



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CIVIL SUIT NO. 7 OF 2016

- 1. ACQUINAS WASIKE
- 2. MUSILI MUTOONI NZAMBU
- 3. LANTECH (AFRICA) LIMITED.....PLAINTIFFS

Versus

- 1. SIDIAN BANK LIMITED (FORMERLY K-REP BANK)
- 2. REGENT AUCTIONEERS.....DEFENDANTS

RULING

The plaintiffs named herein above filed a notice of motion dated 7th September, 2016 under certificate of urgency pursuant to Section 1A, 1B, 3A, Order 40 Rule 1(a), (2), (4), (8) of the Civil Procedure Act and Rules 2010 and all enabling provisions seeking the following orders:

(1) THAT this application be certified urgent, heard exparte with service being dispensed with in the first instance.

(2) THAT a temporary order of injunction do issue restraining the Defendants/Respondents either by themselves, their officers, servants and/or agents or otherwise howsoever from advertising, selling and/or disposing by public auction or private treaty the Plaintiffs’ properties described as title Nos.
KAJIADO/LOODARIK/1147,KAJIADO/LOODARIK/1148,KAJIADO/LOODARIK/1578,KAJIADO/OLCHORO-ONYORE/6111,KAJIADO/OLCHORO-ONYORE/6112,KAJIADO/OLCHORO-ONYORE/8663, KAJIADO/OLCHORO-ONYORE/8664 and L.R. No. 28134 (BLOCK 4) KAJIADO COUNTY (“the suit properties”) pending the hearing and determination of this application interpartes.

(3) THAT a temporary order of injunction do issue restraining the Defendants/Respondents either by themselves, their officers, servants and/or agents or otherwise howsoever from advertising, selling and/or disposing by public auction or private treaty the Plaintiffs’ properties described as title Nos.
KAJIADO/LOODARIK/1147,KAJIADO/LOODARIK/1148,KAJIADO/LOODARI/1578,KAJIADO/OLCHORO-ONYORE/6111,KAJIADO/OLCHORO-ONYORE/6112,KAJIADO/OLCHORO-ONYORE/8663, KAJIADO/OLCHORO-ONYORE/8664 and L.R. No. 28134 (BLOCK 4) KAJIADO COUNTY (“the suit properties”) pending the hearing and determination of this suit.

(4) **THAT** this application be heard inter partes on such date and at such time as this Honourable Court may direct.

(5) **THAT** costs of this application be provided for.

The certificate of urgency was heard and determined on 20/9/2016 before the Hon. Ogola J who directed that the application be served and heard inter partes before this court on 27/9/2016. Pursuant to the orders so issued prayer No. 1 and 2 of the notice of motion are spent.

The matter is for consideration whether prayer No. 3 is grantable in favour of the plaintiffs as against the defendants/respondents. The plaintiffs' application is supported by the affidavit sworn on 7/9/2016 by Acquinas Wasike and the grounds on the face of the notice of motion. The grounds in support of the application were premised in the following terms:

- 1. That no proper and or valid demand notice has been given to the plaintiffs/applicants in accordance with the law and in light of the charge instrument.**
- 2. That the statutory power of sale has NOT crystallized as the plaintiffs have NOT been validly served with relevant notices and the mandatory statutory notice required under Section 90 (1) and (2) (b) of the Land Act, 2012 Laws of Kenya**
- 3. That the defendants/respondents have illegally issued a notification of sale yet the applicants were and have been in negotiations with the first defendant and have already paid and continue to pay the necessary installments towards settling the loan amount and are not in any way in arrears.**
- 4. That the plaintiffs/applicants are in grave danger since the notification of sale dated 28th July, 2016 issued by the second defendant /respondent is due for expiry anytime now with a further threat that the suit properties will be advertised on the 13th September, 2016 for sale by public auction or private treaty at the plaintiffs' risk including the risk as to costs and consequences flowing from the advertisement and unless restrained by this honourable court, the respondents intend to make good their threat of advertising and selling the suit properties at a pittance to the applicants' detriment.**
- 5. That the applicants have been in negotiation with the first defendant and have been willing to settle the loan amount in the agreed installments BUT the defendants have now unfairly recalled the entire colossal loan amount and are now bent unreasonably to sell by public auction or private treaty the suit properties.**
- 6. That the provisions of Section 104 (2) of the Land Act provides for cancelling, varying, suspending, or postponing any scheduled sale or extending the period of time for compliance by the charger or substitution of a different remedy other than outright sale.**
- 7. That the instant application is brought *bonafides* and out of abundant caution and is made in the best interests of justice and fairness.**
- 8. That the defendants/respondents acts unless restrained by this honourable court, the plaintiffs/applicants will be jeopardized and risk suffering irreparable loss and damage as the intended sale is intended to defeat equitable right of redemption of the suit properties.**
- 9. That it is now desirable, fair and just that this honourable court should intervene.**
- 10. That such other/of further grounds to be adduced at hearing thereof.**

The case for the plaintiffs and defendants can be deduced from the affidavits filed together with annexures herein in which reference would be made from time to time at a point of determining the real

issue(s) as between both parties.

The Plaintiffs Case:

It is deponed in the affidavit by one Aquinas Wasike that on or about October 2014 an application for a loan facility for the sum of Ksh.170,000,000 was made to the 1st defendant bank to facilitate their businesses venture including the purchase of 49% stake in RO Planet. The said facility was to be secured by a charge over the properties described as title Nos. **KAJIADO/LOODARIK/1147, KAJIADO/LOODARIK/1148, KAJIADO/LOODARIK/1578, KAJIADO/OLCHORO-ONYORE/6111, KAJIADO/OLCHORO-ONYORE/6112, KAJIADO/OLCHORO-ONYORE/8663, KAJIAD/OLCHORO-ONYORE/8664**. The 1st defendant further had a debenture created over the assets of the third plaintiff including a charge on the property LR No. 28134 (Block 4) Kajiado County.

The plaintiffs further deponed that in accordance with the loan offer and acceptance agreement, the loan facility was repayable within a period of fifty four months at a consecutive monthly installments of Ksh.4,684,576.19 after the expiry of the moratorium period by the albeit to third plaintiff's account, who was in fact the borrower while the 1st and 2nd plaintiffs guaranteed the loan.

It is further averred by the plaintiffs that they have continued to meet their obligations of repayments despite experiencing some challenges culminating in certain instances late payments. That both parties entered into a renegotiations mutually acceptable to reschedule the installments payments but unfortunately the 1st defendant has taken a step to recall the entire loan amount. The plaintiffs took issue with the recalling of the entire loan amount when efforts were being made to resume normalcy in their payments. As a commitment to that obligation, a monthly installment of Ksh.5,285,081.14 was remitted to the 1st defendant.

It is further the plaintiff's averment that in the mix of all these circumstances, the 1st defendant through the 2nd defendant has issued a notification of sale dated 28/7/2016 to advertise and dispose off by way of public auction all the charged properties to secure the loan. The plaintiff further complains that the issue of notification of sale was premature and that the defendants have not deemed it fit to serve the 2nd plaintiff who is a joint owner of the charged land.

In view of the averments therefore, the power of sale was not exercisable by the 1st defendant for failure to serve the necessary statutory notices to the 2nd plaintiff.

The Defendant's Case:

The defendants reply to the plaintiffs case was primarily based on the replying affidavit sworn by Arnold Kwesiga; legal counsel of the 1st defendant. The 1st defendant gave a chronology of events and terms of engagement culminating into signing of loan agreement in favour of the plaintiffs for Ksh.170,000,000.

As a result of acceptance of the offer the plaintiffs charged various properties described as title Nos. **KAJIADO/LOODARIK/1147, KAJIADO/LOODARIK/1148, KAJIADO/LOODARIK/1578, KAJIADO/OLCHORO-ONYORE/6111, KAJIAD/OLCHORO-ONYORE/6112, KAJIADO/OLCHORO-ONYORE/8663, KAJIAD/OLCHORO ONYORE/8664** to secure the loan facilities. The defendant went on to state that no sooner the 1st defendant disbursed partial amount of the loan being Ksh.88,800,000 to the plaintiffs. They defaulted in repayments as agreed in the instrument of charge.

It is deponed under paragraphs 18, 19 and 20 by the 1st defendant a statutory notice dated 10/3/2016 to make good the default was served upon the plaintiffs, but continued to ignore the notice to liquidate the loan outstanding arrears. That the 1st defendant in compliance with the provisions of Section 96 (2) of the Land Act opted to exercise statutory power of sale to realize the debt from the securities. The deponent averred that all procedure requirements prior to and after issuance of exercising the statutory power of

sale were followed to the latter as per law established.

In support of the averments on this issue, the 1st defendant made reference to annexures on correspondence exchanged between both parties in these respect transactions. The 1st defendant contended therefore that the exercise of the statutory power of sale is not premature nor void as contemplated by the plaintiffs.

At the hearing of the application, Mr. Masika for the plaintiffs submitted that the application as crafted together with affidavit evidence meets the threshold set out in the case of **Giella v Cassman Brown & Co. Ltd [1973 EA 358]** on grant of interlocutory relief. Mr. Masika contended that the 1st defendant was under a duty to serve a demand notice of the outstanding arrears to the plaintiffs before a statutory notice will crystallize. Mr. Masika further submitted that the reading of Clause (1) of the Charge Instrument stipulates on the date of payment of monies due and owed. That in the course of the transactions, Mr. Masika argued that a negotiation was initiated to convert the loan and a rescheduling of repayment period from 36 months to 54 months.

Mr. Masika made reference to the provisions of Section 56 (2) of the Land Act 2012, Section 90 of the Land Registration Act. He was of the view that the 1st defendant obligation was to serve the demand notice before exercising the statutory power of sale. Mr. Masika further contended that the impugned statutory notice was not served upon the 2nd plaintiff as a co-owner of the charged properties.

Mr. Masika further took issue with the amount in the statutory notice which is not in consonant with the amount in the notification of sale by the 2nd defendant. The contestation according to Mr. Masika being the recall of the entire loan in the notification of sale of Ksh.88,800,000 while the first requirement could have been on arrears due and owing. He alluded to the compliance by the plaintiffs in liquidating the arrears by the payment of Ksh. 5,685,000 in September, 2014.

Mr. Masika further contended that the defendants are in breach of Section 56 (1) of the Land Act, Section 90, 96 and 97 of the Land Registration Act on both notification and also requirements under the duty of care of a chargee to the chargor before remedy to dispose off the properties secured in advancing the loan can be realized to settle the debt.

Mr. Masika counsel for the plaintiffs in a nutshell submitted that the three pronged test that courts in Kenya apply in considering applications for interlocutory injunctions has been demonstrated from the facts of this case. Counsel placed reliance on the threshold test in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

Defendant's Submissions:

Mr. Muchemi counsel for the defendants submitted that the plaintiffs have failed to establish a prima facie case with a probability of success at the hearing to warrant interlocutory relief of injunction. In support of his submissions Mr. Muchemi invited the court to familiarize itself with the averments in the replying and further affidavits regarding the contract loan. Mr. Muchemi contended that the plaintiffs had admitted default as per the provisions of Clause (1) of the Charge Instrument. In his submissions, Mr. Muchemi stated that the demand notice was not a requirement given the provisions of Clause (1) of the Charge Agreement which binds the parties.

Learned counsel contended that the 1st defendant demanded Ksh.7,784,000. The 1st defendant according to counsel complied with Section 56 of the Land Act, Section 90 (1), 96 and 97 of the Land Registration Act. Mr. Muchemi further submitted that the 1st defendant exercised statutory power of sale. There was a three months notice issued and served upon the plaintiffs. That was followed with a notification of sale by the 2nd defendant on instructions issued by the 1st defendant.

Mr. Muchemi cited the case of **Albert Mario Cordeiro & Another v Vishram Shamji [2015] eKLR** in which the learned judge espoused the compliance checklist in exercising the statutory power of sale. In

reliance of the principles in the cited authority, counsel submitted that the defendants complied with all the legal provisions under Section 96 (2) of the Land Act and Section 15 of the Auctioneer Rules 1997 as amended in 2009. In that regard counsel submitted that the plaintiffs have not demonstrated any breach to warrant an interim order of stay. Learned counsel argued further that the defendants cannot be restrained from realizing the securities offered since the amount owed is due and outstanding. He placed reliance on the case of ***Downhill Limited v Harith Ali El-Busaidy & City Finance Bank Ltd Civil Appeal No. 254 of 1999***. It was learned counsel's contention that the plaintiffs have not brought themselves within the legal ambit to be granted interlocutory injunctions as they have defaulted in loan repayment.

The Law and Case Commentaries:

The interpretation and application of the following provisions under the Land Act 2012, Land Registration Act 2012 and the Auctioneers Act 1997 as amended in 2009 are pertinent in resolving the issues at play in this application.

Section 90 (1) of the Land Act 2012:

“If a chargor is in default of any obligations, fails to pay interest or any other periodic payment or any part due under any charge or in the performance or observation of any covenant, express, or complied 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 months by the end of which the payment in default must have been completed.

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

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

Section 96 (1):

“Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under Section 90 (1) a chargee may exercise the power to sell the charged land.

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

(3) A copy of the notice to sell served in accordance with subsection 2 shall be served on:-

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- (b) The holder of the land on which the lease has been granted, if the charged land is a lease.**
 - (f) Any person who is a co-owner with the chargor.**
 - (h) Any guarantor of the money advanced under the charge.....”**

Section 97 (1):

“A chargee who exercises a power to sell the charged land including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under alieu to obtain the best price reasonably obtainable at the time of sale.”

(2) A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer.

Section 56 (2) of the Land Registration Act 2012

“A date for the repayment of the money secured by a charge may be specified in the charge instrument and if no such date is specified or repayment is not demanded by the charge on the date specified, the money shall be deemed to be repayable three months after the service of a demand, a written, by the chargee.”

Section 65 (2):

“A date for the repayment of the money secured by a charge may be specified in the charge instrument and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.”

Section 74 (1):

“If default is made in payment of the principle sum or of any interest or any other periodical payment or of any part thereof or in the performance or observance of any agreement, expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the amount owing or to perform and observe the agreement as the case may be.

(2) If the chargor does not comply within three months of the date of service, with a notice served on him under subsection (1) the chargee may.....

(b) Sell the charged property.”

Auctioneers Rules, 1997 rule 15

“Immovable property:

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property-

(a) Record the court warrant or letter of instruction in the register;

(b) Prepare a notification of sale in the form prescribed in Sale Form 4 set out in the second schedule indicating the value of each property to be sold;”

The question of grant of interlocutory injunctions has been widely litigated in our courts. The celebrated case of *Giella v Cassman Brown & Co. Limited [1973] EA* discussed and laid the foundation on the guiding principles for grant of such applications. The principles elucidated in the case are:

- (1) The applicant must establish a prima facie case with a probability of success at the main trial.**
- (2) Secondly the applicant must demonstrate irreparable harm and compensatory damages cannot be an adequate remedy for the loss or harm suffered.**
- (3) Thirdly the applicant has to show that the balance of convenience tilts in his favour should the court be in doubt as regards the test under the first and second requirements as a condition to grant interlocutory injunctions.**

This jurisprudence on injunctions grounded on the three tier pronged test under *Giella v Cassman* has dominated our courts for a long time. There have been changes to the constitution and the law since the decision in 1973 by the Court of Appeal in this authority. The court of 2016 has new tools to utilize in administration of justice and grant of injunctions. There is in place the Republic Constitution of 2010 and new laws on substantive justice and fair administration action. Article 159 (2) (d) in administering justice without undue right to technicalities and Section 1A, 1B of the Civil Procedure Act on overriding objective and the courts duty to further the objection for the just and administration of justice.

Substantially following the above provisions, my brother **Mabeya J** in a persuasive case of *Jan N. Elsen v Herman Philipps Steya also known as Hermannus Philipps Steyn & 2 Others [2012] eKLR* said as follows:

“I believe in dealing with an application for interlocutory injunction, the court is not necessary bound to the three principles set out in the *Giella v Cassman case*. The court may look at the circumstances of the case generally and the overriding objective of the law.”

In *Suleiman v Amboseli Resort Ltd [2004] eKLR 589 Ojwang Ag. J as he then was (at pg 607)* delivered himself thus:

“Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago. In *Giella v Cassman Brown in 1973* case in shore and no new element may be added to that position, I am not with respect in agreement with counsel in that point for the law as always kept growing to greater levels of reference as it expands to cover new situations not exactly foreseen before.”

Justice Holfman in the English Case of *Films Rover International* made this point regarding the grant of injunctive relief *1986 3ALL ER at pg 780 – 781*:

“A fundamental principle of – that the court should take whichever course appears to carry the lower risk of injustice if it should turn out t have been wrong traditionally, on the basis of the well accepted principles set out by the court of appeal in *Giella v Cassman Brown (Supra)* the court has to consider the following questions before granting injunctive relief:

- (1) Is there a prima facie case?**
- (2) Does the applicant stand to suffer irreparable harm?**
- (3) On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and move intrinsic test which is now**

in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt for the lower rather than the higher risk of injustice.”

The character of a prima facie case has been defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR*. The court stated as follows:

“A prima facie case is a case in which on the material presented to the court a tribunal directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call an explanation or rebuttal from the latter. A prima facie case is more than an arguable case, it is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

Lord Diplock in the case of *American Cyanamid Co. v Ethicon Ltd [1974] FSR 312* had thus to said on interlocutory applications:

“My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff legal right is made, upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken on a time when ex hypothesis, the existence of the right or the violation of it or both is uncertain and will remain uncertain until final judgement is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before the uncertainty could be resolved. That the practice arose of granting him relief by way of interlocutory injunction.”

In *Kenleb Cods v New Gatitu Services Station [1990] KLR 557* the court held on the issues thus:

“To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application, but must also show he has a right legal or equitable which requires protection by injunction.”

The learned authors of *Blackstones Civil Practice [2004] at pg 3719* pointed out regarding the principles on grant of injunctions in American Cyanamid Case as follows:

“The court must also be careful to apply the overriding objective and to grant an injunction only if it is just and convenient according to them, the underlying purpose of the guidelines is to enable the court to make an order that will do justice between the parties whichever way the decision goes at the trial, while interfering with the parties freedom of action to the minimum extent necessary.”

The rights and duties of chargee in exercising of his power of sale are clearly spelt out in the Land Act and Land Registration Act 2012. I also find the summary of the rights and duties duly summarized in a persuasive authority of *Dreckett v Rapid Vulcanizing Ltd [1983] 20 JLR 21* in which **Wolfe J** overridden the dictation of **Kekwich J** in *Colson v Williams LJ [1889] Vol 58, 539 at pg 540* as follows:

“Where a mortgagee under ordinary circumstances thinks and, as long as he is not prohibited by the terms of his contract, he is the sole judge of what is necessary to realize his security, he can do so without hesitations if there is a notice to be given he must give it; if some conditions are to be observed they must be observed, but as regards the time when he shall realize his security he is the sole arbiter and no one can interfere with him. He may even do it from bad motive.....

The court has nothing to do with the motives of a mortgagee, if he, from whatever motive, deems it right to realize his security, although he may be guilty of spite, although he may even look forward with complaisance or satisfaction to the ruin of his debtor, still, if he chooses to exercise his power, he can do so, but whether he acts from good or bad motive, whether he acts merely as a man of business deserving to realize his security, or whether he acts from

some other or any of the reasons which may influence the human mind, he is equally bound to remember that there is an equity of redemption behind him, and that being so he cannot do that which would otherwise be possible, and in many circumstances easy. A mortgagee to whom is owed a sum of money on security of land cannot offer the land to a purchaser merely for that which could cover his principle, interests and costs independently of the value of the property. If there is a margin which can be reasonable obtained he must remember that there is the mortgagor or possibly a second mortgage claiming through him or possibly other persons having charges who are entitled to be considered. But so long as he exercises the power fairly in that view, so long as he does which he fairly can do to realize a fair price, he is in my judgement entirely free.”

Analysis and Resolution:

The above statutory provisions and the principles of law discussed herein are to be applied in determining this application. The question to be considered is whether the plaintiffs have established a case under the test of *Giella v Cassman Brown* principles or to add a fourth that the case falls under the overriding objective for grant of interlocutory injunction.

In this regard, I have heard the rival submissions by both counsels. The affidavit evidence and annexures relied upon by the parties to outline their respective position has been of considerable help in shifting the ‘wheat’ from chaff. The plaintiffs’ counsel submitted on various issues revolving around the charge instrument and statutory provisions to urge this court to find a prima facie case has been made out.

The contestation was under Clause (1) of the charge instrument which contains broad issues on rights and obligations of the chargor and chargee. Mr. Masika identified issues to do with the framing of Clause (1) setting time as of essence for the chargor to make payments to the defendant bank. Learned counsel identified the provision as to time that the covenant was for the chargor to pay on the 7th day after the date of this charge the principal monies and interests secured by the charge.

He submitted that the notice under Section 90 (1) (2) of the Land Act of 2012 dated 10/3/2016 demanding settlement of liabilities due and owing is faulty. He further contended that the notice relied upon by the 1st defendant is unlawful, void, inefficient to trigger the statutory power of sale under Section 90 (1) (2) of the Land Act. Learned counsel further contended that prior to the statutory notice of 10/3/2016 the 1st defendant is in breach of Section 90 (1) for lack of issuance of a default demand for 1 month. It was further his contention that the statutory power of sale had not crystallized under Section 90 (1) as read together with Section 96 (1) of the Land Act.

Learned counsel further argued that the parties were negotiating and one of the agreement reached was rescheduling the repayment period to 54 months. Counsel further contended that the penalty applied under Clause (1) of the charge instrument was to trigger the statutory power of sale was premature. That according to counsel raises a serious question to be tried. On his part Mr. Muchemi vehemently opposed the line of submissions by counsel for the plaintiffs Mr. Masika. He mentioned that the plaintiffs are in breach of the loan agreement. The obligations are set out in Clause (1) and the rest of the charge instrument on rights and obligations of each party. Mr. Muchemi pointed out that the plaintiffs are in default and the statutory power of sale has arisen.

The 1st defendant has opted to exercise statutory power of sale to liquidate the debt. The requisite notice under Section 90 (1) and (2) was served upon the plaintiffs. He further submitted a notice to sell under Section 96 (2) of the Land Act 2012 was also duly served as evidenced by the affidavit of service and copy of registered post receipt. Under Section 90 (1) the right to sell the mortgaged properties of the plaintiffs by the charge depended on two conditions:

(a)The power of sale must have arisen in the sense that as provided for in the mortgage and the debt was due and outstanding. If the loan secured by the mortgage is payable by way of monthly or quarterly installments, the power of sale arises as soon as the installment is due and unpaid.

(b)The power of sale must have become exercisable under Section 96 (1) of the Act.

In this case, the defendant bank is mandated by statute under Section 90 (1) to comply with conditions precedent as to; notice requiring payment of the mortgage money has been served on the chargors; the chargors have defaulted in payment of the money three months after such service or some interests is in arrears and remain unpaid for two months after becoming due and outstanding.

From the record the defendant bank made reference to the notice dated 10/3/2016 as evidence of compliance with the provisions of Section 90 (1) (2) of the Land Act. Mr. Masika for the plaintiffs contended that the defendant bank was under a legal duty to issue a demand notice on writing to the plaintiffs. Learned counsel submitted that the defendant bank was in breach of Clause (1) of the mortgage deed as at to the specific date as stipulated under Section 56 (1) of the Land Registration Act.

On my part, I have weighed the affidavit evidence, and submissions by both counsel on the construction and interpretation of Clause (1) of the mortgage deed. My take is that the plaintiff has taken issue with the mortgage and as at the specified time on the 7th day after the charge date and the said provision of the three months period. In the arguments by Mr. Masika for the plaintiffs revolves the provisions of Section 90 (1) which provides:

“Continuance default for one month on the part of the charger. What Mr. Masika is disputing is in regard to the failure by the defendant bank to issue a notice. The plaintiffs’ requiring payment of the months due and owing.”

Mr. Muchemi for the defendant bank contended that Section 90 (1) and of the Land Act and Section 56 (1) of the Land Registration was complied with by making reference to the statutory notice of 10/3/2016.

The question I pause where notice is required to be served as it is the case provided for under Section 56 of the Land Registration Act; do the three months begin to run from the date of service of the notice; and not from expiration of the time filed by the notice for payment in observance with Section 90 (1) of the Land Act. If the plaintiffs were in default continuously for a period of one month from the period specified if the mortgage was there a demand in writing from the defendant bank to the chargor to rectify the default.

Mr. Muchemi referred to the statutory notice dated 10/3/2016 as evidence of compliance with Section 90 (1) of the Land Act. My reading of the contents of the notice makes reference to a demand issued to rectify the default of Ksh.787,784,612.19. When was that demand issued to the chargor so that completion of time can be affixed for the power of sale to be said to have arisen? This court finds no convincing answers from the rival submissions by the plaintiffs unto the defendant bank.

The way I hear Mr. Masika contending the defendant bank notice dated 10/3/2016 did not fulfill the forgoing condition of issuance of demand in writing after the month from the date of breach to rectify that default as stipulated in the agreement.

The 1st defendant has opted to exercise statutory power of sale to liquidate the debt. The requisite notice under Section 90 (1) and (2) was served upon the plaintiffs. He further submitted a notice to sell under Section 96 (2) of the Land Act 2012 was also duly served as evidenced by the affidavit of service and copy of registered post receipt.

Secondly, Mr. Masika challenged the issue of breach by the 1st defendant under the provisions of Section 97 (1) and (2) of the Land Act. In reciting the provisions learned counsel pointed out the 1st defendant was under a duty to ensure that a forced sale valuation is undertaken by a valuer. That according to learned counsel was not done by the 1st defendant. It is an issue to be tried at the trial. Mr. Muchemi for the 1st defendant did not address the issue on valuation as raised by Mr. Masika. The affidavits evidence by the 1st defendant provided no evidence of a valuation report under Section 97 of the Act.

Thirdly Mr. Masika raised a complaint about insufficiency of notice and compliance with the Auctioneer Rules the 2nd defendant with Rule 15 and 17 of the Auctioneers Rules. Learned counsel contended that the securities are advertised to be sold on 30/9/2016. The 2nd defendant has not advertised the property to invite bidders since the same is by way of public auction. He further submitted that despite the notification of sale an auctioneer is in contravention of the rules for failure to indicate the value of the properties to be sold at the auction. Mr. Muchemi response on this did not provide a rebuttal nor the replying and further affidavit by the 1st defendant dependent. That can be an issue to be investigated at the trial. The notification of sale by the auctioneer has left blank the clause on price and value of the property.

I have also considered the provisions of Clause (1) of the charge instrument. The specified period is indicated to start running after the 7th day after the date of the charge. It is not clear how that period is calculated to give effect to repayment obligation to the chargor. The affidavit evidence has not resolved the ambiguity so to say. That for one has got to be interpreted for all purposes in reference to the provisions of the statute. That is an issue which this court cannot resolve without delving into the merits and construction language of the instrument.

It is apparent from the material placed before me the plaintiffs' case has raised important factual and legal issues which in consideration requires a resolution on the merits. In my mind I take cognizance that the exercise of the chargee's power of sale is a special provision. The same law provides safeguards to protect the charged property for both the chargor and chargee.

Indeed under Section 97 (1) of the Land Registration Act a duty of care is imposed on the chargee and to act in good faith at all times.

What Section 97 provides is for the chargee to do all in good faith and fairness to take steps to obtain valuation of the chargor's property. The chargee is also under an obligation to undertake a forced sale valuation by an independent valuer. This duty by the chargee has to be complied with before exercising the right of sale. The 1st defendant has not exhibited any valuation report of each of the properties subject matter of the notification of sale. That is an issue which calls for an answer at the trial.

In a persuasive authority in the case of *Sablebrook PK v Credit Union Australia Ltd [2008] QSC 242 42* advice. In this case, the mortgagee sold property to a purchaser for \$240,000 in April 2003. The mortgagee did not seek expert valuation advice or obtain the updated valuation, and they did not have information on market trends. **Apple Garth J** stated:

“I find that its (the mortgagee's failure to obtain an updated valuation in April 2003, an updated valuation opinion from HTW or at least an estimate of current market value from local real estate agents breached it's statutory duty in circumstances in which it had no reliable information concerning the current market value of the land it proposed to sell by private treaty.”

Applying this persuasive authority to this application, the defendant bank by the time it's exercising the power of sale no latest valuation was done nor the forced valuation as provided for under Section 97 of the Land Act.

The statutory duty of care under Section 97 of the Land Act is mandatory that a charge not only has to obtain the best price reasonably obtainable at the time of sale; a chargee is obliged to ensure that a forced valuation is undertaken by a valuer before exercising the statutory power of sale. In this case, the sale is scheduled for 30/9/2016. The auctioneer in the notification inviting bids has not provided information on market or reserve price of the property. The charge has not valued the properties under Section 97 (2) of the Act. That issue needs to be ventilated further whether the chargee fulfilled his legal duty under Section 97 of the Act.

In my view, parliament should have made it mandatory that no chargor's land is sold for not less than its

market value if it is ascertainable either in a public auction or private treaty. The law therefore imposes a greater duty of care on chargee when they exercise their power of sale. If a chargee adopts a process that ensures the manner in which the power of sale as exercised is unlawful, then this court has a duty to prevent the sale from proceeding.

A chargee who abuses his power of sale by exercising discretion to the mortgaged property at an undertaken and without taking precaution by insisting on a valuation report should be restrained.

Mr. Masika submitted and urged this court to find that the defendant bank power of sale had not crystallized for failure to serve notice to the co-owner of the properties charged to secure the loan in contravention of Section 96 (2) (3) of the Land Act 2012. Mr. Muchemi for the defendant bank contended that service upon the plaintiffs was through registered post.

On consideration of the dispute on service, I am of the view that though a further affidavit annexes certificate of posting, it is not clear which from the certificate the date of posting and receipt of the notice by the plaintiffs. The question of service is a condition precedent to be fulfilled by the chargee before enforcement of the covenant to repay. This court was unable to ascertain the exact dates of posting from the attached certificates. Since that issue due to ineligibility was not resolved by the rival affidavit evidence, it has to be determined at the main hearing whether service by way of certificate of posting was proper in the circumstances.

DECISION

In all the circumstances of this and following the legal principles in *Giella v Cassman Brown (Supra)*, *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (Supra)* and being convinced that serious triable issues have arisen under Section 56 (2), (3) of the Land Registration Act, 2012, Section 97 (1), (2) and Section 96 (3) (b), (f) and (h) of the Land Act, 2012. I am of the view that distilling the issues raised, damages would not be an adequate remedy for the plaintiffs for the very reason that exercise of the power of sale prior to and after that power has arisen is regulated by statute.

At this stage the concern of the court is to assess whether granting or withholding interlocutory injunction is more likely to produce a just result. That is more so taking into account the overriding objective in adjudication of disputes for the reasons discussed earlier in my ruling.

I am therefore satisfied that the plaintiff has made out a prima facie case to warrant grant of interlocutory injunction. Accordingly, I grant the same in the following terms:

- 1. That the application for interim temporary injunctions on a notice of motion dated 7/9/2016 is hereby allowed.**
- 2. That the sale of properties of the chargor scheduled for the 30/9/2016 is hereby stopped.**
- 3. The parties do set the matter for hearing on a priority basis.**
- 4. Costs of this application to abide the outcome of the main application.**

It is so ordered.

Dated, delivered in open court at Kajiado on 29th day of September, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Masika for the Plaintiff present

Mr. Itaya for Muchemi present

Mateli Court Assistant