REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL COURT AT NAIROBI

CIVIL SUIT NO 545 OF 2014

KOILEKEN OLE KIPOLONKA ORUMOI.....PLAINTIFF/APPLICANT

Versus

MELLECH ENGINEERING &

CONSTRUCTION LIMITED.....1ST DEFENDANT

AFRICAN BANKING CORPORATION LIMITED.....2ND DEFENDANT

S.M GATHOGO T/A VALLEY AUCTIONEERS.....3RD DEFENDANT

RULING

Injunction application

[1] Before me is the Plaintiff's application dated 25th November, 2014.The Motion is expressed to be brought under Order 40 Rules 1(a), 10(1)(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act). The substantive prayers in the application are:

i. ***THAT the 2nd and 3rd Defendants to be restrained whether by themselves or through their servants or agents or anybody claiming through them whatsoever from selling, transferring or dealing in any manner whatsoever with the Plaintiff's parcel of land known as Title Number Kajiado/Ewaso-Kedong/2154 until this suit is heard and determined.***

ii. ***THAT this Honourable Court be pleased to order that the 2nd Defendant/Respondent do supply the Plaintiff /Applicant with a Statement of Account on the financial facilities/the loan granted to the 1st Defendant from the time when the charge against the Plaintiff's property was registered to date.***

iii. ***THAT the costs of this application be borne by the Defendants/ Respondents.***

[2] The application is supported by the affidavit of **KOILEKEN OLE KIPOLONKA ORUMOI** sworn on 25th November, 2014.

The Plaintiff's Case

[3] The Plaintiff is the registered owner of all that parcel of land known as Title Number Ewaso-Kedong/2154 and has annexed a copy of the title document marked as exhibit **KO1.** He stated that, on or about 12th August, 2011, one of the directors of the 1st Defendant known as Mr. Gerald Wamalwa requested the Plaintiff to guarantee financial facilities which the 1st Defendant intended to obtain by placing his parcel of land as security. The Plaintiff accepted the 1st Defendant's request on condition that the 1st Defendant could only use his property as security for a period of three years only and that the 1st Defendant was going to pay the Plaintiff Kshs 150,000.00 every month during the three years. A copy of the agreement between the Plaintiff and the 1st Defendant is Annexure **KO2**. According to the agreement, the 1st Defendant should have returned the Plaintiff's title deed on or before 11th August 2014.

[4] On or about December, 2011the 1st Defendant applied for financial facilities from the 2nd Defendant. And the Plaintiff's land was charged to secure the 1st Defendant's financial facilities of up to a maximum of Kshs 90,000,000.00. To date, the Plaintiff has never been supplied with a copy of the charge. See Annexure marked **KO4**which is a certificate of official search confirming the registration of the charge. The Plaintiff avers that the basis of the said Kshs 90,000,000.00 was not explained to him. The Plaintiff argued further that, his is now valued at Kshs 10,000,000.00 and he wonders how the same land was used to secure financial facilities worth Kshs 90,000,000.00.Annexure marked **KO11b** is a copy of the valuation report confirming the value of the land.

[5] The Plaintiff confessed that he is illiterate, he cannot read or write in English and the contents of the charge were not explained to him.He contended that, all he can recall is that he was called by the 1st Defendant's Advocate, one Ms. Winnie Wambui to go and execute documents whose content was not explained to him. The same advocate, Ms Winnie Wambui is the one who prepared the agreement which stated that his land would only be charged for three years. He, therefore, had no reason to doubt that his land would be released to him after three years. The Plaintiff stated that he did not get independent legal advice on the matter because Ms Winnie Wambui advocate all along acted for the 1st Defendant.

[6] After the 1st Defendant received the financial facilities it breached the agreement and failed to make the monthly payments of Kshs. 150,000. See annexure **KO6**whichis a copy of the demand letter sent to the 1st Defendant by the Plaintiff's advocates.The 1st Defendant also defaulted on repaying the loan advanced to it. As a result of the default, on 24th April, 2014, 23rd May, 2014 and 3rd June, 2014 the 2nd Defendants advocates sent demand letters to the 1st Defendant demanding payment of the outstanding amount of the loan. See annexures marked **KO7, KO8** and **KO9-** copies of the demand letters. The Plaintiff also received a copy of the demand letter on 3rd June, 2014 in which the 2nd Defendant's advocates threatened that the charged land due to the default by the 1st Defendant. See annexure marked **KO10-** a copy of the demand letter.

[7] The Plaintiff contended that he learned from the demand letter dated 24th April, 2014 that the financial facilities secured by a charge on his property had been converted into a term loan of Kshs 30,325,476.66. The Plaintiff also learnt that the1st and 2nd Defendant arranged to have two more parcels of land belonging to a Mr. Moses Lonkisa Ole Nkuya charged to secure the said term loan without the Plaintiff. On 26th July, 2013 when these financial facilities to the 1st defendant were converted to a term loan, the Land Act had come into force and the 2nd defendant should have sought the consent of the Plaintiff's spouse. The total value of the Plaintiff's parcel of land and that of Moses Lonkisa Ole Nkuya is Kshs 195,400,000.00. Annexures marked **KO11a** and **KO11B** are copies of valuation reports for Kajiado/Lorngosua/2446 and Kajiado/Lorngosua/243 respectively, both belonging to Moses Lonkisa Ole Nkuya.

[8] Despite repeated promises, the 1st Defendant has not repaid the loan to date. Annexure

marked **KO12** is a bundle of correspondence exchanged between the 1st and 2nd Defendants.On or about 3rdOctober, 2014, the Plaintiff received a notice from the 3rd Defendant dated 17th September, 2014 advising that his property was to be sold by way of public auction on 26th November, 2014. Annexure marked **KO13** is a copy of the notice.Moses Lonkisa Ole Nkuya also received a notice of sale of his two parcels of land. Annexture marked **KO14** is a copy of the notice. The Notices indicated that the outstanding balance of the loan was Kshs 12, 869,799.07 which is contrary to the alleged balance contained in the 2nd Defendants demand letters issued on 24th April, 2014, 23rd May, 2014 and 3rd June, 2014. The demand letter issued by the 2nd Defendants advocates on 3rd June, 2014 indicated that the outstanding loan amount as at that date stood at Kshs 39,339,584.53. Incidentally the demand letter issued on 23rd May, 2014 indicated that the outstanding balance was Kshs 39,489,584.00.

[9] The Plaintiff submitted that, considering that the aggregate value of the Plaintiff's land and Mr. Moses Koileken's land is Kshs 195,400,000.00 the 2nd Defendant has no justification for disposing of the three parcels of land to recover an outstanding balance of Kshs. 12,869,799.07. Under **section 97(2)of the Land Act** the chargee before exercising the right of sale should ensure that a forced sale valuation is undertaken by the Valuer. The Plaintiff believes that no such valuation was undertaken in this case. Under **section 97 (1)of the Land Act** the chargee owes a duty of care to the chargor or any guarantor.The Plaintiff is apprehensive that his land will be sold despite the fact that there are many irregularities surrounding the charge registered against his property.The Plaintiff verily believes that the value of his land was highly exaggerated to give the 1st Defendant a benefit of securing valuable facilities and that the Defendants took advantage of the illiteracy of the Plaintiff to execute this plan.The Plaintiff has never been served with a statutory notice for the sale of his land as required by law.The Plaintiff argued that his lane was charged irregularly and unlawfully. And his family resides on the suit property. he has no other land where his family can live.

[10] On the basis of the above, the Plaintiff is convinced that he has **met** the requirements for granting of an injunction pending the hearing and determination of the suit as per **Giella vs. Cassman Brown and Company Ltd [1973]E.A 358**. There **are many issues in dispute which can only be substantiated by way of examination of witnesses and the Plaintiff has established that he has a prima facie case. Among the important issues are;**

i. **Whether charging the Plaintiffs land to secure financial facilities worth almost ten times the value of the plaintiff land renders the charge null and void.**
ii. **Whether non-disclosure of material facts can render the charge void.**
iii. **Whether failure to explain to the plaintiff who is illiterate the consequences of having his land charged can render the charge void.**
iv. **Whether failure to serve a statutory notice renders the intended sale null and void.**
v. **Whether the 2nd Defendant has breached the law by failure to undertake a valuation of the Plaintiffs land in accordance with section 97 of the Land Act.**
vi. **Whether the 2nd Defendant is entitled to sell properties valued at** 195,400,000.00 in order to recover a debt of Kshs 12,869,799.07.
vii. Whether a notification of sale should also have been served on the plaintiff's spouse and children since they reside within the suit property.

[11] He has sentimental attachment to his land. His family lives on the land, and if the land is sold, no amount of damages can compensate the plaintiff for his loss. He cited the case of Civil Suit No. 107 Of 2014Patrick Mukiri Kabundu vs. Equity Bank Limited & Another. Accordingly, he prays for an injunction to issue.

The 1stRespondentsupported the motion

[12] The Respondents supported the Motion. It filed a Replying Affidavit sworn by Mr. Gerald

Reuben Wamalwa. The 1st Respondent also filed submissions on 18th December 2014. The application is opposed by the 2nd and 3rd Defendants through grounds of opposition dated and filed on 9th December 2014.

[13] The 1st Defendant confirmed in the Replying Affidavit that, on or about 31st October 2011, the 2nd Defendant made an offer to the 1st Defendant to lend a sum of approximately Kshs. 90,000,000.00 made up of an advance payment guarantee, performance guarantee and overdraft facility. The letter of offer indicated that the said advances were secured by amongst others, a charge over title number Kajiado/Ewaso/Kedong/2154 registered in the name of Koileken Ole Kipolonka Orumoi. As a condition precedent to release of the said facilities, a valuation was to be carried out on the said property to establish whether it would return a forced sale value of Kshs. 75,000,000/-. On valuation, it was established that its value was below the proposed facilities. The 1st Defendant requested Moses Lonkisa Ole Nkuya, the registered proprietor of properties title numbers Kajiado/Longusua/2446 & Kajiado/Longusua/243 and the Plaintiff/Applicant in HCCC No. 471 of 2014, to provide and provided the said parcels of land as further security, subject to a line of credit guarantee agreement.The letter of offer, and amendments were accepted and legal charges executed and registered over title numbers Kajiado/Ewaso/Kedong/2154, Kajiado/Longusua/243, and Kajiado/Longusua/243. But, despite repeated requests, the charge documents as well as loan agreement, guarantee and indemnity were not given to the 1st Defendant. The 1st Defendant cannot therefore be said to be in collusion with the 2nd Defendant as alleged.

[14] Due to the dispute between the 1st Defendant and Brookside Dairy Limited, the 1st Defendant requested the 2nd Defendant to restructure the loan and convert it to a term loan. On 26th July 2013, the offer for restructuring was approved. The loan was also subject to an invoice discounting arrangement with regard to a construction project undertaken by the 1st Defendant for Brookside Dairy Limited.

[15] The loan repayment fell into arrears on account of a dispute between the 1st Defendant and one of its clients, Brookside Dairy Limited, which dispute pertains to an outstanding amount of over Kshs. 31,895,608.89 owed to the 1st Defendant. The 2nd Defendant has always been kept informed and is well aware of the dispute. Indeed, the 2nd Defendant's representatives visited Brookside Dairy Limited premises on various occasions for purposes of verifying this position. This matter is in arbitration.

[16] The 2nd Defendant issued a demand letter to the 1st Defendant on 24th April 2014 for the payment of the purported outstanding debt of Kshs. 37,962,230.53. The 1st Defendant then entered into negotiations with the 2nd Defendant as the 1st defendant and its representatives are willing, able and keen to settle an ascertained debt due to the 2nd Defendant. While the discussions were underway, and while the 1st Defendant continued to make payments, the 2nd Defendant proceeded to issue a further demand for Kshs. 39,489,544.53 on 23rd May 2014.Despite various requests, the 2nd Defendant has failed, refused and/or ignored to supply the 1st Defendant with the charge document, loan agreement, valuation reports and guarantees by the Applicant and by Moses Lonkisa Ole Nkuya. The 2nd Defendant has also failed, ignored and/or refused to supply the 1stDefendant with its loan account statement to enable verification of the outstanding loan amount despite several requests being made. The 1st Defendant believes that he refusal to supply them with the documentation requested for is due to the fact that the 2nd Defendant is applying unlawful methods of interest calculation as per the interest charged on the principal amount and arrears incurred. The 2nd Defendant is now using its advantaged position to unlawfully harass the 1st Defendant and its guarantors for the sole purpose of unjustly enriching itself.

[17] As at 26th July 2013 when the loan was restructured, the amount allegedly owing was Kshs.

30,525,476.66. In the 2nd Defendants advocate letter dated 3rd October 2014, the claim is now Kshs. 42,024,176.53 and interest accruing at 23% per annum. The 3rd Defendant's notice (auctioneer) is for Kshs. 12,869,799.07 with an interest of 36% per annum. The difference between what the agents of the 2nd Defendant are demanding is a colossal Kshs. 29,154,677.59. These things, according to the 1st Defendant show that is non-compliance with Section 90 of the Land Act Cap 280 Laws of Kenya. Section 90 of the Land Act provides, *inter alia*, that

> ***"The notice required by subsection (1) shall adequately inform the recipient of the following matters—***
>
> ***the nature and extent of the default by the chargor;***
>
> ***if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed***
>
> ***if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified"***

[18] The 1st Respondent cited the case of **David Gitome Kuhiguka v Equity bank Ltd [2013] eKLR**, where Justice J.B. Havelock stated;

> ***"If that was not enough for this Court to allow the Plaintiff's Application, the Defendant would seem to have also fallen foul of Section 90 (2) (b) of the Land Act 2012. I have perused the Statutory Notice issued by the Defendant to the Plaintiff dated 10th October 2012. That letter details the full amount of Kshs.6,546,892.20 owing by the Plaintiff to the Defendant in respect of the former's loan account as at that date. It does not detail the amount that must be paid to rectify the default as required by Section 90 (2) (b) (supra). The up-shot of all the above is that I find some merit in the Plaintiff's Notice of Motion dated 13th March 2013 and I allow the same with costs."***

According to the 1st Respondent, the question is whether the 2nd Defendant and its agents provided the 1st Defendant and the Plaintiffs with ***the amount that must be paid to rectify the default. The 2nd Defendant's advocates, in their last demand, claim Kshs.*** 42,024,176.53 while its Auctioneers demanded Kshs. 12,869,799.07. What is the amount that must be paid to rectify the default? The 2nd Defendant has kept silent and it has not provided the 1st Defendant with proper accounts. The interest of the 2nd Defendant is only to sell the properties regardless of these mandatory provisions of law. They urged that the dispute herein is not limited to accounts as has been misapprehended by the 2nd Defendant. It includes the 2nd Defendant's failure to comply with Section 90 (2) (b) of the Land Act with regard to the amount that must be paid to rectify the default. They relied on the case of **Alfred Osanya v Giro Commercial Bank Limited & another [2014] eKLR**, where Justice Havelock observed as follows:

> ***"However, the 1st Defendant's Advocates do not appear to have appreciated the mandatory provisions of section 90 (2) (b) which detail that the statutory notice must detail the amount that must be paid to rectify the default and the time. As above, the Term Loans would not be entirely due and owing to the instalment plan agreed with the company. The statutory notice does not detail the amount that must be paid to rectify the default as regards the Term Loans. As a result, I come to the same conclusion in this case as I had reached in the David Gitome Kuhiguka case (supra), and I find that the said statutory notice herein dated 5th September 2013 to be defective and, as a result, invalid."***

[19] The 1st Defendant also complained that its account is being subjected to un-contractual or illegal interest. The 2nd Defendant's representatives conceded that these may be due to computer malfunctions. The oscillation in interest charges is confirmed by the inconsistent notices placing the interest between 23% per annum and 36% per annum (see notices by Majanja Luseno & Co. Advocates and the Auctioneers Notices both dated 17th October 2014). A party in breach of its contractual obligations should not be allowed to benefit from their own transgressions. By loading un-contractual and or contradictory interest rates, the 2nd Defendant is in contravention of Article 46 (1)(b) and (c) of the Constitution on the rights to the information necessary for consumers of goods and services to gain full benefit from goods and services and to the protection of their health, safety and economic interests. The 2nd Defendants actions, particularly the withholding of information on how it arrived at the various figures being demanded, are intended to clog the 1st Defendant's and Guarantors' equity of redemption. See the Honourable Justice Odunga's decision in **Francis Joseph Kamau Ichatha V Housing Finance Company of Kenya Limited [2014] eKLR**.

[20] The 1st Respondent made further submissions that the 2nd Respondent is also non-compliance with Section 97 of the Land Act Cap 280 Laws of Kenya on the duty of care to undertake a forced valuation before exercising the power of sale. Section 97 (1) and (2) provides that:

> ***"A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale***
>
> ***A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer"***

According the 1st Respondent the 2nd Defendant did not provide the 1st Defendant with any forced sale valuation report. The Plaintiff too claims he was not with any valuation for forced sale value. The 2nd Defendant has not exhibited any such valuation report. See **David Gitome Kuhiguka v Equity bank Ltd (supra),** where Justice Havelock stated, *inter alia*, that:

> ***"However, is this enough to satisfy the requirements of section 97 (2) of the Land Act as aforesaid? In my opinion, it does not do so for two reasons. 1stly, the Valuer has clearly stated in its terms of reference that it had been asked to advice on the suit property's current market value for mortgage purposes. In other words, it related to the amount that the Defendant could/would lend to the Plaintiff as per the said Charge dated 14th March 2012 being Shs.5,500,000/=. 2ndly, the valuation, by the time that the sale came round in April 2013, was over a year out of date. With properties in and around Nairobi in the current property market boom, it may well be that the suit property could have vastly increased in value even for forced sale purposes in the 14 months period. As a result, I find that the Defendant has not complied with Section 97 (2) of the Land Act in this connection. The obligation on a chargee to ensure that a forced sale valuation is undertaken by a valuer comes under the heading to Section 97 of the Land Act, 2012 – "Duty of chargee exercising power of sale". To my mind, such a duty is obligatory."***

In **Amos Kanyuru Kinani v Housing Finance Company Limited & Another [2007] eKLR**, the Honourable Justice Azangalala, observed, *inter alia*, that:

> ***"It is illustrative that the Learned Judge of the Court of Appeal was considering an appeal from the High court which had refused an injunction where property had been sold at a public auction. In my humble view the observations of Platt, J.A. apply with***

even more force in the case at hand where there is no evidence that the 1st defendant before selling the suit property to the 2nd defendant ever examined the property market to establish the best price of the suit property as it was bound to act in good faith and have regard to the interests of the mortgagor"

In **Nationwide Finance Co. Ltd Vs Meck Industries Ltd & Michael Gerald Kimani** [2001] eKLR, Honourable Justice Alnasir Visram also delat with this subject and stated*inter alia*, as follows:

"The failure to comply with the relevant mandatory requirement of the Auctioneers Rules was a material irregularity. Failure to include the reserve price resulted in the property being sold for Kshs. 300,000/= less its forced sale value. This obviously occasioned substantial loss to the Plaintiff and ought to be set aside."

Therefore, the 1st Defendant concluded on the subject that the proposed sale is null and void *ab initio.*In fact, in a Report and Valuation commissioned by the Moses Lonkisa Ole Nkunya, carried out by Horizon Valuers Limited on 4th October 2014 over Title Number KAJIADO/LORNGOSUA/2446, the property was valued at Kenya Shillings One Hundred and Sixty Six Million (Kshs. 166,000,000.) KAJIADO/LORNGOSUA/243, also belonging to Moses Lonkisa Ole Nkunya was valued by the same Valuers at Kenya Shillings Nineteen Million Four Hundred Thousand (Kshs. 19,400,000.) The Plaintiffs property was also valued by the same Valuer who placed its current open market value, as at 19th August 2014, at Kenya Shillings Ten Million (Kshs. 10,000,000/=). The combined value of these properties is Kshs. 195,400,000. The 2nd Defendant is not entitled to auction all the three parcels of land for an unascertained indebtedness, and in any case, not more than the Kshs. 42,024,176.53.

[21] Under Section 104 of the Land Act the Court is enjoined to consider various factors when dealing with Charged land including whether "it is reasonable to approve, or as the case may be, to make the order to sell the charged land." In this case, it is unreasonable to permit the sale of three distinct parcels of land. In the case of **Alice Awino Okello v Trust Bank Ltd & Anor LLR No. 625 (CCK)** the Court of Appeal declared, *inter alia*, that: ***"the balance of convenience is in favour of the Applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances."*** There is sufficient cause for the exercise of this Honourable Court's discretion in favour of the Plaintiff herein and in HCCC No. 471 of 2014 given the tri-partite nature of the Charge instrument herein and the clear violations/inconsistencies by the 2nd Defendant.In **Captain J. N. Wafubwa V Housing Finance Co. Of Kenya [2012] eKLR**, the Honourable Court considered the effect of a sale that was concluded in the face of a dispute on accounts and observed, *inter alia*, that

"…This being so, the Plaintiffs' property ought not to have been sold by Private treaty in February 2009. That property was unlawfully sold, as at that time the Plaintiff did not owe the Defendant any money on account of the aforesaid mortgage transaction."

Contrary to the suggestion by the 2nd Defendant, this case and HCCC No. 471 of 2014, between **Moses Lonkisa Ole Nkuya Versus Mellech Engineering & Construction Limited & 2 Others**are related as they both involve Guarantors for a loan advanced to the 1st Defendant. The submission by the 2nd Defendant that this Honourable Court should ignore this fact is completely faulty and would result in gross unfairness. Why would a Chargee insist on selling three distinct parcels of land in order to realize a loan balance that is in any event, not ascertained? The Honourable Justice Ogola, in **Captain J. N. Wafubwa V Housing Finance Co. of Kenya (supra)** observed as follows:

"Banks cannot just hide behind the contracts they make, regardless of how unjust they are, to literally destroy their customers. Without their customers the banks cannot

operate. A time has come for banks in Kenya to look into the eyes of their customers and answer the question: Are banks Kenyans? Or have they just entered Kenya for business?"

[22] The 1st Defendant undertook that since it is still in business, it is capable and willing to rectify any default after proper ascertainment of the sum owing. Auctioning of the land will be premature, excessive and in bad faith. They submitted that the 1st Defendant and Guarantors have demonstrated a*prima facie case* with a probability of success; that they shall suffer irreparable harm which cannot be compensated in damages and the balance of convenience tilts in their favour. The 1st Defendant humbly prayed that the Honourable Court do preserve the suit property by granting the Prayers sought by the Plaintiff. The ruling herein should also apply to the Application filed in HCCC. No. 471 of 2014 *(Moses Lonkisa Ole Nkuya –V- Mellech Engineering & Construction Limited & Others).*

The 2nd and 3rd Respondents opposed the Motion

[23] The 2nd and 3rd Respondents opposed the application and filed Grounds of Opposition filed on 9th December, 2014.They submitted that the Plaintiff admits at paragraphs 7, 8, and 10 of his Supporting Affidavit that he executed a Charge on his land known as Title Number Kajiado/Ewaso-Kedong/2154 (hereinafter referred to as "*the Suit property*") as security for a financial facility to be given by the 2nd Defendant to the 1st Defendant. Later, the 1st Defendant approached the 2nd Defendant requesting the financial facility advanced to be converted into a term loan. This was accepted by the 2nd Defendant and the loan was approved. The financial facilities were approved on terms set out in the respective Letters of Offers exhibited at pages 1 to 31 of the Replying Affidavit of Agatha Kiattu. Memoranda of Acceptance were executed by the directors of the 1st Defendant , Gerald Reuben Wamalwa and Grace Wanjiru Wamalwa as follows:

"....we further confirm that we have obtained independent legal advice and opinion on the meaning of the terms and conditions in your said Letter as well as their full purport effect and tenor."

The financial facilities sought were secured inter alia as follows:

i. First Legal Charge over L.R Number KAJIADO/EWASO/KEDONG/2154;

(ii) First Legal Charge over all that parcels known as LR. No. Kajiado/Lorngusua/243 and LR No. Kajiado/Lorngusua/2446;

(iii) Credit Agreement;

(iv) Personal Guarantees and Indemnities of disclosed persons, the Plaintiff herein and Koileken Ole Kipolonka Orumoi inclusive; and

(v) Demand Promissory Notes.

[24] The Plaintiff herein executed a Deed of Guarantee and Indemnity by affixing his thumb print on each and every page and the execution part thereof. This was witnessed by **Winnie Wambui Advocate**. The Plaintiff similarly executed a Charge in favour of the 2nd Defendant for the facility granted to the 1st Defendant. More importantly, the Plaintiff did execute a Certificate by which he confirmed having understood the effect of sections 74 and 79 of the Registered Lands Act. See pages 11 and 112 of the Replying Affidavit of Ms. Kiattu. Moses Lonkisa Nkuya also executed similar charges in favour of the 2nd Defendant. The requisite consents of the Land Control Board were obtained in the creation of the Charges. As a guarantor, the Plaintiff's

obligation to the Bank is activated once there a demand and/or notice of default on the part of the principal Borrower. Liability thus attaches upon there being a demand by the Creditor. This remains the law on Guarantees. The 1st Defendant defaulted to repay the loan as agreed which entitles the Bank to exercise its statutory power of sale of the suit property. The Plaintiff entered into a separate and distinct agreement with the 1st Defendant to the effect that the suit property could only be used as security for the facility for a period of 3 years only and that the 1st Defendant would be paying the Plaintiff a monthly sum of Kshs. 150,000.00. The agreement does not bind the 2nd Defendant at all as it is NOT a party thereto. The terms of that Agreement was not incorporated into the loan agreement between the 1st Defendant and 2nd Defendant or the Deed of Guarantee and Indemnity executed by the Plaintiff and the 2nd Defendant. Thus a default by the 1st Defendant of its obligations to the Plaintiff does not suspend the Chargee's rights under the Charges and/or Deed of Guarantee and/or Indemnity. To so hold would not only re-write the contract between parties but will also be against the doctrine of privity of contracts. To the 2nd Respondent, this application is a veiled attempt by the Plaintiff to compel the 1st Defendant to honour its obligations under the agreement it entered with the Plaintiff.

[25] The 2nd Respondent argued that, the loan facility of Kshs. 90,000,000.00 was secured the suit property as well as all that parcels known as LR. No. Kajiado/Lorngusua/243 and LR No. Kajiado/Lorngusua/2446 both registered in the name of Moses Lonkisa Nkuya. The 2nd Defendant owed the Plaintiff no duty to inform him that the facility had been further secured by additional property. This duty, if any, was owed by the Principal Borrower and not the Bank. The Bank duty is to ensure that the securities offered by a borrower were sufficient for the nature of financial accommodation sought. The Plaintiff guaranteed the facility advanced to the 1st Defendant to the extent of Kshs. 30,525,476.66 only. The Deed of Guarantee and Indemnity was in addition to the charge.

[26] The 2nd Respondent stated that the Plaintiff as well as the 1st Respondent admits in their affidavits that the 1st Respondent defaulted. They also admitted that, upon default, the 2nd Defendant issued all relevant notices of its intention to exercise its statutory power of sale. See paragraphs 15 and 20 of his Supporting Affidavit. The Notices are exhibited at pages 118 to 132 of Ms. Kiattu's Affidavit.The Demand letter for purposes of the Guarantee is to be found at pages 129 to 130 of Ms. Kiattu Affidavit while the Statutory Notice is to be found at pages 131 to 132. According to the 2nd Respondent, it was not the intension of Parliament that a loan should accrue to the value of the property before a bank is entitled to exercise a statutory power of sale. And Moses Lonkisa ole Nkuya is not a party here and so issues on his lands cannot be tried here.

[27] The 2nd Defendant termed the request for accounts and statement of account to be just a smokescreen. Accounts were at all material times availed to the Borrower and had the Plaintiff also made any request thereto, it would have been heeded to without the necessity of a Court Order. In any event a dispute as to accounts CANNOT form the basis for grant of an injunction. See the case of ***Hyundai Motors Kenya Limited v East African Development Bank Ltd [2007] eKLR***, the Court (*Warsame J.*) that;

> ***"The application in my view epitomizes the resolute nature of the plaintiff and its utter contravention of the requirement of good conscience and commercial ethics. It has borrowed huge sums of money on the strength of the charge document. It admits or acknowledges a debt of Kshs 100 million. There is persistent default but wants to use every trick on earth to restrain the defendant from selling the suit property. It appears nowadays there is no end to litigation and it has become customary for defaulter to the slightest excuse in order to postpone the day of reckoning. They must have in mind that the money of the lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the plaintiff. The monies of the lenders are a carrot accompanied by a stick and the stick can only be used when there is a default. Where there is an absolute default, the party in default cannot avoid the stick simply because it***

has taken the carrot.

In short I agree with the defendant's Advocate that the plaintiff is trying to ask for an injunction using the back door, pretending to be asking for interpretation of the charge document. I hold the view the interpretation or validity of the charge document cannot be used to obtain an order preserving the status of the suit property."

And also the Court of Appeal in ***Fina Bank v Ronak Ltd [2001] 1 64*** at page 68 held as follows;

"*In any event, disputes over accounts were no basis for granting an injunction to the Respondents against the Appellant*"

The Principal Borrower upon being issued with a demand letter dated 22nd August 2014 (at page 127) made the following unequivocal admission;

"....Due to our difficult financial position at the moment, it is our request that for an initial period of 6 months we continue paying this loan at Kshs. 500,000.00. It is our belief and hope based on business prospects that within this period our finances would have improved and hence we would be in a position to enhance these repayments to a higher figure to be mutually agreed between ABC Bank and ourselves...."

But they paid nothing. They should not use an injunction to shield their default. Equity which follows the law cannot permit this.

[28] The 2nd Respondent argued that the Plaintiff's claim that the contents of the Charge document were not explained to him and he mistakenly thought that the Charge was for only 3 years are a facade. They cited the decision of a High Court of Justice in Northern Ireland in the **Thomas James Smyth case** [2010] NIQB 74 who held that *''the defence ofnon est factum is of narrow scope and does not… begin to arise in any of these cases."*The Plaintiff has not established that the character of what he executed was different from what he thought he was executing. The nature of the document he was executing was a Deed of Guarantee and Indemnity. Indeed he executed a Deed of Guarantee and Indemnity. Non est factum cannot be available to him.

[29] In sum, the 2nd Respondent submitted that the entire case by the Plaintiff does not meet the threshold set out in ***Giella case***. The Plaintiff offered the suit property as security to secure a facility granted to the 1st Defendant; the 1st Defendant has defaulted in its contractual obligations to the 2nd Defendant; the alleged non explanation of the contents of the Charge is a smoke-screen; and the argument by the Plaintiff that he will suffer irreparable loss if the suit property is sold does not warrant the issuance of the orders sought. A property once pledged as security becomes a potential commodity of sale. The sentimental attachment placed upon is diminished once the property is pledged as security.There is many a case law on the point.On claims the property is the Plaintiff's family home, see **HCCC Number 82 of 2006Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation)**

"… 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".

The 2nd and 3rd Respondent stated that the debt is admitted.There is evidence of service of the Notices and the same is admitted. See **HCCC Number 115 of 2012 Abdulkadir atex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation)**Musinga J. held;

"It is not disputed that the Borrower is in arrears of its loan repayment to the 1st

Defendant. The court has established that an appropriate statutory notice was served upon the Plaintiff … in the circumstances, the Plaintiff has not made out a prima facie case with a likelihood of success."

Again, they submitted that the value of the suit properties is ascertainable. It has not been shown that the 2nd Defendant would be unable to meet the damages in the event the Plaintiff succeeds in the main suit. See *Mrao Limited –vs- First American Bank of Kenya Limited. [2003]KLR 125*Kwach JA as he then was stated;

"in recent times a tendency has developed in the superior court of treating applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale just like any application for injunction…. This is a clear case of default, the appellant admitted this, there was no basis, upon which the appellant would obtain an injunction.

Prima facie case is …….. one 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

… If courts were to allow debtors to avoid paying their just debts by taking some defences I have seen in the recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring capital into a country whose courts are a haven of defaulters."

[30] See also In **Civil Application No. Nai 182 of 2014 (UR 141/2014)Collin Bett t/a C.K. Bett Traders v Ecobank Kenya Limited & Watts Enterprises** the Court of Appeal held thus;

"The Applicant has not suggested to us that should his intended appeal be successful, the 1st Respondent would not be in a position to repay the amount realised from the sale of the suit property. In Daniel Kamita Gichuhi & Another v Consolidated Bank of Kenya [2007] eKLR (Civil Application No. NAI 159 of 2007, an Applicant was denied orders of stay for failing to show that the Respondent Bank could not be financially capable of fully compensating him. Based on the material placed before us, we find that the Applicant has not demonstrated that unless the order of injunction is granted, his appeal would be rendered nugatory. It is will be fairly easy, should the intended appeal succeed, to conduct a valuation of the property and compensate the Applicant for any loss he may incur.

In St. Ann's Limited v Planfarm Limited & Another Civil Appeal No. 79 of 2009 (as cited in Shimmers Plaza Limited v National Bank of Kenya Ltd [2013] eKLR (Civil Application 38 of 2013), this Court stated that where a dispute relates to a property which has been put forth as security, the property can be valued easily and the Applicant's claim is capable of being compensated by way of damages.

The other reason why we find that the Applicant would not be deserving of the order of stay. It is trite law that the Court will not grant an order of injunction where such an order would cause undue hardship to the other parties – see Githunguri v Jimba Credit (supra). In addition in Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Limited & 2 Others [2009] eKLR (Nairobi Civil Appeal No. 124 of 2008) this Court pointed out that where a property, even a residential property is charged to secure a loan, it is converted into a commodity for sale and where there is failure to pay the charge debt or loan, no sentimental value or attachment to the mortgaged property, however great, would operate against the exercise of the statutory power of sale by the mortgagee."

[31] And **Nairobi ELC 184 of 2013 (Stanley Kirui -vs- Westlands Pride Limited)** Gacheru J

held as follows;

> ***".... it is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party as that would be inequitable"***

Mombasa HCCC 99 of 2013 (John Edward Ouko -vs- Naional Industrial Credit Bank Limited) while quoting with approval the decision in National Bank of Kenya Limited -vs- Pipeplastic Smakolit (K) Limited Another, Mary Kasango J held as follows;

> ***" a court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence is pleaded and proved".***

The Judge further held..

> ***" the Court having found that the Plaintiff has failed to show prima facie case with probability of success if the an injunction is granted it would encourage the Plaintiff and others like him to avoid paying their just debts.*"**

The 2nd and 3rd Respondents cited other cases including; **Fina Bank Limited -vs- Spares and Industries Limited** (2000) 52 wherein Shah J.A; and **Nairobi HCCC Number 19 of 2008 (Ebony Development Company Limited -vs- Standard Chartered Bank Limited)** Lady Justice Khaminwa (now deceased). They concluded by saying that this is not a proper case for granting an injunction and urged the Court to dismiss the application with costs to them. They also stated that the ruling herein should abide in in HCCC 471 OF 2014 **(*Moses Lonkisa Ole Nkuya vs. Mellech Engineering & Construction Limited & Others*).**

THE DETERMINATION

Issues

[32] I should decide whether an injunction is merited or not. But the following are the questions I should ask: Has the Applicant established a prima facie case? Will he suffer irreparable damage unless an injunction is granted? And on the overall, where does the balance of convenience lie? These traditional thresholds of the law were set out in the case of **Giella vs. Cassman Brown**. But as we apply them, we are reminded that the court should consider all the circumstances of the case and take a path that serves justice in the case. This wider approach of matters is commanded by the Constitution and the overriding objective. To achieve this objective of the law, I should determine:-

a. ***Whether the defence of non est factum is available to and has been proved by the Plaintiff;***
b. ***Whether disputes in accounts is a basis for granting an injunction. Here I will also discuss the allegation that the 2nd Respondent charged un-contractual interests;***
c. ***Whethera forced sale valuation was done;***
d. ***Whether the relevant notices were issued; and***
e. ***The rights and obligations of a guarantor. Under this issue, I will the liability of the guarantor.***

The defence of *non est factum:* I am illiterate

[33] The Plaintiff stated that he is illiterate; he does not know how to write or read. This could be true and indeed he signed the instruments herein by affixing his thumb print. He sort of pleaded *non est factum.*An exposition of the law on this defence is important here. First, there has been a deliberate intervention of law to confine the plea of *non est factum* within narrow boundaries and scope**.** The fact of illiteracy is not denied in this case, but for it to afford the defence of ***non est factum***to the Plaintiff to deny legal instruments which he executed, he must discharge such a huge

burden, and show on evidence thathe took all due care and or reasonable precautionsto establish, understand and appreciate the character, nature and effect of those legal instruments. The Plaintiff stated that he did not seek independent legal advice because the advocate who prepared the instruments herein was acting for the 2nd Respondent. He also stated that he had agreed with the 1st Respondent that his property was to be placed as security for a loan to the 1st Respondent of the sum of Kshs. 90,000,000. These things show that the Plaintiff was well aware of the nature of the mission he set out for, and which culminated into the execution of the legal instruments in question. Also if he was apprehensive of his predicament, he was at liberty to seek for independent legal counsel, which he did not. There is also no evidence of any coercion or to show that he was misled or induced to sign the instruments. He knew perfectly well his property was to be charged as security for loan. Other than bareallegations, the Plaintiff did not adduce any cogent evidence of apt circumstance which would entitle him to invoke the defence of ***non est factum***. On this plea of ***non est factum***I am content to cite the following very elaborate decisions; **Gallie – v- Lee [1971] AC 1004**and a High Court decision in Northern Ireland in the case of**Thomas James Smyth case [2010] NIQB 74.** I dismiss the plea.

Disputes on accounts

[34] As a general rule, disputes on accounts or amounts owing on amortgage will not *per se* be a basis for granting of an injunction. But if, from the charge or evidence adduced in court, the amounts claimed are excessive or tinctured with illegal charges and interest, the mortgagee may be restrained from exercising its statutory power of sale. The 1st Respondent, while supporting the application alleged that there were un-contractual charges which were levied on his account, and he suspected that is the reason why the 2nd Respondent has refused to provide them with the legal instruments and statements of accounts on the mortgage. There was no real evidence on these allegations. But I reckon they complained that they have not been provided with the statements and the legal instruments registered herein. The only stick issue which they have alluded to is the differences on amounts contained in the various notices issued herein. I will render myself fully on this when I will be discussing the Notices. Meanwhile, I note that the 2nd Respondent fearlessly stated that statements of the accounts herein are readily available and gave an undertaking that the statements and accounts could have been rendered to the Plaintiff without the necessity of a court order. On that basis, I order the 2nd Respondent to provide the Plaintiff and 1st Respondent with statements of accounts herein within the next 30 days of this ruling.

Whether a forced sale valuation was done

[35] I have not seen any forced sale valuation report. None was annexed in the affidavits by the 2nd Respondent or by the 3rd Respondent. There is a duty on the chargee to ensure a forced sale valuation is carried out on the charged property when it has decided to exercise its statutory power of sale. The 2nd Respondent initiated the process of exercising the statutory power of sale and it is incumbent on them to have caused the forced valuation. Some commentators posit that section 97 of the Land Act does not specify the time within which the forced valuation should be done except that it is done before the public auction. My view is that it must be done within reasonable time before the sale; not too far before the sale or not too close to the sale, for the exercise serves important legal calling, that is, it will inform the reserve price of the property and examine the market in order to obtain the best price reasonably obtainable at the time of sale. Therefore, the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the chargor to have reasonable value for his property. That is why the duty under section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the chargee and its agents especially the auctioneers.

Notices

[36] I have perused the notices issued herein. Notice issued to Koileken Ole Kipolonka Orumoi dated 17th September 2014 is for 40 days and is issued under section 90(2) of the Land Act. The

amount quoted is Kshs. 42,024,176.53. The one given to Moses Lenkisa Ole Nkuya is dated 3rd October 2014 and it is also for 40 days under section 90(2) of the Land Act. The amount quoted is Kshs. 42,024,176.53. The latter notice mentions that the land to be sold is KAJIADO/LORNGUSIA/2446.The Redemption Notice dated 17th September 2014 that was given by the auctioneer, the 3rd Respondent indicates that the sum owing for which the Plaintiff's land was being sold was Kshs. 12,869,799.07 and the sum continued to attract interest at 36% per annum until payment in full. The Notification of Sale dated 17th September 2014 carried the same amount as the Redemption Notice. These Notices were issued on the same debt and are statutory notices which are ordained of law. They are a matter of right and should reflect the true state of affairs. Whereas the notices by the advocates may have substantially complied with the law, those by the auctioneer make a complete and marked departure on the amount claimed from those by the advocates. The Redemption Notice as well as the Notification of Sale draws from the Statutory Notices issued by the chargee or its agents or advocates. Any departure in the notices by the auctioneer from the statutory notices under the Land Act, especially on the amount owing renders the Redemption Notice and the Notification of Sale invalid. There can be no sale based on those notifications. If there is any subsequent change in amount owing, perhaps because the chargor made some payments or for some other lawful reason, the changes must be properly communicated to the chargor. And of course, these changes will affect the earlier notices issued. There is no explanation or justification offered for the differences in amounts in the notification of sale and redemption notice by the 3rd Respondent. The 1st Respondent has admitted it owes money to the 2nd Respondent, except it disputes the amount owing. The Plaintiff admits the debt too. Although their claims may not be correct, there is, however, merit in the argument that these notices breached the law, and so the properties cannot be sold on the basis of notices which indicate different amounts. The problem is compounded by the fact that there is no forced sale valuation as per the law.

Liability of Guarantor

[38] On the basis of these findings, temporary relief is merited. The Plaintiff is a guarantor and his liability arises once the borrower defaults and he should always ensure that the borrower pays up lest his property be sold. He has admitted that the 1st Defendant owes the 2nd Respondent. The 1st Respondent has also admitted that it owes the 2nd Respondent, but it too has not paid the sums it believes it owes. Therefore, in granting the relief of injunction, the court will take into account the conduct of the 1st Defendant and the Plaintiff. I will, therefore, require the 2nd Respondent to only issue proper notices under section 90, i.e. the forty (40) days' notice, the forty five (45) days Redemption Notice and the Notification of sale of the suit property. The notices should reflect the correct sum owed as shown in the statements I have already ordered the 2nd Respondent to provide to the 1st Respondent and the Plaintiff. The injunction to restrain the 2nd and 3rd Defendants from selling the suit property will last for as long as proper notices and statements of accounts have not been issued and provided, respectively as directed. They should also carry out the forced sale valuation as required under section 97 of the Land Act. But I should disabuse the notion which seems to be emerging from arguments by many debtors; the requirement that one must be informed of the default and the amount of money which he is supposed to pay in order to purge the default depends on the terms of the charge. If the charge states that default of any one instalment on its due date renders the entire loan payable, then the payment of the entire debt is what purges the default. The application dated 25th November, 2014 succeeds to the extent stated above. I will not award the Applicant costs given the fact that he admitted that the debt is owed but has not paid it. As this case was consolidated with number 471 of 2014, and the argument on the notices are similar, these orders shall apply *mutatis mutandis* in 471 of 2014. It is so ordered.

Dated, signed and delivered in court at Nairobi this 16th day of March 2015

F. GIKONYO

JUDGE