



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT AND LAND NO.157 OF 2013**

**BHALVINDER PAL SINGH S/O SURJI SINGH.....1ST PLAINTIFF/APPLICANT**

**COUNTY MOTORS LTD.....2ND PLAINTIFF/APPLICANT**

**VERSUS**

**EQUITY BANK.....RESPONDENT**

**R U L I N G**

1. This ruling follows the filing of submissions on the application filed here on 18/6/2013. The application is a Notice of Motion and is dated 17/6/2013. It is brought under Section 3, 3A and 63(c) and (e) of Civil Procedure Act (Cap 21), Order 40 Rules 1 (a), 2(1), 2(2), 4 and 8 of Civil Procedure Rules.
2. It was filed contemporaneously with the suit herein and prayers 1,2 and 4 are already dealt with. At this stage therefore, the focus is on prayers (3) and (5) which are as follows:-

Prayer 3: That pending interpartes hearing and determination of this suit the honourable court be pleased to issue a temporary injunction restraining the defendant/Respondent – **EQUITY BANK LTD** its servants, agents, employees or any other person acting through or under its instructions from advertising for sale, selling, disposing off, transferring, alienating, auctioning or in any other way interfering with or dealing with 1st plaintiff's ownership or possession of land parcels **TITLE Nos. Kibos Area L.R. NO.10419/12 (I.R. 18571/76) and L.R. NO.10419/13 (I.R NO.18571/28)..**

**Prayer 5:** That the costs of this application be awarded to the plaintiff/Applicant.

3. The application is premised on the grounds that the defendant's bank has breached the contract and covenants between the parties by charging uncontractual, illegal, unconscionable and usurious rates of interests; the sums demanded by the defendant are not supported by the statements of account and analysis thereof; the defendant has instructed a firm of auctioneers who served a notification of sale on the 1st plaintiff/Applicant in respect of land parcels **KIBOS AREA 10419/12 (IR 39427) and L.R. NO.10419/13 (I.R.NO.39428)** in respect of **COUNTY MOTORS LTD**, who is a stranger to plaintiff/Applicant; that the 1st plaintiff/Applicant didn't charge his properties to **COUNTY MOTORS LTD**; the defendant has overcharged the plaintiff with bank charges and penalties; the defendant never notified the plaintiff of the changes in rates of interests as enjoined by S.84(1) of the Land Act, 2012; the plaintiffs were never served with the 40 days notice required under S.96(2) of the Land Act 2012; the sum of 30,000,000/= for which the plaintiff offered his properties as security was never disbursed to the plaintiff; and that the security for borrowing by **COUNTRY MOTORS LTD** was secured by registration of vehicles and chattels mortgages and the sums lent were under Asset Finance and wholly secured by the

vehicles.

4. It was also averred that the statutory Notice issued by the defendant is defective in that it refers to **L.R. 10419/12(I.R. 39427)** and **L.R. 10419/13(IR 39423)** while the properties charged to the defendant were **L.R.10419/12 (I.R.18571/26)** and **L.R.10419/13 (I.R 18571/28)**.
5. There is imminent auction of the plaintiffs properties and there is no justification for that as the plaintiff has been making payments. The arrangement was under the Asset Based Finance agreements and loan facilities. He is at any rate upto date with payments. There are no arrears owing to the defendants, the plaintiff said.
6. The imminent auction will occasion severe loss, damage, detriment and embarrassment to the plaintiff not compensable in damages.
7. The plaintiff said further that he has a prima facie case with a probability of success; he will also suffer irreparable loss and hardship that cannot be adequately compensated by an award of damages. The balance of convenience is also said to tilt in favour of the plaintiff.
8. Two supporting affidavits, one by **BHALUINDER PALSINGH** and another by **PRITHPALSINGH PANDHAL**, were sworn in support of the application. Both generally reiterate the grounds on the face of the application. Both also cite mis-description of the properties and 2nd plaintiff. They allege too that the notice given was defective. They deny that there was default to warrant issuance of statutory Notice of sale.
9. The two affidavits also mention lack of issuance of the requisite Notices by the defendant when effecting variation of interest rates. According to the two deponents, the move by the defendant to sell the charged properties has no justification. The intended sale will not only lead to loss of goodwill for the 2nd plaintiff but may also lead to collapse of business, the deponents alleged.
10. The defendant filed a replying affidavit on 3/7/2013 which, inter-alia, gave some background concerning the financial arrangements between the parties.
11. The replying affidavit underplayed the mis-description of 2nd plaintiff and emphasized the contractual arrangement allowing the defendant to vary interest rates without reference to the plaintiffs. The interest rate was put at 18% but would rise by a further 6% in case of default.
12. And contrary to assertion that the borrowings made were secured by joint registration of vehicles and chattel mortgages and that the arrangement was under Asset Finance and wholly secured by the vehicles, the defendant averred that the securities were renewed personal guarantee by 1st plaintiff over properties L.R. No.10419/12 and 10419/13, existing fixed and floating debenture charge over the present and future assets of the 2nd plaintiff, and existing hire purchase agreement and joint registration of various motor vehicles. In addition, there were the directors' personal guarantees and indemnities of Kshs.56,525,786/= to be executed in favour of Equity Bank Ltd.
13. The allegation that some money was not disbursed was denied and the 2nd plaintiff was said to be in arrears in payment and the move by the defendant to realize the securities was therefore said to be proper and lawful.
14. The plaintiffs are therefore said to be properly served with statutory Notice of sale and the subsequent notification of sale by the auctioneers. The plaintiffs were duly informed, it was deponed, to repay the credit facility within 3 months and this was necessitated by the plaintiffs repeated failure to pay for the credit facility as agreed. In particular, the plaintiffs are said to have issued several cheques which were dishonoured for lack of funds.
15. The defendants replying affidavit elicited a further affidavit from 2nd plaintiff. In it, the 2nd plaintiff averred that that the mis-description of the 2nd plaintiff as "**COUNTY MOTORS LTD**" was a grossly

misleading issue and not merely a simple mistake for there could well be existing a company going by the mis-described name.

16. The 2nd plaintiff reiterated that the interests charged are contrary to the letters of offer and the 2nd plaintiff was faulted for not clearly showing the computation of interest in order to dispel the notion that such interests are contrary to the letters of offer.

17. It was reiterated too that no notice was given before variation of interests. The 30,080,000/= said to be borrowed was also said not to have been disbursed. And there is no default in payment, it was alleged and, if anything, the plaintiff is ahead in such payment, having overpaid what was due during the material period by Kshs.3,731,261.07.

18. Not to be outdone, or probably to even things out, the defendant filed a further replying affidavit. In the affidavit, it was reiterated that the interests charged were as per the letter of offer and included a penalty of 6% as the plaintiff had fallen into arrears.

19. It was also alleged that the plaintiff was supposed to be paying through his account but he stopped this and started issuing cheques. Most of such cheques were then dishonoured upon presentation for payment.

20. The defendant also availed a schedule showing amounts due and payable and amounts actually paid from 11/5/2011 to 11/7/2013. The schedule shows arrears amounting to Kshs.11,540,465.35.

21. Submissions were filed in this matter in lieu of hearing and it is now apposite to look at them. The plaintiff's submission were filed on 27/9/2013. The defendant was faulted for issuing a statutory notice and subsequent notification of sale that mis-stated both the properties and the 2nd plaintiff. The statutory notice was said to be defective and the decided case of **SHAROCK KHER MOHAMED ALI & ANOTHER VS SOUTHERN CREDIT BANKING CORPORATION LTD (2008) eKLR**, which dealt with the issue of mis-description of properties, was availed to persuade the court to make a finding that a prima facie case is established.

22. The decided case of **RINYA HOSPITAL VS CO-OPERATIVE BANK OF KENYA LTD & ANOTHER (2008) eKLR** was also availed to point the way forward as regards a defective, and therefore invalid, statutory notice. In the case, it was held that an invalid statutory notice cannot legitimize the exercise of a chargee's power of sale, even where the chargor is openly in default.

23. Issue was also taken with the alleged indiscriminate charging of interests without notification to the chargor. According to the plaintiff, interests to be charged would range between 15% to 18%. The computation done by the plaintiff showed that the defendant charged interests at over 16% and unexplained charges amounting to Kshs.1,980,000 had been charged. According to the plaintiff, section 84(1) of the Land Act, 2012, was violated because the defendant did not issue a notice as required by that Section before varying the interest rates.

24. Further, the defendant was faulted for merely alleging compliance with the contractual arrangement concerning interests without offering specific response to plaintiff's computation of payment in the availed report.

25. The decided cases of **MUIRURI VS BANK OF BAROBA LTD (2001) KLR 1&3** and **EMMANUEL EGESA WAMBWIRE T/A NEW BUSIA MATERNITY AND NURSING HOME VS NATIONAL BANK OF KENYA LTD (2005) eKLR** were availed to point the way forward concerning failure to give notice of variation of interests rates and failure to show how such rates are changed or varied.

26. The plaintiff's submission reiterated that there was failure in that the plaintiff was not served with the 40 day notice required; that there was no default in payment; that the plaintiff will suffer irreparable loss; and that the balance of convenience is in the plaintiff's favour.

27. The defendant's submissions commenced with a postulate of the requirements necessary to grant or refuse an injunctive relief. The decided case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A 358** was proffered for guidance in that regard. The imperatives enjoin establishment of a prima facie case with a probability of success, the likelihood of suffering irreparable loss not compensable in damages; and consideration of balance of convenience where the court is in doubt as to the first two requirements.

28. What then followed was an attempt to articulate why the requirements have not been met in this matter. As regards prima facie case, it was pointed out that the plaintiff is in default. The plaintiff had also charged his properties first for the loan of 30,000,000/= and subsequently for a loan of 56,525,786/= meant mainly for consolidating and restructuring of outstanding facilities. In these circumstances, defendant submitted, the statutory power of sale had accrued and it was proper for the defendant to seek to exercise it.

29. And was the statutory Notice properly and legally issued? The plaintiff's are faulted for trying to make it appear that the charged property was mis-described, in effect rendering the notice defective, but it was pointed out that the purpose of the notice is essentially to inform the chargor of default and the chargee's intention to recover the amount outstanding. The amount owing, the redemption period, and the required service of the notice were all proper and correct. According to the defendant therefore, the chargor's option consisted in paying the owed sum in order to obviate the intended sale but the chargor did not do this. The sale of the charged properties in order to realize the amount owing was therefore due.

30. The notification of sale issued by the auctioneers was also proper, the defendant submitted. The plaintiffs, it was pointed out, cite failure by the defendant to give a 40 days notice. But the defendant pointed out that the 40 days requirement was merely a minimum period and the notice given by the auctioneers had given a 45 days notice. The defendant further submitted that the notice was comprehensive with all the details and the omission of letter "R" in the word **COUNTRY** so that the word appears as **COUNTY** was a mere mistake.

31. The defendant suggested that the interest rates agreed stood at 18% with a rider that default would attract an additional 6%. After default, the total interest would therefore stand at 24%. The cases of **DANIEL KAMAU MUGAMBI VS HOUSING FINANCE CO. OF KENYA (2006) eKLR** and **SAMMY THUO KENGEA & Another VS HOUSING FINANCE CO. OF KENYA LIMITED (NAKURU) HCC NO.279/05** were cited to illustrate that penalty interests and default charges by the bank would not constitute enough ground to injunct the chargee or bank from exercising statutory power of sale. Damages were said to constitute an adequate remedy to compensate an aggrieved chargor should it later turn out that such interests and penalties were illegal. And that is the position too where the amount owing is in dispute and the decided case of **SCHOLASTICA NYAGUTHII MUTURI VS HOUSING FINANCE CO. OF KENYA LIMITED: HCC NO.10/2010** was said to be illustrative of this position.

32. All the aforesaid arguments were proffered to drive home the point that a prima facie case was not made out by the plaintiff. It was thereafter submitted that the plaintiffs would also not suffer loss that is not compensable in damages. Towards the end, it was pointed out that the plaintiff's arguments that the sale might be below the market price, and that the sugarcane in the property would also be sold at throw away price, are all not enough to prove irreparable loss. The plaintiff were said to be merely speculating and the defendant is in any case in a position to pay damages. The case of **SAMUEL MWANGI KANUDI VS BANK OF INDIA (2006) eKLR** was cited to reinforce this argument.

33. The defendant then addressed the issue of the balance of convenience. The argument advanced is that the plaintiff is already indebted to the defendant. The plaintiff has been drawing cheques which have been dishonoured. The amount owing continues to rise and the plaintiff has not yet offered proposals on payment. In view of this, the defendant is said to be more at risk of making loss or suffering damage. Further, the defendant has the ability to compensate the plaintiff in damages should that ultimately become necessary. The court was therefore told that the balance of convenience is in favour of the defendant. The case of **ST. ELIZABETH ACADEMY – KAREN LIMITED VS HOUSING**

**FINANCE CO. OF KENYA LIMITED: (2013) eKLR** was proffered to reinforce the argument.

34. The plaintiffs are also accused of material non-disclosure. It is said they alleged that the first loan of 30 million shillings was not disbursed to them yet subsequent arrangement of another loan of about 56 million shillings could not have been entered into if the previous loan had not been disbursed. They also failed to disclose that they had been issuing bouncing cheques. Also hidden from the court, the defendant alleged, was the 6% penalty interest in case of default. The case of **ST. ELIZABETH'S ACADEMY** (Supra) was again cited in support of this allegation. And **DANIEL KAMAU MUGAMBI VS HOUSING FINANCE CO. OF KENYA LIMITED** as quoted in St. Elizabeth Academy's case was said to reinforce the position that injunctive relief cannot be granted if the applicant has unclean hands.

35. The are further submissions by the defendant captioned “**Argument in favour of Equity Bank**”. The arguments are an amplification of the arguments and facts raised earlier on.

36. For instance, the principles in the case of **GIELLA's** case (Supra) were repeated this time as articulated in the case of **MUREITHI VS CITY COUNCIL OF NAIROBI. C.A NO.5 OF 1979**. And while the earlier submissions had quoted the St. Elizabeth's Academy case (Supra) to show that the borrower cannot hide behind the importance of charged property to prevent sale, the same is repeated this time round vide the case of **SAMUEL MWANGI KANUDI VS BANK OF INDIA: HCC NO.30/2006**. In all, these further submissions do not raise anything new. They merely amplify or restate the earlier arguments.

36. There was a chance to highlight submissions. Counsel for the plaintiffs chose to rely entirely on the written submissions. Counsel for the defendant however made a highlight that covered aspects like mis-description of property, variation of interests, non-disclosure of material information, and (non) – disbursement of some money. All these are issues earlier covered at length in the earlier submissions, a repeat here being probably for tenor and effect.

37. I have considered the applications with its two supporting affidavits and the annexures availed. I have considered too the replying affidavit, further replying affidavit, further affidavit by 2nd plaintiff, plaintiff's submissions, defendant's submissions, further defendant's submissions and the defendant's highlight of its submissions. I have paid attention to the decided authorities availed. And of course, because this is an application for interlocutory injunction requiring a look at the suit itself, I can not forget to make a non-conclusive consideration of the suit.

38. It seems to me that there are several issues calling for consideration and determination. It appears that the issues are as follows:-

**(a) Notices: Was there mis-description of properties in the notices given? Was there mis-description of 2nd plaintiff? Were the notices defective?**

**(b) Were the amounts advanced covered wholly by joint registration of vehicle and chattel mortgages under Asset Finance arrangement or were other securities additionally part of the contract?**

**(c) Was there material non-disclosure by the plaintiffs?**

**(d) Were the plaintiffs upto date in payments?**

**(e) Interests: Was there need to vary interests? Were the plaintiffs entitled to be notified of variation? Was any variation done legal and/or contractual?**

**(f) Was there failure by the defendant to disburse a sum of 30,000,000/= borrowed as a loan?**

**(h) Does the plaintiffs' application meet the threshold for granting injunctive relief?**

39. It is now necessary to turn to the issues before reaching the final determination.

Notices: The plaintiffs beef with the defendant over this issue concerns first, mis - description of property and second, giving the second plaintiff the wrong name. It was also alleged that one notice requiring giving of 40 days period before selling the property was not given to the plaintiffs. The defendant's response to all this is that it is the plaintiffs who have mis-described the property. It was asserted that the description given by the defendant is the correct one. And the alleged mis-naming of the 2nd plaintiff was a mere simple mistake while a 45 days notice was given to the plaintiffs instead of the 40 days notice that the plaintiffs say was required.

40. I have looked at the records. The plaintiffs alleged that the properties were mis-described in the notices. According to the plaintiffs the properties charged were L.R. 10419/12 (IR18571/26) and L.R. 10419/13 (I.R 18571/28). The Notices talk of the following properties: L.R 10419/12 (I.R 39247) and 10419/13 (I.R 39428). If one stops there without considering more, one may be tempted to agree that the properties are mis-described. It is clear that the I.R figures stated by the plaintiffs are different from I.R figures shown in the notices.

41. But one must consider where the details are obtained from. The details are obviously obtained from the titles of the properties offered as security. It becomes necessary therefore to look at the titles. And a look at the titles shows that each title has two different I.R details. The first title – L.R No.10419/12 – has two different I.R details viz I.R 18571/26 and I.R.39427. The second one – 10419/13 – has I.R 18571/28 and I.R 39428. The plaintiff has taken one set of I.R's to describe the properties and the defendant has taken a different set of I.R's to describe the same properties.

42. What this means is that the parties are referring to the same properties but by different description. It is clear that each description would sufficiently identify the properties. The details stated by each side are right there on the face of the titles or certificates availed. When all this is taken into account, it becomes hard to agree with the plaintiffs that the properties are mis-described. Indeed, there is no mis-description. One side has chosen one set of details to describe the properties while the other has picked a different set of details to do the same thing.

43. And the letter of offer that concerns the loan facility of 56,525,786 does not contain the IR details of the properties given as security. It merely mentions L.R.No.10419/12 and L.R 10419/13. The contents of that letter are not faulted by the plaintiffs. It seems to me that when this suit started, each side arrogated to itself the luxury of including more details to describe the properties. The manner in which they did so is now the bone of contention here.

44. I reject the plaintiff's assertion about the description of the properties. I do so after considering the circumstances surrounding the alleged mis - description and after also considering the decided case availed as a back-up to the plaintiffs arguments. In fact I would need to point out that the decided case availed pointed to more serious, fundamental and extensive mis-description whose total effect could easily mislead. It is not the same in this case. There is no mis-description here; only different description.

45. Was there mis-naming of the 2nd plaintiff? The answer to this question is **YES**. The 2nd plaintiff is named as **COUNTY MOTORS LTD** Instead of **COUNTRY MOTORS LTD**. To the defendant, this is a minor mistake that can be excused. To the plaintiff, it is a serious thing, a possible game changer. **COUNTY MOTORS LTD**, the plaintiffs said, could well be in existence but they have never dealt with it. The mis-naming therefore is a fundamental wrong and should not be ignored.

46. But it is necessary to cast a further look into the issue. The letter of offer for a loan facility of Kshs.56,525,786 describes the borrower, who is the 2nd plaintiff, as follows:

**COUNTRY MOTORS LTD, P O BOX 636, KISUMU.** A question arises: Can you find **COUNTY MOTORS LTD, P O BOX 636, KISUMU?** The answer is an obvious No. The address given belongs to 2nd plaintiff. If **COUNTY MOTORS LTD** exists, it would have a different address. The fact that it is the plaintiff's address that is used shows that the mis-naming was a

simple mistake, possibly a typo.

47. But we can even go further and ask: Would you find a **COUNTY MOTORS LTD** that contracted with the defendant for the same amount of loan, on the same date, same place, and with the same properties as security? The answer to this is No. The entity that did this is the 2nd plaintiff and the misspelling of the word **COUNTRY** into **COUNTY** is therefore manifestly an inadvertent error. That is how I see it and I reject the plaintiff's position on this issue.

48. Were the amounts advanced covered wholly by joint registration of vehicles and chattel mortgages under Asset Finance arrangement or were other securities additionally part of the arrangement? The loan facility of Kshs.56,525,786 marked consolidation of previous financial arrangements between the plaintiffs and the defendant. This arrangement is admitted by both sides and the starting point in considering this issue begin with it. The letter of offer for that arrangement is dated 21/2/2011. It seems to be the last letter of offer between the parties. At page 2 of the letter, there is a part captioned **SECURITY**. The two suit properties are mentioned as securities. And there are other securities in addition apart from joint registration of vehicles. The plaintiffs are therefore not talking the truth when they try to make it look that the suit properties were not part of the securities. The plaintiffs averments on this issue are therefore rejected.

49. Was there material non-disclosure by the plaintiffs? It is the defendant who made this allegation. Proof of it would give credibility to the allegation that the plaintiffs are without clean hands. According to the defendant, the plaintiff allegation that the earlier loan facility of 30,000,000/= was not disbursed is belied by their acceptance of the loan facility of 56,525,786/= which consolidated all previous financial advances including the loan of 30,000,000/=. A pertinent question is asked as to why the plaintiffs could accept a subsequent loan facility if the previous one had not been disbursed. A related concern also raised by the defendant concerns interest rates. The plaintiffs are said to have alleged that interest rates were raised without their knowledge while the letter of offer had stated clearly the applicable interest rates and further spelt out that default would attract a penal increase of 6%.

50. While these concerns are not without foundation, a reading of the plaintiffs averments does not come across as wilful and deliberate falsehoods. It seems to me that the plaintiffs are merely trying to state their side of the case. To me, they are merely expressing their grouse with the defendant. It is upon the court to accept it or not. On this issue, I am not in accord with the defendant. I reject the allegation.

51. Were the plaintiffs up to date in payments? The plaintiffs believe they were perfectly upto date. Infact they believe they had paid some excess amount. To the defendant, the plaintiffs were in default and there were arrears of payment.

52. To show they are upto date in payments, the plaintiffs sought help from an entity called Dhadialla Associates, which is a firm of Certified Public Accountants. The aim was to analyze the interests charged, the penalties imposed, and the repayments made from March 2011 to June 2013. The results showed that the sum owed was Kshs.27,037,588.35 and not Kshs.34,805,010.93 as the defendant claimed. The results also showed unknown charges levied amounting to 1,980,000/= while the interest rate was 16%. A further look also revealed that at Kshs.1,601,957/= which was the monthly payment agreed between the parties, the amount required to be paid for the 26 months running from May 2011 to June 2013 was Kshs.41,650,882 yet the actual payment made by the 2nd plaintiff during that period amounted to Kshs.45,382,143.07, which is 3,731,261.07 over and above what was required.

53. That being the case, the plaintiffs argued, there were no arrears and no default and the defendants power of sale of the suit property had therefore not arisen.

54. To counter this, the defendant stated that the plaintiffs deviated from the agreed mode of payments and started drawing cheques in favour of the defendant. A number of those cheques however ended up being dishonoured owing to non-availability of funds. The defendant also offered a schedule showing, interalia, amounts payable and amounts actually paid. The schedule covered the period from May 2011 to July 2013 and showed that the 2nd plaintiff owed Kshs.11,540,465.35 after all due scrutiny and analysis.

55. It seems to me that after various past finance dealings between the parties everything was consolidated as one aggregate loan facility amounting to Kshs.56,525,786 vide a letter of offer dated 21/2/2011. The 2nd plaintiff duly accepted the arrangement contained in the offer. The mode of payment was from the 2nd plaintiff's account directly to the defendant and the monthly sum payable was Kshs.1,601,957/=. It appears that the repayment period was 48 months.

56. It appears clear however that not long after that arrangement, the plaintiff deviated from the agreed mode of payment and started issuing cheques to the defendant. It appears that the defendant decided to accept these payments albeit with a written warning vide a letter dated 7/6/2011 that such payment would not affect its legal remedies.

57. It seems to me that at the time the statutory Notice was being issued, the amount owing was Kshs.56,395,113. By the time that this suit was being filed here, what the plaintiff allegedly owed – and this is by the defendant's own account – was Kshs.11,540,465.35 (see the defendant's further replying affidavit at para 8). By any standards, the plaintiff had gone along way in trying to address the problem. Infact, it appears that the plaintiff was still making payments and, by the plaintiff's account, there were no arrears or default. Instead an excess payment amounting to over 3 million shillings had been paid.

58. The plaintiffs have a point here. It appears clear that commendable efforts had been made to repay the loan. It appears clear to me that when the plaintiffs realized that the defendant was still determined to sell the suit property, they sought a professional opinion and the result from that endeavour energized them to file this suit. I have looked at the result. I think a serious point is being made by the plaintiffs. I realize that the opinion made is not one issuing from the plaintiffs. It issues from a professional third entity. The defendant's own opinion is not like that. It comes from the defendant itself. And even then, it shows clearly that the plaintiffs owe far less than what the Statutory Notice states as the owed amount.

59. Ultimately then, when the argument by both sides are weighted and considered, it is more reasonable to find favour with the plaintiff's arguments. There is need to seriously consider whether the plaintiffs actually owe the defendant amount stated in the notices. There is a chance that the plaintiff's averment is possibly true.

60. Then there is the issue of interests. According to defendant, there was need to vary interest rates because there was default in payment. According to the plaintiffs, there was no such need as there was no default. I would not wish to belabour this point so much. It seems to me that the defendant varied the interests upwards by imposing a penal percentage of 6% because according to it, the plaintiffs had defaulted. A consideration of my position on the issue of whether the plaintiffs were upto date in payment or not would show that it is a moot point whether interests could be varied or not.

61. But since variation seems to have been done anyway, were the plaintiffs entitled to be notified of such variation. It seems to me that according to the defendant, the plaintiffs were not entitled to such notification. The arrangement (read agreement) between the parties didn't require such notification and the law applicable, according to the defendant, did not also enjoin giving such notification. According to the plaintiffs however, such notification was a necessary requirement under the Lands Act, 2012.

62. Here is my take on this issue: It is necessary to contextualize this case in time perspective. The case was filed in 2013. The default mentioned by the defendant seems to have started accruing in 2011. The aspect of time places it under the new Constitutional dispensation, the constitution itself having been promulgated way back in 2010. The land Act, 2012, commenced on 2/5/2012.

63. Section 78(1) of the Land Act, 2012, when referring to the part of the statute dealing with the charges, states as follows:

**S78(1):**

**This part applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, any other charges of land which are specifically**

**referred to in any section in this part.**

The part referred to in the section is actually part VII dealing with charges and runs from Section 78 to Section 106 of the ACT. Section 84 of the Act, which deals with the need to give notice of variation of interest rates, is obviously a provision of Part VII to which Section 78 applies.

64. The charges herein obviously started before the enactment of the Land Act, 2012, but since the charges were continuing at the time of the commencement of the Act, the Act applies to them as from the time of its commencement. I say from the time of its commencement because there is no intention manifest in the Act that it could apply retrospectively and indeed it makes no sense to hold such a position. If the defendant then varied interests after the Land Act came into force, the plaintiffs were entitled to Notice, any different prior arrangements notwithstanding. The defendant was wrong therefore to think that the new regime of land laws does not apply at all.

65. But was the need for such Notice absent even prior to commencement of Land Act 2012? In the case of **MUIRURI VS BANK OF BARODA LTD (2001) KLR** at page 183, the court of Appeal suggested the need for such notice when it observed

**“It is however, arguable whether it is fair for a party to such an agreement to arbitrarily vary upwards such rate of interest without prior notice to the other party or parties to the agreement”.**

66. And while judicial pronouncement was merely suggestive of the need for such notice, it is necessary to look at our constitution to see if there was need for such notice in the new constitutional dispensation, which is the period running from year 2010. It seems to me that if the plaintiffs requested for such information, they would be entitled to access it under article 35 (1) (b) of the Constitution because it was information that could affect their property rights. But even if they did not ask for such information, it is necessary to realize that the plaintiffs were consumers of defendant's services. Under article 46(1)(b) of the constitution, they were entitled as of right to all the information necessary for them to gain full benefits from such services. The need for such information necessarily required the issuing of notices informing when, why and by how much the interests were being varied. This is particularly more so considering that such variation was adverse to them and they would need such information to decide what to do.

67. It seems to me therefore that from the year 2010, the giving of such notice was a Constitutional requirement and from the year 2012 when the Land Act, 2012, came into force, the giving of such Notice became both a constitutional and Statutory requirement. I am therefore unable to accept the defendant's argument that it was not necessary to give notices to the plaintiff. The arrangement they may have entered into could not override constitutional and statutory requirements.

68. Was there failure by the defendant to disburse a loan of 30,000,000/=. It is not necessary to delve deep into this issue now. I am handling this matter at interlocutory stage and whether disbursement took place or not is a matter of evidence to be more conclusively determined at the trial. But suffice it to observe that at this stage, the plaintiff's arguments are not very persuasive. They argue that disbursement did not take place but, as the defendant argues, the latter arrangement for payment of about 56 millions shillings included the sum of 30,000,000/= said not to be disbursed. The plaintiffs voluntarily agreed to pay the sum of over 56 million shillings. They cannot now turn around to say that amount was not disbursed. At this stage, their argument is hard to believe. I reject it.

69. Does the plaintiff's application meet the threshold for granting injunctive relief? There are various arguments made by the plaintiffs which I have rejected. But I have accepted two and these two have established a prima facie case. I have found that the plaintiffs make a formidable argument on the issue of whether they are up to date in payments. I have also observed that they were entitled to Notices concerning variation of interests and imposition of penal charges.

70. And what about adequacy of damages as a remedy to the plaintiffs? One would argue that the

defendant is capable of paying damages. But it is not an unassailable position of law that where the respondent or defendant can pay damages, then the plaintiff or applicant is not entitled to injunctive relief.

**STEVE OUMA IN “ A COMMENTARY ON THE CIVIL PROCEDURE ACT CAP 21”** 2nd Edition at Page 440 states as follows:

**“It is not settled, however, that where damages may be an appropriate remedy, an interlocutory injunction should never issue”.**

In simple terms, the remedy of damages is not everything. It is necessary to give serious thought to the applicants case. In the case at hand, the plaintiff's advance a serious argument that they don't owe. They also point out the defendant's serious omission to give requisite notices concerning variation of interests and charging of default penalties. You cannot violate another person's right because you are able to pay damages.

71. And it is necessary to consider that in this case, it is not only the loss of properties that the plaintiffs are concerned about; there is also the loss of reputation and credit-worthiness. And these two considerations are critical at this time bearing in mind that the law now allow banks and other financial institutions to share information regarding credit-worthiness of borrowers. The defendant's position on the issue of damages is rejected.

72. And the balance of convenience? The law requires that the balance of convenience be considered only if the court is in doubt concerning the other two requirements. I have expressed my position on the other two. I have no doubt concerning the position I have taken. I will therefore not consider the balance of convenience.

73. In light of what I have so far stated, I allow the application but costs will be in the cause.

74. But the injunctive relief granted herein will not be unconditional. It has been alleged that the plaintiffs have stopped payments. The plaintiffs came to court because, contrary to defendant's assertion, they felt they were upto date in payments at that point in time. They did not come to court because they had finished all payments. In essence therefore, the plaintiffs still owe the defendants. The allegation that payments have stopped has not been denied or controverted. The plaintiffs have absolutely no legal justification to stop paying. The injunctive relief granted herein risks being discharged at the option of the defendant should payment not resume one month after delivery of this ruling.

**A.K. KANIARU – JUDGE**

**29/1/2014**

**29/1/2014**

Before A.K. Kaniaru – Judge

Diang'a G.- Court clerk

No party present

Interpretation – English/Kiswahili

Walukwe for defendant

Menezes (absent) for plaintiff

**COURT:** Ruling on application dated 17/6/2013 read and delivered in open Court.

Right of Appeal – 30 days.

**A.K. KANIARU -JUDGE**

**29/1/2015**