REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 112 OF 2014

ALFRED OSANYA …………………………….………PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LIMITED ………...1ST DEFENDANT

GARAM INVESTMENTS ………………………..2ND DEFENDANT

R U L I N G

1. The Plaintiff's Application before this Court was dated 21st March 2014, brought under Certificate of Urgency. The same was grounded under the provisions of **sections 3A and 63 (e)** of the *Civil Procedure Act*, **sections 90, 97, 98, 103, 105 and 106** of the *Lands Act*, **section 13 (7) (a)** of the *Environment and Land Court Act*, as well as **Order 40 rules 1, 2, 3(3) and 4** of the *Civil Procedure Rules, 2010*. The Application sought Orders that this Court be pleased to issue an interim injunction restraining the Defendants, their employees, agents and/or servants from disposing, selling by public auction or otherwise transferring and/or in any manner whatsoever dealing with all that property known as L. R. No. 12715/8335 (Original No. 12715/ 36/19) (hereinafter "the suit property") pending the hearing and determination of this suit. The Application also sought that the Court be pleased to reopen the Charge dated 10th January 2013 and, among other things, direct the first Defendant to consider the Plaintiff's application for an enhanced loan facility and an enhanced loan repayment schedule.
2. The Application by the Plaintiff was brought on the following grounds:

> **"a) the 1st Respondent is in the process of exercising its statutory power of sale over the charged property registered as L.R. 12715/8335 (I.R. N. 115087).**
>
> **b) The 2nd Respondent has advertised for sale the Plaintiff's property and the sale by public auction is scheduled for 01/04/2014.**
>
> **c) The intended sale is premature and illegal for the following reasons:**

i. **The 1st Respondent has not served the Applicant with the mandatory notice of not less than three (3) months.**

ii. **The Respondents have not carried out a forced sale valuation and thus the market value of the property is grossly understated.**

iii. **The 1st Respondent has failed to exercise due diligence in order to obtain the best price reasonably obtainable at the time of sale. The intended sale will not obtain the best price.**

iv. **The notice to sale was not served upon the Applicant's spouse.**

d) The honourable Court has unfettered discretion to reopen the Charge dated 10/01/2013 for the following reasons:

i. **The property the subject matter of the charge is the Applicant's matrimonial home.**

ii. **The 1st Respondent has unreasonably denied the Applicant an enhanced loan facility yet the value of the charged property is more that double the current loan.**

iii. **The charged property is located in a prime are and appreciates over time.**

iv. **The 1st Respondent is in breach of the Charge which enjoined it to from time to time advance further funds to the Applicant and/or Tabuleat Coating Ltd.**

v. **The 1st Respondent has charged interest on the loan at the rate of 30%, which rate is excessive, oppressive, unconscionable and not provided for in the Charge. The rate of interest at time of taking the facility was 20%.**

vi. **The Plaintiff is 36 years old, with a young family and has a tremendous potential for business growth. Granted additional funds with a re-structured payment schedule, the Applicant will be able to service the loan.**

e) Unless restrained by this court the Respondents will dispose the property at a very low price. The respondents sold in January 2014 the Applicant's motor vehicle, a Subaru Forester Reg. No. KBH 855X at a mere Kshs. 550,000/=.

f) The Applicant has a good case with high chances of success.

g) The Applicant and his family will suffer irreparable loss and damage if the orders herein are not granted because apart from being disposed of their matrimonial home, the business under Tabuleat Coating Ltd, which is their only source of livelihood, will collapse.

h) It is in the interest of justice fair and expedient in all circumstances of the case that the application be allowed".

3. The Application was supported by the Affidavit of the Plaintiff sworn on 21st March 2014. The Plaintiff gave details that he was a shareholder and director of Tabuleat Coating Ltd (hereinafter "the company") and that the first Defendant had extended to the company credit facilities to finance its business. As security therefore, the Plaintiff had charged the suit property to the first Defendant by a Charge annexed to the said Affidavit dated 10th January 2013. The Plaintiff maintained that it was a term of the Charge that the first Respondent would from time to time extend to the company further financial accommodation, credit facilities and advances. As a result, by letter dated 4th January 2013, the Plaintiff had requested the first Defendant to enhance the loan facility to the company by a further Shs. 2 million. The Plaintiff maintained (rather naïvel)y that the company easily qualified for the enhanced loan facility as the value of the suit property was in excess of Shs. 13,900,000/-. The Plaintiff then went on to detail progress as regards the company's business and his negotiations with the first Defendant bank. He related that he had

been turned down as regards the application for further loan facilities. He had also taken out a personal car loan account but that the first Defendant had repossess the vehicle and it was sold for Shs. 550,000/-. Now, the first Defendant was in the processed of selling the suit property. The Plaintiff believed that the vehicle had been disposed of by the first Defendant at what he termed a throw away price.

4. Continuing his Affidavit in support of his Application, the Plaintiff confirmed that he had been served with a Notification of Sale on 30th January 2014 which showed an outstanding amount of Shs. 7,609,986.05 whereas his bank statements showed an outstanding amount of Shs. 7,063,819.43. The Plaintiff had then collected documents from the first Defendant's advocates after paying Shs. 3000/- for the same. Among the said documents was a Valuation Report prepared by Messrs. Cephas Valuers Ltd dated 24th January 2014 placing an open market value on the suit property at Shs. 12,000,000/-. This compared with the valuation from Messrs. Hectares & Associates dated 18th April 2012, placing the open market value of the suit property at Shs. 13,900,000/-. The Plaintiff maintained that the first Defendant had not carried out a forced sale valuation as regards the suit property and it was obvious that the same had been undervalued. The Plaintiff's said Affidavit went on to detail matters which this Court did not consider relevant to the Application, apart from the fact that he maintained that the interest rate of 30% applied to the loan amount was unconscionable and oppressive. He also maintained that the first Defendant's decision to deny the company additional loan funds was unfair and unjust and in blatant breach of the terms of the Charge. The Plaintiff noted that the first Defendant had declined to grant him more time to enable the sourcing of funds through the disposal of certain assets, but made no reference to what those assets were. Finally, the Plaintiff observed that the second Defendant advertised the suit property for sale on 17th March 2014 and that a prospective buyer had already viewed the suit property. The Plaintiff believed that the first Defendant should only invoke its statutory power of sale as a remedy of last resort. The Plaintiff then came before this Court on 25th March 2014 under the said Certificate of Urgency and was granted a temporary injunction pending the inter-parties hearing of his Application before Court.
5. The Plaintiff's Application before Court was further supported by the Affidavit of his wife **Faith Abidha Obimba** sworn on 21st March 2014. The deponent detailed that she was aware of the loan facility granted to the company by the first Defendant and that the suit property, registered in her husband's name, was offered as security. The suit property was the matrimonial home and the deponent and her husband had been constructing it progressively from 2009. The deponent stated that she was also aware that the company had requested for additional funds to finance its business but that the same had been declined by the first Defendant for what the deponent termed: "unknown reasons". As regards the sale of the suit property by public auction, the deponent detailed that, upon advice from the Plaintiff's advocates on record, she ought to have been served with the Notification of Sale. She had not been served with such notification. She had read the valuation report prepared by Cephas Valuers Ltd on 24th January 2014 and she wished to point out that she was at home on that date and nobody had come purporting to carry out a valuation of the suit property. Finally, she detailed that she and her husband were a young couple with a son aged 3 years and if the suit property was sold, they would be homeless.
6. The first Defendant filed its Replying Affidavit on 29th April 2014. The same was sworn by its Risk Manager as its Head Office one **Tilas Nthia Muringi.** The deponent stated that, at the outset, he considered the Plaintiff's suit to be frivolous and lacking in merit, its only purpose being to delay and/or obstruct the first Defendant's right to exercise its statutory power of sale over the suit property. He had been advised by the first Defendant's advocates on record, that the suit was frivolous and incompetent in that the principal borrower, the company, had not been enjoined as a Plaintiff to these proceedings. He noted that, by a letter of offer dated 23rd March 2011, the Plaintiff had been trading under the business name of Tabuleat Coating and had been granted an overdraft facility by the first Defendant of Shs. 3 million and a term loan also of Shs. 3 million. The deponent detailed that the pertinent terms of the said letter of offer detailed that a Charge document dated 16th April 2011, incorporating the agreed terms of the said letter of offer had been drawn up, executed by the Plaintiff and registered as against the suit property. He noted that the Plaintiff converted the business into a limited liability company and a Certificate of Incorporation was issued to the company on 10th May 2011. The directors and shareholders of the company were the Plaintiff and his wife. The deponent further noted that by a Resolution dated 16th

February 2012, the company took over and assumed all the liabilities of the sole proprietorship business. The original letter of offer was therefore replaced with a further letter of offer dated 22nd March 2012 in the name of the company. It had taken over the outstanding loan facility at Shs. 2,675,577/- with applicable interest rates of 26% per annum. The loan facility was to be repaid by monthly instalments of Shs. 98,821/-. Simultaneously on even date, the company was granted a term loan facility of Shs. 500,000 as working capital repayable by monthly instalments of Shs. 27,106/- for a period of 24 months at the same interest rate. The security to back the loan was a Board Resolution, directors' guarantees and a Chattels Mortgage over motor vehicle registration number KBH 855X. The initial Charge over the suit property was discharged and replaced by a fresh Charge in relation to the company dated 10th January 2013 in the amount of Shs. 6,000,000/-.

7. Mr. Muringi went on to review the Affidavit in support of the Application and he clarified that it was not automatic that the Plaintiff and/or the company would always be entitled to be granted credit facilities upon request, as the Plaintiff had alleged. There was no such provision in the Charge document. The request for a further Shs. 2 million had been considered but declined and as at 4th January 2013, the company's current account was overdrawn by Shs. 515,047/-, whereas the two loan accounts were in arrears of Shs. 98,000/- and Shs. 54,000/- respectively. The deponent went on to say that the mere fact that the suit property had appreciated in value was not sufficient to guarantee that the borrower could be entitled to further credit facilities as alleged. Mr. Muringi detailed that the company and/or the Plaintiff had failed to make any serious efforts to repay the outstanding debts. In the year 2013, only a sum of Shs. 250,000/- was paid into the current account and no monies paid into either loan account. As a result of these persistent defaults, several written demands had been made by the first Defendant to the Plaintiff and the company but the same were ignored. As a result, the first Defendant issued a statutory notice dated 5th September 2013 which was served by registered post using the borrower's last known postal address being that used by the borrower on the Charge document. Receipt of the same was expressly admitted by the Plaintiff at paragraphs 14 and 16 of his Supporting Affidavit.
8. Mr. Muringi went on to say that at the time of the issuance of the statutory notice, the amount owed to the first Defendant bank was Shs. 6,943,142.19 comprising the overdraft account and the two Loan accounts. He further advised that the Plaintiff's motor vehicle registration number KBH 855X had been valued, advertised and sold. From the vehicle valuation report, its market value was put at Shs. 630,000/- and its forced sale value at Shs. 450,000/- . In fact that the vehicle had fetched Shs. 550,000/-. The proceeds of sale had been credited to the No. 3 Loan account. As regards the suit property, Mr. Muringi stated that the first Defendant had undertaken a proper inspection and valuation of the property through Messrs. Cephas Valuers Ltd as required by law. That company's valuation was annexed to the Supporting Affidavit as Exhibit "AO-14" and, as at the date thereof being 24th January 2014, the open market valuation was Shs. 12 million with a forced sale value of Shs. 9 million. The deponent noted that the same value had conducted a valuation report of the suit property on 15th March 2011 at the time of granting the borrower the credit facilities. On that date, the open market value had been Shs. 10,500,000/-. That valuation had never been questioned by the Plaintiff and an appreciation of Shs. 1.5 million in under 3 years was considered to be fair and reasonable in the circumstances. As regards the rate of interest charged, Mr. Muringi commented that the rate of interest on the monies lent to the company was at the rate of 26% per annum together with a default rate of 4% per annum (total 30%) as per the two letters of offer dated 22nd March 2012 and as per the Charge document dated 10th January 2013. That document also provided for the first Defendant bank to vary the rate of interest without consulting the Plaintiff and, in this regard, the deponent annexed to his said Replying Affidavit copies of letters written to the Plaintiff and the company (borrower) in that regard.
9. As regards the second Supporting Affidavit of the Plaintiff's said wife dated 21st March 2014, Mr. Muringi first detailed that the same had been sworn and filed by a stranger to these proceedings and, as a result, this Court should entirely disregard the same. In the alternative, the deponent maintained that the suit property was inspected and valued by Cephas Valuers Ltd on 24th January 2014. He then went on to say that the deponent of the said second Supporting Affidavit was not the owner and/or the chargor of the suit property and, as a result, there was no requirement in law or otherwise to serve her with either the statutory notice or the Notification of Sale prior to the auction. However, the said Faith Abidha Obimba had signed a consent and confirmation by spouse

at the back end of the Charge of document dated 10th January 2013 detailing that she would not object and consent would not be required in the event that the first Defendant do exercise its statutory power of sale. However and further, she had been duly served with the Notification of Sale on 30th January 2014 and she had acknowledged the same. Mr. Muringi attached a copy of a letter from the first Defendant's appointed auctioneers dated 31st January 2014 together with the Certificate of Service, to this end.

10. On 8th May 2014, the Plaintiff filed a Supplementary Affidavit bearing even date. He maintained that he would suffer irreparable harm if the suit property was sold. In reference to Mr. Muringi's said Affidavit sworn on 29th April 2014, he maintained that the assertion that the company ought to have been enjoined in the suit, was frivolous. The Affidavit challenged various points that had been made by Mr. Muringi in his said Affidavit as regards utilisation by the company of the loan facilities as well as detailing that he had only received a communication from the first Defendant bank on 30th July 2012 as regards variation in interest rates. The deponent then made the statement that although the letter of offer had detailed that the rate of interest applicable was 26% per annum, that rate had been varied downwards to 20% per annum by the first Defendant bank's letter dated 28th September 2012. The Plaintiff maintained that the company was unable to meet its orders because of the first Defendant bank's refusal to grant it additional funds. He maintained that the first Defendant bank had agreed to enhance the facilities by an additional loan of Shs. 1,500,000/-. The Plaintiff then attacked the valuation of the suit property maintaining that it had been undervalued and pointed to the valuation thereof by Messrs. Hectares & Associates annexed to his previous Affidavit. Thereafter, the deponent briefly commented upon aspects of law that he had been advised about by his advocates on record including the fact that his wife ought to have been served with the Notification of Sale in person as the suit property was the matrimonial home.

11. The said Mr. Muringi also swore a Supplementary Affidavit on 6th June 2014 in which he commented upon the Supplementary Affidavit of the Plaintiff as above. He clarified that the facility of Shs. 6,000,000/-advanced to the company was by way of term loan and an overdraft facility. The terms of the letter of offer dated 23rd March 2011 were self-explanatory. He also maintained that the company, being the principal borrower, had regularly been advised concerning variations in the rate of interest from time to time. It was incorrect as regards the rate of interest interpreted by the Plaintiff. In default of repayment of the loan, the company was liable to pay extra default interest at the rate of 8% per annum in accordance with the letter of offer. Mr. Muringi denied that there was any acceptance by the first Defendant bank to grant further financial accommodation to the company. The letter to which the Plaintiff had referred merely contained guidance on what documents and information should be supplied for the first Defendant to consider an application for an additional overdraft facility. As regards the difference in valuation figures, the deponent detailed that the same was minimal and it was unreasonable to expect that different valuers would arrive at exactly the same value in relation to the suit property. Finally, Mr. Muringi commented that he believed that any dispute on the exact amount due to the first Defendant from the company was not a valid ground upon which to seek and/or obtain an injunction as prayed for by the Plaintiff.

12. The Plaintiff's submissions as regards his Application dated 21st March 2014 were filed herein on 6th June 2014. After detailing the background of the case, the Plaintiff noted that, at the heart of the Application, was the first Defendant bank's intention to sell the suit property by public auction. The Plaintiff submitted that the intended sale was unlawful for the following reasons:

> **"5.1 The bank did not serve the plaintiff with the mandatory notice of not less than 3 months contrary to section 90 (2) (b) of the Land Act (the Act). Section 90 (1) of the Act enjoins the bank to serve a defaulter if it continues to be in default for a period of one month. Once default is established, the bank must serve the charger with the 3 months notice contemplated under section 90 (2) (b) of the act. The plaintiff received the notice on 10/12/2013 (annexture AO-7, page 92-93 and annexture AO-8, page 94). The assertion by the plaintiff that he was served with the statutory notice by Mr. Muringu on 10/12/2013 is not denied by the bank.**
>
> **5.2 Three (3) months lapsed on 09/03/2014 whereas the notification of sale was served on 30/01/2014. The notification of sale was therefore prematurely served**

(annexture AO-10, page 99). See <u>Jimmy Wafula Simiyu</u>; bundle of authorities, page 6).

5.3 On whether or not the statutory notice was served, the court in Jimmy's case held that it is arguable whether or not a statutory right of sale could accrue before the charger had been served with a copy of the notice (bundle of authorities, page 7).

5.4 Even if it is to be assumed that the notice was properly served, the notice as is, is ambiguous and defective for the following reasons:

5.4.1 It does not indicate how much is in default and how much is to be paid in order to rectify the default within the meaning of section 90 92) (b). It only shows the indebtedness of the charger barely 8 months after the execution and registration of the charge.

5.4.2 It provides that the sale is to be by public auction or private treaty. The notice ought to be clear on which mode it would adopt as there should be no room for uncertainty. In his email dated 30/01/2013 (annexture AO-5, page 88), the plaintiff requested to sell the property by private treaty. There was however no response from the bank.

5.4.3 Any part payment of the debt would be on without prejudice to the notice meaning that the bank would still go ahead to sell the property even if the plaintiff rectified the default. <u>The notice as is took away the chargor's rights to redeem the property by correcting the default</u>.

5.5 In <u>David Gitome Kuhiguka</u> (bundle of authorities, page 13), one of the grounds on which the court allowed the application was that although the notice indicated the total amount due, it did not detail the amount that must be paid to rectify the default as required under section 90 (2) (b)".

13. The Plaintiff went on to submit that the first Defendant did not carry out a forced sale valuation of the property before putting it up for sale. I found this submission extraordinary in the face of the Report and Valuation of the said Cephas Valuers Ltd dated 24th January 2014 which was annexed to the Plaintiff's own Affidavit in support sworn on 21st March 2014 as Exhibit "AO-14". At page 6 of that Report, the valuers quite clearly detailed the open market value for the suit property at Shs. 12 million and the forced sale value at Shs. 9 million. Further, I hold no store by the Plaintiff's submission that the property was undervalued by reference to the Hectares & Associates valuation dated 18th April 2012. Although the open market value in that Report and Valuation was placed at Shs. 13,900,000/-, the realisation value (which I take to be the forced sale value) was detailed at Shs. 9 million, exactly the same as the Cephas Report and Valuation although the latter was submitted some 20 months after the former. The Plaintiff went on to say that the first Defendant had failed to comply with the provisions of **section 97 (2)** of the *Land Act (2012)*. Again I have no sympathy with the Plaintiff in this submission as **section 97 (2)** reads:

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

In my view, the first Defendant has complied with that section in that this Court has no problem with the Report and Valuation done by the said Cephars Valuers Ltd dated 24th January 2014. My Rulings in **<u>Zadarack Oyaro Achoki & Anor v Consolidated Bank of Kenya Ltd</u> (2013) eKLR** and **<u>David Githome Kuhiguka v Equity Bank Ltd</u> (2013) eKLR** have no relevance to this matter.

14. The Plaintiff went on to submit that the notification of sale was not served upon his spouse. Regretfully for the Plaintiff, I don't find that this is the case. The Auctioneer's Certificate of Service annexed to the Replying Affidavit of the first Defendant as Exhibit "TNM 16" quite

clearly indicates that the said spouse was duly served with the Notification of Sale on 30th January 2014 at the suit property but that she had declined to sign for the same. I have taken note of the first Defendant's submissions as to the said spouse signing a consent and confirmation in the Charge document dated 10th January 2013. I agree with the Plaintiff that such consent and confirmation does not exempt the first Defendant from having to serve the Notification of Sale as required by **section 96 (3) (c)** of the *Land Act (2012)*. However, my having found that the Auctioneer served the said Notification of Sale upon the Plaintiff's wife, I do not consider that the first Defendant was in breach of **section 96 (3)** aforesaid.

15. The Plaintiff's submissions continued by maintaining that the outstanding loan as at 28th February 2014 was detailed at Shs. 7,063,819.43 whereas the demand notice detailed Shs. 7,609,986.05. The Plaintiff pointed out that there was a need to reconcile the company's accounts. That is as may be but such is no ground for the granting of an interlocutory injunction. Further, and as observed by the first Defendant in its submissions, the Plaintiff is merely a guarantor of the credit facilities granted to the company as principal borrower. As such, I agree, he has no *locus standi* in law to question the manner in which the company's accounts have been kept by the first Defendant bank.
16. The Plaintiff's submissions continued by saying that he sought the reopening of the Charge herein, pointing to **sections 105** and **106** of the *Land Act (2012)*. He maintained that the refusal by the first Defendant bank to advance (presumably to the company) more funds was not only a breach of the Charge but discriminatory. Here again, I find sympathy with the first Defendant's submissions that it was expressly stated in clauses A, B and C of the Charge that the suit property was to remain as security for such credit facilities as may have been given to the company, as principal borrower, from time to time but at the first Defendant's sole discretion. It was not automatic that the Plaintiff and/or the company would be entitled to be granted credit facilities upon request and there was no such provision in the Charge document. The first Defendant admitted receiving a letter from the company dated 4th January 2013 requesting for a further credit facility of Shs. 2 million but that request was considered and declined for the reasons stated in the Replying Affidavit. In my view, the refusal by the first Defendant bank to advance the Plaintiff (or the company) further funds was neither a breach of the Charge nor the said Letter of Offer. As a result, I see no reason as put by the Plaintiff before this Court, to reopen the Charge under the provisions of **section 105** of the *Land Act (2012)* which reads:

"The Court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties."

Further, I don't see that the first Defendant breached the provisions of **section 82 (1)** of the *Land Act (2012)*. The first Defendant did make provision in the Charge document to give further advances or credit to the company as principal borrower but such provision did not detail that it had to extend further monies or credit.

17. Moving onto the first Defendant's submissions, it listed the issues raised by the Plaintiff as follows:

a. Whether the Plaintiff/principal borrower company failed to service the loan due to refusal by the bank to grant further credit facilities.

(b) Whether the Plaintiff has been served with a statutory notice.

c. Whether the bank has kept the accounts in a proper manner.
d. Whether the bank has carried out a proper valuation and inspection of the suit property.
e. Whether the bank has applied the correct rate of interest on the account.
f. Whether the Plaintiff's spouse has been served with the notification of sale.
g. Whether the bank is entitled to exercise its statutory power of sale over the suit property.
h. Whether the plaintiff has established a prima facie case with a probability of success at the trial.

In its submissions, the first Defendant answered "No" to issues (a) and (h) above but "Yes" to the

other issues and listed. The first Defendant also referred this Court to the cases of **Habib Bank AG Zürich v Pop-In (Kenya) Ltd & Ors. Civil Appeal No. 147 of 1989 (unreported), J. L. Lavuna & Ors. v Civil Servants Housing Company Ltd & Anor. Civil Appeal No. Nai 14 of 1995 (unreported), Chai Ltd & Ors v Trust Bank Ltd & Anor. HCCC No. 698 of 1996 (unreported), Trust Bank Ltd v Eros Chemists Ltd & Anor. Civil Appeal No. 133 of 1999 (unreported), Menno Travel Services Ltd v Kenya National Capital Corporation Ltd HCCC No. 1580 of 1996 (unreported), Peter Mbiyu Muthina v Barclays Bank of Kenya Ltd HCCC No. 943 of 2002 (unreported)** and, so far as the principles of granting temporary injunctions were concerned, the cases of **Giella v Cassman Brown (1973) EA 358, Dismas Oduor Owuor v Housing Finance Company (Kenya) Ltd & Anor HCCC No. 630 of 2001 (unreported) and Solomon Mureithi Kibocha v Central Bank of Kenya HCCC No. 275 of 2003 (also unreported).**

18. This Court has already commented as above on some of the submissions made by the Plaintiff in support of his Application. Looking at the issues outlined as above firstly by the Plaintiff and secondly by the first Defendant, this Court would detail as follows:

a. I have already detailed that I have found that there was no liability on the part of the first Defendant to grant further credit facilities to the company being the principal borrower. The provisions of the Letters of Offer and the Charge dated 10th January 2013 cannot be interpreted to mean that the Plaintiff or, to be more precise, the company, were to enjoy an open-ended cheque-book of monies borrowed from the first Defendant bank. The decision as to whether to advance more monies or otherwise lay entirely with the first Defendant. Whether or not the Plaintiff/principal borrower (company) failed to service the loan due to the refusal of the first Defendant bank to grant further credit facilities is immaterial to the Application before Court.

b. As regards the service of the Statutory Notice, the Plaintiff maintains that he was not served in accordance with **section 90 (2) (b)** of the *Land Act (2012)*. In this regard, I accept the first Defendant's version that the principal borrower, the company, and the Plaintiff were sent a number of letters warning as to default as regards repayment of credit facilities. On receiving no response to such letters, the first Defendant maintained that it served the three months Statutory Notice by registered post upon the Plaintiff and the company at the last known address of both known to the first Defendant, the same being the address used by the company as per the Charge document dated 10th January 2013. The first Defendant maintains that the statutory notice has not been returned undelivered or unclaimed to date. The Plaintiff's story as far as the Statutory Notice is concerned was that he was served presumably with a copy thereof, by Mr. Muringu on 10th December 2013, a fact that was not denied by the first Defendant. But then why should it be? What the first Defendant is relying upon is the service of the statutory notice as provided for in the Charge document, by way of registered post at the last known address of the principal borrower and the Plaintiff.

c. As regards whether the first Defendant has kept the company's account in a proper manner, I would reiterate my observations in paragraph 14 above. I don't believe that the Plaintiff had the locus to rely upon such a ground where the company has not been made a party to this suit.

d. In relation to a proper valuation being taken as required by **section 97 (2)** of the *Land Act (2012)*, again I have commented upon this as above in paragraph 13. I am satisfied that the first Defendant carried out a proper valuation as required by the above section.

e. I am satisfied that the company as principal borrower, did receive several letters as exhibited to the Replying Affidavit as "TNM 14" regarding changes in the rate of interest chargeable on the credit facilities advanced to it. Whether the Defendant bank has applied the correct rate of interest on the account is a matter to be determined at the trial of the suit in due course. However as stated in the **Habib Bank** case (supra) as per **Kwach JA**:

> **"That clearly is an admission of default and as I understand the law a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has been served with a valid statutory notice, can be restrained from exercising its statutory power of sale."**

f. As above, I have already found that the Plaintiff's spouse had been served with the notification of

sale in accordance with **section 96 (3) (c)** of the *Land Act 2012*.

g. As to the issue of whether the Defendant bank is entitled to exercise its statutory power of sale over the suit property, I have no doubt that the principal borrower, the company, was granted credit facilities by the Defendant bank guaranteed by the Plaintiff. The company has expressly admitted as per Exhibit "TNM 15" of the Replying Affidavit as to its default. The real question is whether the Defendant bank has served a proper statutory notice upon the Plaintiff. I have perused the copy of the statutory notice served by the Defendant bank upon the Plaintiff exhibited to the Replying Affidavit as "TNM 12 (a)". The same is dated 5th September 2013 and was sent by registered post to the Plaintiff at P. O. Box No. 8179 - 00300 Nairobi by the firm of Kagwimi Kang'ethe & Co. Advocates. That is the address detailed for the Plaintiff and the company on the Charge document dated 10th January 2013. Further, it is the address detailed in the letter of offer for a loan facility to the company by the Defendant bank in its letter of 22nd March 2012. Throughout it seems that the Plaintiff and the company have been utilising P. O. Box 8179 – 00300 Nairobi. As a consequence, I am satisfied that the Statutory Notice was properly served upon the Plaintiff.

As to the details of the statutory notice required to be served, **section 90 (2)** of the *Land Act (2012)* is self-explanatory in that regard. It reads:

> **"90. (2) The notice required by subsection (1) shall adequately inform the receipient of the following matters –**

a. **the nature and extent of the default by the charger;**

b. **if the default consists of the non-payment of any money due under the charge, <u>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</u>;** (Underlining mine).

c. **if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the charger must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;**

d. **the consequence that if the default is not rectified within the time specified in the notice, the charge will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**

e. **the right of the charger in respect of certain remedies to apply to the court for relied against those remedies."**

I have carefully perused the various Letters of Offer made by the Defendant bank to the company as regards credit facilities. The most pertinent of those letters are those dated 22nd March 2012 exhibited as "TNM 6" and "TNM 7" to the Replying Affidavit dated 29th April 2014. Both of those letters involve Term Loans made to the company. If one examines the Statutory Notice dated 5th September 2013, the said Term Loans are captured as Account No. 300 6114/TL/2 at Shs. 2,607,049.12 Dr. and Account No. 3006114/TL/3 at Shs. 420,034.89 Dr. In both cases, the Term Loans were repayable by way of monthly repayments, the first at Shs. 19,821.00 per month over 41 months and the second at Shs. 27,106.00 per month over 24 months. Consequently at the date of the statutory notice, it would have been incorrect that the whole amount of the Term Loans would have been due and owing. The Court has no problem as regards the amount demanded by the first Defendant in respect of the overdraft facility allowed to the company being Account No. 3006114/CD/1 in the amount of Shs. 3,916,058.18. However, the first Defendant's Advocates do not appear to have appreciated the mandatory provisions of **section 90 (2) (b)** which detail that the statutory notice must detail the amount that must be paid to rectify the default and the time. As above, the Term Loans would not be entirely due and owing owing to the instalment plan agreed with the company.

The statutory notice does not detail the amount that must be paid to rectify the default as regards the Term Loans. As a result, I come to the same conclusion in this case as I had reached in the **David Gitome Kuhiguka** case (supra), and I find that the said statutory notice herein dated 5th September 2013 to be defective and, as a result, invalid.

h. As a result of my immediate finding above, I consider that with regard to the last issue put before Court by the first Defendant, that the Plaintiff has established a *prima facie* case with a probability of success in relation to the validity of the statutory notice as per the guidelines set out in the **Giella v Cassman Brown** case as above.

19. Having detailed the above, I agree with the first Defendant that the Plaintiff and indirectly, the company, has admitted that a substantial debt is due and owing. I consider that the Plaintiff's excuse for the indebtedness being that the business of the company has collapsed as a result of failing to access further credit facilities from the first Defendant, is preposterous. In my view, the Plaintiff's conduct was inequitable and I am minded of the finding of **Njagi J.** in the case of **Kyangavo v Kenya Commercial Bank Ltd & Anor. (2004) 1KLR 126** to which I referred to in my Ruling in the **Zadarack Achoki** case (supra) in which the learned judge found:

"Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this Court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently he has not done equity. In the hands of the plaintiff, a permanent injunction would wreak havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and chargees have their own rights".

20. As a consequence of the Defendant not complying with the mandatory requirement under the provisions of **section 97 (2) (b)** of the *Land Act, 2012*, this Court has little option but to allow prayer no. 3 of the Plaintiff's Notice of Motion dated 21st March 2014. However in finding such, I am aware as to the extensive borrowing by the company from the first Defendant as guaranteed by the Plaintiff herein. I am mindful of the dictum of **Njagi J.**in the **Kyangavo** case to the extent that:

"He that comes to equity must come with clean hands and must also do equity."

Accordingly, I am of the opinion that if the Plaintiff is to enjoy the interim Orders that I have granted above pending the hearing and determination of this suit, then he must make some effort either of his own accord or through the company, to commence repayment of monies that are undoubtedly owed to the first Defendant. In this regard, I direct that the interim injunction that I have granted will only remain in place provided that the Plaintiff do pay to the first Defendant the sum of Shs. 3,827,553.54 being the extent of the company's overdraft as per the letter addressed to the company for the attention of the Plaintiff dated 3rd December 2013 exhibited as "TNM 11" to the said Replying Affidavit. Such will need to be paid within 30 days from today's date. There will be no order as to costs of the Application.

DATED and delivered at Nairobi this 31st day of July, 2014.

J. B. HAVELOCK

JUDGE