REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI

CIVIL CASE NO. 212 OF 2009

JOHN NAHASHON MWANGI..PLAINTIFF

Versus

KENYA FINANCE BANK LIMITED

(IN LIQUIDATION) ....…..................... DEFENDANT

RULING

Two applications: Reinstatement of suit and injunction

[1] There are two applications filed by the Plaintiff. One is dated 13th June, 2014 and the other dated 8th July 2014. The former application seeks for three significant orders. The orders are; 1) leave of the court for the firm of King'ara & Co Advocates to come on record for the plaintiff; 2) reinstatement of this suit; and 3) leave to amend the plaint. Prayer I is already spent because, on 16th June 2014 the court permitted King'ara & Co Advocates to come on record for the plaintiff. The outstanding prayers in the first application are, therefore, the reinstatement of suit and amendment of the plaint. The application 13th June, 2014 is the first in time and will be dealt with first under the title; Reinstatement of suit and Amendment of Plaint. The application for injunction will be dealt thereafter.

Reinstatement of suit and amendment of plaint

[2] This suit was dismissed on 13th December, 2011 by Justice Mabeya for want of prosecution. The Plaintiff has now applied for its reinstatement, and upon such reinstatement he be granted leave to amend the plaint dated on 17th December, 1987. The application is expressed to be brought under Section 1A, 1B, 3A of the Civil Procedure Act, Order 9 rule 9 and 10, Order 8 rule 3, order 12 rule 7, order 51 Rule 1 of the civil procedure rules and other enabling provisions of the law. The application is supported by grounds appearing on the face of the application and the affidavit of John Nahashon Mwangi filed herewith and dated 13th June, 2014.

The Applicant's gravamen

[3] The Applicant has explained the circumstances in which the suit was dismissed. First, this suit was originally filed as **John Nahashon Mwangi v Kenya Finance Bank Limited Civil Case No. 5085 of 1987** and the plaintiff obtained orders restraining the Defendant from realising the security herein pending the hearing and determination of the application. Those orders were

extended from time to time. But, when the case was ordered by consent to be set down for hearing in 1989, the defendant was restrained from exercising any statutory right including power of sale in respect of the security. The matter was however heard but the Defendant pursued the setting aside of the consent orders to no success until 1994. In the said year, the Defendant advertised for sale of plaintiff's property but was restrained by orders of court dated 11th April, 1994.

[4] Sometime in 1995, the Plaintiff's advocate ceased to act for him and informed the defendant counsel by the letter dated 6th January, 1995. The plaintiff then instructed the firm of Njongoro & Company advocates who could not locate the court file despite valiant effort. The plaintiff was forced to instruct the firm of Ndonye, Mbugua, Atudo & Macharia Advocates and then Majanja Luseno advocates; again, these firms of advocates were not able to locate the court file. The plaintiff avers that he has since learnt that, when the Commercial Division, High Court, Nairobi was created, the file was transferred to the said Division and was allocated a new number, i.e. Civil case 212 of 2009. Meanwhile, the plaintiff and his advocates were not aware of these changes and did not know the whereabouts of the file. However, the parties continued negotiating to settle the matter but the defendant went into liquidation and the negotiations came to a halt. The development also affected any possibility of setting down the matter for hearing.

[5] The plaintiff later learnt that, sometimes in 2008, Kenya Finance Bank Limited (in liquidation) sought and was granted leave of the court to defend the matter on behalf of the defendant. The application for leave was purportedly served upon Kaplan & Stratton Advocates who refused service because the firm had ceased acting for the plaintiff. The application was allowed unopposed. Then, on 25th October, 2011, the Defendants filed an application seeking to have the matter dismissed for want of prosecution. The said application was purportedly served upon Kaplan & Stratton Advocates who again refused to accept service on the ground that they had ceased acting for the plaintiff. The application was allowed unopposed.

[6] Eventually, on 30th May, 2014 the plaintiff finally located the file through his advocate's currently on record and learnt about these developments and dismissal hence this application. The Plaintiff contends that the there was no proper service of the application for dismissal if suit as it had been purportedly served upon a firm of advocates who had ceased acting for the defendant and which information was well within the knowledge of the defendants. Further, the defendant has admitted of having received communication from the said firm that they were no longer acting for the plaintiff. The affidavit of service indeed states that the application was left with one Nancy who refused to accept the said documents on the grounds that the firm was no longer acting for plaintiff. Despite the information, the Defendant failed to make any other effort to serve the plaintiff or his new advocates who were well on record or seek further directions from the court. On this basis alone, the court should exercise its unfettered discretion and set aside the dismissal order. At least the plaintiff was entitled to a notice to show-cause why the matter should not be dismissed. The failure to attend was not intentional or deliberate on the part of the plaintiff and the same should be excused. See **Shah v Mbogo** that exercise of discretion of the court to set aside ex parte orders is to avoid an injustice or hardship resulting from accident, inadvertence or excusable mistake or error and not otherwise to delay justice. F. Azangalala, Ag. Judge in the case of **Associated Warehouse Co. Ltd & others v Trust Bank Ltd HCCC No.1266 of 1999 (unreported)** stated:-

> **"Rule 2(1) of order 16 (repealed Civil Procedure Rules) presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive. In this case the plaintiff were not given a chance to show cause why their suit should not be dismissed. The plaintiffs have this persistent complaint regarding alleged "Bearer certificates of Deposit". The plaintiffs may have misinterpreted the effect of the interlocutory order made by Gacheche, Commissioner of Assize as she then was. This reason for delay in prosecuting this suit may be unsatisfactory, but I will not hold it against the Plaintiffs. In any event, the defendant has not demonstrated the prejudice it will suffer.**

[7] The plaintiff refuted the defendant's claim that the error in this matter can only be apportioned to the plaintiff's previous advocates on record. The plaintiff stated that they were not aware of the transfer of the file and were not informed of the same; indeed that explains why three firms of advocates could not trace the file. As a matter of natural justice, the plaintiff ought to have been given an opportunity to be heard. In line with the policy of the court not to shut out a litigant from hearing, and to drive him from the seat of judgment without a hearing, the Applicant prayed for the dismissal order to be treated as having been obtained ex parte and be set aside. The plaintiff says it has an arguable case which should be given a chance in court. See the case of **Nimrod Vs Joseph Momanyi.** The plaintiff has shown it engaged extreme efforts to trace the file and did so only in May, 2014 and immediately proceeded to file the application herein. There is therefore no delay application filing this application. If, the court finds that there is delay, the same is not inordinate bearing the circumstances.

[8] The delay in the prosecution of the suit herein, in any case, arose due to the liquidation of the defendant. The matter could not proceed until such appropriate steps in law had been taken and leave granted to continue with the suit. The plaintiff was not indolent as the defendant would like the court to believe, because he engaged the defendant in negotiation for amicable settlement. The negotiations were thwarted by the liquidation of the defendant. When all of these things are put together, the defendant stands to suffer no prejudice if the suit is reinstated. The defendant still holds documents of title and the property is still charged to it and therefore it cannot say it will suffer prejudice. Any damage, if at all, will be compensated by way of damages. See **Patel v E.A. Cargo Handling Services Ltd (1974) EA 74.** The plaintiff is more than able and is willing to pay any amount that is found legitimate under the facility. The plaintiff is desirous to prosecute the suit. See the case of **Chemwolo & Anor v Kubende (1986) KLR 492** the court held that in considering whether to set aside an interlocutory judgment, the court must consider facts and circumstances of the case prior and after the entry of judgment. The court should exercise its discretion and set aside the dismissal order. See the case of **Shanzu Investment Ltd v the Commissioner of lands, Civil Appeal NO. 100 of 1993,** quoted in rose **Wanjiku Kamau v Tabitha N. Kamau & 3 others (2014) eKLR** at page 3, the court held that

> **"The court has a wide discretion to set aside judgment and there are no limited and restrictions on the discretion of the judge except if the judgement is varied, it must be done on terms that are just''.**

See also the case of **Patel Vs East Africa Cargo Handling Services Limited (1974) EA 75 at page 76 cited in Lochab Bros. Limited V Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 others (2013) eKLR** at page 4 it was held that

> **"There are no limited or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just… The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by rules."**

In exercise of its discretion, Justice Hoffman stated in films **Rover International Ltd v Cannon Film Sales Ltd (1986) e All ER 772 at page 780 – 781,** cited in **Lochab Bros. case** above,

> **" A fundamental principle is …. That the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong."**

According to the Applicant, the above factors amounted to reasonable explanation for the delay in prosecuting this case and the delay should be excused and suit reinstated.

[9] On amendment of the plaint, the plaintiff submitted that a litigant is entitled to be given a reasonable opportunity to present his case in accordance with Article 50 of the Constitution of Kenya 2010. The amendments to the plaint sought are meant to give the court adequate opportunity to consider the issues in dispute. See the case of **Andrew Ouko v Kenya**

Commercial Bank Limited & 3 others [2014] eKLR on the foregoing**.** And also the case of **Central Bank Limited v Trust Bank Limited (2000) 2EA 365 cited in Andrew Ouko v Kenya Commercial Bank Limited & 3 others (2014) eKLR,** where the court held that:-

> **"The overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated by costs."**

Similarly the case of **Joseph Ochieng & 2 others t/a Aquiline Agencies v First National Bank of Chicago (1995) eKLR** and **Tilde Vs Harper 9`1878) 10 Ch. D 393** are useful. Bramwel L.J. in the latter case stated that:-

> **"My practice has always been to give leave to amend unless I have been satisfied that the applying party was acting mala fide or that by his blunder he had done some injury to his opponent which could not be compensated by costs or otherwise."**

[10] Therefore, leave to amend pleadings should only be denied as a last resort and with good or sufficient cause. The amendments will not occasion any prejudice to the defendant. Order 3 Rule 1 allows a party to amend their pleadings at any stage and stipulates as follows:

> **3) " Subject to Order 1, Rules 9 and 10, Order 24, Rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."**

Sub-rule 2 states as follows:

> **"Where an application to the court for leave to make an amendment under sub-rule (3) (4) and (5) is made after the relevant period current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any sub-rule if it thinks just to do so."**

[11] The plaintiff averred he intends to amend its plaint in good faith. Secondly, the plaintiff has since changed advocates several times since the suit was first filed and cited the case of **Andrew Ouko v Kenya commercial Bank Limited & 3 others (2014) e KLR** where the court observed that:-

> **" it is not lost to the court that parties continuously look at their cases introspectively if the same are finally heard by the court to ensure that they fully present their cases for determination by the court. Upon instructions by a party and perusal of documentation in a matter, a firm of advocates may form a particular opinion about how to prosecute its client's case while another firm that takes over the matter from that previous firm, might look at the matter differently necessitating a change of tact."**

[12] The Plaintiff also relies on the legal changes in law which need be capture in the pleadings. Those changes are in the Land Registration Act (Act No.3 of 2012) and the Land Act (Act No. 6 of 2012) as well as the changes the Civil Procedure Rules, 2010 which affect the suit property. The two land acts entitle the plaintiff herein to further statutory protections, relief, and procedural fairness and regulates the manner and instances in which a charge can exercise its statutory power of sale. Also, failing to honour the provisions of Sections 44A of the Banking Act which section mandates the defendant to determine the date the plaintiff's loan became non performing (if at all)

and to inform the plaintiff of the said determination and the purported principal amount and the interest accruing thereon and therefore any intended exercise of the statutory power of sale is premature. Equally, the Plaintiff wishes to incorporate in this suit the fact that the suit property is developed and currently valued at about one billion and is the matrimonial home of the plaintiff. The loan amount was Kshs. 1,450,000 with the defendant claiming the sum of Kshs. 800,000 as the balance of the loan facility by the time of filing this suit. Further, the Plaintiff says the amendment will provide clarity of some crucial issues and developments. Some payments made after the plaint was filed have also not been captured. For all those reasons the Plaintiff is convinced the amendments should be allowed.

The defendant opposed the application

[13] The Defendant opposed reinstatement of this suit and amendment of the plaint. They filed concise grounds of opposition as well as elaborate submissions dated 1st July 2014 and 9th July 2014, respectively. The defendant argued that the plaintiff does not deserve exercise of discretion in their favour due to his previous conduct herein. And that the previous advocates on record, M/S Kaplan & Straton Advocates remained on record for the plaintiff until 16th June 2014 when M/S King'ara & Co Advocates came on record. They were served with the process herein but did not act as by law in the matter. Therefore, the plaintiff's remedy lies in negligence against the said advocates and not in setting aside of the dismissal order herein. The Plaintiff is also guilty of laches- the application was filed over three and half years after the dismissal of suit- thus if the suit is reinstated, the Defendant will suffer prejudice in terms of time and extra legal costs in litigation. The Defendant made a distinction between setting aside and review of a dismissal order. They posit that order 17 does not provide for setting aside of a dismissal order. The only option, therefore, is to ask for a review under order 45 which has set strict thresholds. And this case does not meet those thresholds. They referred to the case of **Teresia Nyakairu Njau vs. George Otieno NKR HCCA NO 11 OF 2000, NBK Ltd vs. Ndungu Njau CA NO 211 OF 1996** and **Shah vs. Mbogo [1967] EA 116** in support of their standpoint. And, in any case, the defendant urged that the application is an abuse of the process of the court and should be denied.

[14] On the request for amendment of plaint, the Defendant contended that it has been made too late in the day and may be extremely prejudicial to them if allowed. First, the plaintiff has not annexed a draft amended plaint as required under order 8 rule 7(3) of the CPR. The omission is a fundamental error as the defendant and the court do not know the nature of the amendments sought in order to see whether they will prejudice the defendant or they are completely new causes of action. Second, the amendment is being sought twenty five years after the original suit was filed which will cause extreme difficulties in responding to. On those reasons, the application for amendment should be refused. They relied on the cases of **Eastern Bakery vs. Castelino [1958] EA 461; Kyalo vs. Bayususf Bros Ltd (1983) KLR 229; and Phillips, Harrison & Crosfield Ltd (1982) KLR 1.**

THE DETERMINATION ON RESTATEMENT OF SUIT

Preliminary issues

[15] There are two matters of preliminary importance which emerge herein. The first one is on the absence of express provision under order 17 on the setting aside or variation of an order dismissing a suit; I say that does not deny the court the power to set aside or vary such order as it deems fit. And, more so, given the draconian nature of dismissal of suit, the absence of an express provision on the setting aside or varying of the dismissal order only makes this a perfect case for the court to invoke its inherent jurisdiction in order to do justice-this jurisdiction is always retained and is in the court as a court of justice once so established under the Constitution. This approach derives from the constitutional principle that the law shall not suffer wrong without a remedy. The second issue is the argument by Mr Thiga that there is a difference between setting aside and review of court orders. I agree. But I will not dwell on the distinction between the two because both are different remedies and are employed differently depending on the circumstances

and facts of each case. The Plaintiff did not apply for review at all and has not canvassed circumstances which would require the court to fall back on to the thresholds of review under order 45 of the Civil Procedure Rules. It would be wrong, therefore, for the court to determine this application on the premise of what Mr Thiga thought was the best option. I will, therefore, consider the application for setting aside on its merit.

Should I reinstate the suit?

[16] This is the major issue and the other applications for amendment of plaint and for injunction will be considered if the suit is reinstated. The decision of the court is purely a matter of discretion which as it has been said time and again should be exercised judicially on defined principles of law. The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial ‘’Sword of the Dancles’’ which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.

[17] There is no dispute that this suit was dismissed on 13th December 2011 by Mabeya J on the application by the Defendant. The application was served on Kaplan & Stratton on behalf of the Plaintiff. The said firm of advocates refused to accept service on the basis that they had ceased acting for the plaintiff. Nonetheless, by dint of law the said firm of advocates was the one on record and the learned judge was careful in his decision for he appreciated that the application had been served ‘’on the advocates on record’’ for the plaintiff. The explanations being given now were not availed to the learned judge when he made the order of dismissal. This was obvious because the advocates served did not attend as they had indicated they had ceased acting for the Plaintiff. Those circumstances, however, do not bring this case within the ambit of order 45 of the Civil Procedure Rules. Now, copious of explanations have been urged before the court by the plaintiff to explain the failure on their part to show-cause why the suit ought not to have been dismissed in the first place. Do they amount to reasonable cause to set aside the dismissal order thereby reinstate the suit?

[18] The firm of Kaplan & Stratton indicated they had ceased acting for the Plaintiff and that was reflected in the affidavit of service failed. Mr Thiga argued and rightly so, that as long as Kaplan & Stratton had not filed an application to cease acting under Order 9 rule 13 of the CPR, they were the advocates on record for purposes of these proceedings. I agree and there are good reasons why the law is so tailored. The process in Order 9 rule 13 of the CPR subserves a bigger constitutional objective; as the enabler of right to and effective legal representation of the litigant concerned and service of process of court. Doubtless, the other party should know the person it ought to serve with court process lest its rights will be impeded if they are left to ad hoc arrangement between advocates and their clients as it will be borne out shortly. Similarly, the right to legal counsel of choice becomes endangered where an advocate decided to cease acting without informing the client and taking appropriate legal steps to cease acting. Kaplan & Stratton informed the plaintiff that they will no longer act for him and this is admitted in his affidavit. The Plaintiff has averred that he engaged Njongoro and Company Advocates and then Majanja and Luseno before engaging King’ara and Co Advocates to represent him in this matter. He argued that the file went missing and the said advocates could not take the necessary steps in the circumstances. They have given a long account on the transfer of file to this Division after which it was assigned a new number 212 of 2009; they claim this was the source of the confusion herein and his

advocates could not trace the file for action until late in 2014 when he filed this application. I have perused the file and observe that advocates including the advocate for the defendant at one point or other wrote to court about non-availability of this file. Majanja Luseno Advocates as well as King'ara and Co Advocates wrote similar letters to court. Although the court replied to the letter by counsel for defendant that the file was readily available for action, it did not reply to those by Majanja Luseno Advocates. I also note that counsel herein cited the old case file number in some of their correspondences to court and the new case file number in others. This only escalated the confusion in this file. But, I reckon that the plaintiff's advocates could have done more, say, apply for reconstruction of a skeleton or holding file especially when they realized that the file is not available for them to file necessary papers. I note that, although Kaplan & Stratton had ceased acting for the Plaintiff, they were served with the application for dismissal of the case and the had not been served with any notice to act or of change of advocates; it would have been prudent for them to extend a little gesture and inform their former client of the impending axe that was likely to befall on him. That would have been quite in order and I do not think it is any onerous or speculative, especially when it is taken in light of the arguments by Mr Thiga that, according to the record Kaplan & Stratton were the advocates for the Plaintiff and so service on them of the application for dismissal was perfectly in order. All these things only lead to the conclusion that there was a lapse of some sort on the part of counsels for the Plaintiff; and as such this case may be considered as one of a mistake of counsel. In making the inference, I have considered the possibility of the argument that the Plaintiff could have done more or be more vigilant about the fate of his case especially given the amount of time which had passed by. But this is not a disciplinary cause against counsels because I believe the error herein is not one which can found a disciplinary cause at all. The lapse is only useful in this case to the extent that it may have been one of the possible sources of confusion in the matter. And, even if courts of law have said time and again that mistake by counsel should not be visited on the client, I repeat, I do not think that this is a matter which should found any affront against the advocates for negligence as suggested by Mr Thiga. That option is not feasible given the nature of the issues before me and the fact that it is the entire cause which has been decimated, a claim for negligence against counsel, if at all, would still not be an appropriate remedy here. In such cases, I should think, the remedy on negligence against counsels, if at all, should be in addition to, rather than in substitution of the remedy for reinstatement of suit. And therefore, an application to set aside a dismissal order should not be defeated simply because the Plaintiff may have another remedy against counsels based on professional negligence. I am not, however, suggesting or making any finding of negligence on the part of the counsels involved in this matter. The rendition of the court in that behalf is strictly limited to answering the argument by Mr Thiga that the remedy of the Plaintiff lay in a claim for negligence against Kaplan & Stratton as opposed to reinstatement of suit.

[19] Will reinstatement of this suit prejudice the Defendant? Intuitive reaction may suggest prejudice will be suffered especially in view of the many years this litigation has been pending in court. They have been over 27 long years of waiting and have been made bitterer by the fact that the plaintiff was enjoying an injunction at some time and the defendant now has embarked on realising its statutory power of sale of the charged property. The Defendant claims that they have been denied of their property in the money they advanced to the Plaintiff and their remedy to realize security herein due to the prolonged pendency of this case. These arguments are valid and I have considered them. But when I place on scale the concerns by the Defendant against those of the Plaintiff, I am inclined to reinstating the suit rather than interring its remains upon a permanent legal death. A legal resurrection of the suit as enabled by equity is in order. Accordingly, I set aside the order of dismissal made by the court on 13th December, 2011 and reinstate the suit for hearing and disposal expeditiously. To strike an almost symmetrical balance between the rights of parties herein, the reinstatement will not be without conditions. The Plaintiff shall comply with all pre-trial requirements and set the matter down for hearing within the next 60 days.

On amendment of plaint

[20] As a general rule, amendment of the pleadings may be done at any time during the proceedings for purposes of determining the real question in controversy between the parties. But

granting the request for amendment of a pleading is nonetheless a matter for the discretion of the court which albeit wide and unfettered should be exercised judicially upon defined principles of law**.** See **Mbogo & Another vs. Shah [1968] E.A. 93**. The thresholds which guide the exercise of discretion in amendment of pleadings were set out in the case of **Central Kenya Ltd vs. Appeal No 222 OF 1998** which can be summarized as follows:

The amendment:

> **(i) Should be necessary for purposes of determining the real question or issue which has been raised by parties;**
>
> **(ii) Is to avoid multiplicity of suits provided there has been no undue delay;**
>
> **(iii) Does not introduce new or inconsistent cause of action;**
>
> **(iv) Does not take away or affect any vested interest or accrued legal rights; and**
>
> **(v) Does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.**

[21] Before I apply these thresholds to the application before me, I should state from the outset that, for good order and prospects, and there is ample judicial decisions on this, the applicant should as a matter of necessity; in a formal application for amendment of a pleading, exhibit a draft amended pleading in the application clearly showing the proposed amendments in the manner prescribed in order 8 rule 7 of the CPR; and where an oral application for amendment is made, state in a clear and concise manner, the nature of the proposed amendment. Failure to do so would deny an otherwise deserving case an opportunity to amend for two reasons. One, the court as well as the other party will not know the nature of the proposed amendments and that makes it impossible to place the proposed amendments on the legal scale of weight. In this case, the prayer for amendment of the plaint has been indicated on the face of the application, but there is nothing substantive which the court can base its decision on in this request. The substance thereof in the submissions of the plaintiff merely cites changes or development in substantive and procedural law on legal Charges and interest rates. He has also stated that the new land law provides further protections to the plaintiff and all these things need to be captured in the plaint. I should state here that matters of law such as the ones being raised here need not be pleaded for a party to avail self of the protections of the law; they are always available to the plaintiff. It is not, therefore, a legitimate claim to found an amendment of the plaint on development of the law. I say these things fully aware of the principle of retroactive application of the law and the effect or repealed law on causes which were transacted under the repealed law. In this case, the ITPA which governed this transaction was repealed and there are new land laws on charges. Whether the old law will govern these proceedings or the new law or a combination of both is a matter of legal arguments which need not have expression in the plaint. In any case, despite the submissions on development of law subsequent to the dispute herein, there is no draft proposed amended plaint from which the court would gauge the prospects of the proposed amendments. Indeed, that omission made Mr Thiga to attempt in a desperate stature to say something about the request for amendment of the plaint, but he ended up engaging in speculative venture as to the nature of the amendments. The court will not attempt to grope in darkness or speculate the nature of the amendments the Plaintiff intends to effect on the plaint. Even on the basis of the reasons above, I do not think the amendment is necessary as any protection of the law will be available to the Plaintiff. I dismiss the request for amendment. It is so ordered. Looking at the entire proceeding and the conduct of the Plaintiff, costs of the application dated 13th June 2014 shall be paid by the Plaintiff to the Defendant.

THE INJUNCTION APPLICATION

[22] The application for injunction is the Motion on Notice dated 8th July, 2014 which is supported by the grounds on the face of the application and the submissions filed herein. The application was premised on the success of the application dated 13th June 2014. Now that the said application has been allowed, I will straight away consider whether an injunction is deserved in the circumstances of this case. The application seeks for two orders, to wit:

a) A temporary injunction to restrain the Defendant by itself, its gents, servants, auctioneers or advocate from doing any of the following acts, that is to say, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, letting, charging or otherwise howsoever interfering with the Plaintiff's possession and ownership of land reference No. 2246/5/ KAREN TITLE No. IR 5311/1; and

b) An order be made under the doctrine of lis pendens and Section 106 of the Land Registration Act, previously enshrined under Section 52 of the Indian Transfer of Property Act (1959) (repealed) that during the pendency of this suit pending final determination in accordance with the law, ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the Charged properties with any land registry, government department and all other registering is hereby prohibited in ALL THAT piece of land known as land reference No.2246/KAREN/ No. IR.5311/1.

The threshold

[23] I will first state the legal dimensions 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……**

The Plaintiff argued

On prima facie case

[24] The Plaintiff averred that he has established a prima facie case and should be granted an injunction. He saw prima facie in the fact that the court had granted him an injunction. He was convinced just like before, he still has prima facie case which should be protected by an injunction based on the fact that the defendant charged illegal interest and penalties. The illegality lie in the unilateral and unlawful alteration of the rate of interest rates contrary to law. He argued that interest rate was regulated by applicable law then and were communicated by the relevant Minister through Gazette Notices and the Defendant was bound by the said rates. Therefore, the interest over and above the one set by the Minister was illegal. He said this is a legal ground on which an injunction should be granted. He cited ample judicial authorities on the point. He saw further reinforcement in the allegation that the charge herein was invalid for it did not adhere to the law especially sections 46 of the ITPA. Therefore, as the charge is invalid under ITPA, under section 100A (1) of Registration of Title Act, the chargee's power of sale cannot be exercised on an invalid charge. He also relied on judicial decisions filed in court to support his standpoint on the said proposition. He did not end there; he submitted that section 44A of the Banking Act has also been violated for the defendant has to date not given the necessary notice to determine the date the loan became non-performing loan and therefore their right of sale has not accrued of exercisable. He also cited cases in support thereof. The Plaintiff also argued that valuation has not been carried out on the property as required by section 97(2) of the Land Act.

[25] The Plaintiff also relies on the doctrine of lis pendens provided under section of 52 of the ITPA (repealed) but saved under section 106 of the Land Act. And relying on the doctrine, he says that all further transactions on the suit property should be halted as the property is a subject of active litigation. He cited ample judicial decisions on the matter.

On irreparable damage

[26] The Plaintiff said he will suffer irreparable damage unless an injunction is issued because the property is of a unique character with developments and improvements of immensurable value. Any sale of the property in the circumstances can only be in violation of the law. These things will only cause damage which cannot be compensated by damages.

Balance of convenience

[27] Therefore, according to the Plaintiff, the balance of convenience tilts in favour of granting the injunction.

The Defendant opposed the application

[28] The defendant filed Grounds of Objection dated 11th July, 2014 and also written submissions in opposition to the application for injunction. Some of the grounds of objection have become moot after the suit has been reinstated. That does not mean they were not valid legal points. They are, except, in view of the turn of events, I will only consider those which remain potent. The defendant argues that the Plaintiff has not met any of the prerequisites for grant of an injunction – prima facie case, proof of irreparable los or balance of convenience being in his favour – as;

(a) There is no proof provided of any impending sale of L.R No. 2246/5;

(b) He has not demonstrated in what way he is likely to suffer irreparable loss in respect of a property he himself offered as a security.

(c) The defendant will suffer prejudice in terms of time and extra legal costs if litigation in this matter does not come to an end.

(d) The application is otherwise an abuse of the process of this court.

[29] The Defendant contended that there is no threat of sale of the suit property as alleged by the Plaintiff and there is no redemption notice under the Auctioneers Act which has been issued or annexed to the application. Under Cap 526 the notice is a pre-requisite before an auction sale. Rule 15 of the Auctioneer's Rules, 1997 provides as follows:

"15. Immovable property

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

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

b) Prepare a notification of sale in the form prescribed in Sale form 4 set out in the Second Schedule indicating the value of each property to be sold

c) Locate the property and serve the notification of sale of the property on the registered owner or n adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

d) Give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction; and

e) On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

[30] Again, the Defendant averred that the claim that valuation of the property has not been done as a basis for injunction is misplaced because; 1) the sale date of the property has not been set yet; and 2) even if the valuation of the property is yet to be undertaken, the law requires valuation to be available at the time of sale, and, therefore, it is premature and speculative to state at this stage that valuation has not been done or will not be available by the sale date. Section 97 of the Land Act provides as follows:

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

(3) if the price at which the charged land is sold is twenty-five per centum below the market value at which comparable interests in land of the same character and quality are being sold in the open market –

> **(a) There shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1) and**
>
> **(b) the charger whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the charge at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the charge has complied with the duty imposed by subsection (1).**

[31] Further, the Defendant submitted that the Applicant has merely stated in the ground of the application that "the plaintiff has repaid the loan as and when instalments became due without default." He has neither provided a corresponding deposition in the affidavit in support of the application, nor provided any proof or annexing any receipts to show the payment. In any case, the Applicant at paragraph 4 of the plaint admitted he had only paid Kshs. 700,000 out of the loan advanced of Kshs. 1,450,000; except that the defendant discretionally (sic) and unilateral changed or altered the terms and conditions of the financial facilities to the detriment of the plaintiffs with intention of clogging Plaintiff's equity of redemption. He has not shown he paid the balance of Kshs. 750,000 together with the accrued interest. That notwithstanding the debt owing is substantial amount of Kshs. 270,161,348.90. According to the Defendant, the complaints herein relate to dispute on interest which cannot be a basis for an injunction. And he cited judicial authorities on the issue.

[32] The Defendant did not stop there. It submitted that the argument by the Plaintiff that his property is; of lucrative and of unique character; in peculiar location in an upmarket suburb of Nairobi; and is matrimonial property and of great sentimental value to the Plaintiff and impossible to replace in the event of a sale, does not qualify as a ground for granting an injunction. Any property given as security for a loan becomes a commodity for sale and is compensable by an award of damages.

[33] The Defendant concluded that the Plaintiff has neither established prima facie case, nor that he will suffer irreparable damage. Thus, the balance of convenience should favour refusal of injunction.

DETERMINATION OF THE INJUNCTION APPLICATION

[34] I have set out the legal thresholds which I will apply in determining this application. But before I do that, let me first settle one matter which has become common and notorious argument in every application for injunction against statutory power of sale of matrimonial premises. Courts of law have had to give long renditions on the arguments in innumerable times. For instance, consider the following works of various courts which are analysed in the case of **Julius Mainye Anyega vs. EcoBank Ltd [2014] eKLR:**

Property is matrimonial home

> **The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly,**

no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation) that;

"… Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".

See also the case of Maithya V. Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139 where Honourable Nyamu, J. stated as follows:

"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities… loss of the properties by sale is clearly contemplated by the parties even before the security is formalized".

And a work of the court in Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR in the rendition below:

On matrimonial home

It is quite arrogant for the Applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a Mortgage under the law. The law on creating Mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had given consent to the Mortgage before the exercise of Mortgagee's statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically sections 79 and 96 of the Land Act. The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better.

The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial home. Now let me consider the substantive issues herein.

[33] The foregoing rendition settles the issue on matrimonial property as well the arguments that the property in question of peculiar or special character. Any property which is properly and lawfully given as security for loan becomes a commodity for sale. And so, any ground based on

those arguments does not in itself prove of *prima facie* case of possibility of suffering irreparable damage. See the case of **C.A Civil Appeal No. 114 of 2009 Nyanza Fish Processors Limited Vs Barclays Bank of Kenya Limited** where the court held that;

> **"The applicant itself has offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the applicant to damages. The Respondent is a bank and there is no gainsaying that it will be able to satisfy the loss"**

Let me consider the other grounds.

Dispute on interest and amount

[34] Mere disputes on the amount of interest or loan amount will never be a ground on which a mortgagee will be restrained from exercising its power of sale of the mortgaged property. Except, where the amount of loan is excessive or interest charged is unlawful and usurious, the court will restrain a mortgagor from exercising statutory power of sale. The excessiveness of the loan amount or the unlawfulness of the interest charged should be easily discernible from the terms of the charge and the applicable law. See Halsbury's Law of England on when a mortgagee may be restrained from exercising the power of sale:

> **"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, <u>unless, on the terms of the mortgage, the claim is excessive</u>".**

Casual look at the initial loan of Kshs. 1,450,000 and a possibility that Kshs. 700,000 had been paid may ignite an intuitive feeling that a claim of Kshs. 270,161,348.90 arising from a balance of Kshs. 750,000 may be excessive. But I am acutely aware that a court of law should not act impulsively, and I am not also determining the amount due at this stage without the advantage of full evidence, hence I have adopted carefully chosen words ''may ignite an intuitive feeling that a claim of Kshs. 270,161,348.90 arising from a balance of Kshs. 750,000 may be excessive'.'' It is not frivolous argument that the interest charged may have been contrary to the law applicable at the time. And, from the available material as well as the fact that the Defendant did not deny that it made the decision to alter interest rate unilaterally- although it insists it was in accordance with the usage and practice of the banking sector at the time- makes this a substantial issue which will need to be fully canvassed by the parties at arms-length. But, despite the foregoing, what is startling is that the Plaintiff has merely stated in the grounds on the face of the application and in the submissions without any proof that he has faithfully paid the balance of Kshs. 750,000. See paragraph 4 of his plaint. I have no reason to doubt the Defendant's averment that, the Plaintiff owes the Defendant and he has not paid a single cent since 1987- which is most abhorred conduct by a court of equity. In sum, both sides of the divide possess eminent issues which deserve a remedy. Thus, the circumstances of this case and equality of parties before the court in this case require the court to fashion a remedy which carries the lowest risk of injustice should the court later on find that it should not have issued the injunction in the first place. I will choose a path which will hold the rights of these parties at almost symmetrical bounds. In light of the conduct of the Plaintiff which I have noted above, and the considerably long period which has passed by without the bank recovering its money, the possibility of the operation of the in Duplum rule becoming a real prejudice to the bank is not remote. In the premises, I will preserve the suit property only on terms which are fair and just. I grant a temporary injunction which will subsist for only ninety (90) days from today to enable the Plaintiff; 1) set down the suit for hearing as earlier ordered; 2) to enable parties to re-calculate the amount which would be payable after applying the applicable interest rates provided in the various relevant Gazette Notices cited by the Plaintiff; and 3) the Plaintiff to pay such sums as re-calculated in (2) above. Default on these conditions will lead to automatic termination of the injunction herein. Either party is, however, at liberty to apply for appropriate orders. I have deliberately decided not to base my decision on the

doctrine of *lis pendens* as provided under section of 52 of the ITPA (repealed) and saved under section 106 of the Land Act because of the conduct of the Plaintiff which I have analysed above.

Costs

[35] Looking at the entire proceeding and the conduct of the Plaintiff, costs of the application dated 8th July 2014 shall be paid by the Plaintiff to the Defendant.

Dated, signed and delivered in court at Nairobi this 22nd day of January 2015

F. GIKONYO

JUDGE