



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO 546 OF 2014 (O.S)**

**IN THE MATTER OF AN APPLICATION FOR RELIEF UNDER SECTION 103(3) OF THE  
LAND ACT NO 6 OF 2012**

**AND**

**IN THE MATTER OF AN APPLICATION FOR RELIEF BY THE SPOUSE OF THE  
CHARGOR M Z S**

**AND**

**IN THE MATTER OF THE EXERCISE OF CHARGEES POWER OF SALE OVER LAND  
PARCEL NO [particulars withheld] I.R. [particulars withheld]**

**M Z S.....PLAINTIFF**

**VERSUS**

**GULF AFRICAN BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

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

**ALDERMAN LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff’s Notice of Motion application dated and filed on 25<sup>th</sup> November 2014 was brought pursuant to the provisions of Order 40 Rule of the Civil Procedure Rules (sic) Section 162(4) of the Land Act. Prayer Nos (1) and (2) were spent. It sought the following remaining orders **THAT:-**

1. Spent.
2. Spent.
3. This Honourable Court be pleased to restrain by a temporary injunction both 1<sup>st</sup> and 2<sup>nd</sup> defendant (sic), their servants and/or agents from advertising, selling or offering for sale either by public auction or private treaty, or alienating or in any manner whatsoever dealing with Land reference number [particulars withheld] I.R. [particulars withheld] or any part thereof until these proceedings are heard and finalized.
4. Costs of this application be provided for.

## PLAINTIFF'S CASE

2. The application was supported by the Plaintiff's Affidavit that was sworn on 25<sup>th</sup> November 2014. Her Written Submissions were dated 2<sup>nd</sup> February 2015 and filed on 5<sup>th</sup> February 2015 while her List of Authorities was dated 9<sup>th</sup> March 2015 and filed on 10<sup>th</sup> March 2015.
3. The Plaintiff stated that L.R. No **[particulars withheld]** I.R. No **[particulars withheld]** (hereinafter referred to as "the subject property") was her property and that her husband Z S (hereinafter referred to as "the Chargor") charged the said property without informing her. She averred that the Chargor showed her copies of the Advertisement that was contained in the Daily Nation of 24<sup>th</sup> December 2014, the 2<sup>nd</sup> Defendant's Notification of Sale demanding a sum of Kshs 33,622,199.52 and the court order that was issued in **HCCC No 778 of 2012 (O.S) Gulf African Bank Limited vs Z R S** in which he had confirmed that he could pay a sum of Kshs 27,000,000/= and costs in the sum of Kshs 700,000/= by 31<sup>st</sup> July 2014.
4. She was apprehensive that the said subject property in which she had an interest in, would be sold for non-payment of the said sums. It was her contention that being the Chargor's spouse and an equitable owner in occupation of the subject property, she was entitled to the requisite notices under Sections 90 and 96 of the Land Act.
5. Further, she averred that the 1<sup>st</sup> Defendant's interest was limited to recovering its monies. She was emphatic that the 1<sup>st</sup> Defendant could therefore opt to sub-divide the subject property and sell only the portion that would satisfy the debt. It was her further contention that she had a right to redeem the subject property and sought a period of forty five (45) days to do so. She therefore prayed that her application be allowed as prayed.

## THE 1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANT'S CASE

6. In opposition to the said application, on 1<sup>st</sup> December 2014, Meimuna Abdullahi, a Senior Legal Officer of the 1<sup>st</sup> Defendant swore a Replying Affidavit that was filed on even date.
7. She stated that, at the request of the Chargor, the 1<sup>st</sup> Defendant made available to him a credit facility and other banking and financial accommodation not exceeding a sum of Kshs 20,000,000/= which was secured by a Charge over the said subject property.
8. However, the Chargor defaulted in payment of the said facility whereupon the 1<sup>st</sup> Defendant served upon him the Statutory Power of Sale by way of registered mail. Subsequently, the 1<sup>st</sup> Defendant filed **HCCC No 778 of 2012 (O.S) Gulf African Bank Limited vs Z R S** wherein the Chargor committed himself, in a consent that was recorded in court, to pay a sum of Kshs 27,000,000/= and costs in the sum of Kshs 700,000/= by 31<sup>st</sup> July 2014. The said consent culminated in a decree. When the Chargor failed to pay the said monies, the said subject property was sold by public auction for a sum of Kshs 70,800,000/= which the 3<sup>rd</sup> Defendant had paid in full.
9. It was its contention that it would be most inequitable to grant the prayers the orders the Plaintiff had sought as the Land Act, 2012 was promulgated to protect genuine interests and not for purposes of defeating a chargee's rights in realising its securities where there had been default.
10. On his part, Joseph Gikonyo, the 2<sup>nd</sup> Defendant's Proprietor, swore a Replying Affidavit on 1<sup>st</sup> December 2014. He stated that on 19<sup>th</sup> September 2014, he received from the 2<sup>nd</sup> Defendant a letter, in which was enclosed a Valuation Report dated 5<sup>th</sup> September 2014 by M/S Accurate Valuers Limited, instructing him to undertake the sale of the subject property by public auction.
11. Pursuant to those instructions, he issued the Chargor with a Notification of Sale on 22<sup>nd</sup> September 2014 and advertised the sale of the said property in the Daily Nation newspaper of 10<sup>th</sup> and 24<sup>th</sup> November 2014 for the auction on 25<sup>th</sup> November 2014. He stated that several bidders attended the auction in which D.K. Mwangi, on behalf of the 3<sup>rd</sup> Defendant herein, was declared the highest bidder at Kshs 70,800,000/=. This was well above the reserve price of Kshs 60,000,000/=. He contended that the bidder paid the requisite twenty five (25%) per cent deposit in the sum of Kshs 17,800,000/=. The balance of Kshs 53,100,000/= was thereafter remitted by

RTGS

12. It was therefore his averment that the 2<sup>nd</sup> Defendant complied with all the provisions of the Auctioneers Act Cap 526 (Laws of Kenya) and the Auctioneers Rules, 1997 and consequently, there was no equity of redemption to be preserved as had been contended by the Plaintiff herein.
13. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants therefore urged the court to dismiss the Plaintiff's application with costs to them. Their Written Submissions and List of Authorities, in support of their case, were both dated and filed on 9<sup>th</sup> March 2015.

### **THE 3<sup>RD</sup> DEFENDANT'S CASE**

14. On 19<sup>th</sup> December 2014, Harish Ramji swore a Replying Affidavit on behalf of the 3<sup>rd</sup> Defendant. The same was filed on 16<sup>th</sup> January 2015. The 3<sup>rd</sup> Defendant's Written Submission were dated and filed on 11<sup>th</sup> February 2015.
15. The 3<sup>rd</sup> Defendant's case was that the Plaintiff could not benefit from the provisions of the Land Act as the same did not operate retrospectively and that her prayers to redeem the said subject property were *res judicata* as a decree had since been issued in **HCCC No 778 of 2012 (O.S) Gulf African Bank Limited vs Z R S.**
16. It stated that once it purchased the subject property in the public auction on 25<sup>th</sup> November 2014, it became its absolute owner having purchased the same for good value as a *bona fide* purchaser. It averred that the Plaintiff's contention that D.K. Mwangi bided for the said property and not itself was not a sufficient ground to grant the Plaintiff the orders she had sought. It was its further averment that the said D.K. Mwangi was the physical bidder by reason of a private contractual agency and nominee arrangement between it and him.
17. It contended that the Chargor had been a persistent defaulter and therefore urged the court to dismiss the Plaintiff's present application as it was made in bad faith and was founded on grossly misleading statements being passed off as facts and not supported by any evidence of probative value.

### **LEGAL ANALYSIS**

18. In her application, the Plaintiff made reference to the provisions of Section 103 (1) (c) of the Land Act, in which she presented to the court in her capacity as a spouse of the Chargor. Under this Section, an application can be filed seeking reliefs under the provisions of Section 85(3) (a) and (b) of the Land Act that stipulate as follows:-

**“A chargee may provide, in a charge instrument, that a chargor who wishes to exercise the right to discharge the charge at any time before the expiry of the term of the charge—**

**(a) shall give one month's notice of the intention to discharge; or**

**(b) shall pay not more than one month's interest at the rate at which interest is payable on the principal sum secured by the charge or at any lesser rate which may be agreed, as well as paying all other money secured by the charge.”**

19. Evidently, this does not appear to be the relief that the Plaintiff was seeking. If it was, then she did not furnish the court with a copy of the Charge demonstrating that the Charge Document had captured the Chargor's wish to exercise his right to discharge the charge at any time before the expiry of the term of the charge.
20. In this respect, the court agreed with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' submissions that the said Section was therefore inapplicable in the circumstances of this case and further associated itself with the holding in the case of **Michael Ronoh Kimutai & 2 Others vs Consolidated Bank of Kenya Limited (2013) eKLR** that was relied upon by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
21. Notably, Section 96(3) (c) of the Land Act contemplates that a spouse who is to be served with the Notice is one who had given consent when a property was being charged. In this respect, the court

was in agreement with the several cases that were relied upon by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and in particular the cases of **Simon Njoroge Mburu vs Consolidated Bank of Kenya Limited (2014) eKLR** and **Leonard Jefwa Kalama & Another vs Consolidated Bank of Kenya Limited & Others (2014) eKLR** to demonstrate that the provisions of Section 103(3) of the Land Act were inapplicable in the case herein.

22. Hence, it was not necessary for the 1<sup>st</sup> Defendant to have served the Plaintiff with the Statutory Notice under the provisions Section 96(2) of the Land Act as the Equitable Mortgage by Deposit of Documents over the subject property was executed on 6<sup>th</sup> June 2011, way before the Land Act became operational. Indeed, the Land Act could not act retrospectively in this regard.
23. The 1<sup>st</sup> Defendant was thus required to serve the Statutory Notices contemplated under the provisions of Sections 90 and 96 of the Land Act upon the Chargor only. Similarly, the 2<sup>nd</sup> Defendant was also obligated to serve the mandatory forty five (45) days' notice upon the Chargor only.
24. Be that as it may, Section 28(a) of the Land Registration Act Cap 300 (Laws of Kenya) that the Plaintiff placed reliance upon, provides as follows:-

**“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—**

a. **Spousal rights over matrimonial property...**”(emphasis court)

25. It therefore follows that although the Plaintiff's interests were not expressed or noted in the Register at the Lands Registry, the registration of the subject property was subject to her spousal rights over the said property and she could seek to protect her interests in the said property. Indeed, under Section 105 (1) of the Land Act, it is stipulated as follows:-

**“The Court may reopen a charge of whatever amount secured on a matrimonial home (emphasis court), in the interests of doing justice between the parties.”**

26. In addition, in Section 102 (2) of the Land Act, it is provided as follows:-

**“At any time before the charged land is sold, or withdrawn from sale, the chargor or any other person entitled to discharge the charge may discharge the charge (emphasis court) in whole or in part by paying to the chargee all money secured by the charge at the time of payment.”**

27. The re-opening of a charge secured by a matrimonial home in the interests of doing justice to parties, the fact that any other person other than a chargor is entitled to discharge the charge and the fact that spousal rights are overriding interests, although not noted in a register, persuaded this court to make a finding that a person who is entitled to discharge a charged property under the provisions of Section 102(2) could include a spouse of a chargor, a guarantor or a personal representative of a chargor. In other words, such other person ought to have an interest in or over the subject property and is not any Tom, Dick and Harry.
28. Although such person who is entitled to discharge a charged property other than a chargor ought not to be served with the mandatory statutory notices, it does appear from the said provisions of Section 102(2) of the Land Act, that a chargor and/or such person entitled to discharge a charged property have an equal right of redemption and a chargee is best advised to issue the said notices upon the chargor in a proper manner to give a such other person an opportunity to redeem the property within the confines of those mandatory notices, if he or she desires to do so.
29. Appreciably, such other person, other than a chargor, ought not to expect to have his or her own separate set of mandatory statutory notices with a view to discharging a charged property. If this were so, it could definitely stifle a chargee's statutory power of sale as any Tom, Dick and Harry could purport to seek protection of the court under the said Section 102(2) of the Land Act every time a chargee attempted to exercise its Statutory Power of Sale and thus open this remedy to

abuse.

30. As the Plaintiff was closely associated to the Chargor and had interest over the charged property, the court accepted her submissions that she had *locus standi* to institute the proceedings herein. Indeed, Article 48 of the Constitution of Kenya mandates the court to ensure access to justice for all persons and not to impede access to justice. Additionally, under Article 50 of the Constitution of Kenya, every person, and that includes the Plaintiff herein, has the right to have any dispute that can be resolved by an application of the law decided in a fair and public hearing before a court.
31. Under Article 45 of the Constitution of Kenya, parties to a marriage are entitled to equal rights at the time of marriage during the marriage and the resolution of the marriage and can therefore take all steps within their power to safeguard their interests regarding any property owned together. The court therefore accepted the Plaintiff's submissions that the court shall have due regard to the principles of elimination of gender discrimination in law related to property in land as is provided for in Article 60(1) (e) of the Constitution of Kenya.
32. Notably, the Plaintiff stated in Paragraph 15 of her Supporting Affidavit that she required forty five (45) days to pay the debt and redeem the subject property. However, this right is not automatic. Where a chargee has duly served the statutory notices before exercising its statutory power of sale, such discharge by such person or Chargor can only be done before the charged property is sold or is withdrawn from a sale.
33. Although the subject property was not withdrawn from the sale but was sold at the public auction, the court nonetheless deemed it fit to scrutinise the Statutory Notices to establish whether or not the said notices were issued in compliance with the provisions of the law for the reason that the court had found that the Plaintiff also had a right of redemption of the said property, before it was sold or withdrawn from sale.
34. It is clear from the provisions of Section 104 (1) (a) and (c) of the Land Act that a court will refuse to authorise a sale if a chargor has remedied the default or the chargor has taken the steps that the chargor was required to take by the notice served upon him or her under the provisions of [Section 90 \(2\)](#) of the Land Act.
35. In a copy of the three (3) months' Statutory Notice dated 18<sup>th</sup> April 2012 on pg 30 of the 1<sup>st</sup> Defendant's Replying Affidavit, the 1<sup>st</sup> Defendant demanded that the Chargor makes immediate payment of the sum of Kshs 21,628,610.55. This was issued under the provisions of Section 69A of the Transfer of Property Act 1882 as amended by the Indian Transfer of Property (Amendment) Act 1959.
36. After the repeal of the said Transfer of Property Act, the 1<sup>st</sup> Defendant issued the Chargor another three (3) months' Statutory Notice dated 8<sup>th</sup> August 2012 under Section 90 (2) of the Land Act demanding the immediate payment of the sum of Kshs 24,330,705.46. This notice was on page 13 of the said Replying Affidavit.
37. Section 90 of the Land Act, under which the said three (3) months' notice dated 8<sup>th</sup> August 2012 was issued, provides as follows:-
  1. **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.**
  2. **The notice required by subsection (1) shall adequately inform the recipient of the following matters—**
    - a. **the nature and extent of the default by the chargor;**
    - b. **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;**
    - c. **the consequence that if the default was not rectified within the time specified in the notice, the chargee would proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part;**
    - d. **and the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.**

38. Notably, while the 1<sup>st</sup> Defendant complied with the duration of the three (3) month period, it did not inform the Chargor of the following:-
- a. **The nature and extent of his default;**
  - b. **the amount that he had to pay 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.**
  - c. **the consequence that if the default was not rectified within the time specified in the notice, the chargee would proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part;**
  - d. **and the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.**

39. Additionally, reading the contents of the said Statutory Notice dated 8<sup>th</sup> August 2012 against the provisions of Section 90 of the Land Act, it was apparent that the said notice did not indicate what the outstanding amount of arrears was. The 1<sup>st</sup> Defendant appeared to have called for the entire amount of the outstanding loan. Demanding the outstanding sum of the loan that it had advanced to the Chargor definitely denied the Chargor or the Plaintiff an opportunity to first rectify the default and effectively clogged their right of redemption.

40. For this reason, the court found that the Statutory Notice that was issued by the 1<sup>st</sup> Defendant was not valid as it was not in accordance with the provisions of Section 90 (2) (b) of the Land Act. A similar finding was also made in the case of **David Gitome Kuhiguka vs Equity Bank of Kenya Limited (2013) eKLR.**

41. Turning to Section 96 of the Land Act, the same stipulates as follows:-

- “1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under [section 90\(1\)](#), a chargee may exercise the power to sell the charged land.**
- 2. 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.”** (emphasis court).

42. The Notice under Section 96 (2) of the Land Act was issued on 22<sup>nd</sup> September 2014. 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.

43. 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 forty five (45) days’ Notification of Sale to be issued by an auctioneer. However, the Notification of Sale by the 2<sup>nd</sup> Defendant was also dated 22<sup>nd</sup> September 2014.

44. This was on the same date the 1<sup>st</sup> Defendant issued the Statutory Notice under Section 96(1) of the Land Act. For all purposes and intent, the said Notification of Sale by the 2<sup>nd</sup> Defendant was invalid having been issued before Statutory Notice under Section 96(1) of the Land Act had expired.

45. It is trite law that the court should and ought not to re-write the contracts that have been entered into by parties. However, it must always have at the back of its mind that the sale of a person’s property is not a matter that should be taken casually because it deprives a party of property, or of interest in, or right over, the property of any description, a right that is enshrined and protected by Article 40 of the Constitution of Kenya, 2010. The importance of not depriving a person his or her property was an issue that was considered in the case of **Alice Awino Akello vs Trust Bank Limited LLR No 625 (CCK).**

46. The court noted the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that once the bid was accepted at the said auction and the 3<sup>rd</sup> Defendant paid the purchase price, the question of settling the sale aside the 3<sup>rd</sup> Defendant did not arise – **See Jackson Kamau Ndegwa t/a Birds Paradise Tour & Travel vs Housing Finance Company of Kenya Limited (2005) eKLR.**
47. That may very well be the strict interpretation of the law. However, it would be unjust, a travesty and miscarriage of justice for the court to close its eyes to the fact that the Chargor was not issued with the mandatory statutory notices and accept that no remedy would in favour of the Plaintiff herein merely because the 3<sup>rd</sup> Defendant contended that it was a *bona fide* purchaser for value.
48. Indeed, the current land legislation is progressive and has evolved enough to give court the power to refuse to authorise an order or grant any remedy proposed by a chargee if it is satisfied that injustice will be done by authorising or approving the remedy as the court may think fit as can be seen in Section 104(2) (d) (ii) of the Land Act.
49. In addition, under Section 104(4) of the Land Act, the court must refuse to authorise or approve a remedy if it appears that the default in issue had been remedied, the chargor had taken steps required to be taken by the notice under Section 90 of the Land Act. There is no doubt that the Chargor or the Plaintiff herein could not have remedied any default or taken any steps as envisaged in Section 104(4)(a) and (c) of the Land Act as no proper or valid Statutory Notice under Section 90 (2) of the Land Act had been issued to the Chargor.
50. In view of the invalidity of the said notices, the sale of the subject property to the 3<sup>rd</sup> Defendant as was evidenced in the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Replying Affidavits or the obtaining of the Valuation Report as required under Section 97 of the Land Act were immaterial and of no consequence and could not validate the purported sale of the subject property at the aforesaid public auction.
51. The invalidity of the said Statutory Notices protected the Chargor and/or the Plaintiff from losing their right of redemption, irrespective of the 1<sup>st</sup> Defendant's Statutory Power of Sale having crystallised following the default by the Chargor herein. It was immaterial that the 3<sup>rd</sup> Defendant was a *bonafide* purchaser of value as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had contended as there was a clear breach of the law in which case the purported sale could not legitimise the said irregular and invalid Statutory Notices.
52. The holding of the case of **Nationwide Finance Company Limited Vs Meck Industries Limited (2005) eKLR** that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants placed reliance upon could not therefore come to their assistance as the circumstances were clearly distinguishable from the circumstances of this case.
53. Undoubtedly, any transfer to the 3<sup>rd</sup> Defendant would cause the Plaintiff and/or Chargor great injustice, loss and irreparable damage as they were entitled to their right of redemption until the fall of the hammer at the public auction. In this regard, the court associated itself with the holding in the case of **Kwanza Estates Limited vs Dubai Bank Kenya Limited (2013) eKLR** where the court held as follows:-

**“I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage...”**

54. The court also associated itself with the holdings in the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others (2008) eKLR** where Warsame J had held that damages were not an automatic remedy when deciding whether or not to grant an injunction and that the same could not be a substitute for loss occasioned by a clear breach of the law. This was the same position that was taken in the case of **Sharok Kher Mohamed Ali v Southern Credit Banking Corporation Limited (2008) eKLR** which was cited, with approval, in **Kwanza Estates Ltd v Dubai Bank Kenya Ltd** (Supra).
55. Indeed, in **Muiri Coffee Estate Limited vs Kenya Commercial Bank [2009] eKLR**, Khaminwa J (as she then was) quoting from the decision of Ringera J (as he then was) in the case of **Lucy Njoki Waithaka vs ICDC** also observed as follows:-

**“It is not an invariable rule that where damages may be an appropriate remedy an interlocutory injunction should never be granted. If that were the rule, the law would**

**unduly lean in favour of those rich enough to pay damages for all manner of trespassers. It would be unjust and be seen to be unjust.”**

56. In **HCCC No 778 of 2012 (O.S) Gulf African Bank Limited vs Z R S**, the 1<sup>st</sup> Defendant was granted leave to execute against the Chargor for the monies that were due and owing to it from him. Once it opted to exercise its Statutory Power of Sale, the 1<sup>st</sup> Defendant was expected to issue with notices that strictly complied with the law.

57. The court therefore took the firm view that allowing the transfer of the subject property to the 3<sup>rd</sup> Defendant would amount to gross injustice. It would be against the basic tenets of the law that the failure by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to have issued the mandatory statutory notices upon the Charger in the manner provided under the law could be compensated by payment of damages.

58. Title had not passed to the 3<sup>rd</sup> Defendant as no transfer had been effected in accordance with Section 37 (2) of the Land Registration Act which stipulates as follows:-

**“A transfer shall be completed by-**

- a. **filing the Instrument; and**
- b. **registration of the transferee as proprietor of the land, lease or charge.”**

59. Accordingly, having considered the pleadings, the affidavit evidence and written submissions and the case law that was relied upon by the parties, the court found that this was clearly a suitable case in which it could invoke its inherent jurisdiction as provided for in Sections 3A and 63(e) of the Civil Procedure Act that give it wide and unfettered discretion to make such orders as may be necessary for the ends of justice and to make such interlocutory order as may appear to the court to be just and convenient to prevent the ends of justice from being defeated. Further, the powers under Section 104(2) of the Land Act are not limited to the powers set out therein but are expansive and can be exercised depending on the circumstance of each case.

60. Whilst the Plaintiff demonstrated that she was entitled to protection by the court as the Statutory Notices issued to the Chargor by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were invalid and in clear breach of the law, the court was nonetheless found that she had met the threshold set out in the case of **Giella vs Cassman Brown & Company Limited (1973) EA 360** so as to be entitled to an interlocutory injunction pending the hearing and determination of the suit herein as could be seen in the holding in the said case in which it was stated as follows:-

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

61. Indeed, the court came to the conclusion that the Plaintiff did not make out a *prima facie* case with a probability of success at trial as she had committed herself to paying the decretal within forty five (45) days from the date of issuance of the mandatory statutory notices. In addition, the Chargor had in the case of **HCCC No 778 of 2012 (O.S) Gulf African Bank Limited vs Z R S** committed himself to paying a sum of Kshs 27,000,000/= and costs in the sum of Kshs 700,000/= by 31<sup>st</sup> July 2014.

62. The consent had not been set aside on any ground of fraud, duress, coercion, mistake, duress or misrepresentation. The court did not therefore find any triable issue to be taken to trial. Bearing in mind the court's findings herein, the prayers in the Originating Summons had since been spent. It would add no value to grant an interlocutory injunction orders in line with the holding in the case of **Giella v Cassman Brown & Company Limited** (Supra) as the Plaintiff had sought had actually been allowed herein. The case of **Mrao Limited vs First American Bank Limited & 2 Others (2003) KLR** that was relied upon by the Plaintiff was thus not relevant herein as there was

- in fact no arguable case at trial.
63. Having so, the court only found it prudent to give the Plaintiff herein an opportunity to protect her interests in and over the charged property for the sole reason that the statutory notices issued by the 1<sup>st</sup> Defendant were irregular, invalid and void *ab initio*. If the statutory notices herein were valid and the 3<sup>rd</sup> Defendant paid the purchase price in the public auction, the court would have made a finding that the Plaintiff would not have been able to stop the sale and then propose to pay the outstanding monies in the manner that she did.
64. Having said so, the Chargor and/or Plaintiff ought not to be allowed to escape the contractual obligations under the contract between the Chargor and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant is therefore at liberty to exercise its statutory power of sale provided that it re-issues valid statutory notices that fully comply with the provisions of the Land Act
65. The questions of the legality or otherwise of D.K. Mwangi having bidden at the public auction on behalf of the 3<sup>rd</sup> Defendant and that of the validity or otherwise of the Valuation Report were rendered moot once the court found that the Statutory Notices issued by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were invalid and irregular.

### **DISPOSITION**

66. For the foregoing reasons, the upshot of this court's ruling was that the Plaintiff's Notice of Motion application dated and filed on 25<sup>th</sup> November 2014 was only allowed to the extent that an injunction has been granted herein restraining the 1<sup>st</sup> Defendant from exercising its Statutory Power of Sale for as long as the Plaintiff and/or Chargor rectify the default herein and/or discharge the Charge.
67. For the avoidance of doubt, as the court found that the Statutory Notices by both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were invalid, irregular and in clear contravention of the law and as a result, the purported sale of the subject property to the 3<sup>rd</sup> Defendant was null and void and is hereby nullified.
68. As pointed out hereinabove, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant must issue the mandatory statutory notices afresh. It must be noted that there is nothing that prohibits the 1<sup>st</sup> Defendant from executing the consent judgment that was entered into by the parties and recorded by the court in **HCCC No 778 of 2012 (O.S) Gulf African Bank Limited vs Z R S** if it so opts to do as the order is still valid and enforceable.
69. In view of the circumstances of this case, each party shall bear its own costs.
70. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of July 2015**

**J. KAMAU**

**JUDGE**