



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO 458 OF 2013**

**SHILLINGI INCORPORATED.....PLAINTIFF**

**VERSUS**

**OVERSEAS PRIVATE INVESTMENT CORPORATION.....1<sup>ST</sup> DEFENDANT**

**HARVEEN GADHOKE.....2<sup>ND</sup> DEFENDANT**

**DANIEL MUTISYA NDONYE.....3<sup>RD</sup> DEFENDANT**

**JOPA VILLAS LLC.....4<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. For the determination of the Court are two applications, the Plaintiff's Notice of Motion application dated and filed on 25<sup>th</sup> October 2013 and the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' Notice of Motion dated and filed on 5<sup>th</sup> November 2013. As both were related, parties requested the court to consider the same and give one ruling. The ruling herein is therefore based on the two (2) said applications which will be dealt with under separate heads.

**PLAINTIFF'S NOTICE OF MOTION APPLICATION DATED 25<sup>TH</sup> OCTOBER 2013**

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2. The said application was brought pursuant to the provisions of Order 40 Rules 1(a) and (b), 2, 3, 4 and 5 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. Prayer Nos (1) and (2) of the said application were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT pending the hearing and determination of this suit, a permanent injunction be and is hereby issued restraining the Respondents whether by itself (sic), its employees, servants**

and/or agents or otherwise, howsoever from interfering with, wasting, damaging, alienating, subdividing, selling, removing, disposing off and/or dealing with in any manner whatsoever with all that parcel of land known as L.R No. 27253/42 located at Mlolongo Area.

4. THAT this Honourable Court do issue any such further and appropriate orders in the circumstances of this matter as it would deem fit to grant.

5. THAT the costs of this Application be provided for.

3. The application was predicated upon the grounds set out in the face of the application. The same can generally be summarised as follows:-

a. THAT the 4<sup>th</sup> Defendant was at all material times the registered owner and/or proprietor of L.R No. 27253/42 located at Mlolongo Area (hereinafter referred to as “the suit premises”).

b. THAT the Plaintiff and the 4<sup>th</sup> Defendant entered into an agreement dated 18<sup>th</sup> January 2008 wherein the Plaintiff was to purchase five (5) units to be developed on the suit premises from the Defendant for a consideration of Kshs 19,000,000/=. The said units were expected to be completed on or before January 2010.

c. THAT the 4<sup>th</sup> Defendant was pursuant to Clause 5 of the agreement required to keep the Plaintiff informed of the development of the suit premises on a quarterly basis.

d. THAT in blatant breach and flagrant disregard of the express terms of the agreement, the 4<sup>th</sup> Defendant failed, refused and/or neglected to complete the construction of the aforesaid development and has neither completed nor accounted to the Plaintiff for its monies and/or funds invested towards the development despite numerous requests.

e. THAT all the Defendants had been engaged in negotiations with unknown third parties with a view of disposing of the suit premises without informing the Plaintiff and/or refunding it its monies and/or funds invested towards the development nor completing the housing units as per the agreement.

f. THAT the Plaintiff acquired a substantial proprietary interest in the property and as such the Defendants could not deal with the suit premises in any manner whatsoever without the Plaintiff’s knowledge and/or consent.

g. THAT the intended sale of the suit premises was aimed at unjustly enriching the Defendants to the detriment of the Plaintiff and that it was not only a breach of the terms of the agreement and a demonstration of bad faith and ill- will on the part of the Defendants but that it was also illegal and unlawful necessitating the restraining of the Defendants failing which the Plaintiff stood to suffer substantial irreparable losses, damages and harm.

#### **AFFIDAVIT EVIDENCE**

4. The application was supported by the Affidavit of Daniel Ndogo, the Plaintiff’s Managing Director sworn on 25<sup>th</sup> October 2013, in which he reiterated all the grounds that had been set out in the face of the application.

5. In response thereto, on 31<sup>st</sup> October 2013, Daniel Ndonge who was the 1<sup>st</sup> Defendant’s Receiving Manager jointly with the 2<sup>nd</sup> Defendant, swore a Replying Affidavit on his own behalf and that of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

6. According to the affidavit evidence of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants, the Plaintiff had failed to disclose

pertinent and material facts herein which were that the 1<sup>st</sup> and 4<sup>th</sup> Defendants entered into a loan agreement, debenture, promissory notes and charge over the suit premises, amongst other documents to secure the loan amount of USD 7,100,000.

7. They stated that the 1<sup>st</sup> Defendant disbursed USD 2,870,166 to the 4<sup>th</sup> Defendant but that it defaulted in its loan obligations by neglecting and/or refusing to repay the loan amount. As a result, the 1<sup>st</sup> Defendant issued the 4<sup>th</sup> Defendant with a demand notice and appointed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as the 4<sup>th</sup> Defendant's Receiver Managers pursuant to the terms of the debenture agreement.

8. The said 1<sup>st</sup> to 3<sup>rd</sup> Defendants contended that the 4<sup>th</sup> Defendant and other third party depositors, who represented the Plaintiff herein, filed several applications in different causes seeking injunctive orders to restrain the 1<sup>st</sup> Defendant from disposing of the suit premises but these were all dismissed. Lenaola, Prof Ngugi and Odunga JJ handled the said applications that had been filed in Machakos HCCC No 215 of 2008 and Milimani HCCC No 450 of 2009. It was also stated that Majanja J also dismissed a Constitutional Petition in which he recognised the 1<sup>st</sup> Defendant's right to realise its security. The 1<sup>st</sup> Defendant then issued two (2) demand notices dated 14<sup>th</sup> June 2013 and 17<sup>th</sup> September 2013 to this effect.

9. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants denied having knowledge of monies allegedly paid to the 4<sup>th</sup> Defendant by the Plaintiff. They said that the 4<sup>th</sup> Defendant did not issue the Notice set out in Schedule 2 as it was obligated to do pursuant to Clause 5.2 of the Security Debenture. The said Notice was to be sent to the 1<sup>st</sup> and potential purchasers under the Tenant Purchase & Subscription of Share Agreement whenever the 2<sup>nd</sup> Defendant received monies from any purchaser of the individual units.

10. They pointed out that there did not appear to be a genuine Agreement for Sale as it was inconceivable that a party would pay the whole purchase price without a valid Transfer Document or without carrying out any due diligence to ascertain whether the property was encumbered or not. They questioned how the Plaintiff could have paid for all the units in 2011 despite the deadline for the payment having been 2010 or where he was during the court proceedings stated hereinabove and when the court 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were appointed as the 4<sup>th</sup> Defendant's Receiver Managers.

11. They stated that the Plaintiff had no *locus standi* or legally recognisable interest over the suit premises and that there was no privity of contract between the 1<sup>st</sup> Defendant and the Plaintiff. It was their further argument that the 1<sup>st</sup> Defendant was the only secured creditor under the Debenture/ Charge and that the Plaintiff, not having been a party to the said Debenture, the Defendant's could exercise all the powers of receivers including the sale of the suit premises without reference to the Plaintiff. The 1<sup>st</sup> Defendant was said to have had the sole mandate under the Security Debenture to decide how best to deal with the charged suit premises in the event of any default by the 4<sup>th</sup> Defendant.

12. They accused the Plaintiff of having been guilty of *laches* disentitling it to any equitable relief. They contended that this was the 7<sup>th</sup> injunction application in relation to the suit premises and there had to be an end to litigation. It was their averment that the Plaintiff's application was an afterthought and filed with the sole intention of preventing and delaying them from realising the sale of the property.

13. It was their contention that the Plaintiff's cause of action lay against the 4<sup>th</sup> Defendant and that it could be compensated by damages. They were emphatic that the Plaintiff had not made out a *prima facie* case for the reason that it was an unsecured creditor whose rights could not take precedence over those of the 1<sup>st</sup> Defendant who was a secured creditor. They therefore urged the court to dismiss the Plaintiff's application as the same was without merit.

**1<sup>ST</sup> TO 3<sup>RD</sup> DEFENDANT'S NOTICE OF MOTION APPLICATION DATED 5<sup>TH</sup> NOVEMBER 2013**

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14. This application was dated 5<sup>th</sup> November 2013 and filed on even date. It was brought under the aegis of Order 40 Rule 7 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT the order issued on 1<sup>st</sup> November 2013 and granted on 31<sup>st</sup> October 2013 issuing a temporary injunction for 14 days be set aside.**

**4. THAT the costs of this application be awarded to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants.**

15. The application was premised upon the grounds that can be summarised as follows:-

**a. THAT no interim orders were issued when the matter was initially filed.**

**b. THAT the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' advocates filed a Notice of Appointment of Advocates and a Replying Affidavit on 31<sup>st</sup> October 2013 and were ready to proceed for hearing on that day had the matter not been taken out of the day's cause list.**

**c. THAT the orders subsequently issued on 31<sup>st</sup> October 2013 were legally unprocedural and ought to be set aside *ex debito justitiae* as the same were issued in the absence of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' advocate yet the initial order was that the injunction application was to be served for *inter-parties* hearing.**

**d. THAT the suit had been brought in bad faith as the 4<sup>th</sup> Defendant was behind the present suit.**

**e. THAT there was material non-disclosure by the Plaintiff to the effect that there had been previous litigation in relation to the suit premises wherein it was held in all occasions that the 1<sup>st</sup> to 3<sup>rd</sup> Applicants had the right to realise the suit premises without further delay as the same had been held up in litigation for the last six (6) years.**

**f. THAT as there was no privity of contract between the Plaintiff and the 1<sup>st</sup> Defendant, the Plaintiff's cause of action was against the 4<sup>th</sup> Defendant.**

**g. THAT the 1<sup>st</sup> Defendant was the only secured creditor under the Debenture which the Plaintiff was not a party to.**

**h. THAT the Plaintiff had not made out a *prima facie* case for the reason that as an unsecured creditor, the Plaintiff's rights could not take precedence over those of a secured creditor in respect of the suit premises and that the Plaintiff could be compensated by way of damages.**

16. In the affidavit in support of the application sworn on 5<sup>th</sup> November 2013, Daniel Ndonge reiterated the grounds that were set out in the face of the application. He also repeated the averments in his Replying Affidavit sworn on 31<sup>st</sup> October 2013.

17. On his part, John Paul Njoroge swore a Replying Affidavit on behalf of the 4<sup>th</sup> Defendant on 21<sup>st</sup> November 2013. The same was filed on 22<sup>nd</sup> November 2013. He denied that the 4<sup>th</sup> Defendant was behind the present suit and averred that the 4<sup>th</sup> Defendant had at all material time litigated in its name.

18. It was the 4<sup>th</sup> Defendant's contention that the 1<sup>st</sup> Defendant did not have capacity to enter into a Debenture in Kenya on the ground that the 1<sup>st</sup> Defendant was not a citizen of Kenya or incorporated and registered to do business in Kenya. It also challenged the validity of the Charge Document on the ground that it was prepared by the firm of M/S Kaplan & Stratton Advocates. It said that Waweru J agreed with the said firm of advocates that there was no conflict of interest, a matter it said needed to be investigated further.

19. The 1<sup>st</sup> Defendant was said to have taken advantage by rushing the sale of the suit premises by way of private treaty yet the 4<sup>th</sup> Defendant had honestly sought buyers in order to clear the outstanding issues with the 1<sup>st</sup> to 3<sup>rd</sup> Defendants.

20. It therefore prayed that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' application be dismissed.

### **LEGAL SUBMISSION BY THE PLAINTIFF**

21. The Plaintiff's written submissions were dated 18<sup>th</sup> March 2014 and filed on 19<sup>th</sup> March 2013. It reiterated the averments that it had made in its Supporting Affidavit sworn on 25<sup>th</sup> October 2013.

22. It placed reliance on the case of **Giella vs Cassman Brown Company Limited (1973) EA**. The principles in the said case were that:-

**a. First, the Applicant must show a prima facie case with a probability of success;**

**b. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not be adequately compensated by damages;**

**c. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.**

23. It submitted that the intended sale by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants was aimed at unjustly enriching themselves to its detriment. It contended that it had adequately established a *prima facie* case with a probability of success.

24. It was its further argument that it had claimed an interest in a specific parcel of land which was situated in a peculiar location and as such, no amount of damages would be adequate to compensate it for the loss it stood to suffer if the suit premises were disposed of as intended.

25. It was its averment that the balance of convenience tilted in its favour as any sale of the suit premises could not be reversed and thus prayed that its application be allowed.

### **LEGAL SUBMISSIONS BY THE 1<sup>ST</sup> TO 3<sup>RD</sup> DEFENDANTS**

26. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants' written submissions were filed on 1<sup>st</sup> April 2014. They set out in great detail the chronology of events in the matter herein as had been set out in their Replying and Supporting Affidavits sworn on 31<sup>st</sup> October 2013 and 5<sup>th</sup> January 2014 respectively.

27. The gist of their case can be summarised as follows:-

**a. THAT the suit premises had been subject of many injunction applications that had been dismissed by several courts and that if the 4<sup>th</sup> Defendant had been unable to obtain an injunction, the Plaintiff who was an unsecured creditor could not obtain the same in respect of the suit premises.**

**b. THAT the Plaintiff was not privy to the Debenture between the 1<sup>st</sup>, Defendant and the 4<sup>th</sup>**

Defendant herein. They referred the court to the case of Ken-India vs Otiende [1991] KLR 419 in which the court therein held that a claimant who was not party to a contract could not maintain an action.

c. THAT the Plaintiff's claim could not rank in priority over the rights of a Debenture as was held in the case of SAA Technical (Property) Limited vs Air Kenya Aviation Kenya (2006) 2 EA 317.

d. THAT a Debenture Holder was under no duty to refrain from exercising its right to appoint a receiver. It placed reliance on the cases of J.K. Industries vs KCB & Another [1987] KLR and Madhupaper International Limited vs Kerr [1985] KLR 846 in this regards.

e. THAT the Plaintiff could not maintain an injunction application in respect of only five (5) units when the Debenture was in respect of the entire subject property.

f. THAT damages would be an adequate remedy as had been the Court of Appeal and Justice Prof Ngugi had held in the cases of Jopa Villas LLC vs OPIC and Stephen Wainaina & Others vs OPIC & Others. It said damages would be adequate as the suit premises was a commercial one.

g. THAT the Plaintiff's argument that the 1<sup>st</sup> Defendant did not have an office on Kenya was irrelevant and that the fact that the 4<sup>th</sup> Defendant was the registered proprietor of the suit premises was immaterial as there was a Charge that had been registered against the said suit premises.

h. THAT there was inordinate delay in the filing of the suit herein which delay, the Plaintiff had not explained as there were various proceedings that had been going on in respect of the suit premises and consequently, the Plaintiff was not entitled to any equitable relief as it had been guilty of *laches*.

i. THAT the present suit was filed after the expiry of the two (2) demand notices dated 14<sup>th</sup> June 2013 and 17<sup>th</sup> September 2013 that had been issued to the 4<sup>th</sup> Defendant by the 1<sup>st</sup> Defendant and it was therefore clear that the suit herein had been presented with collusion between the Plaintiff and the 4<sup>th</sup> Defendant herein. It pointed out that the 4<sup>th</sup> Defendant was supporting the injunction Plaintiff's application as it had raised issues regarding the Land Act.

j. THAT there was nothing peculiar about the suit premises and as a result, the balance of convenience tilted in favour of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants who would suffer irreparable loss as the basis of the loan advances to the 4<sup>th</sup> Defendant was the suit premises, which was their sole security.

k. THAT the Plaintiff had not established a *prima facie* case with a probability of success but that it was propagating a fraud and advancing creative arguments as to why an injunction should issue.

#### **LEGAL SUBMISSIONS BY THE 4<sup>TH</sup> DEFENDANT**

28. In its written submissions dated 24<sup>th</sup> March 2014 and filed on 25<sup>th</sup> March 2013, the 4<sup>th</sup> Defendant argued that it also had a genuine grievance in that the title of the Charge and the Debenture showed that the same were drawn by M/S Kaplan & Stratton Advocates. It submitted that if the ruling of Waweru J was to the effect that the said firm did not draw the said documents, then it raised the possibility of the existence of other documents which the 1<sup>st</sup> to 3<sup>rd</sup> Defendants were relying upon. It also asked the court to consider that the 1<sup>st</sup> Defendant did not have an office in Kenya.

29. It stated that it had challenged the proposed sale at the Court of Appeal, which proceedings were pending hearing at the said court and that this court ought to establish whether the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had followed the procedures pursuant to the Land Act, 2012 as it should enjoy equal benefit of the law as other persons whose properties were being sold after the commencement of the said law.

30. It denied acting in cahoots with the Plaintiff herein and averred that all it had done was to get better offers to ensure that there was no loss to the parties.

## **LEGAL ANALYSIS**

31. When the parties appeared in court on 19<sup>th</sup> May 2014, they requested the court to deliver its ruling based on the said written submissions, which they adopted, in the determination of the said two (2) applications herein

32. The court has carefully analysed the written submissions by the parties herein and in the very first instance rejects the arguments advanced by the Plaintiff and the 4<sup>th</sup> Defendant and accepts those of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants as seen hereinbelow.

33. The 4<sup>th</sup> Defendant's contentions that the Debenture and Charge between it and the 1<sup>st</sup> Defendant were invalid is not a question that is before this court for determination or one that this court can entertain. The issue of the conflict of interest of the firm of M/S Kaplan & Stratton Advocates was addressed by Waweru J. There is no indication that the same was ever set aside by the Court of Appeal or reviewed, or at all. The decision was rendered by a court of equal and competent jurisdiction as this one, in which case, the argument cannot be re-opened and/or re-visited for determination by this court.

34. The 4<sup>th</sup> Defendant cannot expect to have benefitted from the monies advanced to it by the 1<sup>st</sup> Defendant, commence a project, default in meeting its obligations to the 1<sup>st</sup> Defendant and subsequently challenge the validity of the said Debenture and Charge on the ground that the 1<sup>st</sup> Defendant was not registered to do business in Nairobi or that it did not have offices in Nairobi or that the said Charge was not drawn by the firm of M/S Kaplan & Stratton Advocates which raised a possibility of other documents other than those that had been placed before the court.

35. The 4<sup>th</sup> Defendant cannot refuse to pay the monies owed to the 1<sup>st</sup> Defendant and still keep the property which was the sole security of the 1<sup>st</sup> Defendant. The 4<sup>th</sup> Defendant would ideally be unjustly enriching itself if it was allowed to stop the 1<sup>st</sup> Defendant from realising its security.

36. The 4<sup>th</sup> Defendant and the 1<sup>st</sup> Defendant entered into a valid and binding contract which the court cannot alter to the detriment of one party. Doing so would be tantamount to re-writing the contract they had been voluntarily entered into. The role of the court is limited to enforcing terms and conditions of the contract when called upon to do by a party and not to emasculate parties from exercising their rights under the contract.

37. The court is unable to accept the 4<sup>th</sup> Defendant's submission that it was only trying to get the best possible price for the disposal of the subject property. If it was unable to meet its obligations, nothing should stop the 1<sup>st</sup> Defendant from exercising its rights under the Debenture and the Charge.

38. The 4<sup>th</sup> Defendant's argument that the 1<sup>st</sup> Defendant had not complied with the provisions of the Land Act, 2012 is also neither here nor there. It did not demonstrate to the court how the 1<sup>st</sup> Defendant had acted contrary to the provisions of the said Act. The burden was upon it to demonstrate that fact which it failed to do.

39. That notwithstanding, the present application was one where the Plaintiff was seeking injunctive orders against the 1<sup>st</sup> Defendant. It is evident from the 4<sup>th</sup> Defendant's submissions and its affidavit

evidence that it was supporting the Plaintiff's application seeking injunctive orders against the Plaintiff herein.

40. However, the 4<sup>th</sup> Defendant cannot hope to achieve its objective of preventing the 1<sup>st</sup> Defendant from realising the security by riding on the Plaintiff's application. What the 4<sup>th</sup> Defendant is purporting to do is to raise red-herrings in this matter to detract the court from considering the real issues that have been placed before it for determination.

41. While the court cannot conclusively make a finding that the Plaintiff and the 4<sup>th</sup> Defendant were colluding so as to prevent the 1<sup>st</sup> Defendant from exercising its rights under the Debenture and the Charge, it is not lost to this court that the effect of granting the Plaintiff an injunction in this matter would essentially be accomplishing the 4<sup>th</sup> Defendant's objective of obtaining an injunction against the 1<sup>st</sup> Defendant.

42. The court finds the Plaintiff's argument it was still the owner of the suit premises *vis-a-vis* the 1<sup>st</sup> Defendant's rights over the said property to have been completely misplaced. That the Plaintiff acquired a substantial proprietorship interest in the said suit premises because it had invested USD 250,000 for the purchase of five (5) units could not have been further from the truth.

43. The Agreement of Sale dated 18<sup>th</sup> January 2008 it entered into with the 4<sup>th</sup> Defendant and the documents evidencing payment that had been attached to its Supporting Affidavit did not confer and could not have in any way conferred proprietorship upon it as the title remained in the 4<sup>th</sup> Defendant's name with the 1<sup>st</sup> Defendant having overriding interest over it in its capacity as a Chargee.

44. In any event, the Plaintiff was clear from its application, written submissions and Supporting Affidavit that the 4<sup>th</sup> Defendant had in blatant breach and disregard of the express terms and conditions failed, refused and/or neglected to complete the constructions of the five (5) units or account for the monies it had invested.

45. Save for a general injunction against all the Defendants herein, the Plaintiff's claim was more specifically against the 4<sup>th</sup> Defendant. A perusal of the Plaint shows that the Plaintiff was seeking, amongst other reliefs, for:-

**a. An order for specific performance of the Agreement dated 18<sup>th</sup> January 2008 between the Plaintiff and the 4<sup>th</sup> Defendant for the sale of five (5) housing units erected and being on all that piece of land known as Land reference Number 27253/42 as per the terms and conditions of the said agreement.**

**b. An order directing the 4<sup>th</sup> Defendant to refund and/or reimburse the Plaintiff in full the sum of USD 250,000 paid by the Plaintiff to the 4<sup>th</sup> Defendant towards the development erected on all that piece of land known as Land reference Number 27253/42.**

**c. An order directing the 4<sup>th</sup> Defendant to provide complete and accurate accounts in respect the (sic) development on all that piece of land known as Land reference Number 27253/42.**

46. The claim for specific performance, as with other prayers in the Plaint, was directed to the 4<sup>th</sup> Defendant. The 1<sup>st</sup> Defendant cannot therefore be drawn into any dispute between the Plaintiff and the 4<sup>th</sup> Defendant, more specifically, a dispute regarding appraisals on the progress of the development of the housing units or the accounting of monies by the 4<sup>th</sup> Defendant.

47. The 1<sup>st</sup> Defendant was under no obligation to inform the Plaintiff before it exercised its rights over the suit premises as was suggested by the Plaintiff as there was no privity of contract between them, a position that was correctly stated by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. Hence, the 1<sup>st</sup> Defendant had the

prerogative to appoint the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as receivers and to enforce its rights under the Debenture and Charge without making any reference to the Plaintiff.

48. It is instructive to note that when the matter first came before this court on 25<sup>th</sup> October 2013, the court observed that the Plaintiff was seeking an injunction in respect of five (5) units which were on twenty (20) acres of the subject property. It therefore declined to grant any temporary injunction *ex parte*. The same was granted by Mabeya J on 31<sup>st</sup> October 2013 purely for preserving the suit premises pending the hearing and determination of the application herein as this matter had been taken out of the cause list on that day.

49. The Plaintiff's contention that it would suffer loss of interest in a unique piece of land was also immaterial. The court agrees with the 1<sup>st</sup> to 3<sup>rd</sup> Defendants that there was nothing peculiar about the suit premises that would persuade this court to prevent the 1<sup>st</sup> Defendant from realising its security. In addition, the court finds no favour in its argument that the Defendants could still dispose of the property if the suit was determined in their favour.

50. The 1<sup>st</sup> Defendant's rights to exercise its statutory power of sale crystallised once the Plaintiff defaulted in payment of the monies. It would therefore not be necessary to make the 1<sup>st</sup> to 3<sup>rd</sup> Defendants wait a minute longer from enforcing the 1<sup>st</sup> Defendant's rights. The outstanding amounts could very well outstrip the value of the suit premises.

51. The issue of depreciation of charged property was addressed in the case of **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others [2006] eKLR** where Ochieng J stated as follows:-

**“... In my considered view, if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years...”**

52. As pointed hereinabove, the court finds itself completely in agreement with the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' submissions and totally rejects those that were advanced by the Plaintiff and the 4<sup>th</sup> Defendant. The court does not therefore see the need of reproducing the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' arguments as they were captured and aptly put. This court adopts the same in their entirety.

53. While other courts of equal and competent jurisdiction have rendered decisions in respect of the suit premises herein declining to grant injunctive orders against the 1<sup>st</sup> Defendant, which decisions would not be binding on this court, this court has considered the facts of this case on merit and finds that the Plaintiff's application must fail in its entirety.

54. The Plaintiff was an unsecured creditor and its rights could not and cannot rank in priority or take precedence to those of the 1<sup>st</sup> Defendant who had a Debenture and Charge over the suit premises herein. This situation obtains for any other investor who may have paid the 4<sup>th</sup> Defendant any monies for development of housing units on the said suit premises. Any cause of action by any investor would lie against the 4<sup>th</sup> Defendant and never against the 1<sup>st</sup> Defendant unless it can show privity of contract between it and the 1<sup>st</sup> Defendant.

55. The power to grant an interlocutory injunction is a discretionary one; it must be based on the law and evidence. Upon applying the principles of the case of **Giella vs Cassman Brown & Company Limited** (Supra) that was relied upon by the Plaintiff to the facts of this case, the court finds that this is not a case where this court can exercise its discretion in favour of the Plaintiff.

56. Having considered the affidavit evidence, the written submissions and the case law, the court finds

that the Plaintiff did not make out a *prima facie* case with a probability of success. The question of the Plaintiff suffering loss that could not be compensated by way of damages if the interlocutory judgment was not granted would not arise. The balance of convenience would not tilt in its favour. In this case, the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant.

57. The court did not find the 4<sup>th</sup> Defendant's Replying Affidavit, if any in response to the Plaintiff's application in the court file. Its presence or absence in the court record would not, however, change the court's position as far as the rights of the Plaintiff and the 1<sup>st</sup> Defendant were concerned.

58. It was irrelevant that the Plaintiff had invested its hard-earned cash. There comes a time when litigation must come to an end. It is high time that the 1<sup>st</sup> Defendant enforced its rights against the 4<sup>th</sup> Defendant herein once and for all. For the avoidance of doubt, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants are at liberty to exercise the 1<sup>st</sup> Defendant's statutory power of sale provided that the same is done in compliance with the provisions of the law.

### **DISPOSITION**

59. For the reasons foregoing, the Plaintiff's Notice of Motion application dated and filed on 25<sup>th</sup> October 2013 was not merited and the same is hereby dismissed.

60. However, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' Notice of Motion application dated and filed on 5<sup>th</sup> November 2013 is hereby allowed in terms of Prayer No (3) therein. The injunctive orders issued by Mabeya J on 31<sup>st</sup> October 2013 to preserve the suit premises herein pending the hearing of the Plaintiff's aforesaid application, are therefore hereby vacated and/or set aside.

61. The Plaintiff will bear the costs of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants for both applications. The 4<sup>th</sup> Defendant will bear its own costs in the two (2) said applications as it had impliedly supported the Plaintiff's Notice of Motion application dated and filed on 25<sup>th</sup> October 2013.

62. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 28th day of July 2014

**J. KAMAU**

**JUDGE**