REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL, COMMERCIAL AND ADMIRALTY DIVISION

HIGH COURT CIVIL CASE NO. 57 OF 2016

JUJA COFFEE EXPORTERS LIMITED ……1ST PLAINTIFF/APPLICANT

TSS TRANSPORTERS LIMITED …….…….. 2ND PLAINTIFF/APPLICANT

TSS INVESTMENT LIMITED …….…...…..3RD PLAINTIFF/APPLICANT

TAHIR SHEIKH SAID AHMED ……....…..……..4TH PLAINTIFF/APPLICANT

VERSUS

BANK OF AFRICA LIMITED…….....……..... 1ST DEFENDANT/RESPONDENT

KAAB INVESTMENTS LIMITED ……..…. 2ND DEFENDANT /RESPONDENT

RULING

1. The application before me for consideration is a notice of Motion dated 6th June, 2016, brought under certificate of urgency. The applicant seeks the following orders:-

1) Spent;

2) Spent

3) That pending the hearing and determination of this suit the 1st defendant their servants and/or agents be restrained by way of injunction from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the 2nd, 3rd, 4th plaintiffs' assets set out below or alienating, transferring, charging, leasing or in any manner whatsoever dealing with any other securities held by the defendants in respect to the 1st plaintiff's accounts:-

(i) Plot No. 44 Section XXI Mombasa Island, Registered in the names of Tahir Sheikh Said Transporters Limited;

(ii) Plot No. 147 Section XXI Mombasa Island, name of Tahir Sheikh Said Investments Limited;

(iii) Plot No. 1654 Section XXI Mombasa Island registered in under the name of Tahir Sheikh Said Investments Limited;

(iv) Plot No. 527 and 526 Section XXI Mombasa Island, Registered under the name (Sic) Tahir Sheikh Said Investments Limited;

(v) Plot No. 5866 Section XXI Mombasa Island, registered under the name of Tahir Sheikh Said Investments Ltd; and

(vi) Tittle No. Mombasa/Block XXVI/381, registered under the name of Tahir Sheikh Said Investments Ltd;

4) Spent;

5) Costs of the application.

2. The application is anchored on several grounds set out on the body of the application. It is supported by the affidavits of Tahir Sheikh Said, the 4th applicant and a Director of the 1st, 2nd and 3rd applicant companies. A second affidavit was sworn by Mohamed Tahir Sheikh Said a Director of the 3rd applicant company.

PRELIMINARIES

3. Mr. Gichuhi, Learned Counsel for the 1st respondent relied on the affidavit of Ben Mwaura, a Senior Manager, Debt recoveries sworn on 4th June, 2016 and filed in Court on 15th June, 2016. Rule 9 of the Oaths and Statutory Declarations Rules requires that annextures to affidavits should be sealed and stamped. The rule reads;-

> ***"All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification."(emphasis mine).***

4. In the case of **Fredrick Mwangi Nyaga vs Garam Investments & Another** [2013] eKLR, Havelock J, (as he then was) considered the application of Rule 9 of the Oaths and Statutory Declarations Rules. The Judge in holding that an exhibit annexed to an affidavit which is not marked is for rejection cited with approval a ruling by Hayanga J, (as he then was) in the case of **Abraham Mwangi vs S. O Omboo & Others** HCCC No. 1511 of 2002 where the Judge held thus:-

> ***"Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That marks the affidavit incomplete and hence also rejected…".***

5. Another decision addressing the matter of annextures to affidavits was made by Judge Mutungi in the case of **Solomon Omwega Omache & another v Zachary O Ayieko & 2 others** [2016] eKLR, where he stated as follows:-

> ***"Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annextures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annextures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistants lack of attention and due diligence."***

6. A perusal of the annextures attached to the affidavit relied upon by the 1st respondent do not bear the seal of a commissioner for oaths and are not marked with any serial letters for identification as specified in the 3rd schedule to the Oaths and Statutory Declaration Rules. Taking into account that the provisions of Rule 9 of the above rules are in mandatory terms, the order that commends itself to me is that of striking out the annextures, which I hereby do. Consequently, the affidavit that is filed in response to the present application which forms the support base for the said annextures cannot stand on its own and is therefore also struck out. This court will therefore take into consideration the affidavits filed by the applicants, the submissions made by the Counsel for the applicants as well as those made by Counsel for the 1st respondent on points of law and the authorities relied upon by both counsel.

APPLICANTS' SUBMISSIONS

7. Mr. Balala Learned Counsel for the 1st to 4th applicants submitted that they have established a prima facie case with a probability of success for the grant of an injunction in that the 1st applicant was not served with statutory notices contrary to section 90 of the Land Act, 2012. Counsel cited the case of **David Ngugi Ngaari vs Kenya Commercial Bank** [2015] eKLR as to the procedure of the issuance of a statutory notice under the said provisions of law.

8. It was submitted that the demand letters set out different interest rates from those permitted by letters of offer. Counsel referred to the case of **Francis Joseph Kamau Ichatha vs Housing Finance Company of Kenya Limited** [2014] eKLR, where the court found that the action of the bank in levying unilateral interest not agreed upon was a mutation of the agreement and an act that violated the Constitutional Right under Article 46(1)(b) of the Constitution of Kenya. Counsel informed the court that the letters of 15th June, 2015 and 4th August, 2015 made a seven (7) day demand for repayment plus a penalty interest at 11% p.a., whereas the letters of offer had an interest rate of 6% without default interest. It was submitted that as in the **Ichactha case** (supra) the Bank gave varying rates of interest that obscured the real interest rate chargeable thus acting as a clog or fetter on the equity of redemption. It was submitted that Section 84 of the Land Act requires Banks to give notice of the variation in interest rates. He cited the case of **Harilal & Co. Ltd. v. the Standard Bank Ltd.** [1967] E.A, where Duffus J at page 524 para H/I stated that "*the banks have no power to charge a penal rate of interest or to change the method of calculating what is reasonable rate of interest without the customer's consent."*

9. Counsel further submitted that the securities sought to be enforced did not comply with the law in that the 1st applicant's securities were all prepared before the year 2012. The facilities pursuant to the letters of offer and accepted by the Borrower after May 2012 and 2013 were bound by section 80(3) of the Land Act. The Court was informed that in the years 2012 and 2013 additional facilities were granted to the 1st applicant for a materially different purpose. The Chargors were always required to consent to the new facilities and to provide resolutions supporting such consent. The 4th applicant was required to confirm his consent and also confirm independent legal advice. It was submitted that in the year 2012 and in March 2013 when the new facilities were being signed for working capital, they were linked to the old charges and this was an attempt to circumvent the requirement of sections 82(3) and 80(3) of the Land Act.

10. It was submitted that where a facility was granted after the year 2012 and sought to rely on securities registered prior to the year 2012, then they do not fall within the scope of section 162 of the Land Act as these were new contracts that were entered into and have to fall within the law at the time of the contract. Failure to adhere to the law rendered the securities a nullity. As such, the 1st respondent was obliged to either prepare fresh security documents incorporating the provisions of section 80(3) or a deed of variation to the original security. It was incumbent upon them to secure fresh resolutions of the Chargors approving the new facilities to the 1st applicant and to approve the use of their assets as security.

11. Counsel for the applicants argued that the Charge, Further Charge and Second Further Charge were for advances made in 2004, 2009 and 2010. After 2009, the 4th applicant became ill and entrusted the running of the companies to some of his children. The children and his relative Aweys took advantage of his illness and in collusion with Officers of the 1st respondent and the 2nd respondent entered into

financial commitments for the benefit of the children and of the 2nd respondent contrary to the terms and the intention of the securities given. These commitments entered into were fraudulent and through either acts of fraud or reckless conduct on the part of the 1st respondent, money was disbursed to the 1st applicant, diverted to the 2nd respondent's account and thus exposed the Chargors to a high risk of losing their properties. He explained that neither the 1st applicant nor the 2nd respondent could authorize the remittance without collusion and fraud on the part of the 1st respondent.

12. Mr. Balala informed the court that in the years 2012 and 2013, a draw down equal to USD 6 Million was effected for purposes other than those provided for in the facility letter. Reference was made to the case of **Peter Ngure Ng'ang'a vs Pioneer Building Society (In Liquidation)** [2014] eKLR where the court held that "the basic obligation of the Chargee included the disbursement of the loan secured by the Chargee. Where the loan was not disbursed in accordance with the Charge then there was a total failure of consideration. The applicants' counsel submitted that in a case such as this where the letters of offer came after the Charge, the letters of offer ought to be given greater weight.

13. The applicants contend that the initial purpose of the borrowings were all for Advance/Bill Discounting/Pre-Export Finance. In the year 2010, the amount for Pre-Export Finance was USD 1 Million. The resolutions for all these borrowings were specific to the borrowings as per the respective offer letters. In December 2011, the Bank offered the 1st applicant a facility for Pre-Export Finance only for the sum of USD 4.5 Million. The purpose was very specific. The 1st applicant in a resolution of 9th January, 2012 purportedly approved the borrowing as per the letter of offer of 15th December 2011. It was submitted that the Chargors never signed the offer letter. They were not privy to this new facility. It was argued that by varying the purpose of the new facility there was a variation in the banks dealings with the 1st applicant thus affecting the Chargors. Counsel added that in December 2012, the 1st respondent purported to renew the facility of the 1st applicant but now varied the purpose. The 1st respondent also granted an additional USD 1.5 Million overdraft to the 1st applicant. This was done without the authorisation by way of resolution of the Chargors and no proof was tendered to show this.

14. Counsel invited the court to look at the bank statements availed by the 4th applicant which show that the 1st applicant never honoured the terms of any facility yet the 1st respondent continued to indulge it. This, he submitted, was a sign of collusion and the 2nd, 3rd and 4th applicants should not be compelled to pay for the facilities. The 1st respondent sought to portray the 1st applicant as a prosperous going concern by continuing to increase advance of funds without seeing any signs of recovery or any repayment. He submitted that the 1st respondent compromised itself and the Chargors' assets. The Chargors did not know what was going on. They did not know what was being advanced or the indulgences granted. He submitted that as a result of the 1st respondent's conduct, the claim against the 1st applicant for any debt for the period from the year 2012 must fail. Counsel cited the case of **Kamau Ichatha v HFCK** *(*supra) where the court held that "*to my mind, the equity of redemption has been clogged by the acts or omissions of the defendant by engaging in acts contrary to the terms and conditions of the charge agreement. Prima facie, the Loan agreement would become irredeemable if charges outside the contractual agreement are loaded into the account. I am therefore satisfied that there is ample and uncontroverted evidence to show that the defendant was involved in activities that would make it difficult for the applicants to honour their obligations in the charge agreement.*"

15. Mr. Balala further submitted that it is trite law that where a Creditor seeks to vary the terms of the dealings with the principal debtor/borrower, through variation of contract or indulgences, the third party chargor/guarantor must be notified and consent to the new course of dealings in order to remain liable. He referred to the case of **Harilal & Co. Ltd** (supra) at page 519, paragraphs F,G,H and at page 520 paragraph A, where Newbold CJ stated thus - "*it is not open to the bank without the consent of the guarantor to alter the terms of its dealings with the merchant and at the same time to require the guarantor to be bound by a guarantee relating to a different course of dealing.*"

16. It was submitted that the 2nd and 3rd applicants are corporate entities separate from the 1st applicant.

Any Charge over the property of the 2nd and 3rd applicants to secure the borrowings of the 1st applicant had to have a commercial benefit to the 2nd and 3rd applicants. Mr. Balala informed the court that it is an established principle, both in common law, and now in the Companies Act that the Directors of a company have to act in the best interest of the particular company in which they are Directors. As such, a guarantee or agreement to take responsibility for a third party's debt has to have some commercial benefit to the company giving its guarantee or property as security. He cited from **Lingards Bank Security Documents**, 3rd Edition at page 56, paragraph 4.1 where the author states - "*some commercial benefit to the guarantor is essential to the validity of such a guarantee unless its creation is a substantive object of the company."*

17. It was submitted that in the instant case, the 1st respondent was satisfied to take up charge securities over the third parties' properties and impose obligations on such third parties without regard to whether it was in their best interests or not. The 1st respondent was unconcerned as to whether the Chargors approved the new facility in a proper and lawful manner through Board resolutions. The court was told that the sale of the 2nd, 3rd and 4th applicants properties valued in excess of the amount claimed will have serious repercussions on them and will lead to the collapse of the companies thus prejudicing the shareholders and creditors of those companies. It was submitted that the collapse of companies and reputation cannot sufficiently be compensated by damages. The sale will have an enduring impact on the very survival of the corporate entities. As regards the 4th applicant the sale of assets will necessarily impact on his life as these are life long fruits of his labour. It was argued that at an interlocutory basis it will be prejudicial to the applicants and it will cause irreparable harm if the property is sold and the court eventually finds that the applicants case had merit.

18. The Court's attention was drawn to the case of **David Ngugi Ngaari** (supra) at paragraph 22 where the court stated it was not bound by the 3 grounds of **Giella v Cassman Brown** alone but would also look at the circumstances of the case and the overriding objective of the law. The said court referred to the decision by Ojwang Ag J (as he then was) in **Amir Suleiman vs Amboseli Resort Limited [2004]eKLR**, where he said that when considering whether to grant an injunction the Courts will consider whether the lower risk and harm lies in granting the injunction than on the higher risk of injustice. Counsel submitted that the purpose of an injunction is to preserve the assets pending the hearing of the main suit and that in the instant case the applicants have shown a number of arguable and serious issues exist on a prima facie basis to justify the orders prayed for.

1ST RESPONDENT'S SUBMISSIONS

19. Mr. Gichuhi, Learned Counsel for the 1st respondent in response to the applicants' submissions cited the case of **Orion East Africa Ltd v Ecobank Kenya Ltd & Another** [2015] eKLR where the Court of Appeal dismissed an appeal by an Appellant who sought to set aside the orders of the superior court that declined to grant an injunction. The court found that the charge had properly been drawn and executed and that a substantial amount of money had been credited to the appellant's account which money had been drawn and utilized. It found that the appellant had not demonstrated that the debt had been repaid.

20. On the issue of parties who challenge securities as a means to frustrate banks' statutory power of sale, the court was invited to look at the decision in **Mrao Ltd v First American Bank [2003] eKLR,** where Justice Kwach J.A, as he then was, addressed the issue of borrowers challenging the validity of the instrument after they are in default. The court quoted from **Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725 at page 29** as follows; *'The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.'*

21. It was submitted that courts frown upon parties challenging the legal charges years after registration. Counsel cited the case of **Coast Brick & Tiles v Premchand** [1966] EA 154 which addressed the challenges that a Chargor who offered its land as security would face. This matter went on appeal to the

Privy Council which upheld the decision of the Court of Appeal. The latter Court addressed the effect of registration of land under the Registration of Titles Ordinance (which became the Registration of Titles Act). The Court stated that *"By section 32 upon registration the land specified becomes liable as security. In view of these provisions I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus. The second reason for my opinion that the onus is heavy is based upon the particular facts of this case. The mortgage was duly registered on February 27, 1956, and the plaint in the action is dated September 21, 1960; no hint of any alleged invalidity was given during those four and a half years..…… A case so presented cannot inspire confidence."*

22. It was submitted that the Land Act, 2012 does not fetter power of sale in respect of securities registered prior to the year 2012. Although the applicants allege that the various legal charges executed prior to the year 2012 are not in compliance with sections 82(3) and 80(3) of the Land Act, this is incorrect as sections 162 of the Land Act contains the savings and transitional provisions that provides that unless the contrary is specifically provided in the Act, any right, interest, power acquired shall continue to be governed by the law applicable. In addition, the bank has issued the statutory notice under section 90 of the Land Act. Counsel added that Justice Mutungi addressed the issue of retrospectivity in the case of **Barclays Bank of Kenya Ltd v Attorney General & another** [2015] eKLR when an issue arose as to whether the chargees power of sale in respect of charges registered before the new Land Act were affected. The judge held, inter alia, that a chargee's power of sale were preserved under the old Act but would be exercised under the New Act when sending the notices. Counsel submitted that in the present case the applicants were served with statutory notices under Section 90.

23. In concluding his submissions, Mr. Gichuhi submitted that the applicants have not proved that they shall suffer irreparable loss. He added that charged property becomes a commodity for sale in the event of default and that theapplicants have to establish that they will suffer irreparable loss which cannot be compensated by an award of damages. Counsel for the 1st respondent cited the case of **Nahashon K. Mbatia Vs Housing Finance Company ltd, (2006) eKLR,** where Waweru J, stated that- *"In any event, having charged the property, the plaintiff converted it to commercial commodity with monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation."*

24. It was submitted that in the instant case, there is no indication that the 1st respondent cannot be able to compensate the applicants. The applicants will therefore not suffer irreparable loss which cannot be compensated by an award of damages. He prayed for the application to be dismissed with costs.

ANALYSIS AND DETERMINATION

The issues that call for determination are-

(i) Whether the 1st applicant was advanced money by the 1st respondent;

(ii) Whether the 1st respondent served the 1st applicant with a Statutory Notice pursuant to the provisions of section 90(2)(b) of the Land Act;

(iii) Whether the interest charged is more than that agreed in the letter of offer;

(iv) Whether the securities registered before the year 2012 can be extended to secure loans advanced after the year 2012; and

(v) If the applicants are entitled to an interim injunction pending the hearing of this case.

26. It is clear from the pleadings on record and the submissions of counsel that the 1st applicant and the 1st respondent have had a rosy customer - banker relationship, respectively, that runs all the way back to the year 2004. The situation came to a head when the latter wrote to the 1st applicant demanding, *interalia*, outstanding amounts that the 1st respondent had advanced to it and expressing its intention to

repossess all assets held as security. That is when the 4th applicant sprung into action by consulting his Advocate who filed the present application.

27. A perusal of the letter of offer dated 15th December, 2011, marked as TSS 6 to the 4th applicant's affidavit advanced a facility USD 4.5 Million to the 1st applicant for Pre-Export Finance that was to be utilized to provide funds for purchases of tea from the auction against confirmed orders from the Borrower's clients in Egypt and Pakistan. The interest was pegged at the rate of 5.5% per annum. The facility was to be secured by existing securities of a First Legal Charge of USD 2 Million, a Second Charge of USD 500,000/-, a Second Further Charge of USD 2 Million, over the properties listed in the letter of offer registered in the names of the 2nd, 3rd and 4th applicants. It was a condition of the Second Further charge that the 4th applicant would issue a personal guarantee for USD 4.5 Million. The letter of offer was duly signed on 10th January, 2012, by two Directors of the 1st applicant. The letter of offer was not executed by the 2nd, 3rd and 4th applicants who were mentioned as Chargors in the said document.

28. Another letter of offer attached to the 4th applicant's affidavit and marked as TSS7 is dated 3rd December, 2012. It was for a facility of USD 4.5 Million for Pre-Export Finance which facility was to be utilized for the 1st applicant's working capital requirements. The interest was pegged at the rate of 6.5% per annum. The letter of offer was duly signed on 12th March, 2013, by two Directors of the 1st applicant. The facility was to be secured by existing securities of a First Legal Charge of USD 2 Million, a Second Charge of USD 500,000/-, a Second Further Charge of USD 2 Million and a new security in the form of a personal guarantee and indemnity for USD 4.5 Million to be issued by the 4th applicant, over the properties listed in the letter of offer registered in the names of the 2nd, 3rd and 4th applicants. The 2nd and 3rd applicants signed the form of acceptance as Chargors to the said facility.

29. Annexture TSS8 attached to the 4th applicant's affidavit is another letter of offer dated 28th April, 2014. It was for a facility of USD 7 Million for Pre -Export Finance/Advance which facility was to be utilized for the 1st applicant's working capital requirements. The interest was pegged at the rate of 7% per annum. The letter of offer was duly signed on 8th January, 2015, by two Directors of the 1st applicant. The facility was to be secured by existing securities of a First Legal Charge of USD 2 Million, a Further Charge of USD 500,000/-, a Second Further Charge of USD 2 Million and new securities in the form of a Third Further Charge for USD 2.5 Million, and a personal guarantee and indemnity for USD 7 Million to be issued by the 4th applicant, over the properties listed in the letter of offer registered in the names of the 2nd, 3rd and 4th applicants. The 2nd, 3rd and 4th applicants signed the form of acceptance as Chargors to the said facility.

30. In paragraph 37, 38 and 40 of his affidavit, the 1st deponent states that they were unable to trace the Charge or the 2nd Further Charge from the Land's office and a search conducted at the Companies Registry showed that the 2nd applicant's 2nd Further charge of the year 2010 over the property plot No. 44 had not even been registered at the Companies registry rendering it a nullity.

31. I am satisfied that based on an analysis of the letters of offer highlighted herein before, the 1st applicant was advanced money for its business transactions by the 1st respondent. The facility dated 3rd December, 2012 was duly executed by two (2) Directors of the 1st applicant and the 2nd and 3rd applicants as Chargors. The facility dated 28th April, 2014, was duly executed by two (2) Directors of the 1st applicant and the 2nd, 3rd and 4th applicants as Chargors. Although the facility dated 15th December, 2011 was executed by two (2) Directors of the applicant, no Chargors executed the said document.

32. The 2nd deponent, Mohammed Tahir Sheikh Said, avers in paragraphs 5 and 6 of his affidavit dated 3rd June, 2016, that prior to the year 2011, properties belonging to the 3rd applicant were charged for a pre-existing facility in favour of the 1st applicant as set out in the plaint and application. He stated further that he had not been notified by the 1st respondent nor met with them at any particular time for any deliberations on the 2nd, 3rd and 4th applicants assets being used as security for any additional facilities purportedly extended to the 1st applicant. He states in paragraph 7 of the said affidavit that he was shocked to be informed by the 1st respondent that their assets were used to secure three different facilities

purportedly extended to the 1st applicant pursuant to letters of offer of the years 2011, 2012 and 2014. In paragraph 8 thereof, he avers that in his capacity as a Director to the 3rd applicant, he was at no point called for a meeting or attended one to deliberate and pass any corporate resolution authorizing the assets of the Company to be used as security for any additional facility extended to the 1st applicant by the 1st respondent. He adds that he has never been shown any of the letters of offer until recently when the 4th applicant called them and showed the same to them. In paragraph 9 of his affidavit, he states that he has never sat at a general meeting or at a Board meeting to authorize the affixing of the 3rd applicant's seal to any new facilitates or guarantees or to approve their securities to be used for the 1st applicant after the year 2011.

33. It is my finding that legally binding contracts were entered into between the 1st applicant and the 1st respondent in respect of the facilities advanced on 3rd December, 2012 and 28th April, 2014. The Land Act, Cap 280 came into force on 2nd May, 2012, it therefore follows that the Charges for the facilities for 3rd December, 2012 and 28th April, 2014 were governed by the provisions of section 80 of the said Act. The issue of whether the 2nd and 3rd applicants gave their consent to charge their properties in properly convened Board meetings and if securities were duly registered or not, can only be conclusively determined by each party being given an opportunity to produce documents in their custody. The bank statements availed by the 4th applicant show without a doubt that funds were advanced to the 1st applicant by the 1st respondent, which were utilized.

34. The 4th applicant in his affidavit states that there was collusion between the 1st and 2nd respondents as a result of which money was credited into the bank account of the 1st applicant by the 1st respondent and then immediately diverted to the account of the 2nd respondent. Although this court noted some cash transfers from the 1st applicant's bank account to that of the 2nd respondent from the bank statement marked as TSS9, this court considers the documentation availed before it as being inadequate for this court to form an opinion on whether the said transfers were as a result of fraudulent activities or legitimate business transaction between the two parties. If indeed there was fraud that was perpetrated by the two, this court was not informed that the said matter was reported to Banking Fraud Investigation Unit for investigations.

35. **The 4th applicant i**n paragraph 35 of his affidavit deposes that on 19th April, 2016, the 1st respondent instructed Tysons Valuers to prepare valuation reports of the securities and received a report on 29th April, 2016 for 6 of the secured properties and he is now apprehensive that the 1st respondent is preparing to sell the said properties without following due process to cover up unlawful advances and the acts they have committed. The 4th applicant alleges not to have received the statutory 3 months notice, the onus is upon the 1st respondent to prove service of a statutory notice and that it complied with the provisions of section 90(2)(b) of the Land Act. Section 90 of the Land Act provides that:-

the Land Act. Section 90 of the Land Act provides that:-

> "(1) ***If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.***
>
> (2) ***The notice required by subsection (1) shall adequately inform the recipient of the following matters-***
>
> > ***a. The nature and extent of the default by the chargor;***
> >
> > ***b. If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three (3) months, by the end of which the payment in default must have been completed. (emphasis mine).***

c. .....

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

e. The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies."

36. Section 90(3) provides that:-

"***If the chargor does not comply within two (2) months after the date of service of the notices under subsection (1), the chargee may:-***

a. sue the chargor for any money due under the charge,

b. appoint a receiver of the income of the charged land,

c. lease the charged land, or if the charge is of a lease, sublease the land,

d. enter into possession of the charged land; or

e. Sell the charged land".

37. In the case of ***Nyangilo Ochieng & Another vs Kenya Commercial Bank*** *[1996] eKLR*, the Court of Appeal stated as follows :-

"It is for the chargee to make sure that there is compliance with the requirements of s.74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent".

38. In the case of Samuel K. Mungai v Housing Finance Company of Kenya Ltd HCCC No. 1678 of 2001 and **Simiyu vs Housing Finance Company of Kenya Ltd HCCC No. 937 of 2001**, **Ringera J** (as he then was), in the Samuel K. Mungai case had the following to say with reference to the Registered Land Act:-

"I think the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages: it is a fundamental breach of the statutes which delegates from the chargor's equity of redemption. Without service of a valid statutory notice, the power of sale does not crystallise and any subsequent service of the notification of sale and the actual auction are merely acts pursuant to a pretended power of sale. As such they are a nullity in law."

The finding in the **Simiyu** case by **Ringera J** was very similar in terms; The Judge stated thus:-

"Although any person aggrieved by any irregular exercise of the power to sell mortgaged property shall have a remedy in damages against the person exercising the power (section 77 (3) of RLA) the irregularities in the exercise of the power of sale which are remediable in damages do not comprehend failure to serve an adequate statutory notice……Without compliance with statutory commands, there can be no valid exercise of the power of sale and accordingly it cannot be said that the mortgagor's capacity of redemption is extinguished in any sale conducted in breach thereof. In view of the above considerations the Plaintiff had made out a prima facie case with a probability of success that the sale would be declared null and void."

39. It is my finding that in the absence of proof on the part of the 1st respondent that it issued the 3 month statutory notice to the 1st applicant, its right to exercise its power of sale was curtailed by non-

compliance. The 1st respondent failed to discharge the onus to prove service of the said notices on the 1st applicant.

40. Although the demand letters of 15th June, 2015 and that of 4th August, 2015 gave the interest of the outstanding amount at a penal rate of 11%, determination of applicable interest in view of default is only determinable if the court has had the advantage of reading the letters of offer alongside the standard terms and conditions applicable to all banking facilities signed between the 1st applicant and the 1st respondent.

41. On whether the applicants have satisfied the conditions for grant of an interim injunction, I note that the court's power to grant an interlocutory injunction is a discretionary one and must be based on the law and evidence. An applicant seeking such an interlocutory injunction, is expected to satisfy the criteria set out in the case of **Giella vs Cassman Brown Company Limited** (supra) where it was held that:-

> ***"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

42. In the case of **National Bank of Kenya Ltd vs Shimmers Plaza Ltd [2009] eKLR**, the Court of Appeal stated-

> ***"The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law, we venture to say that where the Court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice then the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law."***

43. The circumstances surrounding this case go further than the issue of issuance of a statutory notice under the Land Act, there are additional issues of the registration and validity of securities and the interest rate applicable to the facilities advanced to the 1st applicant. I am satisfied that the applicants have made out a case for the grant of an interim injunction on a balance of convenience. I therefore make the following orders:-

> **(i)** That pending the hearing and determination of this suit the 1st defendant their servants and/or agents are restrained by way of an injunction from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the 2nd, 3rd, 4th plaintiffs'/applicants' assets set out below or alienating, transferring, charging, leasing or in any manner whatsoever dealing with any other securities held by the defendants in respect to the 1st plaintiff's accounts:-
>
> (a) Plot No. 44 Section XXI Mombasa Island, Registered in the names of Tahir Sheikh Said Transporters Limited;
>
> (b) Plot No. 147 Section XXI Mombasa Island, name of Tahir Sheikh Said Investments Limited;
>
> (c) Plot No. 1654 Section XXI Mombasa Island registered in under the name of Tahir Sheikh Said Investments Limited;
>
> (d) Plot No. 527 and 526 Section XXI Mombasa Island, Registered under the name (Sic) Tahir Sheikh Said Investments Limited;

(e) Plot No. 5866 Section XXI Mombasa Island, registered under the name of Tahir Sheikh Said Investments Ltd; and

(f) Title No. Mombasa/Block XXVI/381, registered under the name of Tahir Sheikh Said Investments Ltd;

(ii) The above order is granted on the condition that the 2nd, 3rd and 4th applicants shall deposit security in the sum of USD 2.5 Million in an interest bearing account opened in the joint names of the law firms on record for the applicants and the 1st respondent within ninety (90) days from today's date; and

(iii) The Plaintiffs/applicants are awarded costs of the Notice of Motion dated 6th June, 2016.

It is so ordered.

DELIVERED, DATED and **SIGNED** in open court at **MOMBASA** on this 21st day of July, 2016

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Balala for the Plaintiffs/Applicants

No appearance for the 1st Defendant/1st Respondent

Mrs. Mwangi for the 2nd Defendant/2ndRespondent

Ms. Rose Echor Court Assistant