**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI**

**CIVIL CASE NO 135 OF 2013**

**(Formerly ELC NO. 303 OF 2013)**

**DAVID NGUGI NGAARI …………………………….. PLAINTIFF/APPLICANT**

**Versus**

**KENYA COMMERCIAL BANK LIMITED……….. DEFENDANT/RESPONDENT**

**RULING**

**Temporary injunction**

[1] This is an application for temporary injunction. It is made by way ofNotice of Motion dated the 27th February 2013. It is supported by an Affidavit sworn on same date and Supplementary Affidavit sworn on 3rdOctober 2013sworn by the **DAVID NGUGI NGAARI.** 2013. The specific order sought is:

**i. A temporary injunction restraining the Respondent whether by itself, its agents and its servants from selling, dealing, interfering, alienating or disposing of all that parcel of land known as L.R No.DAGORETTE/KINOO/922-KINOO pending the hearing and determination of this suit.**

**Applicant's gravamen**

[2] The Applicant gave the background information that: On or about December 2010, Dama Developers Limited, the Borrower, obtained a loan from the Respondent in the sum of approximately Kshs.15,000,000/- for purposes of developing a four-storey residential flats on a portion of the subject parcel of land. The Applicant guaranteed the said loan and charged the subject parcel of land. A copy of the said charge instrument has never been provided to the Applicant despite numerous requests and visits to the Respondent's offices. As part of the loan appraisal the Respondent sought and secured services of a quantity surveyor who estimated construction costs at Kshs.15,000,000/-. The Respondent also engaged Messrs. Chikwel Limited to undertake the construction and proceeds of the said loans were being disbursed in installments.It was a term of the loan agreement that the Borrower will commence repayment of the principal sum immediately the residential units were completed and occupied and upon rent being collected, and that only interest on the principal amount at the rate of Kshs.250,000/- per month would be paid while construction was in progress. The Applicant stated that he paid the latter interest.

[3] In April 2012 the construction company suddenly withdrew from the site before completion of development of residential units citing lack of funds. This caused financial and mental anguish to the Applicant. The Applicant also alleged that;he was duped by the Respondent into executing a charge; and

that there was an element of fraud and misrepresentation on the part of the Respondent. The Respondent, contractors and quantity surveyors therefore conspired in a bid to defraud the Applicant of his hard earned property and investment where his matrimonial home stands. Had the contractors completed the residential units as agreed, the same would have raised rent sufficient to repay the loan. That notwithstanding, the Applicant is currently paying Kshs.150,000/- per month as a sign of good will despite his financial woes authored by the Respondent.

[4] The Respondent had through Freeman Auctioneers arranged to dispose of the subject parcel of land by way of public auction on 28th February 2013 as advertised in the Daily Nation Newspaper of the 21st February 2013 without issuing the requisite statutory notice. The Respondent wishes to sell the said parcel of land at Kshs.17,653,553.94/- which is below the current value of the said parcel which stands at Kshs.26,000,000/- as per a recent valuation report on court record.

[5] According to the Applicant the court should determine:

a. **Whether the Respondent's right of statutory power of sale has accrued; and**
b. **Whether the conditions for issuance of an injunction have been met herein.**

[6] The Applicant's case is three-fold. One; that the Respondent did not issue the requisite statutory notice notifying the Applicant of the intended sale of charged property by auction. There is no evidence on record to that effect or to prove posting of notices of sale which is mandatory as held in **Trust Bank Ltd. vs. Eros Chemists [2000] 2 EA 550**and **Ochieng and Another vs. Ochieng and others**. The Applicant only learnt from the advertisement by Respondent of their intent to sell charged property by public auction. The Applicant did not receive demand or a valid notice to exercise the power of sale from Respondent. The Applicant alsorelied on the decision in **Elizabeth Wambui Njuguna -Vs- Housing Finance Co. of Kenya Ltd [2006]Eklr** where the court held that:-

**''…the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption.**

For that reason Respondent's statutory power of sale had not accrued and that the advertisement of auction violated Applicant's right to redeem the charged property.

[7] Two; that the Respondent failed to conduct a proper forced valuation and has instead undervalued the charged property herein to the detriment of the Applicant. The Respondent has thus not discharged his duties to the Applicant under **Sections 90(2), 97 & 97(2)** of the Land Act 2012.

[8] Three; the Applicant disputes the penalties and interest accrued on the principal amount borrowed. And despite repeated demands in writing and requests there has been no account that has been rendered by the Respondent to reconcile and establish how much was transmitted to the Applicant and how much interest and penalties have accrued thereof. The Applicant has made numerous visits to the Respondent's office the Respondent on the matter but in vain. The Applicant does not know how much is owed in the bank books. To this end therefore the right of statutory power of sale has not accrued and the Applicant wishes to rely on the decision in **Ihenya v Barclays Bank(1977) LLR 507 (CAK).**

[9] Again, the Applicant invoked Section 44 of the Banking Act whichestablishes the principle of variation of rates by banks. The applicant herein has on several occasions proposed to the Respondent to review payment terms herein following breach of contract on the part of the Respondent. But the Respondent has ignored such proposals and is instead adamant in selling the charged property with a malicious connotation. Further, the Applicant has been making payments on a monthly basis in the sum of Kshs.150,000/- which is what is affordable in his circumstances and plight authored by the Respondent's breach. Therefore he has not defaulted on any payment.

[10] The Applicant pleads fraud and breach of contract on the part of the Respondent and its agents and relies on the decision in **Haveer Investment Limited versus Equitorial Commercial Bank CA**

**Civil Appeal Number 172 of 2009** where the Court of Appeal issued an injunction against exercising statutory power of sale on the basis of there being an element of fraud on the part of the Respondent as is the case herein.From the foregoing, the Applicant urges this honourable court to find that the Respondent's statutory power of sale has not accrued and that the same is premature as the Applicant's right of redemption has not been extinguished. The facts pleaded herein satisfy the threshold on law in **Giella vs Cassman Brown Limited[1973] EA 348.** They have established prima facie case in the sense of the case of **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**as failure to serve statutory notice pursuant to the provisions of **Section 90 (2) of the Land Act 2012**is no doubt an infringement of the Applicant's right over the charged property. In addition the Applicant has shown that the Respondent is guilty of breach of contract, fraud and misrepresentation as pertains to the terms of the loan facility. Unless the sale is stopped by way of an injunction, the Applicant will suffer irreparable injury which cannot be 'adequately compensated by an award of damages'. They also cited Lord Wilberforce in the House of Lords case of ***Hoffman LaRoche& Co. Industry V Secretary of State for Trade and Industry*** **[1975] AC 295 at 355 (H.L)**who described irreparable damage to be;

**"The object of [an interim injunction] is to prevent a litigant who must necessarily suffer the law's delay, from losing from that delay the fruit of his litigation; this is called 'irreparable damage',…"**

[11] The Applicant urged the court to take judicial notice and consider the distinct nature of land where one parcel of land is unique from the other. Further, there is a sentimental value to this parcel of land as his matrimonial home sits thereon and monetary compensation is not sufficient in the circumstances. The Applicant is also in occupation of the said parcel of land where he has put up a residential house. He stands to be greatly disadvantaged. As the ELC at Mombasa noted in **Lilian Mercy Mutua T/A Lilian M. Gems V Elizabeth Wangechi Olonginda& 3 Others Civil Case 36 of 2013 [2013]eKLR;**

**'The status quo is that the applicant has occupation of the disputed land and is in actual occupation of the mine. Truly the balance of convenience favours the applicant.'**

[12] In all the foregoing matters, the balance of convenience lies in favour of granting the injunction. They cited the case of **Alice Awino Okello v Trust Bank Ltd & Anor LLR No. 625 (CCK)which was quoted in the case of Kisimani Holdings Ltd & Anor v Fidelity Bank HCCC Number 744 of 2012[2013] eKLRwhere the Court of Appeal stated;**

**"…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."**

For those reasons, he prays to the court to grant him the injunction sought.

**The Defendant opposed application**

[13] The Respondent filed submissions and Replying Affidavit sworn by **KENNEDY KASAMBA** on 16th April 2013 in opposition to the application. The Defendant submits that it was not a party to the transaction in question. It only financed the construction project between the Plaintiffs herein and the Developers (Dama Developers Limited) by advancing to the borrower a mortgage facility.The Plaintiff as the Director of the Developer guaranteed the loan by a charge on the suit property. The Defendant bank advanced to the said developers a mortgage facility to the tune of Kshs. 15,000,000 for purpose of completing construction of four (4) storey residential apartments on L.R No Dagoretti/KINOO/922-Kinoo.The Defendant submitted that it did not appoint the contractors for the construction project as alleged by the Plaintiff in his application. The said contractors were selected and approved by the Developer, and the Plaintiff as one of its Directors at all relevant stages requested, the Defendant to disburse funds in favor of the said contractor.The Defendant only engaged the services of an Independent valuer to ascertain the true value of works undertaken before disbursement of any funds to the contractors. Therefore, the Defendant's involvement in the constructions projects was only as a financier in the commercial transaction and hence it was not directly involved with contractor and quantity surveyors as alleged by the Plaintiff in his submissions herein.

[14] The Defendant argued that the Charge instrument was duly executed by the Plaintiff and the Developer Company (of which the Plaintiff is one of the Directors) and the same was registered as against the Plaintiff's title and in favour of the Defendant to secure the Principal amount advanced to the said developers. The Plaintiff was always fully aware of the import of the Charge registered against his property, the Guarantee executed in favor of the Developers and the consequences of default in the loan repayment by the Developers. The property was legally charged to the bank so as to secure its interest on the sum advanced in favor of the borrower.The Plaintiff surrendered the Title documents for the aforesaid property to the Defendant bank pursuant to the charge instrument and in so doing; he fully understood and agreed to the full import of the terms set out in the charge instrument registered in favour of the bank.It is thus misleading for the Plaintiff to allege that a copy of the Charge instrument was never availed to him just to import blame the Defendant. In any event, it is noteworthy that the charge over the suit property was independent of and separate from the transaction relating to the construction of the residential apartments.

[15] The Defendant denied there was any element of fraud and misrepresentation on the part of the Defendant. They gave the reason that the Defendant was not a party to the transaction relating to the suit property and did not directly deal with the contractors as they were selected and approved by the Developer together with the Plaintiff as a Director thereof.**"KK-5"** in the Defendant' Replying Affidavit, it is clearly evident that at all relevant stages, it was the Developer's Directors (the Plaintiff being one of them) who requested the Defendant to disburse payment in favour of the contractor upon request by the Developers and after confirming from the Defendant's Independent's values of the true value & quality of the construction works undertaken. The Defendant denied having defrauded and/or misrepresented the Plaintiff as far as the transaction herein is concerned. In any event, no proof has been tendered before the Honorable Court by the Plaintiff to support his allegations of fraud as against the Defendant bank or at all.

[16] The Defendant submitted that it is evident that there has been default in the repayment of the Loan facility by the Borrower and the Plaintiff as the Guarantor of the advanced facility. The various correspondences sent to the Plaintiff and the borrower Company informing them of the arrears in the loan account and requests to regularize the loan account has not elicited any positive response apart from the suit herein. Neither the Plaintiff as the guarantor nor the borrower has tendered to the Defendant an acceptable proposal on settlement of the amount outstanding or at all. The Defendant in its Replying Affidavit filed in Court on 16th April 2014 has tendered as exhibit marked **"KK 8"** a true copy of the Statutory Notice sent to the Plaintiff and the borrowers through registered mail. It is clearly established that a **Three (3) months statutory notice** was duly issued by the Defendant to the Plaintiff as per the requirements of Section 90(1) of the Land Act, 2012 and this was done before the Defendant instructed Messrs Freeman Auctioneers to issue the requisite redemption notices and advertise the sale of the charged property by way of public auction. Therefore, the Plaintiff submissions that he was never served with the Statutory Notice is an outright lie and intended to mislead the Honourable Court. On the grounds hereinbefore, the Defendant's statutory power of sale has therefore accrued.

[17] Based on the foregoing, the Defendant is convinced that the Applicant has not met the threshold established in the case of **Giella Vs Cassman Brown (1973) EA 358** and in **Mrao Limited Vs First American bank Limited & 2 Others (2003) KLR.** The Defendant submitted that since the remedy being sought by the Plaintiff is an equitable one, the Court should decline to exercise its discretion because the Applicant has been shown to be guilty of conduct which does not meet the approval of the Court of equity. See G.V. Odunga J in **Jane WambuiWeru vs Overseas Private Inv. Corp & 3 others (2012) eKLR.** The Defendant further submitted that there exists a higher threshold that must be satisfied before grant of an injunction. This was held so by Ringera J as he was then was in the case of **Showind Industries Vs Guardian Bank Limited & Another (2002) 1 EA 284**. The Learned Judge stated as follows:-

**"…….an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"**

The Defendant's submissions is that the Plaintiff had not made out a prima facie case with probability of success to warrant the grant of an order of injunction from the Honourable Court. And, as such, the issue of damages cannot arise in such a case. In any case, the Plaintiff has not demonstrated to this Honourable Court that an award of damages would not be an adequate remedy and or that the Defendant would not be in a position to satisfy an award of damages if any is awarded. In sum, the Plaintiff has come to Court solely for purposes of defeating the Defendant's statutory rights in realization of its securities. He has failed to redeem his property as by law required. Therefore, the balance of convenience lies in favour of refusing the injunction. See the case of **E.A Industries Vs Trufoods (1972) 420.** ThePlaintiff has withheld from the Court material facts pertaining the facilities granted and the entire transaction creating the charge. The Plaintiff has come to Court with unclean hands. His application should be dismissed with costs.

[18] Further, the Defendant urged that, from the Statement of account tendered as exhibit "KK-6" in the Defendant's Replying Affidavit sworn by KENNEDY KASAMBA, it is evident that there has been default in the loan repayment to the detriment of the Defendant bank and its banking practices. It is thus clear that the Plaintiff and the borrower are guilty of laches for he has not explained the borrower's default and the Plaintiff's failure to exercise his equitable right of redemption. Apply, the maxim of equity that "*equity aides the vigilant and not the indolent*", as was emphasized in the **Showind Industries Limited** case (supra). See also **Machakos HCCC NO 215 of 2008-Jopa Villas LLC Vs Private Investment Corp & 2 Others** where the Learned Justice Lenaola stated that:-

**"I am clear in mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced……our Courts must uphold the sanctity of lawful commercial transactions"**

[19] For the reasons set out in the above submissions, the Defendant urged the Honorable Court to dismiss the Plaintiff's application with costs.

**DETERMINATION**

[20] The application before me is one for temporary injunction. But I think for the court to properly enter the realm of temporary injunction and determine the application, I should say something about the following submissions that were made by the Defendant:-

**<u>The Defendant further submitted that there exists a higher threshold that must be satisfied before grant of an injunction</u>. This was held so by Ringera J as he was then was in the case of Showind Industries Vs Guardian Bank Limited & Another (2002) 1 EA 284. The Learned Judge stated as follows:-**

**"……..an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward".**

[21] I may be mistaken or out of context; but if for a moment the Defendant meant that there is another higher measure for temporary injunction or that temporary injunction is to be granted sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward, there is absolutely a misnomer there. The test cited in the **Showind Industries Vs Guardian Bank Limited & Another (2002) 1 EA. 284**relates to interlocutory mandatory injunction. The specific threshold for interlocutory mandatory injunction as stated in the said case is that:-

**"……..an injunction [read interlocutory mandatory injunction] is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward". [Addition and reference are mine]**

[22] Nonetheless, I need not re-invent the wheel on temporary injunctions. I have considered all the pleadings, affidavit evidence, submissions by parties as well as the applicable law. I take the following

view of the matter. Injunctive relief, just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before. And courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set in the case of **GIELLA vs. CASSMAN BROWN** to wit:-

**a) Has the Applicant established a prima facie case with high chance of success?**

**b) Will the Applicant suffer irreparable damages unless an injunction is issue? and**

**c) Where does the balance of convenience lie?**

See the decision of Mabeya J in **Jan Bolden Nielsen vs. Herman Philliipus Steya Also Known As Hermannus Phillipus Steyn & 2 Others (2012) eKLR** wherehe citedOjwang Ag. J (as he then was)in the case of**Suleiman vs Amboseli Resort Ltd (2004) eKLR 589** as follows:-

**'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……**

[23] I will apply the above test herein. The guide here is the case of **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**whichdefined a prima facie case as follows;

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

**Issues**

[24] After careful consideration of the pleadings, the affidavit evidence, submissions of the parties and the applicable law, the correct question to ask is this: Based on the material presented to the Court, and the court properly directing itself thereto, can it 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 Defendant? The Applicant has raised three pertinent issues. The first is that there has been fraud on him by the contractors and the Defendant. The second that he was not served with the requisite notices under the law. And the

third that the charged property is of a unique nature as it contains his matrimonial home to which he has extreme sentimental attachment.

**Matrimonial home**

[25] I will deal with the last issue on sentimental attachment to the charged property by citing a work of the court in **Julius Mainye Anyega vs. Eco Bank Limited [2014] eKLR** where the court expressed itself as follows:

**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".**

[26] 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".**

[27] 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.**

**[35] 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.**

[28] Therefore, the fact that the charged property is a matrimonial home alone will not suffice as a ground of granting an injunction as long as the chargee has fully adheredto the law. Let me now examine the other issues cited by the Applicant.

**Notices**

[29] There is no doubt that the Applicant is a guarantor to the borrower. The guarantee was in a form of a charge over the suit property. The law, the way I understand it, is that a guarantee is a separate and distinct contract from the borrower's contract. The guarantee is, therefore, enforceable as such. Except, however, the guarantor who has given his land as guarantee and a charge has been registered, he also enjoys the protections offered to a chargor under the Land Act. The principal debtor should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the Land Act. The notice must be copied to the guarantor because the liability of the guarantor will arise upon default by the principal borrower. The Notice under section 90(1) of the Land Act was properly issued and liability on the guarantor attached. However, I understand the law to be that, after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 daysunder section 96(2) of the Land Act before the chargee can sell the charged property. I should think that, the rationale of the position of the law I have postulated is that once a mortgage always a mortgage; the charge created on the suit land is a charge for all purposes and intents within the sense of the Land Act and such charge does not become of a different character because it has been created by and over the land of a guarantor of the borrower; it is a charge in favour of the lender. The notice under section 96(2) of the Land Act is mandatory, precedes and is quite apart from the Redemption Notice issued under rule 15 of the Auctioneers Act. Courts have rendered themselves explicitly on this obligation and I am content to cite some few cases.**Albert Mario Cordeiro& another vs Vishram Shamji [2015] e KLR** where the Court rendered itself thus:

**Notice to sell charged property Section 96(2) of the Land Act which provides as follows:-**

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

**[26] This section is slowly attracting attention from judges, practitioners as well as scholars of multi-disciplinary fields. And I consider the debate around the subject to be of great jurisprudential value in Kenya especially in the context of the yet-to-be-resolved land question; the provisions on property rights in the Constitution of Kenya, 2010, and the protections of equity of redemption in the new land law. In the cases I have handled on the section, I have seen attempts to fuse the requirement in section 96(2) of the Land Act with Rule 15 of the Auctioneers Rules, 1997. Some arguments I have encountered seem to suggest a Notice of Redemption under Rule 15 of the Auctioneers Act is sufficient for purposes of section 96(2) of the Land Act. I think, there is clear legal bifurcation between these two laws and any attempt to fuse the two only increases the confusion of the purpose of section 96(2) of the Land Act. I may speculate here. Perhaps one may think that the Redemption Notice under the Auctioneers Act is sufficient because; it comes after the Statutory Notice; it is for 45 days which is more than the 40 days under section 96(2) of the Land Act; serves the purpose of giving an opportunity to the Chargor to redeem the property; and**

**notifies the Chargor of impending sale of the property if the sum demanded is not paid within the period of 45 days provided in the Notice. But I should state that the requirements under section 96(2) of the Land Act are mandatory and quite separate from the requirements under the Auctioneers Act. The Redemption Notice under the Auctioneers Act is also mandatory but it is issued separately from and after the one under section 96(2) of the Land Act; strictly in that sequence and I will cite ample reasons in support thereof.**

**[27] Of importance, when Parliament enacted section 96(2) of the Land Act, the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the Constitution. Again, rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee. It is not specially tailored for purposes of section 96(2) of the Land Act. One other important thing: Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But now it has gained statutory expression in section 89 of the Land Act which provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption. I refuse that section 96(2) of the Land Act is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the Auctioneers Act. The, debate is not, however, closed. I may cite other works of the court for further illumination of the subject. See the rendition in the case of Palmy Company Limited vs. Consolidated Bank of Kenya [2014] eKLR that:-**

**''As far as I am aware, this requirement of a notice to sell under section 96(2) of the Land Act, and that the chargee shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell, are still points of judicial debate. Some courts have dealt with that requirement for instance in MALINDIELC COURT LAND CASE NO. 1'B' OF 2014 JOSIAH KAMANJANJENGA v HOUSING FINANCE CORPORATION OF KENYA & ANOTHER, Angote J. stated that:**

**Having analysed the chronology of events, I take the view that the auctioneer's fees is only payable once the bank gives to the auctioneer lawful instructions. Section 96(2) of the Land Act stipulates that the Bank cannot exercise its power to sell the charged property until at least 40 days have lapsed. The Plaintiff was served with the 40 days' notice on 18$^{th}$ October 2013, which was the fourth day after the posting of the letter dated 10$^{th}$ October, 2013. The letter, according to the documents annexed on the Replying Affidavit, was received by the post master general on 14$^{th}$ October, 2013.**

**It is only after 27$^{th}$ November, 2013, which was the 40$^{th}$ day after 18$^{th}$ October, 2013, when the Plaintiff is supposed to have been served with the letter, that the 1$^{st}$ Defendant would have instructed the 2$^{nd}$ Defendant to proceed to issue to the Plaintiff with a notification of sale pursuant to the provisions of Rule 15 of the Auctioneers Rules, 1997 and not earlier than that.**

**Consequently, the letter of instructions dated 14$^{th}$ November, 2013 by the 1$^{st}$ Defendant addressed to the 2$^{nd}$ Defendant instructing it to sell the suit property was prematurely issued and is contra-statute. The said instructions and the subsequent notification of sale by the 2$^{nd}$ Defendant are therefore, prima facie, a nullity and cannot be the basis for the auction which had been scheduled for 26$^{th}$ January, 2014 or the loading of the auctioneer's fees on the Plaintiff's loan account.**

**The notice to sell should be in the prescribed form but nothing prohibits the said notice being issued on behalf of the chargee by its authorized agents. Although the Defendant submitted that:**

**''On expiry of the Statutory notice, the plaintiff was served with a further notice for Forty (40) Days and thereafter served with a Redemption Notice on 25$^{th}$ September 2013 requiring it to**

**redeem the charged property within Forty Five (45) Days and a Notification of Sale informing the Plaintiff that the property would be sold on 5th December 2013 unless the sum of Kshs. 42,575039.65 being the outstanding loan amount was settled''.**

**…I have not seen any notice to sell the charged land which was issued to the Applicant under section 96(2) of the Land Act. What I see in the documents annexed to the replying affidavit are the Statutory Notice by the chargee's advocates, letter of instruction by the Defendant to the auctioneers, Redemption Notice and Notification of Sale by the auctioneers. In the absence of a notice clearly indicated to be a notice under section 96(2) of the Land Act, I am not able to legally pronounce that such notice was issued. However, I anticipate arguments will be made in the future and there is room to argue that the redemption NOTICE by the auctioneers was also a notice to sell by the chargee as envisioned in section 96(2) of the Land Act because it was issued by an agent duly instructed by the chargee and also informed the Applicant that its property will be sold after 45 days unless it redeems it. If that argument prevails, needless to state that the Redemption notice is a generous one for it exceeded the minimum 40 days envisaged under section 96(2) of the Land Act. Another element would kick in; that the law envisages a minimum of 40 days to elapse before completing a contract for sale of the charged land, which could mean the notice, should be for more than 40 days except any contract for sale of the charged land cannot be completed at least before 40 days have elapsed. That imagination brings me to the question whether the notice to redeem issued under rule 15(d) of the Auctioneers Rules could serve as a notice to sell under the Land Act. A practical problem would emerge; the notice under section 96(2) of the Land Act is a notice to sell not a notice to signify an intention to sell. Does it therefore, mean the notice under section 96(2) of the Land Act should specify the date of sale as does the redemption notice issued under the Auctioneers Rules? There could be as many and varied arguments on this point. But I will take a more pragmatic and purposive approach of the law.**

**[28] On the basis of the above, in the absence of a Notice to sell under section 96(2) of the Land Act, the Statutory Power of Sale cannot be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice have been issued. This is a potent ground for an injunction. None was issued. However, the failure to issue this Notice under section 96(2) of the Land Act will not invalidate a statutory Notice which has been issued properly under section 90 of the Land Act.**

[30] I have not seen any notice to sell under section 96(2) of the Land Act. The statutory power of sale may not have fully matured and thus, is not exercisable.

**Alleged fraud**

[31] There is absolutely no fraud on the part of the Respondent. If the contractors and the surveyors were negligent or left the site without notice, they are the one who are to carry the blame as professionals. Indeed, professionals carry professional liability to the developer and so they should be sued and held liable as such. The said professional and contractors are not parties in the suit and it will be against the law to make any finding of liability against them. Nonetheless, that fact is important in this application.

**On statements and delivery of charge**

[32] From the submissions of the Applicant he was fully aware of the terms of the charge despite the possibility that he may not have been formally provided with a copy of the charge as registered. If a copy was not formally provided, it may be so provided without much ado. Quite aside from that, I note that the Applicant has been paying a monthly repayment of Kshs. 150,000. That is a good gesture on their party after the contractors abandoned the site. He is not, therefore, an indolent or malicious defaulter as he has been portrayed by the Respondent. I have also considered the term of the agreement on repayment of the debt which was tied to completion of the project and the anticipated rent therefrom. It is, accordingly imperative that due accounts are rendered by the bank to the Applicant in accordance with the terms of the loan agreement herein.

**Appropriate relief**

[33] Whereas the bank is not guilty of fraud, and whereas the Applicant has not paid the entire debt, the circumstances of this case calls for a relief which is appropriate. Accordingly, I order the following:

**a) That the Respondent bank shall render to the Applicant statements of account of the loan herein in accordance with the terms of the loan agreement within the next 30 days;**

**b) Upon rendering the accounts in (a) above, the bank shall comply with section 96(2) of the Land Act and issue a notice to sell the charged property. Of course, any sale thereafter of the charged property will abide by all relevant provisions of the Auctioneers Act;**

**c) Meanwhile, the Respondent shall not sell the charged property as long as the above two conditions are not fulfilled. In other words, I issue a conditional temporary injunction restraining the proposed sale of the charged property subject to the fulfillment of conditions (a) and (b) above. Should, these conditions be fulfilled, nothing will stop the chargee from exercising its statutory power of sale against the guarantor.**

**d) The application dated 27th February 2013 has succeeded to the extent I have mentioned above. And given the circumstances of the case, I order that each party shall bear own costs. It is so ordered.**

**Dated, signed and delivered in court at Nairobi this 18th day of June 2015.**

**-------------------------------------------------**

**F. GIKONYO**

**<u>JUDGE</u>**