



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION
CIVIL CASE NO 388 OF 2013

ZIPPORAH MWANGI NJENGA.....PLAINTIFF

VERSUS

HOUSING FINANCE LIMITED.....1ST DEFENDANT

GARAM AUCTIONEERS.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 6th September 2013 and filed on even date was brought pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, 2010. Prayer No (1) was spent. She sought the following remaining orders *inter alia*:-
 1. Spent.
 2. **THAT the Defendants/Respondents herein their agents and or servants be restrained from disposing by way of public auction, private sale or in any other way, property known as parcel No. Kiambaa/Thimbigua/3039 in Kiambu County, registered in the names of the Applicant pending the determination of this application, the main suit herein.**
 3. **THAT the purported Notice of the Defendant/Respondent to the Plaintiff/Applicant be declared null and void.**
 4. **THAT the costs of this application be in the cause.**
2. The application was premised on several grounds which can generally be summarised as follows:-
 - a. **THAT the amount as demanded by the Defendant was in excess and that the *in duplum* rule applied in the instant case as the interest accrued was equal to the amount borrowed in which event the accrual of interest should have ceased.**
 - b. **THAT the Plaintiff had sought an audit of the amount and a chance to pay and time to settle the decretal amount since she was not denying being indebted to the 1st Defendant.**
 - c. **THAT the Plaintiff and the 1st Defendant had entered into mutual negotiations on**

- rescheduling of the debt but that the same were thwarted by the 1st Defendant.
- d. **THAT the 1st Defendant had advertised the sale of her property on 10th September 2013 but that it did not serve her with the 45 days' notice only, serving her with the Notice dated 20th August 2013 on 22nd August 2013.**
- e. **THAT the 1st Defendant had waived its statutory power of sale by accepting piecemeal payments from the Plaintiff and consequently, the intended sale should be set aside and the notice served upon them declared null and void.**

AFFIDAVIT EVIDENCE

3. The application was supported by the Plaintiff's Affidavit sworn on 6th September 2013. She reiterated the grounds on the face of the application. She admitted having defaulted on payment which she had resumed to pay and indicated that she was "not okay" with the figures that had been reflected in the statements.
4. In response to the said application, Geoffrey Kimaita swore a Replying Affidavit on behalf of the Defendant on 18th September 2013. The same was filed on the same date. He described himself as the 1st Defendant's General Manager- Credit.
5. He pointed out that the Plaintiff had admitted in Paragraph (4) of her affidavit that the 1st Defendant advanced her monies and that a Charge had been registered in its favour. Further, it was evident from Paragraph (8) of the Supporting Affidavit that the Plaintiff had not denied being indebted to the 1st Defendant.
6. He set out the chronology of all that had transpired culminating in the Plaintiff being granted the facility to purchase the subject property by the 1st Defendant. It was his contention that the 1st Defendant served the Plaintiff with a Statutory Notice of Sale dated 21st May 2012 when she defaulted in payment of the outstanding amount.
7. He stated that the 1st Defendant reached an agreement with the Plaintiff in which she was to make payment of the instalments on the understanding that the 1st Defendant would exercise its statutory power of sale in the event she defaulted in payment of any of the instalments. He averred that due to the default of the Plaintiff, on 5th November 2012, the 1st Defendant issued her with a forty (40) days' notice pursuant to provisions of the Land Act, 2012. It was also his averment that the 2nd Defendant served her with a forty five (45) days Notification for Sale dated 15th November 2012.
8. He contended that on 16th November 2012, the Plaintiff made amends on the payment of instalments as a result of which the impending sale was suspended. He stated that the Plaintiff, however, failed to meet the monthly instalments whereupon the 1st Defendant issued the requisite notices. The same were annexed to the 1st Defendant's Replying Affidavit in response to the Plaintiff's application.
9. He deposed that the Plaintiff was a perennial defaulter who had issued bounced cheques which was in itself, an offence that was punishable under the law. It was his contention that the Plaintiff could not be heard to complain that the 1st Defendant had not gone out of its way to accommodate her.
10. It was his averment that the Plaintiff had come to court with unclean hands and was guilty of material non-disclosure. He set out several other grounds to demonstrate why the Plaintiff's application was without merit and prayed that the present application be dismissed.
11. The 2nd Respondent's Replying Affidavit was sworn by Joseph Mungai Gikonyo, a licensed auctioneer, on 16th October 2013. He deposed that the Plaintiff had admitted being indebted to the 1st Defendant. He stated that on 15th November 2012, he served the Plaintiff's husband with the Notification of Sale and forty (45) days' Statutory Notice, which he accepted on behalf of the Plaintiff but declined to endorse his signature on the back of the 2nd Defendant's copy. He added that as a precaution, he sent the said notices to the Plaintiff vide registered mail through the Plaintiff's Post Office Box Number 39346-00623 Nairobi.
12. It was his averment that the Plaintiff wrote to the 1st Defendant vide her letter of 16th November 2012 in which she requested the "uplifting" of the statutory notice. The 1st Defendant then

- instructed the 2nd Defendant in a letter dated 22nd November 2012 to suspend an impending sale on the ground that the 1st Defendant and the Plaintiff had entered into acceptable arrangements on the payment of the monies.
13. He stated that the 2nd Defendant issued another notice on 20th August 2013 which was in compliance with the provisions of the Auctioneers Rules, 1997 as the Plaintiff did not pay the monies as she had promised. It was his contention that the Plaintiff had enjoyed considerable indulgences from the 1st Defendant and that her application was an afterthought devoid of merit and intended to frustrate sale of the suit property.
14. The Plaintiff swore a Supplementary Affidavit that was filed on 5th December 2013. The same was, however, undated. She generally deposed that interest was extremely inflated, that there was lack of proper issuance of notices by the Defendants and that further, she stood to suffer substantial loss and material damage if the intended sale of the suit property was not prevented and/or stopped.

LEGAL SUBMISSION BY THE PLAINTIFF

15. In her written submissions dated 20th January 2014 and filed on 22nd January 2014, the Plaintiff submitted that it was not fair for the 1st Defendant to have invoked its statutory power of sale when it knew that there was a dispute on the amount that was owing to it. It was her argument that the claim was excessive but that the 1st Defendant had adamantly refused to conduct a joint audit with her so as to come with the correct amounts due under the claim.
16. She argued that even though the courts could not restrain the mortgagee from exercising its statutory power of sale, the mortgagee could be restrained where the claim was excessive under the terms of the mortgage. It relied on **paragraph 725 Halsbury's Laws of England 4th Edition Vol 32.**
17. She stated that Section 96(2) of the Land Act stipulated that a notice to sell had to be given at least forty (40) days before the sale. It was her averment that the statutory notice dated 21st May 2013 was overtaken by events as parties agreed to do away with the said notice. She stated that although the 1st Defendant issued a forty (40) days' notice while the 2nd Defendant issued a forty five (45) days' notice, the two (2) months' notice under Section 90 of the Land Act were not served upon her.
18. It was her submission that the 2nd Defendant issued a notice on 20th August 2013 yet the same (sic) was to be on 10th September 2013 which she said fell short of the forty five (45) days redemption notice envisaged under Rule 15(d) of the Auctioneers Rules, 1997. She stated that in any event, the certificate of postage did not indicate the addressee of the notice of 5th April 2013 purportedly issued by the 1st Defendant.
19. She relied on the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others (2008) eKLR** where Warsame J held that a mortgagee could not exercise its statutory power of sale unless and until a notice requiring payment had been served and default had been made three (3) months after such service. She submitted that this was similar to the positions that had been held in the cases of **Muti v Kenya Finance Corporation & Another [2004] E.A 182** and **Elizabeth Wangui Njuguna v Housing Finance Company of Kenya Ltd [2006] eKLR.**
20. She added that under the "Ndonde" *duplum* rule, the maximum that a bank could recover by way of interest was the equivalent of the principle sum. It was her averment that interest would stop when it equalled the principle amount. She placed reliance on the cases of **Vijay Morjaria v Harris Horn Junior & Another [2012] eKLR**, **Barclays Bank of Kenya Ltd v Farmers Partner Limited & 2 Others [2012] eKLR** and **Commercial Bank of Africa Limited v Paul S Imision & Another [2012] eKLR** where the courts arrived at the aforesaid conclusion.
21. She pointed out that the 1st Defendant had received a sum of Kshs 18,000,000/= and that it was estopped from relying on previous notices that it had been issued. She referred the court to the case of **Zadrack Oyaro Achoki & Another vs Consolidated Bank of Kenya [2013] eKLR** where Havelock J granted an interim injunction as the parties had agreed that the outstanding sum of monies be paid piecemeal.
22. She averred that she had satisfied the three (3) cardinal principles set out in the case of **Giella v**

- Cassman Brown & Company Limited (1973) EA 360**. She argued that she had established a *prima facie* case with a probability of success as the 1st Defendant had not done a forced sale valuation before it embarked to sell her property which only showed bad faith on its part. She relied on the case of **Mohamed Khaled Khashoggi v Equity Bank Ltd [2013] eKLR** wherein Havelock J observed that a forced sale valuation had to be undertaken by the valuer before a sale could be undertaken in accordance with the provisions of Section 97 (2) of the Land Act.
23. It was also her argument that she could not adequately be compensated by damages because the loss of her property would be through a breach of the law. She placed reliance on the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others** (Supra) 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 it said that had been taken in held 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 [2013] eKLR**.
24. She also submitted that the balance of convenience tilted in her favour as she had established a *prima facie* case with a high probability of success and further demonstrated that damages would not be adequate compensation of the subject property was sold. She relied on the case of **Alice Awino Okello v Trust Bank Ltd & Another LLR No. 625 (CCK)** that was cited, with approval, in the case of **HCCC No 744 of 2012 Kisimani Holdings Limited & Another vs Fidelity Bank Limited** to buttress her argument.
25. She urged the court to find that non-compliance with the law by a charge (sic) pre-empted a chargee's right to statutory sell the property of a chargor. She therefore prayed that her application be allowed and that the Defendants bear the costs of the same.

LEGAL SUBMISSIONS BY THE 1ST DEFENDANT

26. In its written submissions dated 2nd February 2014 and filed on 3rd February 2014, the 1st Defendant reiterated the averments contained in its Replying Affidavit. It stated that the Plaintiff had admitted certain facts that it had stated in its Replying Affidavit and that she was therefore guilty for non-disclosure of material facts.
27. It added that the Plaintiff had done nothing to alleviate the position since being granted a *status quo* order on 18th September 2012. It referred the court to the case of **Kyangaro vs Kenya Commercial Bank Limited (2004) I KLR 126** where Njagi J had observed that the defaulter could not remain in default and retain possession of the charged property.
28. Havelock J had cited the learned judge's observation in the case of **Patrick Waweru Mwangi & Another vs Housing Finance Company of Kenya Limited [2013] eKLR** when he declined to grant the applicant herein further interim orders or maintain the *status quo* despite the property having been a matrimonial property.
29. It further placed reliance on the case of **Thomas Ratemo Oira v Equity Bank Ltd HCCC No 131 of 2011** in which Havelock J reiterated the holding of Ringera J (as he then was) in **Woodcraft Industries Ltd & 3 Others v East African Building Society HCCC No 602 of 2000** in which the court therein had found that the applicant not to have met the threshold set out in the case of **Giella v Cassman Brown** (Supra) as was the case herein.
30. It was its further argument that the Plaintiff had come to court to seek an equitable relief which she did not merit as she was guilty of material non-disclosure and had come to court with unclean hands. It therefore prayed that the Plaintiff's application be dismissed with costs to it.

LEGAL SUBMISSIONS BY THE 2ND DEFENDANT

31. The 2nd Defendant filed its written submission dated 3rd February 2014 on even date. It averred that it personally served the Plaintiff with the forty (45) days' notice in addition to sending the same and the Notification of Sale by registered post to her Post Office Box Number 39376 00623 Nairobi, which was the post office box number that was contained in the Charge Document.
32. It therefore submitted that the Plaintiff was estopped from denying that she was not served with

- the said forty five (45) days' notice as she had admitted having received its courtesy notice dated 20th August 2013.
33. It referred the court to the case of **Abdulkadir Sharrif Abdirahim v Ecobank Kenya Limited & Another [2012] eKLR** where Musinga J (as he was then) determined that the plaintiff therein had been served when the defendant therein adduced evidence of a certificate of postage.
34. In submitting that the dispute in the interest amount did not act to deter the 1st Defendant from realising its security, the 2nd Defendant relied on the case of **Emmanuel Wenani T/A Namarome Enterprises v Kenya Commercial Bank Ltd [2009] eKLR** where Lesiit J invoked the holding in the case of **Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd** where the Court of Appeal had held that a dispute in computation of interest was a mathematical error that did not warrant restraining a chargee from exercising its statutory power of sale.
35. The 2nd Respondent therefore urged the court to bind itself to the said authority as the Plaintiff had not established a *prima facie* case with a high probability of success demonstrated that, unless the order sought was granted, she would suffer loss that could not be compensated by way of damages. It therefore urged the court to dismiss the Plaintiff's application with costs as it lacked merit.

LEGAL ANALYSIS

36. From the perusal of the documents herein, it did appear to the court that the following were the grounds upon which the Plaintiff was relying upon to obtain a temporary injunction pending the hearing and determination of the case herein that:-
- a. **THAT the 1st Defendant ought to have set aside the Statutory Notice when she entered into fresh negotiations with it on how she would liquidate the outstanding monies.**
 - b. **THAT the 2nd Defendant advertised the subject property for sale before giving the requisite notices.**
 - c. **THAT she was not served with any requisite notices.**
 - d. **THAT the Defendants had not undertaken a forced sale valuation of the subject property before they advertised it for sale.**
37. Section 90 of the Land Act, 2012 stipulates as follows:-

90. (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;

(d) The consequence that if the default is not rectified within the time specified in the notice, the chargee 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 chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the charge may—

(a) Sue the chargor for any money due and owing under the charge;

(b) Appoint a receiver of the income of the charged land;

(c) Lease the charged land, or if the charge is of a lease, sublease the land;

(d) Enter into possession of the charged land; or

(e) Sell the charged land;

38. The 1st Defendant annexed to its Replying Affidavit, copies of letters written to it by the Plaintiff seeking to pay loan amount in instalments, a proposal that it accepted vide its letter dated 8th June 2012. It was a conditional acceptance in that the 1st Defendant had expressly stated in writing that in the event the Plaintiff delayed or failed to remit any of the instalments as she had promised, then it reserved its right to exercise its statutory power of sale as per the notices that had already been served on her.

39. The 2nd Defendant did also attach to its Replying Affidavit, a copy of a letter where the Plaintiff was seeking indulgence from the 1st Defendant and a letter from the 2nd Defendant dated 22nd November 2012 asking it to suspend an impending sale as the 1st Defendant and the Plaintiff had entered into an acceptable arrangement in respect of the payment of the mortgage monies.

40. The 1st Defendant also annexed to its Replying Affidavit, a statutory notice dated 21st May 2012 that had been issued in accordance with Section 74 of the Registered Land Act Cap 300 (the laws of Kenya) (now repealed) and another Statutory Notice under Section 90 (3)(e) of the Land Act dated 5th November 2012. It also sent the Plaintiff a letter dated 15th November 2012 informing her that her personal information and credit account details had been disclosed to the Credit Reference Bureau in accordance with the Banking Act and Credit Reference Bureau (CRB) Regulations 2008.

41. It is very clear from the above that the Plaintiff was duly served with the Statutory Notice pursuant to Section 74 of the Registration of Land Act (now repealed) and Section 90 of the Land Act, 2012. The postal address in the said notices and the certificates of postages show that the said notices were sent to the Plaintiff through Post Office Box Number 39376- 00623 Nairobi. This was the postal address shown in the Charge Document, which the Plaintiff did not deny ever having executed.

42. The statutory notice issued to the Plaintiff by the 1st Defendant was still valid as it contained all the information that was required to be given therein. It was not waived by the mere fact that the 1st Plaintiff accepted payment in instalments. In any event, the 1st Defendant's letter of 8th June 2012 was crystal clear of what the consequences of default by the Plaintiff would be.

43. It was therefore not necessary for the 1st Defendant to issue a fresh statutory notice after suspension of the impending sale. This is a position that has been held by several courts. Indeed, this court took the same position in the case of **John Kinyanjui Kanya & Another vs Barclays Bank of Kenya Limited & Another [2013] eKLR** where it also adopted the same holding in the case of **Gitau Muiruri vs Standard Bank (K) Limited [2005] eKLR** amongst other cases. This position was also held by the Court of Appeal in the case of **Civil Appeal No 111 of 1986 George Gikubu Mbutia vs Jimba Credit & Another** (unreported), a holding that is in fact binding on this court.

44. Turning to the notices sent by the 2nd Defendant, the court notes that the forty five (45) days' Redemption Notice dated 15th November 2012 was sent to the Plaintiff's aforesaid postal address advising her that the sale of the subject property would take place on 22nd January 2013.

45. For the same reason that the 1st Defendant was under no obligation to re-issue a statutory notice to the Plaintiff, the 2nd Defendant was also not required to re-issue another forty five (45) days'

- Redemption Notice following the suspension of the sale that was scheduled for 22nd January 2013. The same holding was made in the cases of **HCCC No 830 of 1999 Nathakal Monji Rai vs Standard Chartered Bank (K) Limited**(unreported) and **Joseph Kiarie Mbugua & Another vs Garam Investment Limited & Another [2006] eKLR**.
- 46.Indeed, requiring a chargee to re-issue a statutory notice and an auctioneer to re-issue a forty five (45) days' notice would discourage chargees from entering into negotiations with chargors to re-schedule payments of mortgage monies after a sale has been scheduled. Such re-issuance of notices would essentially set back chargee in terms of time that would be spent in realising its securities. Since it would not be commercially or economically viable to enter into such negotiations, the proper procedure is that fresh notices are not re-issued after a sale has been postponed.
- 47.The court would therefore not agree with the Plaintiff that the 2ndDefendant ought to have issued a fresh forty five (45) days' Redemption Notice before it advertised sale of the subject property for 10th September 2013. The fourteen (14) days' notice indicating that the property would be sold on 10th September 2013 was dated 20th August 2013 and was for all purposes and intent, valid and sufficient. This fourteen (14) days' notice must as a matter of course be re-issued whenever a sale is suspended as the chargor is entitled to its right of redemption until the very last minute.
- 48.Evidently, the 1st Defendant's initial statutory notice was issued under the Registered Land Act (now repealed). The 1st Defendant is required to fully comply with the provisions of the new land regime. Duty is bestowed upon a Mortgagee to exercise care towards the Mortgagor.
- 49.Section 97 of the Land Act provides as follows:-
1. **A chargee who exercises a power to sell the charged land...owes a duty of care to the chargor...to obtain the best price reasonably obtainable at the time of sale.**
 2. **A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**
 3. **If the price at which the property is sold is twenty five per centum or below the market value at which comparable interests of land of the same character and quality are being sold in the open market-**
 - a. **There shall be rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and**
 - b. **The chargor whose charged land is being sold for the price may apply to a court for an order that the sale be declared void; but the fact that a plot of charged land is being sold by the chargee at an undervalue being less than twenty five per centum below the market value shall not be taken to mean that the chargee has complied with subsection (1).**
- 50.In paragraph 4 of the Certificate Under Section 15 (C) of the Auctioneers Rules, 1997 attached to the 2nd Defendant's Replying Affidavit, it has been stated that "the property was unchanged from the description contained in the Valuation Report."
- 51.The amount that a suit property is disposed of is a relevant issue. The court must be satisfied that the amount the property has been sold at is the best amount the Chargee would have obtained from the sale of the subject property. Neither the 1st nor the 2ndDefendant submitted a copy of the said Valuation Report as evidence before this court. It is therefore not known what the value of the suit property was at the time the same was scheduled for sale on 10th September 2013.
- 52.In the absence of any evidence that the subject property was valued in accordance with the provisions of Section 97 of the Land Act, the court can only come to the conclusion that the 1st and 2nd Defendants had not fully complied with the provisions of the law. The importance of this issue was considered by this court in the case **HCCC No 318 of 2009 John Mwenja Ngumba & Another vs National Industrial Credit (NIC) Limited & Another [2014] eKLR** where it held that the issue of whether or not the property therein had been sold at the proper price be determined at full trial.
- 53.While the 1st and 2nd Defendants failed to satisfy the court that they had undertaken the valuation as required by the law, the court is not satisfied that the omission would be sufficient to bring the Plaintiff within the parameters of the case of **Giella vs Cassman Brown & Company Limited**

- (Supra) as this is an issue that can be remedied without any prejudice being suffered by the Plaintiff and without interfering with the 1st Defendant's statutory power of sale of the subject property. The 1st and 2nd Defendants ought to be afforded an opportunity to comply with the provisions of the law on the valuation of the subject property, if they had not already done so. If they had done so, nothing stops them from proceedings with the realisation of the security herein.
54. The Plaintiff had come to court seeking an equitable relief. She, however, came with unclean hands. She was guilty of non-disclosure of material facts. While she said that the 1st Defendant had been paid more than Kshs 18,000,000/=, she failed to provide any tangible evidence that she had paid the said monies. The *in duplum* rule would therefore not come to her aid. From the evidence presented to this court, it does appear that the mortgage debt stood at Kshs 9,390,999.10 while the amount credited was shown to have been Kshs 1,737,434.55. It is therefore clear from the facts of this case that the Plaintiff was truly and justly indebted to the 1st Defendant.
55. She cannot keep the subject property and keep the 1st Defendant from realising its security. There is every likelihood that outstanding amount could outstrip the value of the property. The same observation was made 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 1st and 2nd 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...”

56. As the court's power to grant an interlocutory injunction is a discretionary one and must be based on the law and evidence, an applicant seeking such an interlocutory injunction, is expected to satisfy the criteria set out in the case of **Giella vs Cassman Brown Company Limited** (Supra) in which it was held that:-

“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.”

57. Having considered the parties' affidavits, the written and oral submissions and the case law in support of their respective cases and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit herein, this court is not satisfied that this is an appropriate case for it to exercise its discretion in favour of the Plaintiff herein.
58. Accordingly, having found that the Plaintiff had not made out a *prima facie* case with a probability of success, the court finds that the question of her suffering loss that cannot be compensated by way of damages if the interlocutory judgment was not granted would not arise and that the balance would not tilt in her favour. Indeed, the balance of convenience tilts in favour of the 1st Defendant. The 1st Defendant is at liberty to exercise its statutory power of sale provided that it fully complies with the provisions of the law.

58.

58. DISPOSITION

59. For the reasons foregoing, the Plaintiff's Notice of Motion application dated and filed on 6th September 2013 is not merited and the same is hereby dismissed with costs to the 1st and 2nd Defendant. The *status quo* orders issued herein on 19th May 2014 are hereby vacated and set aside.
60. It is so ordered.

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

J. KAMAU

JUDGE