



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 214 OF 2014**

**REHEBEAM AGENCIES LIMITED.....1<sup>st</sup> PLAINTIFF**

**GEOFFREY ATALIZA AMAYI.....2<sup>nd</sup> PLAINTIFF**

**Versus**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS AGENCIES.....2<sup>ND</sup>  
DEFENDANT**

**RULING**

**Temporary injunction**

[1] This is an application for injunction. It is made by way of Notice of Motion Application dated 22<sup>nd</sup> May 2014 and it seeks for the following specific orders *sinter alia*:-

- i. **A temporary injunction restraining the Respondents, their agents, servants and/or employees from selling, alienating, evicting, interfering, and/or in any way dealing with the 2<sup>nd</sup> Plaintiff's property known as Title No. NGONG/NGONG 19875 pending the hearing of this Suit.**

[2] The said application is expressed to be brought under Order 40 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 of the Civil Procedure Rules 2010 and Article 40 of the Constitution. It is supported by two affidavits sworn by the 2<sup>nd</sup> Plaintiff on 22<sup>nd</sup> May 2014 and on 18<sup>th</sup> February 2015, respectively.

**The Applicants' gravamen**

[3] The 2<sup>nd</sup> Plaintiff is a Director of the 1<sup>st</sup> Plaintiff and the registered owner of the suit property known as Land Title No. L.R NGONG/NGONG/19875. The 2<sup>nd</sup> Plaintiff is a guarantor of a loan facility of Kshs. 4,400,000.00 advanced to 1<sup>st</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff offered three

assets as securities, namely:

- a. **Motor Vehicle Registration Number KBM 799Z (Audi Station Wagon)**
- b. **Motor Vehicle Registration Number KAW 388W (Mercedes Benz)**
- c. **Legal Charge over Land Title Number NGONG/NGONG/19875**

[4] The Plaintiffs allege that they have regularly serviced the facility until December 2013 when the 1<sup>st</sup> Plaintiff experienced financial difficulties and notified the 1<sup>st</sup> Defendant of that fact. See the letter marked as annexure “GAA 5” to the Plaintiffs’ Supporting Affidavit. However, the 1<sup>st</sup> Defendant has taken steps to realize the Property despite the fact that interests imposed are disputed, the loan account is not in arrears, the procedure of redemption was un-procedural etc. The Plaintiffs are convinced that they have met the threshold for granting an interlocutory injunction as established in the case of *GIELLA V. CASSMAN BROWN (1973) EA 358*. First, they say that they have established a prima facie case as defined in the case of *MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] eKLR*as;

- i. **The Defendants’ failed to issue Notice to sell as provided for under Section 96(2) of the Land Act, 2012.**
- ii. **The Three (3) Months Statutory Notice issued under Section 90 was defective for failure to state the rectification Amount.**
- iii. **The Account as between the Plaintiff and the 1<sup>st</sup> Defendant is not in arrears.**

[5] They emphasized that failure to serve a Forty (40) day Notice to sell the charged property invalidated their quest to exercise the statutory power of sale. See 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 the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”**

[6] To them, the 1<sup>st</sup> Defendant only issued a Statutory Notice as provided by Section 90 of the Land Act but failed to issue a forty (40) day Notice to Sell as provided for by Section 96 (2) of the same Act. The 1<sup>st</sup> Defendant has not denied this fact. Both notices are distinct and mandatory. See the decision in the case of *ALBERT MARIO CORDEIRO & ANOTHER V VISHRAMSHAMJI [2015] eKLR*, where the court stated in part that:

**“If the sale of the suit property is carried through in the absence of a proper Notice to sell it will amount to a clog on the Chargors’ Equity of Redemption.**

**Accordingly, I am prepared to and hereby grant an injunction to restrain the sale of the suit property as long as a proper Notice to sell the property and Notification of Sale under section 96(2) of the Land Act and Rule 15(c) of the Auctioneers Rules have not been issued, respectively. That is to say, the Chargee is at liberty to issue a Notice to sell under section 96(2) of the Land Act and thereafter have the property sold in accordance with the Auctioneers Act and Rules.”**

[7] The Plaintiffs did not stop there. They submitted that even the Three (3) month Statutory Notice issued by the 1<sup>st</sup> Defendant did not comply with the provisions of Section 90 (2) (b) of the Land Act (supra). It did not state the amount that must be paid by the Chargor to rectify the default. The relevant provision provides as follows:

**“....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.”**

According to the said Statutory Notice dated 25<sup>th</sup> October 2013 the Chargee demands the entire disputed amount of Kshs. 7,848,311,83 as at 25<sup>th</sup> October 2013 but does not state the amount that must be paid to rectify the default. See the case of **DAVIS GITOMEKUHIUGUKA VS. EQUITY BANK LTD (2013)eKLR**, where Justice J. B. Havelock held as follows:

**“...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 Shs.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.”**

[8] They also cited the case of **Manasseh Dengavs. Eco Bank Kenya Limited & Another [2015]eKLR**, where the Court stated as follows:

**“Reading the contents of the said Statutory Notice against the provisions of Section 90 of the Land Act, it is evident that the said notice did not indicate what the outstanding amount of arrears was but actually called for the whole outstanding sum of Kshs 40,959,962.04. 32. If one was to assume that the mandatory Statutory Notices were valid and lawful, the Plaintiff did not appear not to have been given an opportunity to rectify the default before the Defendant exercised its statutory power of sale, a right he was entitled to. This was not an issue that was picked up by the Plaintiff but nonetheless the court deemed it necessary to raise the same so as to uphold the law.**

**Evidently, the 1st Defendant did not issue the Plaintiff with a Notice under the provisions of Section 96 (2) of the Land Act which once again made the purported sale of the subject property null and void ab initio. The 1<sup>st</sup> Defendant was not expected to proceed to complete any contract for the sale of the charged land until forty (40) days had elapsed from the date of the notice to sell in the prescribed form which was not the case herein. A reading of Section 96 (1) of the Land Act shows that these forty (40) days would be in addition to the three(3) months’ notice and different from the Notification of Sale to be issued by an auctioneer. No evidence was provided by the 1st Defendant to demonstrate that it had complied with the provisions of Section 96 (2) of the Land Act.**

**The court therefore finds that the sale of the subject property to the 2nd Defendant to have been unlawful and had no legal basis. The failure by the Defendant to comply with the provisions of Section 90 (2)(b) and Section 96 (2) of the Land Act were serious issues that automatically invalidated the sale to the 2nd Defendant at the public auction on 14th August 2014. If the sum that was demanded by the Defendant was the whole outstanding sum of the loan that it had advanced to the Plaintiff, this would definitely have denied the Plaintiff an opportunity to first rectify the default.**

**Notably, in its Statutory Notice of Sale, M/S Majanja & Luseno Advocates stated that as at 30th November 2012, the outstanding amounts due to the 1st Defendant from the Plaintiff stood at Kshs 40,959,962.04. In its Statement of 17th June 2014 on page 101 of the 1st Defendant’s Replying Affidavit, it stated that as at 30th November 2012, the outstanding balance was Kshs 41,319,709.56. 38. Appreciably, the Plaintiff argued that the 1st Defendant had debited him illegally, he did not demonstrate how this came about. If this was the only ground under which the Plaintiff had been**

**relying upon, it would have been difficult to get injunctive orders”**

[9] The Plaintiffs also contended that the 1<sup>st</sup> Defendant’s action in seeking to exercise its statutory power of sale when in fact the Plaintiffs’ loan account has never been non-performing is an illegality. The Plaintiff in his letter dated 30<sup>th</sup> April 2014 marked as “GAA 5” to the Plaintiffs’ Supporting Affidavit to the Application explains the default of payment of the monthly arrears and attached a bank slip for repayments done. This means that repayments have been made. The accounts are still active as evidenced by the 2<sup>nd</sup> Plaintiff’s bank statements marked as “GAA 3” to the Plaintiffs’ Supporting Affidavit. They, however, admitted that there are outstanding amounts owed to the Bank as the facilities are still active and being serviced. However, the Account **IS NOT IN ARREARS!** As long as the 1<sup>st</sup> Defendant seeks to exercise their statutory power of sale based on a non-performing account, they are bound by provisions of Section 44A of the Banking Act cap 488 Laws of Kenya. The amount they claim of Kshs. 8,084,523.00 is extraneous and in contravention the aforementioned section which provides as follows:

**44A.(1) An institution shall be limited in what it may recover interest recovered on defaulted loans from a debtor with respect to a non-performing loan to the maximum amount under subsection (2)**

**(2) The maximum amount referred to in subsection (1) is the sum of the following-**

- (a) the principal owing when the loan becomes non-performing;**
- (b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and**
- (c) expenses incurred in the recovery of any amounts owed by the debtor.**

**(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last become non-performing.**

The Plaintiffs claimed that the interest rates were disputed by the Plaintiff but his grievances were not taken into account by the 1<sup>st</sup> Defendant. Moreover, even after the filing of the suit and despite the fact that the interest rates are disputed the Plaintiffs have shown good faith by making payments to the 1<sup>st</sup> Defendant amounting to Kshs. 3,726,000.00 as shown by their banking slips made to the 1<sup>st</sup> Defendant annexed and marked as a bundle, as “GAA1” to the Plaintiff’s further affidavit. Section 104 (4) of the Land Act (supra) states that:

**104 (4) A court must refuse to authorize or approve a remedy if it appears to the court that—**

- (a) the default in issue has been remedied;**
- (b) the threat to the security has been removed;**
- (c) the chargor has taken the steps that the charger was required to take by the notice served under section 90; and**
- (d) the chargee has taken or attempted to take some action against the chargor in contravention of section 90 (4).**

According to the Plaintiffs, part-payment amounts to taking the steps required by the Notice despite the fact that the said notice was irregular hence the Court should make a finding in favour of the Plaintiffs who are keen on having the matter resolved.

[10] The Plaintiffs submitted that the 1<sup>st</sup> Plaintiff will suffer irreparable injury which cannot be adequately compensated by way of damages unless injunction is issued. He will lose his matrimonial home in the property and will be rendered homeless and destitute on a sale that would be illegal and irregular. The fact that the 1<sup>st</sup> Defendant in Paragraph 24 of their Supplementary Affidavit stated that they are capable of compensating the Plaintiff does not justify refusal of relief by way of injunction. A matrimonial home however holds much more value than just its market price and is of immense value to the Plaintiff. See the case of **JIMMY WAFULA SIMIYU V FIDELITY COMMERCIAL BANK LIMITED**[2013] eKLR where the Court while quoting the case of **JOSEPH SIROMOSIOMO VS HOUSING FINANCE COMPANY OF KENYA NAIROBI HCCC NO 265 OF 2007 [2008] eKLR** held as follows:

**“In view of the foregoing, I find that the Plaintiff has made out a prima facie case with a probability of success. Having found so, I need not consider whether damages would be adequate. I agree with Hon. Mohamed Warsame J (as he then was) that damages are not an automatic remedy particularly for loss occasioned by breach of the law as contended by the Defendant. In *Joseph Siro Mosiomo Vs Housing Finance Company of Kenya Nairobi HCCC No 265 of 2007 [2008] e KLR* the learned judge held:-**

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

[11] According to the Plaintiffs, the balance of convenience tilts in favour of the Plaintiff/Applicant as he is the party who would suffer more harm should the injunction not be granted. See the case of **East African Industries Vs Truefoods (1972)1 EA. 420. The property is worth over Kshs. 20 million while the balance outstanding which is disputed and may be subject to reduction is only Kshs. 8.08 million. The plaintiff will lose his investments and matrimonial home. He beseeched the court to grant the injunction.**

### **1<sup>st</sup> and 2<sup>nd</sup> defendant’s Opposed Application**

[12] The Respondents opposed the application and filed a Replying Affidavit of John Njenga, the General Manager Legal Affairs of the 1<sup>st</sup> Defendant and a Supplementary Affidavit of Janet Muthee, the Assistant Manager Legal in the Debt Collection Unit. It is deposed that;

a) The 2<sup>nd</sup> Plaintiff applied for and was advanced several loan facilities by the 1<sup>st</sup> Defendant on various occasions while trading in the name and style of Rehebeam Agencies, a business name and as such, the 1<sup>st</sup> Plaintiff which is a limited liability company is non-suited. The loan facility was secured by a legal charge over L.R No. NGONG/NGONG/1987 (**the suit property**) registered in the name of the 2<sup>nd</sup> Plaintiff. The first loan for Kshs. 2,400,000.00 was advanced to the 2<sup>nd</sup> Plaintiff on 16<sup>th</sup> January 2008. All subsequent 6 borrowings were advanced to the borrower the 2<sup>nd</sup> Plaintiff on the same security and conditions.

b) The 2<sup>nd</sup> Plaintiff subsequently breached the terms of the agreement between the parties by failing to liquidate his debt fully and is indebted to the 1<sup>st</sup> Defendant cumulatively in the sum of Kshs. 7,065,323.68 from his two loan accounts as at 17<sup>th</sup> May 2013 which continues to accrue interest until payment in full. Due to

default in repayment, the 1<sup>st</sup> Defendant was constrained to issue a statutory demand letter dated 17<sup>th</sup> May 2013 to the 2<sup>nd</sup> Plaintiff in his capacity as the chargor demanding payment of the said arrears. Default continued nonetheless and Notice of intention to exercise statutory power of sale over the suit property was issued on 25<sup>th</sup> October 2013 to the 2<sup>nd</sup> Plaintiff. Again, default persisted and the 1<sup>st</sup> Defendant was constrained to give instructions to the 2<sup>nd</sup> Defendant to sell the charged land by public auction in order to recover the outstanding loan balance.

[13] A dispute arose as to the amount to be paid by the 2<sup>nd</sup> Plaintiff to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Plaintiff claims the amount claimed by the 1<sup>st</sup> Defendant in the sum of 8,084,523.00 is extraneous and that on 30<sup>th</sup> April 2014 his loan arrears was 4,870,000.00 and not 8,084,523.00 as demanded by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant on its part claims that that sum of 8,084,523.00 was as a result of default by the Plaintiff which prompted the interest rate to shoot up at the rate of 6% per month above the normal interest rate as clearly envisaged in the parties' contract. The 2<sup>nd</sup> Plaintiff did not take the advantage of the notices to redeem his property. Instead he remained in arrears. The 2<sup>nd</sup> Plaintiff operates and runs two loan accounts with the 1<sup>st</sup> Defendant being loan account no.0010597009368 and loan account no.0010599727161 but the 2<sup>nd</sup> Plaintiff has produced evidence in court in relation to account number 0010101208140 which is a savings account and not a loan account. This is clearly an attempt to conceal material facts from this honourable court. The 2<sup>nd</sup> Plaintiff is not being truthful and is misleading the court so as to continue enjoying injunctive orders to the detriment and expense of the 1<sup>st</sup> Defendant. As a result of this the 1<sup>st</sup> Defendant is suffering losses which continue to increase as the facility and balance thereto attracts interest and grows bigger. The principles of equity prevent the Plaintiff from seeking equitable; He who comes to equity must come with clean hands and be ready to do equity.

[14] The Respondents listed the following as issues for consideration by the court:-

- a. **Whether the Defendant's right to exercise its statutory Power of sale under Section 96(2) of the Land Act has properly crystallized.**
- b. **Whether the 2<sup>nd</sup> Plaintiff had been properly given Notice as per the law before the 1<sup>st</sup> Defendant went ahead to exercise its statutory power of sale.**
- c. **Whether the varying interest rate by the 1<sup>st</sup> Defendant was agreed to by the Plaintiff when forming their contract.**

[15] The 1<sup>st</sup> Respondent insisted that it issued a Notice of intention to exercise Statutory power of sale of the suit property on 25<sup>th</sup> October 2013 pursuant to Section 96(2) of the Land Act although the Plaintiff highly disputes in paragraph 10 of their Further affidavit. Contrary to the averments by the 2<sup>nd</sup> Plaintiff, there was a valuation carried over the suit property by **Prestige Management Valuers** as evidenced in paragraph 18 of the Respondent Supplementary Affidavit and the annexure thereto as required under Section 97 (2) of the Land Act 2012 which reads:

**“A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”**

[16] The Applicants herein have loan debt arrears and cannot rely on this court to stop the Defendant/ Respondent from exercising a lawful remedy provided for by the law. They acted in accordance with section 90(1) of the Land Act which states

**“If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be. “**

The 2<sup>nd</sup> Plaintiff does not deny being in default. He even offered to explain the reason for his failure to service the facility. But he has not paid the debt in full. The 1<sup>st</sup> Defendant set out to exercise its power of sale after repeated successive actions of default by the 2<sup>nd</sup> Plaintiff. They did not do anything which was contrary to the law or which could clog the equity of redemption as all opportunities in law were given to the chargor to redeem his property.

[17] The contentions that the interest is unlawful are side shows as the Charge instrument clearly stated that the 1<sup>st</sup> Defendant reserved the right to vary the interest rate in its sole and absolute discretion. It also provided that default in paying any of the instalments would attract additional interest at the rate of 6% as a penalty for late payment above contractual interest rate. Further the Land Act elaborates in Section 84 that where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice of at least 30 days served on the chargor by the charge. The 2<sup>nd</sup> Plaintiff is just misleading the court on interest claims. The notices given exceed the forty days required under statute. The Defendant should therefore not be barred from recovering its debt by selling the suit property. On interest see the case of **Kisimani Holdings Limited and Another Versus Fidelity Bank Limited** which referred to the case of **Fina Bank Ltd v Ronak Ltd (2001) 1 EA 54 (CAK)** in which the Court of Appeal held;

**“As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis.”**

And also the case of **PELICAN INVESTMENTS LTD -VS- NATIONAL BANK OF KENYA LTD, [2000]2 EA 488 (CCK)**, Onyango Otieno J stated as follows:-

**“Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest.....In any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction.”**

This is further supported by various holdings of the court to the effect that:-

**“An injunction restraining a mortgagee from exercising his power of sale can be granted very rarely if the dispute is only as to the amount of interest” ( See Shah Vs Shah ( 1965) EA 91.**

Again in **Sports Cars Ltd Vs Trust Bank Ltd, Case No 754 of 1999**, the court held that:-

**“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the Mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due, unless on terms of the mortgage, the claim is excessive”.**

[18] In sum, the Respondents are convinced that the Plaintiffs have not met the legal thresholds set out in the case of **Giella vs. Casman Brown (1973) EA 358**. The Plaintiffs have not established *prima facie* case or infringement of a right. He deposited some money in his savings account and not the loan account. See **Mrao Limited v First American Bank (supra at page 138) Justice Bosire** stated as follows;

**“The applicant had come to a court of equity but having failed to show utmost good faith I cannot but hold that it was not entitled to the injunction it prayed for in its application. In my view, therefore there is no basis for interfering with the learned Commissioner’s decision. I would on my part, without the need of considering the remaining two tests in *Giella v Cassman Brown & Co. Ltd (supra)*, dismiss the appellant’s appeal with costs both here and in the court below.”**

[19] Even if the second principle was to be taken into consideration, the Applicants have not demonstrated that they will suffer an injury which cannot be adequately compensated by an award of damages. The property may be compensated in monetary terms despite the claim that it is a matrimonial home. See **Waweru J**, in the case of **Nahashon K. Mbatia Vs Housing Finance Company Ltd, (2006) eKLR**. And given the conduct of the Applicants and the circumstances of the case, the balance of convenience would tilt in favour of the 1<sup>st</sup> Defendant which is owed by the Applicant and has complied with all the requirements under the law. They urged the court to dismiss the Notice of Motion Application dated 22<sup>nd</sup> May 2014 with costs and order that the Defendant be at liberty to sell the charged property. In the Alternative, they urged the Honourable Court to order the Plaintiff/Applicant herein to deposit in court within Thirty (30) days the amount due.

### **DETERMINATION**

[20] This is an application for injunction. I will not re-invent the wheel. 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 issued? and**
- c) **Where does the balance of convenience lie?**

See the decision of Mabeya J in **JAN BOLDEN NIELSEN VS. HERMAN PHILLIPUS STEYA Also Known As HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR** where he cited Ojwang 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) e KLR 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.....**

[21] I will apply the above test herein. 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.

### **2<sup>nd</sup> Plaintiff: Guarantor or borrower?**

[22] An issue has emerged; whether the 2<sup>nd</sup> Plaintiff is a Guarantor or borrower. I will tackle this issue carefully not to determine the locus standi of the 1<sup>st</sup> Plaintiff to file this suit at an interlocutory stage. The 1<sup>st</sup> charge dated 28<sup>th</sup> January 2008 states that the Chargor, i.e. GEOFFREY AMAYIATALIZA T/A REHEBEAM AGENCIES is the person to whom the loan was advanced. The letter of offer dated 16<sup>th</sup> January 2008 stated that Borrower means Rehebeam Agencies. The further charge dated 2<sup>nd</sup> February 2010 also stated that the additional facilities were made to GEOFFREY AMAYIATALIZA and REHEMA ALI NYAMARA. The letter of offer dated 6<sup>th</sup> January 2010 defines Borrower to mean Geoffrey AmayiAtaliza and Rehema Ali Nyamara T/A Rehebeam Agencies. All the documents presented in court show that the 2<sup>nd</sup> Plaintiff is the borrower. I will proceed on that basis.

### **Taking lowest risk**

[23] The 2<sup>nd</sup> Plaintiff is clearly a defaulter. He has not paid the loan advanced to him. I am perplexed to note that he made payments into his savings accounts instead of the loan account. See the Respondents Supplementary Affidavit of Janet Muthee, the Assistant Manager Legal in the Debt Collection Unit of the 1<sup>st</sup> Defendant. Such is useful information which the 2<sup>nd</sup> Plaintiff should have disclosed to the court. Injunctive relief is an equitable relief and it may be refused to a party who does not meet the approval of equity.

[24] The 2<sup>nd</sup> Plaintiff is alleging that the statutory notice issued under section 90(2) of the Land Act is defective as it does not indicate the amounts which need to be paid in order to rectify the default herein. The 1<sup>st</sup> Respondent argued that the entire amount was due and payable due to the default and so, the remedy required of the 2<sup>nd</sup> Plaintiff was payment of full amount due. These arguments are eminently plausible. The charge states that default of any one payment on its due date renders the entire debt due and payable. It is arguable; therefore, that in determining the default which should be rectified, section 90(2) of the Land Act is to be interpreted in accordance with the terms and conditions of the agreement of the parties and the charge. The argument by the 2<sup>nd</sup> Plaintiff is not, therefore, indomitable one that would impel the court to ground its decision on at this stage. Apart from that, the Plaintiff claimed that the 1<sup>st</sup> Defendant did not issue a notice to sell under section 96(2) of the Land Act. The 1<sup>st</sup> Respondent insisted that they issued one on 25<sup>th</sup> October May 2013. But, despite these arguments by the 2<sup>nd</sup> Plaintiff, his conduct is contrary to the expectations of equity; he did not come to court with clean hands. In such cases, conduct of parties

will be considered in granting equitable relief in order to ensure no body reaps from his wrongs just because the law was on his side. I will, therefore, determine the case purely in the interest of justice. The 2<sup>nd</sup> Plaintiff admits the debt except he is saying that the debt due is lower than the sum claimed. They stated that the debt is for the sum of Kshs. 4,870,000. He attributed the bloated sum to ‘unlawful interest’. The 1<sup>st</sup> Respondent on the other side has referred to the charge which gives them absolute discretion to vary interest rate. They also explained that under the charge, any default will attract penalty interest and charges. These are matters which can only be unraveled during the hearing. In any case, such disputes on the amount due or interest are not a basis for issuing injunctions *per se* unless the amount is unconscionable or illegal from the face of the charge. Such clear discernment is not possible here. The facts of the case are obscure and cannot reveal a clear tilt of scales of convenience on affidavit evidence.

[25] Again, contrary to the allegations by the 2<sup>nd</sup> Plaintiff, there is a valuation report by **Prestige ManagementValuers** as evidenced in paragraph 18 of the Respondent Supplementary Affidavit. The valuation is on the suit property. But I am delighted for one thing; the 1<sup>st</sup> Respondent is not averse to an injunction being issued subject to the Applicant depositing the entire sum claimed in court. In light of the material before me, and the circumstances of this case, I am, however, inclined to issue a conditional temporary injunction to restrain the sale of the suit property provided that the 2<sup>nd</sup> Plaintiff shall, within 60 days, deposit the entire sum of Kshs. 8,084,523 in an interest earning account in joint names of counsels for the parties in a bank to be agreed by the parties. This order is most appropriate especially in the face of the conduct of the 2<sup>nd</sup> Plaintiff in the entire transaction. It will also hold parties herein in almost symmetrical bound as we await the substantive issues to be heard and determined. Meanwhile, I direct that Parties shall within 30 days of today comply with the practice directions of the division and have the matter set down for hearing. It is so ordered.

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

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**F. GIKONYO**

**JUDGE**