



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NUMBER 173 OF 2014**

**CHARLES ALEX NJOROGE.....PLAINTIFF**

**Versus**

**NATIONAL BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**JOSEPH M. GIKONYO**

**T/A GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Injunction**

[1] I have before me a Motion dated 29<sup>th</sup> April 2014 for injunctive relief to restrain the Defendants from selling the suit property known as Title Number LIMURU/BIBIRIONI/1031 Limuru. The Plaintiff argued that the transaction the subject of this suit is tainted with fraud, illegality, misrepresentations and breach of statutory provisions because, contrary to the agreement that interest payable was at the fixed rate of 12% per annum, the 1<sup>st</sup> Defendant throughout the loan repayment period, charged interest at a rate that is higher than the fixed rate of 12% without the consent of the Plaintiff. The Plaintiff averred that he has fully paid his portion of the guarantee to the borrower, but he is ready and willing to pay up any amount which should be found to be due if given a reasonable period of time to do so. The Plaintiff also alleged that the Defendants intend to dispose of the suit property at a gross undervalue in breach of the provisions of Section 97 of the Land Act. And since the suit premises are unique in nature, if they are sold, the Plaintiff would not be able to be compensated by damages alone.

[2] According to the Plaintiff, he has established a prima facie case with a probability of success. Clause 7 of the letter of offer-annexure “CAN-1” in his supporting affidavit sworn on 29<sup>th</sup> April 2014- the agreed interest rate was fixed at 12% per annum over the entire period of the loan, i.e. six years inclusive of one year grace period as per clause 6 of the said letter of offer. Under the charge, the 1<sup>st</sup> Defendant was to charge interest “not exceeding that allowed by law.” The 1<sup>st</sup> Defendant started charging interest at the rate of 15% as early as the year 2009 as can be seen from the statement of account produced annexure “CAN-2” in the Plaintiff’s supporting affidavit sworn on 29<sup>th</sup> April 2014. This illegal increase of rate of interest is a clog of the

Plaintiff's right of redemption. Had the correct rate of interest been applied, the payments made to the 1<sup>st</sup> Defendant by the Plaintiff are enough to repay the loan in full. The Applicant referred the court to the case of **Francis Joseph Kamau v Housing Finance Company of Kenya Limited [2014] eKLR** where the Honourable Justice Odunga at paragraph 68 stated;

***“In my view a party ought not to mutate the terms of a contract unilaterally to the detriment of the other party to the contract.”***

[3] They also cited the case of **Givan Okallo Ingari & Another v Housing Finance Co. (K) Ltd [2007] 2 KLR 232** where Warsame J expressed himself as follows:

***...In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties' agreement.... In my view if the defendant applied default charges on the plaintiffs account but which was not permitted or provided by the charge document then that is prima facie uncontractual or illegal.'***

[4] The loan granted to Olive Farm Limited on 5<sup>th</sup> December 1996 was Kshs 30,027,897/- was at a fixed interest rate of 12% per annum. The loan amount increased to Kshs 78,533,731.10/- as at 25<sup>th</sup> May 2009 as stated in the replying affidavit of Josphat Kamau sworn on 5<sup>th</sup> May 2014. Basic mathematics, even where the borrower did not make any payment at all after a period of three years it is impossible for the loan amount to have reached the sum of Kshs 78,533,731.10/-. The most it would have reached without any payment being made is Kshs. 40,837,939.92/-. In the replying affidavit of Josphat Kamau, the balance brought forward as at 28<sup>th</sup> April 2009 was Kshs 42,563,739.55/-. So where did the figure of Kshs 78,533,731.10/- come from? It is the 1<sup>st</sup> Defendant who can only explain the same.

[5] **Mrao Limited v First American Bank of Kenya Limited & 2 Others (2003) KLR** stated when a Mortgagee may be restrained from exercising his power of sale, i.e.:

***“He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive”.***

The Applicant claimed that the amount of Kshs 69, 350,474.50/- claimed by the 1<sup>st</sup> Defendant is excessive and cannot be justified on the terms of the letter of offer and charge created by the Plaintiff. The loan to Olive Farm Limited and for which the Plaintiff herein was a guarantor was essentially granted by the European Investment Bank-Kenya Global Private Enterprises Loan II Project to assist Kenyan farmers to mechanise their farms to be able to compete globally with other first world countries. And the 1<sup>st</sup> Defendant is demanding for repayment of a loan that it did not grant to any party.

[6] The Plaintiff's contention is that the Defendants have breached statutory provisions in the manner in which they have attempted to dispose the suit property. They failed to comply with Section 90 (1) of the Land Act which required the 1<sup>st</sup> Defendant to issue a notice to the Plaintiff adequately informing him of the nature and extent of the default and the amount that must be paid to rectify the default. The 1<sup>st</sup> Defendant issued a notice dated 31<sup>st</sup> July 2013 and produced at page 123 of the replying affidavit of Josphat Kamau sworn on 5<sup>th</sup> May 2014 demanding payment of the sum of Kshs 69,350,474/50. But, in the same affidavit at page 130, the statement of account of the borrower indicates that the outstanding amount as at 7<sup>th</sup> March 2013 was Kshs 32,653,067.95/-. There was an incredible rise in a period of four months. The difference in amounts taints the notice issued on 31<sup>st</sup> July 2013, thus, not in compliance with the law. Under section 96 (3) (c) of the Land Act it is provided that the notice to sell served in accordance with subsection (2) shall be served on a spouse of the chargor who had given consent. That section was also not complied with

as the charged property is the matrimonial home of the Plaintiff. Similarly, section 96 (3) (h) of the Land Act it was violated as the notice to sell served in accordance with subsection (2) was not served upon any guarantor of the money advanced under the charge. Again section 96 (3) (i) of the Land Act was trampled upon as the notice to sell served in accordance with subsection (2) was not served upon any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property. The 1<sup>st</sup> Defendant was aware that the Plaintiff had leased part of the premises. All these are fundamental breach of statutory provisions by the Defendants.

[7] The 1<sup>st</sup> Defendant did not discharge its of care under section 97(1) of the Land Act to the charger, any guarantor of the whole or any part to obtain the best price reasonably obtainable at the time of sale. Under section 97(2) the 1<sup>st</sup> Defendant is obligated to ensure that a forced valuation is undertaken by a Valuer. All the firms of valuers who carried out the valuations reports referred to below are all in the panel of valuers of the 1<sup>st</sup> Defendant. These are by: Gimco Limited dated 16<sup>th</sup> July 2001; Premier Valuers Limited of 29<sup>th</sup> January 2014; Daytons Valuers Limited dated 8<sup>th</sup> May 2014 and 9<sup>th</sup> May 2014; Tysons Limited dated 23<sup>rd</sup> June 2014. The valuation report dated 16<sup>th</sup> July 2001 which is over 13 years ago the open market value was placed at Kshs 84,920,000/-. The forced sale value was placed at Kshs 50,950,000/- with land, site works and buildings at Kshs 35,950,000/- and machinery, plant and equipment at Kshs 15,000,000/-. This valuation was procured by the 1<sup>st</sup> Defendant herein on 16<sup>th</sup> July 2001. In the valuation report dated 29<sup>th</sup> January 2014 the forced sale value was placed at Kshs 24,000,000/- with land being valued at Kshs 4,500,000/- and improvements at Kshs 19,500,000/-. In the valuation reports dated 8<sup>th</sup> May 2014 and 9<sup>th</sup> May 2014 the forced sale value of the land and buildings was placed at Kshs 90,000,000/- whereas that of the plant and machinery was placed at Kshs 30,000,000/-. The open market value was placed at Kshs 190,000,000/-. This report was obtained by the Plaintiff with the leave of the court. The two valuations reports are consistent with the valuation that had been carried out by the 1<sup>st</sup> Defendant in the year 2001. In the valuation report dated 23<sup>rd</sup> June 2014 the forced sale value of the land was placed at Kshs 65,000,000/- whereas that of the Plant and Machinery was placed at Kshs 40,000,000/- This valuation was procured by both parties pursuant to a court order. It is instructive to note that a valuation of the land by the 1<sup>st</sup> Defendant in the year 2001 put the open market value of the suit land at Kshs 12,250,000/- while another valuation 13 years later put the open market value of the suit land at Kshs 6,000,000/-. The Plaintiff urged the court to note that it is common knowledge that the value of land in Kenya generally and around Limuru area where the suit property is located have drastically increased in the last fifteen or so years and it does not make sense for the 1<sup>st</sup> Defendant to purport to currently value the land at a value that is less than the market value in the year 2001. We are not told the reason as to why the value of the suit land, buildings and machinery fell drastically. The difference in the valuations is because none of the Valuers visited the suit property to carry out a valuation as required under section 97 (2) of the Land Act. Indeed the gates are always locked and the Plaintiff swore in his affidavits that he personally works at the suit premises and did not see any of the valuers except Dayton and Tysons. The impugned valuations did not also separately state the value of the buildings and the value of the plant and machinery implying that the valuation totally ignored the value of the plant and machinery.

[8] The Plaintiff urged this court to find that the valuation carried out by the 1<sup>st</sup> Defendant and dated 29<sup>th</sup> January 2014 does not reflect the true and accurate value of the suit premises. He further urged the court to find that the Daytons Valuers Limited reports as a true and accurate reflection of the value of the suit premises as the same are most comprehensive and give the most details of the suit premises. Similarly, the Plaintiff further urged the court to make a finding that the 1<sup>st</sup> Defendant has not discharged its obligation to obtain the best obtainable price in respect to the valuation dated 29<sup>th</sup> January 2014; or to ensure that the forced sale value is in compliance with the provisions of section 97(1). The forced sale value has to be the best obtainable price. The 1<sup>st</sup> Defendant did not comply with the requirements of section 97(2)

[9] The Plaintiff submitted that the court should not allow breach of statutory provisions under sections 90, 96 and 97 of the Land Act to continue just because the 1<sup>st</sup> Defendant being a bank can compensate the Plaintiff. See the case of **Sunrise Homes Limited v National Bank of Kenya & Another HCCC NO 17 of 2014** (unreported) this court delivered itself as follows:

*“Except I should state that in cases where there is a clear breach of the law by the mortgagee, no court should allow the breach to continue simply because the loss thereof is compensable in damages or the offending party is able to pay the compensation. What the court should do in such clear breach, is to issue an injunction in order to prevent the breach from continuing and any or further loss from occurring. Compensation is never a substitute for intermediate relief which a party requires to vindicate a right which has already crystallized. See decision of Warsame J (as he then was) in JOSEPH SIRO MORIOMO V HOUSING FINANCE COMPANY OF KENYA NAIROBI H.C.C.C. NO. 265 OF 2007; (2008) ECLR, that;*

*“Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”*

[10] Therefore, the injunction should issue. The suit premises is the Plaintiff’s matrimonial home and a specialized, unique and uncommon processing plant where the Borrower has employed over 150 employees who stand to lose their employment should the suit premises be sold. The suit premises is used for mushroom growing, organic compost production, meat processing, sausage production, fertilizer production, mineral water processing and growing of food crops including vegetables and fruits. This unique nature of the farming projects undertaken on the suit premises has been acknowledged by the 1<sup>st</sup> Defendant in the supplementary affidavit sworn by Josphat Kamau on 9<sup>th</sup> July 2014 at paragraph 11(a) thereof. The 1<sup>st</sup> Defendant financed the projects on the suit premises and was thus fully aware of their specialized and unique nature. The Buildings, Plant and Machinery are affixed to the suit premises and cannot be uprooted and taken elsewhere to enable the Plaintiff and or the borrower continue undertaking the specialized farming activities. The machines in the meat section which has been leased to Ngaro Narok Meat Industries as per the lease dated 10<sup>th</sup> April 2014 and produced in court as annexure CAN-7 are currently idle because the tenant cannot start using the meat section until this case is resolved. There are also prayer rooms and a chapel which cannot be given a monetary value. The balance of convenience tilts in his favour. The Plaintiff has offered to deposit in court the the sum of Kshs 8,000,000/- that the 1<sup>st</sup> Defendant claims the borrower is in arrears within three months of an order of this court. The Plaintiff has offered and has actually been paying the sum of Kshs 300,000/- monthly pending the reconciliation of accounts with the 1<sup>st</sup> Defendant. Since filing this suit the Plaintiff has paid the 1<sup>st</sup> Defendant the sum of Kshs 1,900,000/- as a sign of good faith and to show his willingness to repay whatever amount that is due to the 1<sup>st</sup> Defendant from the borrower. The Plaintiff is willing to pay the entire outstanding amount (if any) given reasonable time. Under section 104 (2) this court has powers to extend the period of time for compliance with a notice served under section 90 of the Land Act.

### **The defendants opposed application**

[11] The Defendants opposed issuance of any injunctive relieve herein. They submitted that, contrary to the Orders of the Court on 25<sup>th</sup> July 2014, the Applicant has not to-date availed his submissions. The Defendant stated that the first issue for determination is: Whether or not the Defendant’s conducted a fair valuation of the suit property. It is not correct for the Applicant to submit that the Valuation Report relied upon by the Defendants which was prepared in January was procured in bad faith, is contrary to Section 97 (1) of the Land Act, 2012, and deliberately undervalues the property and is contrary to Section 27 (2) of the Land Act 2012. The Defendants stated that those averments have no factual and/or statutory basis. It was the view of the

Defendants that the Bank acted in extreme good faith towards Olive Farm Limited (“the Borrower”) and the Applicant, and it has repeatedly acceded to the Applicant’s numerous proposals for repayment and requests for additional time over a period spanning 4 years to no avail. The Applicant herein has not provided any evidence or particulars of such bad faith and or negligence on the part of the Defendants to this Honourable Court.

[12] Further to the foregoing, the Defendants submitted that **Section 97 (2) of the Land Act** only bestows a duty on the Bank, as the Chargee, to ensure that a forced sale valuation is undertaken by a Valuer, a requirement which the Bank fully complied with as per the valuation report by Premier Valuers Limited dated 24<sup>th</sup> April 2013. The burden of proof then is upon the Plaintiff to show that the valuation by the Defendant’s Valuer did not result in the best price reasonably obtainable for the suit property. See **Zum Zum Investment Limited v Habib Bank Limited [2014] eKLR**, where this Honourable Court held thus –

*“.....16. The question that this court must therefore address is whether the Plaintiff has satisfactorily demonstrated that the value of Kshs. 312,000,000.00 is not the best price reasonably obtainable for the suit property.....”*

*.....21.. The Defendant carried out valuation of the suit property and availed the report by Tysons Limited dated 24<sup>th</sup> April 2013. That report contains both the open market value of the property being Kshs. 390,000,000/- and the forced sale value of Kshs. 312,000,000/-. The Defendant, in my view, complied with Section 97 (2) of the Land Act by undertaking the forced sale valuation of the suit property. Once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time.....”*

*.....27. In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds.”*

[13] The Defendants averred that the Applicant herein has not discharged the burden of proof and failed to demonstrate that the valuation relied upon by the Defendants does not reflect the best price obtainable. They were of the view that the counter valuation report, including the Tysons Valuation Report, does not in any way address the Bank’s valuation report. In any event the Applicant has recognised that, save for the issue of machinery on the property, the relevant issues addressed in the Defendant’s valuation report are in fact the same issues addressed in its own valuation report and are therefore not irrelevant issues. The Tysons Valuation Report prepared on the instructions of the parties takes into consideration irrelevant considerations and is contrary to the express instructions of the Defendants. **(See the paragraphs Supplementary Affidavit of the Josphat Kamau sworn on 9<sup>th</sup> July, 2014)**. In light of the foregoing, the Defendants urged this Honourable Court to hold that the Plaintiff has not satisfactorily demonstrated, on a balance of probability, the reason why the Valuation Report relied upon by the Defendants should be disregarded or that they should rely solely on the plaintiff’s own Valuation report or the Tysons Valuation Report. They defendants are convinced the court will hold that prior to the setting of the auction date the Defendant’s conducted a fair valuation of the suit property.

[14] The Defendants posit that the Applicant has not satisfied the principles applicable to the

grant of interlocutory injunctions enunciated in the case of *Giella v Cassman Brown and Co. Ltd* [1973] EA 358 which are:

1. ***The Applicant must show a prima facie case with a probability of success;***
2. ***An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages;***
3. ***If the Court is in doubt, it will decide an application on the balance of convenience.***

[15] According to the Defendants, the Applicant has not established prima facie case with a probability of success. They cited the Court of Appeal definition of a prima facie case *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others*, [2003] KLR, 125, 132. thus:

***“ I would say that in civil cases it is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”***

And that:

***“... a prima facie case is more than an arguable case .It is not sufficient to raise issues. 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....”***

[16] T to them, there is no evidence of any infringement of a right as alleged or at all for the following reasons:

(a) The Applicant is the registered proprietor of all that property known as Title Number LIMURU/BIBIRIONI/1031 LIMURU and he charged the suit property as guarantor to the loan granted by the 1st Defendant to the Borrower.

(b) Although the Applicant disputes the amount owing, it is not in dispute that the Borrower has not fully paid the loan and so the Applicant is liable to pay the same.

(c) The Defendants have at all times acted in accordance with the law and have served all requisite statutory notices and notifications and has gone ahead to grant the borrower ample time to remedy its default to no avail.

(d) As is evident from the certified bank statements availed to this Honourable Court, at the time of filing the present Application the Borrower had not serviced its debt for over a year. (Refer to paragraph 14 of the Bank’s Replying Affidavit and to the Annexure marked JK.10 at page 130 and 131 of the Defendant’s Replying Affidavit.)

(e) It is therefore not true that any right has been infringed as alleged or at all.

[17] In any event, it is trite law that a dispute over the accounts of the loan payments such as is claimed by the Applicant is not a relevant consideration in or a ground to grant injunction. They relied on the decision in the case of *Mohammed Khaled Khashoggi v Equity Bank Limited* [2013] eKLR that:-

***“..Accordingly, I agree with the Plaintiff’s submissions that it is now settled law that the issue of disputed accounts and interest cannot be a ground for the issuance of injunctive Orders. To this end, I would refer to the finding of Kwach JA in the well-known Court of Appeal authority – Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (supra) as follows:***

***“The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury’s Laws of England, Vol 32 (4th Edition) paragraph 725 as follows:- “725 when mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.” .....*”**

[18] The Defendants submitted that, as this is a clear case of default by a Chargor, this Honourable Court cannot grant an injunction to prevent the Defendant from exercising its statutory power of sale, because, in doing so, the Court would be re-writing the contract for parties. See the case of ***Webwaka Trade Ltd v Diamond Trust Bank Ltd [2014] eKLR***. In view of the foregoing, they submitted the Applicant herein has not demonstrated a *prima facie* case.

[19] They were also of the view that the Applicant has not shown he will suffer irreparable injury which cannot be compensated by an award of damages if the injunction is not granted. The Applicant submitted that the suit property has prayer rooms and a Chapel and also contains his matrimonial house and thus he stands to suffer great prejudice should the same be auctioned off. According to the Defendants, the Court should just disregard the said averments for the reasons that- 1) Once land has been given as security for a loan, it becomes a commodity for sale; and 2) Where a party has offered land as security to a financial institution, the irreparable sentimental value is only existent as long as the Borrowing party does not default. In ***M'mbwani M'njau v K-Rep Bank Ltd & 2 others [2013] eKLR*** it was held that-

***“As the 1st defendant is lamenting, the loan continues to attract interest and thereby increasing the indebtedness of the borrower and enhancing the losses of the 1st defendant. I do not agree that a guarantor's security can only be realized after the securities offered by the borrower have all been sold. What if there are no willing purchasers for example? ..... The injunction being sought seeks to restrain the 1st and 2nd defendants, among others, “from selling, re-advertising for sale or in any other way manner (sic) whatsoever from dealing with land reference No.KARINGANI/MUGIRIRWA/1043 Pending the hearing and determination of this suit”. To me this would be a draconian order considering that the plaintiff had willingly offered his land to the 1<sup>st</sup> defendant as security for the loan obtained by the 3rd defendant. This being an interlocutory application, I will take care not to delve into matters which deserve handling at the hearing and determination of the main suit. At this stage, I only need to rely on the relative weight of the parties' propositions. I find that the applicant has not satisfied the conditions for the grant of an injunction. The applicant has not shown that the intended sale of the suit land to realize a security is unlawful, null and void. He has not established a prima facie case. As I have already stated I am inclined to believe the 1st and 2nd respondents that the apposite Statutory Notice was given. One of the other conditions for grant of an injunction is that the applicant will suffer an irreparable injury which cannot be compensated by an award of damages. I find that the 1st respondent would be able to financially compensate the plaintiff should he win the suit eventually. One might say that there is sentimental value in the land in question, therefore, making the loss irreparable. I hazard to say this, where a party has offered land as security to a financial institution, the irreparable sentimental value is only extant as long as the borrowing party does not default or other satisfactory arrangements are made. The circumstances herein enervate the sentimental value of the suit land veritably.”***

[20] Likewise, Ringera J. in ***Isaac O. Litali v Ambrose W Subai & 2 others HCCC No. 2092 of 2000*** (unreported), as quoted by J.B. Havelock J. in ***Mohammed Khaled Khashoggi v Equity Bank Limited [2013] eKLR*** held as follows:

***“...Here again I adopt the holding of Ringera J. in the Isaac Litali case (supra) as***

*follows:*

***“However, since the plaintiff has in his pleading and affidavit made a mountain out of the fact that he has developed the land in question to a home and its sale would therefore occasion pain and loss which cannot adequately be compensated in damages, I think it would be fair to express a view on the matter. I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful. I say so for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form security. And needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages.”***

[21] The Defendants submitted that there is absolutely no basis for a determination that the Applicant will suffer irreparable damage. In any case, the Bank is capable of compensating the Applicant herein in the unlikely event that the suit is successful. And in all these, the balance of convenience favours rejection of the application. From the record, the Applicant has no intention and/or capability of repaying the moneys owed to the Bank as there have been numerous proposals to pay the debt owed to the 1<sup>st</sup> Defendant which were never honoured. The loan continues to attract interest and thereby increasing the indebtedness of the borrower and enhancing the losses of the 1<sup>st</sup> Defendant. The court should adopt the decision by Havelock J. in the case of ***Mohammed Khaled Khashoggi v Equity Bank Limited*** supra thus:

***“...I adopt with alacrity the holding of Ringera J. (as he then was) in the Kenya Project and Investments Ltd case (supra) when with reference to the Giella principles he detailed:***

***“That stand has been so often restated in other decisions of the East African Court of Appeal as well as those of the present Kenyan Appeal Court that this court must decide applications for interlocutory injunction in conformity therewith. All that need be added for the sake of clarity is that the ‘doubt’ mentioned in the third condition must in logic refer to the existence or otherwise of a prima facie case. Judicial practice also supports that understanding. It should also be borne in mind that the remedy of injunction is equitable in origin and accordingly the court must decline to exercise its discretion in favour of an applicant whose conduct is shown not to meet the approval of a court of equity. Delay, acquiescence and unclean hands would disqualify an applicant from equitable relief....”***

[22] They beseech the court to dismiss the Notice of Motion Application dated 29<sup>th</sup> April 2014 because the Applicant by his conduct, in failing to honour his obligations, is of unclean hands. He should also be ordered to pay costs of the suit in line with the principles in the case of ***Devram Manji Daltani vs. Danda [1949] 16 EACA35*** that:

***“.....A successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.....”***

And in ***Republic v President Mwai Kibaki & 8 Others Ex-Parte: Men For The Equality Of Men And Women & Women’s Political Alliance-Kenya [2014] eKLR*** where it was held that:

***“.....In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation.....”***

## THE DETERMINATION

### Issues

[23] On 19<sup>th</sup> May 2014, by consent of the parties, the court made, inter alia, the following important recordings:

**a)'That the only issue for determination shall be on the fair valuation of the suit property.**

**b)'That the parties shall agree on a valuer who shall value and file a report on the current value of the charged property but also the status of the machinery on the land, f affixed to the property.**

The sale was also postponed further to 19<sup>th</sup> June 2014. On 5<sup>th</sup> June 2014, Parties agreed on Tysons Limited to do a joint valuation on the suit property. After the valuation report by Tysons was filed in court, the Defendant applied to file a supplementary affidavit to speak to issues in the report which they felt were new, irrelevant and contrary to instructions given. Parties also filed submissions on the entire application despite the orders of 19<sup>th</sup> May 2014. I will, therefore, determine all the issues which have been raised herein including the sticky one on valuation. I see one composite issue: whether the Applicant deserves injunctive relief. In determining this issue, invariably, the legal principles in the case of *Giella vs Cassman Brown* as they have developed over the years; the question of valuation as well as strands of argument that the Applicant's conduct does not meet the approval of the court of equity will be discussed and decided upon.

### The threshold

[24] I will first state the legal dimensions and test that I shall apply here. Like any other limb of law, the law on injunctive relief *has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before*. The fundamental principle, therefore, in applying the traditional the traditional and accepted principles set out in the case of *Giella vs. Cassman Brown* for the grant of injunctive relief, is *that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"*. See the decisions of *Ojwang Ag. J (as he then was)* in the case of ***Suleiman vs Amboseli Resort Ltd (2004) eKLR 589*** and *Justice Hoffman in the English case of Films Rover International (1986) 3 All ER 772* on the above proposition. Another superb rendition is an a work of Mabeya J in the case of ***Jan Bolden Nielsen vs. Herman Phillipus Steyn alias Hermannus Phillipus Steyn & 2 Others (2012) eKLR*** where the learned judge stated that:-

***'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs. Amboseli Resort Ltd (2004) eKLR 589 Ojwang Ag. J (as he then was) at page 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 vs Cassman Brown, in 1973 cast in stone 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 has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"...."***

***Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.***

- i. ***Is there a prima facie case....***
- ii. ***Does the applicant stand to suffer irreparable harm...***
- iii. ***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 more 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.....***

[25] The major arguments by the Applicant are: 1) that the rate of interest was fixed by the Charge at 12% but the Defendant kept on charging interest at a rate higher than 12% without the consent of the Applicant. This variation of interest has hugely inflated the loan debt. 2) That the suit property has been grossly undervalued and the valuation Reports by the Defendant are merely being used to sell off the property at throw away price. 3) That the Notices herein were not properly served in accordance with the law as; i) they bear erroneous dent amount which is different from the amount shown in the statement of accounts provided by the Defendant; ii) they were not served on the relevant persons recognized in law, to wit, the spouse of the Applicant who gave consent to the charge as well as other tenants on the suit premises whose presence the Defendant is aware of.

### **Dispute on interest rate**

[26] As a general rule, a dispute in interest is not a basis for issuance of injunction against exercise of the chargee's power of sale. However, where it is easily discernible from the terms of the charge and law that usurious or illegal interest had been charged, the court may grant an injunction on that basis. I will examine the documents herein in order to come to a just determination of this issue. A reading of the entire Charge reveals that the charge was not only to cover the debt stated in the charge but was also a continuing security for other financial facilities which the Lender may from time to time advance to the Borrower. The Charge at Clause 1 refers to '*interest at the rate or rates hereafter mentioned*'. Clause 2(a) of the Charge provides for '*... together with interest at a rate (not exceeding that allowed by law) decided by the Lender and calculated on daily balances and debited monthly by way of compound interest and the Lender need not inform the Chargor of any change in the rate of interest so payable...*'. In all subsequent clauses, the Charge has used terms such as...*interest rate aforementioned*. The joint Deed of Guarantee also guarantees payment of moneys advanced to the Borrower together with interest thereon without reference to a specific rate of interest. Here, the letter of offer is the only fallback document on the actual rate of interest agreed by the parties.

### **Letter of offer**

[27] Letter of offer could be relied upon by the court in order to ascertain the intention of the parties or agreement of the parties on an issue such as of interest rate where the Charge does not provide for the actual rate of interest or how it shall be determined. Except, however, such documents should not be inconsistent with the Charge. See the view of courts on the matter in the rendition in the case of *Surya Holdings Ltd & 2 others vs. CFC Stanbic Bank*

### **Status of Letter of Offer in a Loan transaction**

***The place of documents preceding Charge, to wit, Letter of Offer and other related correspondences in a loan transaction, has received fairly comprehensive treatment by the courts. Without multiplying the numerous decisions on the issue, I will quote the decision of Ringera J (as he then was) in MORRIS & COMPANY v KCB LTD [2003] 2 EA 605, that parties to a contract must be held up to their bargain. Also I am content to quote a work by Kimondo J in the case of JOHN MURIITI GACUGO NG'ANG'A v HFCK LTD & ANOTHER NBI HCCC NO 15 OF 2005 (UR) that:***

**“.....The 1<sup>st</sup> Defendant had pleaded in paragraph 4 of its amended statement of defence that upon execution of the charge instrument, the letters of offer were not relevant to the contract. I disagree. The letters of offer executed by the parties are relevant in forming the foundation of the contract and the intention of the parties. Of course, as between them and the charge instruments, the charge is superior and if there is any conflict, then the terms of the charge would supercede any other agreement between the parties”.**

**Mabeya J expressed similar opinion on the matter in the case of CHRISTOPHER NDOLO MUTUKU & ANOTHER v CFC STANBIC BANK LIMITED [2013] eKLR.**

**Accordingly, the Letter of Offer and any other pertinent document in the bargain of the loan which eventually leads to a charge, bind the parties in so far as they are not inconsistent with the charge, and such documents preceding the charge are useful in ascertaining the intention of the parties. Quite apart from the legal position I have stated, all the debentures herein and the charges created thereto acknowledge the letters of offer and agreements in the bargain leading to the debt herein and there is nothing in those letters of offer and agreements which is inconsistent with the debenture thereto.**

[28] The letter of offer dated 23<sup>rd</sup> October, 1996 stated as follows:

**Interest rate**

**“Fixed rate of interest at twelve percent (12%) per annum over the entire period of the loan”.**

**Servicing/Repayment**

**“...Default payments will attract a surcharge of 2% per annum above the interest rate charged on the loan. In the event of restructuring the loan repayment a similar 2% p.a. will be charged”.**

[29] There is no doubt that the Borrower defaulted in repaying the loan. And the Notices herein were issued properly as by la required. But from the record and evidence of the Applicant as well as the Defendant, there has been several restructuring of the loan. According to the letter of offer which the Applicant is also relying upon, a surcharge of 2% over and above the 12% agreed on is chargeable on default of repayment. The Applicant has been silent on the surcharge which is clearly provided for in the letter of offer as well as the Charge at Clause 2. Therefore it is mischievous for the Applicant to attempt to rely on the wise words of Waesame J (as he then was) in the case of **Givan Okelo Ingari (supra)** when the learned judge stated **“...in my view if the Defendant applied default charges on the Plaintiff’s account but which was not permitted or provided by the Charge document then that is prima facie un-contractual or illegal”**. The argument by the Applicant that the interest rate was to be constant at 12% when there has been default on and restructuring of the repayment of the loan, is misleading. And, based on the Prima facie evidence before the court, the claim by the Applicant that the interest was excessive and so is the debt herein is not a formidable ground on which the court may base its decision in granting injunctive relief. And looking at the terms of the Charge, the amount of loan, the subsequent default on repayment, restructuring and loan amortization schedule, the court is not in any position to say the amount of Kshs. 69,350,474.50 is excessive as to restrain the exercise of Chargee’s power of sale herein.

[30] The Borrower has defaulted in repayment and the Applicant as a Guarantor has equally neglected in the performance of his obligations to ensure the debt he guaranteed is repaid in full. The restructuring of repayment herein and the amortization schedules of repayment were occasioned and at the request of the Applicant. His conduct of not repaying the entire debt owing at the time it has become due and the restructuring thereof have made the debt continue to swell to huge proportions. He should not now turn around and expect the court to aid him pass the blame to

the Defendant. I note also that the Applicant only makes much generalized statements that he has repaid the portion which is covered by his guarantee without giving the specific total amount he has paid. He has also resorted to conjectures that the debt cannot by any standard swell to Kshs. 78 million when he has himself annexed schedules of restricted repayment plan laying out how the amount is arrived at over the period agreed upon from the time of restructuring of the loan repayment.

## **Valuation**

[31] I am now left with one issue. The one on the forced valuation report and which should be used for purposes of sale herein. I should state that **Section 97 (2) of the Land Act places** a duty of care on the Bank, as the Chargee, to ensure that a forced sale valuation is undertaken by a Valuer. The Bank undertook two valuation Reports dated 16<sup>th</sup> July 2001 and 29<sup>th</sup> July, 2014. The Applicant commissioned his own dated 8<sup>th</sup> May 2014. Then the court ordered a valuation to be undertaken by a Valuer agreed on by both parties and a valuation by Tysons Limited dated 23<sup>rd</sup> June was filed in court. A valuation for purposes of sale of a charged property should be done in good faith, professionally and by a qualified Valuer with the sole aim of obtaining the best price reasonably obtainable for the suit property at the time. Once such a valuation is undertaken for forced sale, any party who alleges it does not reflect the best price reasonably obtainable for the suit property bears the evidential burden to prove otherwise. I am content to rely on the decision by Kasango J and a work of this court in *Zum Zum Investment Limited vs. Habib Bank Limited [2014] eKLR* and *Palmy Holdings Limited vs. Consolidated Bank of Kenya*, respectively. In *Zum Zum case*, Court held thus –

*“.....16. The question that this court must therefore address is whether the Plaintiff has satisfactorily demonstrated that the value of Kshs. 312,000,000.00 is not the best price reasonably obtainable for the suit property.....”*

*.....21.. The Defendant carried out valuation of the suit property and availed the report by Tysons Limited dated 24<sup>th</sup> April 2013. That report contains both the open market value of the property being Kshs. 390,000,000/- and the forced sale value of Kshs. 312,000,000/-. The Defendant, in my view, complied with Section 97 (2) of the Land Act by undertaking the forced sale valuation of the suit property. Once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time.....”*

*.....27. In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds.”*

And in *Palmy case* the court stated that:

*The Defendant says that the valuation report by the Applicant is an overly exaggeration whilst the Applicant says the one by the Defendant is a gross under-valuation of the suit premises. The onus of establishing on prima facie basis, that the*

***Applicant's right has been infringed by the Defendant by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant. Other than the report by Prudential Valuers, there is nothing on record to support the claims by the Applicant or to discredit the valuation by Kenstate Valuers. The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Defendant as to entitle the court to call for an explanation or rebuttal from the Defendant. That approach is necessary to prevent defaulters from filing valuation reports with value way beyond the open market value just to obtain an injunction. Needless to state that having an arguable point, as is the case here, is not sufficient to establish a prima facie case for the grant of an injunction especially in cases of exercise of the power of sale by a chargee who has shown that the Applicant has defaulted and continue to be in default. It be known that, as long as it is lawfully exercised, the Statutory Power of Sale is not a favour that the chargor extends to the chargee or an infringement on the right of or a foreclosure of the chargor's equity of redemption; it is a statutory remedy which is inextricably tied to the right of the chargee to recover its money-which is property guaranteed under Article 40 of the Constitution.***

[32] In this case there have been arguments by the Defendant that its valuation reports are professionally done and in order, but the one by the Applicant is self-seeking and overly exaggerated. They stated that they did not carry out valuations in question in bad faith whatsoever or in any way or deliberately undervalued the suit property, and thus, dismissed the arguments by the Applicant as lacking any factual basis. The Plaintiff on the other hand claims that the valuations by the Defendant were cooked with a view of disposing the suit property at a gross under-value. And that they did not consider a comparative analysis of properties around the vicinity of the suit property. Much was submitted on this matter especially by the Applicant. On the scale of the material before the court, I do not find anything to support the claim that the Bank acted in bad faith or deliberately undervalued the suit property. There is no proof, therefore, of breach of the duty of care under section 97(2) of the Land Act. But the court will be more concerned with the valuation which was done by Tysons Limited and filed in court on 1<sup>st</sup> July 2014. The said valuation was ordered by the court and was carried out by a Valuer agreed between the parties. The said valuation gives a market value, mortgage value, as well as forced value of the suit property. The forced value of the suit property as stated in the report is Kshs. 65,000,000 and Kshs. 40,000,000 for land & buildings, and Plant & Machinery, respectively. The Defendant argued that the Applicant has not demonstrated why the reports by the Defendant should be disregarded or why the alternative ones including the one by Tysons Limited should be adopted for purposes of sale of the suit property. The Applicant touted for the Report by Dayton Valuers Limited and stated that it is most reflective of the value of the premises. I note that Tysons Limited did not state the status of the plant and machinery and specifically whether they are affixed to land. That notwithstanding, I hereby adopt the said Valuation Report to be used for purposes of the sale herein. Meanwhile, parties should provide reports and make submissions on the possibility of severing and or treating the Plant & Machinery separate from land and buildings for purposes of sale. Despite, the order of the court, Tyson Limited did not provide in their report the status of the plant and machinery and their attachment to the land.

[33] I find it curious, though, that the Applicant has continued to lease out part of the charged property without prior consent of the Chargee. I should also say something about the most touted peculiar nature of the suit property as well as the sentimental attachment the Applicant has on his property as matrimonial home and a religious shrine. At the risk of monotonous repetition, any sentimental attachment to a property that is given as security for loan may not matter, as such property is a commodity for sale like any other except only it must be sold in accordance with the law. I find, however, that the Applicant has made one positive promise; that he is willing to repay whatever money found owing if given reasonable time to do so. In the premises, I will postpone the sale of the suit property for 120 days to enable the Applicant to pay the sum owing herein which failing the Defendants shall be at liberty to sell the suit property without the necessity of applying in that behalf. Secondly, the Applicant shall pay the auctioneers charges so far incurred

on the sales which the court postponed from time to time when this application was pending hearing. The charges shall be agreed upon or taxed by the court. I will not, however, condemn the Applicant to pay costs of the application because the Defendant also accepted certain compromises which had been proposed by the Applicant and as a result, postponed its right to sell the suit property on the earlier occasions it fell due. Accordingly, each party shall carry own costs.

**Dated, signed and delivered in court at Nairobi this 28<sup>th</sup> day of January 2015**

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**F. GIKONYO**

**JUDGE**