the case of “Giella – Versus - Cassman Brown Company Limited [1973] EA whereby, at p. 360, Spry V-P and the Court of Appeal in the case of “Nguruman Limited – Versus Bonde Nielsen and 2 Others [2014] eKLR further elaborated on the test for whether an Applicant has shown a prima facie case by stating that all the three Giella conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. He opined that it was prudent to point out a cardinal principle that must be followed in disputes brought before the courts for determination on the same issue; which principle was properly applied in case of “Mbutia – Versus - Jimba Credit Finance Corporation & Another [1988] eKLR, where Platt JA in delivering judgment stated that, the correct approach in dealing with an application for injunction is not to decide the issues of fact but rather, to weigh up the relevant strength of each side’s propositions. He went on further to reason that:

“ Ideas of finalising disputes at the interlocutory stage should never come to mind, unless the parties, by agreement, have asked the Court to treat the application as the hearing of the suit. That is not often the case when the facts are disputed.”

27. He averred that cognizant to avoid finalizing on any of the disputed facts between the Parties herein, we submit that the Plaintiff, by its Notice of Motion Application dated 21<sup>st</sup> August 2023, has failed to demonstrate that the Giella principles, as they apply to the Application and this suit as a whole, as well as any other such like matters, have been fully satisfied, and he further submitted on the same as follows:

- i. Whether the Plaintiff and the Defendant have demonstrated a prima facie case capable of success by their respective Applications for grant of orders of injunction?

The Court of Appeal defined a prima facie case in the case of “Mrao Limited – Versus - First American Bank of Kenya Limited [2003] KLR. The Court of Appeal in Nguruman Limited (supra) went further in its holding by stating that the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from invasion.

28. Further, the Learned Counsel referred Court to the provision of Section 109 of the *Evidence Act* (Cap. 80) of the Laws of Kenya provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The *Evidence Act* then goes on in its Section 112 to stipulate that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. The Counsel averred that it was not in contention that the Defendant was advanced financial accommodation by the Interested Party, which facilities were secured by way of a Charge over the Suit Properties. The Defendant, though, claimed



to have performed his obligations as a borrower by paying the instalments, and that he has made substantial repayments and was desirous of continuing to service the loan. However, this claim by the Defendant was just that: an allegation, nothing more. There is no evidence offered to support the claim of substantial repayments made, nor is there any evidence in support of this desire to “service the loan”.

29. The Defendant further alleged that the Suit Property seemed to have been secretly subjected to an un-procedural and unlawful auction and was in danger of being interfered with in circumstances that did not accord with various provisions of the law.

He further cited the provision of Section 90 (1) of the *Land Act*, 2012 (hereinafter the “*Land Act*”), provided that if a Chargor, in default of any obligation, failed 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 continued to be in default for one (1) 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.

30. The notice under the provision of Section 90 of the *Land Act* was required to adequately inform the recipient of the nature and extent of the default by the Chargor, and, if the default consisted 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 (3) months, by the end of which payment in default must have been completed. The Learned Counsel Submitted that, due to the Defendant’s persistent default in payment of the sum of Thirty-Six Million Five Hundred Ninety-Six Thousand One Hundred Forty-Three Cents Twenty-Nine (Kshs. 36,596,143.29), and in accordance with the provision of Section 56 (2) of the *Land Registration Act* and Section 90 of the *Land Act*, the Interested Party duly issued the Defendant with statutory notices dated 24<sup>th</sup> August 2021 and 11<sup>th</sup> February 2022, respectively. The Counsel held therefore, that the Defendant was duly issued with the mandatory thirty (30) days’ and ninety (90) days’ notice to rectify his breach and default in the way of either an acceptable proposal for payment and/or remedy of the default, failure of which the Interested Party would, after the expiry of the ninety (90) days from the date of receipt of the notice, be entitled to exercise its statutory power of sale.

31. He opined that the aforementioned notice was duly delivered by way of registered mail, postage pre-paid, in accordance with the provisions of Clause 14.3 of the Charge dated 25<sup>th</sup> January 2019, which set out that any notice or demand for payment by the Chargee shall without prejudice to any other effective mode of serving the same be deemed to have been properly served if sent by post to the Chargor’s postal address. There was no dispute as to the postal address used by the Interested Party in effecting service of the said statutory notices. The Interested Party had also produced the Certificate of Postage in support of this averment. See Interested Party’s annexure “FCB-2” to the Replying Affidavit for a copy of the Charge dated 25<sup>th</sup> January 2019, and annexure “FCB-7” for a copy of the Statutory Notice dated 11<sup>th</sup> February 2022, and the Certificate of Postage in respect thereof. The Defendant, for unknown reasons, failed, neglected and or refused to remedy his default within the notice period provided, leading to the Interested Party proceeding to exercise its power of sale as chargee of the Suit Properties. The Interested Party then issued the forty (40) days’ notice to sell as mandated by section 96 (2) vide a notice dated 16<sup>th</sup> May 2022. This notice to sell was once again duly delivered by way of registered mail, postage pre-paid, in accordance with the provisions of Clause 14.3 of the Charge dated 25<sup>th</sup> January 2019. The Interested Party had also produced the Certificate of Postage in support of this averment. See Interested Party’s annexure marked “FCB-8” for a copy of the Statutory Notice dated 16<sup>th</sup> May 2022 and the Certificate of Postage in respect thereof.



32. Upon the lapse of the forty (40) days' notice to sell, the Interested Party's Auctioneers then issued the Defendant with the forty-five (45) days' Notification for Sale dated 29<sup>th</sup> June 2022 as required by Rule 15 of the Auctioneers' Rules. This forty-five (45) days' redemption notice was delivered to the Defendant by way of email dated 29<sup>th</sup> June 2022. The Counsel's contention was that it was the Interested Party's case that when the Defendant failed to remedy his default within the timelines provided, the Interested Party then proceeded to issue instructions to its Auctioneers to proceed to sell the Suit Properties by way of public auction. The Auctioneers advertised, in The Standard newspaper edition of 16<sup>th</sup> August 2022, the sale of the Suit Properties by way of public auction to be held on 31<sup>st</sup> August 2022.
33. However, no bid was accepted on the said date. Subsequently, the Auctioneers notified the Interested Party that the Suit Properties were re-advertised in The Standard newspaper edition of 6<sup>th</sup> February 2023 for sale by way of public auction to be held on 21<sup>st</sup> February 2023. The sale by public auction duly proceeded on 21<sup>st</sup> February 2023, in which one Mr. Hassan Swaleh Taib (the Plaintiff herein) emerged as the highest bidder with a bid of Kenya Shillings Sixty-Two Million (Kshs. 62,000,000.00). Refer to annexure "FCB-14" of the Interested Party's Replying Affidavit for a copy of the Auctioneer's letter dated 22<sup>nd</sup> February 2023. The Interested Party duly received the auction sale price of Kenya Shillings Sixty Two Million (Kshs. 62,000,000.00) on or around 22<sup>nd</sup> February 2023, and consequently, by way of a letter dated 27<sup>th</sup> February 2023, the Interested Party released to the Plaintiff the original Title Deeds in respect of the Suit Properties, together with the original Charge dated 25<sup>th</sup> January 2019, for his safe-keeping. Refer to annexure "FCB-15" and "FCB-16" of the Interested Party's Replying Affidavit for copies of the Bank's letter dated 27<sup>th</sup> February 2023 and Facility Repayment Schedule showing zero balance after the proceeds from the auction were applied.
34. Therefore, the Learned Counsel submitted that the Defendant had, following the lawful transfer of interest in land from the Interested Party to the Plaintiff, illegally and without any legal right, authority and connivance, trespassed on the Suit Property. The Plaintiff, upon fall of the hammer, became the legal and registered owner of the Suit Property vide a lawfully held public auction in exercise of the Interested Party's statutory power of sale. Second, the Defendant had without legal right, authority and connivance trespassed upon the Suit Property thereby interfering with the Plaintiff's quiet possession. Third the Defendant shall continued to interfere with the Plaintiff's peaceful enjoyment of his constitutional right to property if not prohibited by orders of this Court. Fourth, the impugned actions, in totality, of the Defendant have, and are likely to further cause irreparable injury and loss to the Plaintiff which said loss and or injury were not capable of being remedied by way of damages.
35. It was the Interested Party's case that the Defendant fell into default of his repayment obligations. This fact was uncontroverted, and the Defendant had also conceded as much in his Plaint, wherein the Defendant has stated, at paragraph 7, that he "...has on several occasions been unable to make substantial payments in realisation of the loan as such he has on several occasions formally written to the Defendant (Interested Party) Company requesting for a restructure, requests which remain unanswered to date." (emphasis added).

To buttress on this point, the Counsel cited a few cases being that of "Yusuf Abdi Ali Co. Limited – Versus - Family Bank Limited [2015] eKLR, the Court therein found that the Plaintiff admitted to being indebted to the Defendant-bank and thus held that the Plaintiff had clearly not made out a prima facie case. Similarly, in the case of "Beatrice Atieno Onyango – Versus - Housing Finance Company Limited & 3 Others [2020] eKLR, Majanja J. held that since the Plaintiff therein had admitted to being indebted to the defendant-bank, no prima facie case had been established.



36. Likewise, the Defendant herein had admitted in the Defendant's Application to being indebted to the Interested Party. On this basis, it was the Counsel's submission that the Defendant had failed to establish a prima facie case, and we urge this Honourable Court be guided by the aforementioned decisions in finding as much. In light of the holding in *Nguruman Limited* (supra), he submitted that it was the Plaintiff herein who has duly discharged the burden of proving his prima facie case with a probability of success at trial. He had done so by way of evidence showing a clear and unmistakable right to be protected; the Plaintiff's right to property under the provision of Article 40 of *the Constitution* of Kenya 2010, was directly threatened by the acts of trespass and interference of the Plaintiff's lawful and quiet possession of the Suit Properties by the Defendant, which acts the Plaintiff's Application seeks to be restrained.
37. Further, the invasion of the Plaintiff's right was material and substantive on account of him being a bona fide purchaser for value, a protected class as prescribed by law; and, accordingly, there was an urgent necessity to prevent the irreparable damage that may result from the Defendant's invasion of the Plaintiff's right as such. Accordingly, the Learned Counsel contended that the Defendant had failed to show that his matter was genuine, arguable and one that was likely to succeed at trial on account that his averments in the Defendant's Application never proved a prima facie case. In the Defendant's Application, the Defendant had admitted that he never entered into a loan facility agreement with the Interested Party for which a charge was registered over the identified Suit Properties which was serving as security for the said loan. The Defendant further admitted to be in default of repayment of the principal and interest amounts due and owing to date, which said sum continues to accrue interest as the Defendant remains in default.
38. In the premise, the Learned Counsel submitted that the Plaintiff's Application had met the threshold of a prima facie case capable of succeeding at trial and therefore prayed to this Honourable Court that it be allowed with costs to the Plaintiff and Interested Party. On the other hand, the Defendant's Application had completely failed to meet this same threshold, and he prayed that this Honourable Court by its findings rules as such and dismisses the Defendant's Application in its entirety.
39. Secondly, whether the Plaintiff and the Defendant had suffered, or were likely to suffer, irreparable harm, injury, loss and/or damage that could not be adequately compensated or remedied by an award of damages. The Learned Counsel submitted that it was the very first principle of injunction law that prima facie the court would not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where a court interfered by way of an injunction to prevent an injury in respect of which there was a legal remedy, it did so upon two distinct grounds: first, that the injury was irreparable; and second, that it was continuous.
40. However, the Court of Appeal in *Nguruman* (supra) stated that all the three *Giella* (supra) conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The Learned Counsel maintained that the Defendant had failed to show any legal and or equitable interest in the suit property at any material time to this suit, whether registered against the Suit Properties' document of title or not. Therefore, the Defendant had not shown that his matter was in the nature of a prima facie case capable of success at trial and this Court need not consider whether he would suffer injury which could not be remedied.
41. Nonetheless, the Learned Counsel submitted that *Halsbury's Laws of England* defines the term "irreparable harm" to mean injury which was substantial and could never be adequately remedied or atoned for by damages, not injury which could not possibly be repaired and the fact that the Applicant may have a right to recover damages was no objection to the exercise of the jurisdiction by injunction,



if his rights could not be adequately protected or indicated by damages. He cited that case of “Pius Kipchirchir Kogo – Versus - Francis Kimeli Tenai [2018] eKLR on the meaning of “irreparable injury”.

It was the Interested Party’s position that the Defendant had not suffered any irreparable harm and if the orders sought by the Application dated 21<sup>st</sup> June 2023 were not granted by this Honourable Court, the Defendant would not continue to suffer irreparable harm, injury, loss and/or damage that cannot be adequately compensated or remedied by an award of damages.

42. On the other hand, it is their submission that if the orders sought by the Plaintiff’s Application was not granted by this Honourable Court, the Plaintiff had and would continue to suffer irreparable harm, injury, loss and/or damage that could not be adequately compensated or remedied by an award of damages. The provision of Section 99 of the *Land Act*, 2012 confers protection upon an innocent purchaser for value whose purchase of an interest in land is as a result of the exercise by a chargee of its power of sale. It further states that in the event of an unauthorised, improper or irregular exercise by a chargee of its power of sale, the person so prejudiced by such acts by the chargee shall have a remedy in damages. The Interested Party in exercising its remedy of statutory power of sale of the Suit Properties under the Charge dated 25<sup>th</sup> January 2019, duly complied with the provisions of Sections 90 and 96 of the *Land Act*, 2012. Despite being afforded every opportunity to remedy his default, the Defendant failed, neglected and or refused to exercise his equity of redemption in respect of the Suit Property prior to the exercise of the Interested Party of its statutory power of sale.
43. The Counsel argued that once the Interested Party and Defendant executed Letter of Offer dated 27<sup>th</sup> November 2018 for the sum of Kenya Shillings Fifty Million (Kshs. 50,000,000.00) for a term of sixty (60) months and subsequently the one of 23<sup>rd</sup> November 2019 for a second sum of Kenya Shillings Seven Million (Kshs. 7,000,000.00) for a term of twenty-four (24) months, the Suit Properties became commodity liable to be liquidated in the property market as such. Sentimental pleas by the Plaintiff must therefore fail for being insufficient proof of irreparable loss or harm not capable of remedy by way of damages. The Counsel referred Court to the cases of “Al-Jalal Enterprises Limited – Versus - Gulf African Bank Limited [2014] eKLR observed as follows:-

“... In Daniel Ndege Ndirangu – Versus - Barclays Bank of Kenya Limited & Another Nakuru High Court Civil Suit No. 8 of 2012 ‘B’ Justice Emukule referred to the case of Sambai Kitur – Versus - Standard Chattered Bank & 2 Others, Eld HCCC No. 50 of 2022, where the court emphasized that:

“It must also be noted that when a chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that, in the event of a default it be sold by a chargee, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale without prior concurrence and consent of the charger. How can he, having defaulted to pay loan arrears prompting a charge to exercise its statutory power of sale, claim that he is likely to suffer loss and injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merit. It is immaterial that the property is a family residence, a fact well known to the Chargor at the time of offering it as security to the charge. The upshot of all these is that following the Giella principles, the loss of injury that the applicant stands to suffer should he succeed in this suit is capable of being compensated in damages adequately.” (emphasis ours)



37. It was patent that both under statute and the authorities, the sale of a charged property in exercise of a statutory power of sale is not an irreparable injury or an irredeemable loss. Should it be later found upon the hearing of the case that there was irregularity or impropriety in the sale, such property was well-capable of valuation and the ensuing monetary compensation is sufficient to repair the harm or loss. He reiterated that the Plaintiff, if denied the relief sought in the Plaintiff's Application, would suffer irreparable harm not capable of being adequately compensated by damages. This was on the premise that, if the orders sought were not granted, the Defendant is likely to interfere with the Plaintiff's peaceful enjoyment of his property and outright infringement of his right to property, a right which could only be limited in accordance with *the Constitution* and other applicable laws. Further, the Defendant has implied to this Court that he was not able to meet his debts when they become due. Therefrom, it was fair to conclude that should the Plaintiff succeed by his main suit, any compensatory order that may be issued to the Plaintiff as against the Defendant would likely be rendered nugatory.
38. Conversely, the Defendant's Application had failed to discharge this requirement for the orders the Defendant was seeking by his application for interlocutory injunction. The Defendant's Application was time barred and overtaken by events. Upon the fall of the hammer, his equity of redemption was extinguished and the title to the Suit Property was lawfully transferred to the Plaintiff. As a purchaser to the property by virtue of the exercise of the Interested Party's statutory power of sale, the Plaintiff was by law protected against persons claiming interest in the said properties as an innocent buyer without notice. What was more, in the event that the Defendant is found to be prejudiced by an unauthorised, improper or irregular exercise of the power of sale by the Interested Party, he shall have a remedy in damages.

In the premise, the Learned Counsel urged this Court to find that the Defendant had failed to demonstrate that he would suffer irreparable harm incapable of remedy by way of damages; conversely, he prayed that this Court allow the Plaintiff's Application.

39. Thirdly, whether, on a balance of convenience, the balance tilted in favour of granting the injunctive Orders sought by the Plaintiff or the Defendant. The Learned Counsel submitted that the balance of convenience tilted in favour of the Plaintiff and in the granting of the orders sought in the Plaintiff's Application. Similarly, the court in "Pius Kipchirchir Kogo (supra)" provided a definition for "balance of convenience" He maintained that due to default by the Defendant on terms of the various financial obligations owed to the Interested Party, the Interested Party issued a statutory notice dated 24<sup>th</sup> August 2021 to the Plaintiff under section 56(2) of the *Land Registration Act* and sections 90 and 96 of the *Land Act*.

In respect thereof, the Interested Party fully complied in all material respects in exercising its remedy of statutory power of sale as Chargee pursuant to the provisions of sections 90, 96, 97 and 98 of the *Land Act*, 2012; and which exercise of such remedy was consequent to and as a result of the Defendant's breaching his duty of repayment of the credit facilities advanced to him by the Defendant-Bank secured by way of a Charge over all those suit properties.

He further maintained that upon the fall of the hammer, the Plaintiff was the rightful title-holder to the Suit Property thereby extinguishing the Defendant's equity of redemption. After sale and transfer of the suit land by the Interested Party, the interest of the Defendant therein has passed and vests in the Plaintiff as its purchaser, free from all liability on account of the charge registered over the Suit Properties; a transfer by the Bank as registered Chargee of the Suit Properties shall have priority over all entries made after the transfer to the Plaintiff.

It was also their averment that the Plaintiff was by law protected as the purchaser of the Suit Property except in the case where the exercise of the statutory power of sale by the Interested Party was



unauthorised, irregular or improper, which said circumstances the Defendant has not proved and which, even if it had been proved, a remedy in damages would be recoverable by the Plaintiff from the Defendant

40. Furthermore, the Defendant's Application as framed is misconceived and untenable in law as it had been overtaken by events. The Suit Property was sold by way of public auction on or around 21<sup>st</sup> February 2023 and completion documents delivered by the Interested Party on 27<sup>th</sup> February 2023 (prior to the filing of the Defendant's Application). Therefore, the action sought to be restrained by the instant Defendant's Application is in vain, and it is now well-established that courts of equity do not act in vain.

He asserted that the Defendant's Application was an afterthought, brought with gross mala fides and was a classic case of abuse of process of this Honourable Court, since the Defendant was issued with the requisite statutory notices under the *Land Act*, 2012, but failed, neglected and or refused to remedy his default within the prescribed timelines. The Defendant has been indolent in bringing his claim before this Honourable Court and was guilty of laches, since the he had every opportunity to seek injunctive relief prior to the auction of the suit property but failed to do so.

In view of the matters averred to hereinabove, the Plaintiff had disclosed a prima facie case as against the Defendant; and further that the Plaintiff has demonstrated that the loss or injury likely to be occasioned if the orders in the Plaintiff's Application were not granted could not be remedied by way of monetary damages. We thus verily believe that the balance of convenience in this matter tilts in favour of the grant of the Orders sought in the Plaintiff's Application.

41. Fourthly, whether the Plaintiff has satisfied the principles for grant of a mandatory injunction. The Learned Counsel held that the Plaintiff had sought as one of his reliefs in the Plaintiff's Application, a mandatory injunction did issue restraining the Respondent, his servants, security guards, agents, employees and any other person from interfering with the Plaintiff's proprietary rights, trespassing or interfering in any other manner with the Plaintiff's quiet possession or dealing with the Suit Property. To buttress point, he cited the cases of "Joseph Kaloki t/a Royal Family Assembly – Versus - Nancy Atieno Ouma [2020] eKLR, the court stated that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases. A mandatory injunction should only be granted in special circumstances and in clearest of cases. Similarly, he referred Court to the case of "Stephen Blanchet – Versus - Wolfgang Muller & another [2016] eKLR the court held as follows:

“the principles upon which a court grants a mandatory injunction are now well settled. It is to the effect that a mandatory injunction cannot issue unless the case is shown to be unusually strong and clear. I may only add that a court sought to issue a mandatory injunction should only do so when convinced that after trial it shall not look back and feel that there was an indiscretion in the grant of the mandatory injunction at an interlocutory stage.”

42. The court in the case of:- Stephen Blanchet (supra) cited with approval "Kenya Railways Corporation – Versus -. Monas M. Nguti" wherein it was also cited with approval the decision in the case of: "Shepherd Homes Limited – Versus - Sandhau as follows:-

“... I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation”

The Learned Counsel opined that the Plaintiff's Application was, indeed, a proper case for the grant of mandatory injunction; that the material contained in the notice of motion and the affidavits that



were before this Honourable Court was sufficient to have the matter disposed of summarily without the need for a trial.

That upon the fall of the hammer, the Defendant became a trespasser and this Court was properly directed in granting the mandatory orders and in giving possession of the properties to the Plaintiff; and that the orders given accord with the legal principles applicable to mandatory injunctions. As this Court stated in the case of “Kenya Breweries Limited & another – Versus - Washington O. Okeyo [2002] eKLR a mandatory injunction could be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.

44. The Court also stated in the case of:- “Shariff Abdi Hassan – Versus - Nadhif Jama Adan [2006] eKLR that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

He further submitted that it was not in contention that the Plaintiff was the registered owner of the Suit Property and that the only basis upon which the Defendant may have an arguable case, as opposed to prima facie case, is on account of the Defendant having entered into a loan facility agreement with the Interested Party for which a charge was registered over the identified Suit Property which was serving as security for the said loan; and the Defendant further admitted to be in default of repayment of the principal and interest amounts due and owing to date, which said sum continued to accrue interest as the Defendant remained in default.

45. In the premise, he submitted that the Defendant was on the wrong, and he prayed that this Honourable Court took action to ensure that justice was meted out without the need to wait for full hearing of the entire case, by granting to the Plaintiff the mandatory so sought as against the Defendant in the Plaintiff’s Application.

46. In conclusion, the Learned Counsel held:-

- a. As observed by the Court of Appeal in the Nguruman (supra), it was well established that the three pillars on which rest the foundation of any order of injunction as set out in the Giella (supra) are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
- b. The Defendant’s admittance in his Application to being indebted to the Interested Party further demonstrated that he has failed to establish a prima facie case, this Honourable Court urged to grant the orders.
- c. The Defendant had been indolent in seeking relief for the acts of the Interested Party resulting in the extinguishing of the Defendant’s equity of redemption, having had every opportunity to seek such relief from as far back as February 2022, and as such the Defendant is guilty of laches and was undeserving of equitable relief from this Honourable Court of equity.
- d. The Defendant had been indolent in seeking relief against the exercise by the Interested Party of its statutory power of sale despite being given ample opportunity to challenge the said sale, through the proper issuance of notices by the Interested Party as per sections 90 and 96 of



the Land Act and section 56(2) of the Land Registration Act. The Interested Party also duly conducted the sale of the Suit Property by public auction in accordance with sections 97 and 98 of the Land Act, the Auctioneers Rules and all other enabling provisions of the law.

47. In a similar application seeking injunctive relief (based on the same set of facts the present proceedings) filed by the Defendant herein in the case of:- Mombasa High Court Civil Suit No. E020 of 2023, Ibrahim Sherro Hussein – Versus - First Community Bank, the Court therein in its Ruling dated and delivered on 19<sup>th</sup> September 2023, came to the conclusion that the Defendant herein had failed to establish a prima facie case and dismissed the Defendant’s application. He urged this Honourable Court to similarly dismiss the Defendant’s Application.
48. In view of the arguments advanced hereinabove, the provisions and principles of law that are applicable in the circumstances of this matter, and the judicial authorities cited hereinabove, the Learned Counsel urged the Honourable Court in the interest of justice and fairness that the Orders in the Plaintiff’s Application be granted as prayed. At the same time, that the Application by the Defendant to be dismissed in its entirety with costs.

### **VIII. Analysis and Determination**

49. I have carefully read and considered the pleadings herein being the two applications dated 9<sup>th</sup> June, 2013 and 21<sup>st</sup> June, 2023 by the Plaintiff and Defendant respectively, the written submissions and the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
50. In order to arrive at an informed, just and fair decision, the Honorable Court has framed the following three (3) issues from the subject matter for determination. These are:-
- a. Whether the Notice of Motion dated 9<sup>th</sup> June, 2023 and Notice of Motion application dated 21<sup>st</sup> June, 2023 meet threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
  - b. Whether the Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage.
  - c. Who will bear the Costs of Notice of Motion application 9<sup>th</sup> June, 2023 and 21<sup>st</sup> June, 2023.

#### **ISSUE No. a). Whether the Notice of Motion dated 9<sup>th</sup> June, 2023 and Notice of Motion dated 21<sup>st</sup> June, 2023 meet threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

51. Under this Sub – heading, the main and common substratum from the two applications is on the granting of temporary and mandatory injunction orders for the preservation of the suit properties. Coincidentally, it is instructive to note that the said applications herein are premised under the provision Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the other numerous provisions of the law. Which provides as follows: -

Order 40, Rule 1.

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 wrongfully 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.

52. The principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Ltd(1973) EA 358”, where it was stated:-

“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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

53. The three (3) conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited -Versus- Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR”,

“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. Limited - Versus - 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”.

54. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in “MRAO Limited -Versus - First American Bank of Kenya Ltd & 2 others (2003) eKLR”,

“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 would 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”

55. While on the one hand, the Plaintiff claims to be the absolute, legal and registered owner of the suit properties, a fact supported by the Interested Party herein, with all the indefeasible rights, interest and title vested in him by law. He held that the Defendant had illegally without any legal rights, authority and connivance of the Applicant trespassed over it. According to him, the Defendant has interfered and continues to interfere with the Applicant’s proprietary rights to access, use and enjoy his property guaranteed under the provision of Article 40 of *the Constitution* of Kenya, 2010.



56. On the other hand, according to the Defendant, he entered into a financial arrangement with the interested party wherefore the Interested Party agreed to advance a loan to him in the sum of Kenya Shillings Fifty Seven Million (Kshs. 57,000.000/=). The said loan facility was secured by a charge over the suit properties. On 22<sup>nd</sup> February, 2023 the Interested Party proceeded to have the Suit Properties charged to the Interested Party to secure a loan advanced to the Defendant which seemed to have been secretly subjected to an unprocedural and unlawful Auction. Subsequently, the Defendant proceeded to file an Notice of Motion Application dated 27<sup>th</sup> February, 2023 in High Court Civil Suit No. E020 of 2023 seeking Temporary Order of Injunction restraining the Interested Party whether by themselves, their agents, servants and/or employees from attaching, repossessing, selling, auctioning or in any other way alienating suit properties pending the hearing of the Application ‘inter – partes’. The said suit is still active in High Court and with high chances of success and the same is pending ruling in respect to the said Application slated for 19<sup>th</sup> September, 2023.
57. In the case of:- “Mbuthia – Versus - Jimba Credit Corporation Ltd 988 KLR 1”, the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
58. Similarly, in the case of “Edwin Kamau Muniu - Versus - Barclays Bank of Kenya Ltd” the court held that;
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
59. Regarding this first condition, the Plaintiff has attached title documents to cement his proprietary rights to the suit land. All these averments are fully corroborated and supported by the Interested Party herein. To me, this should be enough as a prima facie case with a probability of success for the time being in force. Therefore, I find and hold that the Plaintiff has succeeded under this condition while the Defendant has not succeeded whatsoever.
60. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that,
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
61. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Plaintiff’s property and as backed up by the Interested Party that it is at risk as he is alleging that the Defendant has interfered and continues to interfere with the Plaintiff’s proprietary rights to access, use and enjoy his property



guaranteed in under the provision of Article 40 of *the Constitution*. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai(2018) eKLR” provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

62. In this instance, the Plaintiff is an innocent purchaser for value and further that the Auctioneer was duly licensed to conduct the sale of the suit properties and a fact well supported by the Interested party herein. It is a fact upheld by the court in the case of:- “Shah & Another – Versus - Shah & Another (2023) KEELC 15728(supra)”. According to the Defendant, despite the Plaintiff being aware of High Court Civil Suit No. E020 of 2023 challenging the excise of Statutory power of Sale by the Interested Party pending determination and Status Quo orders being in place, he has proceeded to forcefully evict the Defendant agents from the said properties and the Defendant is apprehensive that the Plaintiff may proceed to interfering with the said suit properties. The Plaintiff despite the Plaintiff being aware of High Court Civil Suit No. E020 of 2023 challenging the excise of Statutory power of Sale by the Interested Party pending determination and Status Quo orders being in place, he has proceeded to forcefully evict the Defendant agents from the said properties and the Defendant is apprehensive that the Plaintiff may proceed to interfering with the said suit properties.
63. Being that the Plaintiff bought the suit properties and had the proprietary rights to the said property, he would not be able to be compensated through damages as he has shown the court that of his rights to the suit property by the title documents. Likewise, in the given circumstances, he has therefore satisfied the second condition while the Defendant as failed whatsoever as laid down in “Giella’s case”.
64. Thirdly, the Plaintiff have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo (Supra)” which defined the concept of balance of convenience as:
- “The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
- In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.
65. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-
- “Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on



the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

66. The Plaintiff and the Interested Party herein contend that the balance of convenience tilts in his favour because he is an innocent purchaser for value on notice and it is not in dispute that the suit property was auctioned off to the Plaintiff by the Interested Party. However, the Plaintiff stand to suffer the most if he is evicted from his home. The Defendant on the other hand has argued that he is worried that if the Plaintiff is allowed to continue to deal in the property either by further developing and/or in any manner interfering with the current state of affairs, the Defendant stands to suffer irreparable damage in the event that the ongoing suit in Civil Suit No. E020 of 2023 is determined in his favour.
67. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated
- “ The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”
68. Bearing this in mind, I am fully convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Plaintiff/Applicant.
69. In the case of:- “Robert Mugo wa Karanja – Versus - Ecobank (Kenya ) Limited & Another [2019] eKLR” where the court in deciding on an injunction application stated;
- “ circumstances for consideration before granting a temporary injunction under Order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”
70. Thus, I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff and the Interested Party herein. In view of the foregoing, I find that the Plaintiff has met the fundamental criteria for grant of orders of temporary injunction while the Defendant has not succeeded in his prayer accordingly .

**ISSUE No. b). Whether the Plaintiff should be granted orders of Mandatory injunction at the interlocutory stage.**

71. Under this sub heading, I will consider the question of whether these orders can be issued at the interlocutory stage. There are numerous decisions of the Court of Appeal offered as guidance on this point.



72. In “Joseph Kaloki t/a Royal Family Assembly – Versus - Nancy Atieno Ouma (supra)” the court of appeal reaffirm its decision in “Kenya Breweries Limited & another – Versus - Washington O. Okeyo [2002] eKLR” and stated that:

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

73. The Court also reaffirmed its decision in “Shariff Abdi Hassan – Versus - Nadhif Jama Adan [2006] eKLR” where it stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

74. From the facts of this instant case, I am not convinced that special circumstances exist in this matter that may warrant the grant of a mandatory injunction. I am also not convinced that this case is so clear that it ought to be decided at once. There are competing claims by both parties and these require further interrogation. At this stage I cannot tell for sure that the Defendant claim is untrue as the issues being contested which touch on proprietary rights to the land can only be determined during a full trial and that is when an order for a mandatory injunction can be issued at the conclusion of the case.

75. I therefore decline to grant orders of Mandatory injunction.

**ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 9<sup>th</sup> June, 2023 and Notice of Motion application dated 21<sup>st</sup> June, 2023.**

76. I have well stated in previous precedence and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“

“58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7<sup>th</sup> December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21<sup>st</sup> December, 2021.”

77. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events.

78. In this case, although the Plaintiff and the Interested Party herein are entitled to the costs of the two applications, but the Honourable Court reserves to have the costs in the cause.



**IX. CONCLUSION & DISPOSITION**

- 79. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Applicant has a case against the Respondent.
- 80. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
  - a. That the Notice of Motion application dated 9<sup>th</sup> June, 2023 by the Plaintiff herein be and is hereby found to have merit and hence allowed in its entirety.
  - b. That the Notice of Motion application dated 21<sup>st</sup> June, 2023 by the Defendant be and is hereby found to lack merit and hence dismissed in its entirety.
  - c. That an order of Temporary injunction do issue restraining the Defendant, his servants, security guards, agents, employees or any other person from interfering with the Plaintiff’s proprietary rights, trespassing or in any other manner of interfering with Plaintiff’s quiet possession or dealing with parcels of land known as Mombasa/Block XLVII/39 and Mombasa/Block XLVII/40 pending the hearing and determination of the Suit.
  - d. That this Honourable Court hereby declines to grant prayer 5 on Mandatory injunction being that this trial is at its preliminary stage.
  - e. That the cost of the Notice of Motion application dated 9<sup>th</sup> June, 2023 and 21<sup>st</sup> June, 2023 be awarded to the Plaintiff and the Interested Party herein though it shall be in the cause.

It is so ordered accordingly.

**RULING DELIVERED VIA EMAIL AS PER THE NOTICES DISPATCHED SIGNED AND DATED AT MOMBASA THIS 5<sup>TH</sup> DAY OF DECEMBER 2023.**

.....

**HON. JUSTICE L.L. NAIKUNI (MR.)**

**JUDGE**

**ENVIRONMENT AND LAND COURT AT MOMBASA.**

