



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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO 98 OF 2014**

**ORION EAST AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**ONESMUS MACHARIA T/A**

**WATTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 10<sup>th</sup> March 2014 was initially presented to the Environment & Land Court before it was transferred to the Commercial & Admiralty Division following an order by Nyamweya J on 11<sup>th</sup> March 2014.
2. It had been brought pursuant to the provisions of Section 13 Rules 1, 2 and 7 (a) of the Environmental & Land Court Act 2011, Order 20 Rules 1, 3 and 4, Order 40 Rules 1, 2, 4 and 8, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1, 1A, 1B, 3, 3A, 63 (c) and (e) of the Civil Procedure Act Cap 21 of the Laws of Kenya and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-
  1. Spent.
  2. Spent.
  3. **THAT 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, agents, servants or otherwise be restrained from advertising, offering for sale, auctioning, selling, transferring, alienating and/or otherwise dealing with property L.R. No. Nairobi/Block 82/2039 and Nairobi/Block 82/2042, Plant, machinery, Equipment, Office Furniture located within Orion East Africa Limited Factory along Orion Drive off Outering Road Nairobi pending the hearing of the suit.**
  4. **THAT the 1<sup>st</sup> Defendant be directed to render and deliver to the Plaintiffs (sic) true and correct accounts and entire statements of account for the Plaintiff's current account and loan accounts operated with the 1<sup>st</sup> Defendant for the mortgage loan, letters of credit/guarantee and overdraft facility.**
  5. **THAT the costs of the application be provided for.**

**PLAINTIFF'S CASE**

3. The Plaintiff's application was premised on several grounds which were restated in the Supporting Affidavit of the Plaintiff's Managing Director, Ruo Maina. The same was sworn on 10<sup>th</sup> March 2014. Its case was that on or about 4<sup>th</sup> November 2010, it applied for credit facility of a maximum of Kshs 29, 100,000/= from the 1<sup>st</sup> Defendant which was constituted as follows:-

- a. **Overdraft** **Kshs 10,000,000/=**
- b. **Letter of Credit/Guarantee** **Kshs 10,000,000/=**
- c. **Mortgage over L.R. 12672/47** **Kshs 9,100,000/=**

4. It stated that its application letter expressly stated the purpose of the securities to be offered. It executed the Letter of Offer on 3<sup>rd</sup> December 2010 in which it was indicated amongst other terms that the Mortgage facility for Kshs 9,100,000/= was to be utilised for the purchase of L.R. No 12672/47 situated at Runda, Nairobi and that a First Legal Charge over L.R. No Nairobi Block 82/2042 and L.R. No 12672/47 for Kshs 29,100,000/= would be created as security.
5. It was its further case that it was within the 1<sup>st</sup> Defendant's knowledge that the sum of Kshs 9,100,000/= was to be paid to the Vendor of L.R. No 12672/47 as the balance of the purchase price of the said property upon the said Vendor furnishing the 1<sup>st</sup> Defendant with all the completion documents but that before receiving the said completion documents, the 1<sup>st</sup> Defendant credited its account with the said sum of Kshs 9,100,000/=.
6. All the same, it stated that it repaid a sum of Kshs 11,245,834/- which cleared the entire mortgage loan and that upon recalculation of the interest payable, the 1<sup>st</sup> Defendant refunded it a sum of Kshs 1,677,716.71 that was allegedly utilised to clear the alleged arrears. It contended that if any interest was payable which it contended it had already paid in full, then the same could only have been charged on simple interest at the rate of 15.75% per annum as had been stated in the Letter of Offer.
7. It was also its averment that the 1<sup>st</sup> Defendant could not legitimately charge interest for the Letter of Credit facility to Cheminova A/S which the 1<sup>st</sup> Defendant cancelled as its action caused the Plaintiff to re-export the consignment back to the country of its origin as a result of which it suffered massive losses. It reserved its right to sue the 1<sup>st</sup> Defendant for the recovery of the said losses.
8. As regard the Letters of Credit facility to Xinxiang Yatelan Food Co Limited for USD 21,600,000, it averred that out of the negligence of the 1<sup>st</sup> Defendant to obtain all the requisite documentation which included a Food Quality Inspection report, in its report of 27<sup>th</sup> March 2012, Kenya Bureau of Standards (KBS) condemned the noodles for having failed the Kenyan standards.
9. It stated that it was served with a Notification of Sale of the charged assets on 29<sup>th</sup> January 2014 but denied ever having been served with the mandatory statutory notice. It averred that despite its request, the 1<sup>st</sup> Defendant did not furnish it with a copy of the Statutory Notice demanding a sum of Kshs 24, 870,000/= and the Certificate of Postage.
10. It was categorical that the charge was to be created over L.R. No. Nairobi/ Block 82/ 2042 and L.R. No 12672/47 and not over Nairobi/ Block 82/2039 as was evidenced in its email of 24<sup>th</sup> December 2010 to the 1<sup>st</sup> Defendant. It stated that L.R. No Nairobi/Block 82/2042 and L.R. No Nairobi 82/2039 had been offered as security to NIC Bank and Equity Bank, the titles which it said the 1<sup>st</sup> Defendant's advocates obtained directly from the two (2) banks as the 1<sup>st</sup> Defendant had agreed to extend to it financial facilities. It reiterated this fact in its Further Affidavit that was also sworn by Ruo Maina on 28<sup>th</sup> May 2014 and filed on the same date.
11. He denied that neither him nor his co-director appeared before any advocate for the execution of page 20 the Charge. In its Supplementary Affidavit sworn by the said Ruo Maina and filed on 4<sup>th</sup> April 2014, the said Ruo Maina also denied that documents in respect of L.R. No Nairobi/ Block 82/ 2042 or L.R. Nairobi/Block 82/2039 were ever brought the Plaintiffs offices.
12. He further averred that the said Charge was not initialled at the bottom of each page as was in the case of the Letter of Offer which omission meant that the said Charge was vitiated by fraud and was invalid for want of proper execution and attestation. He also said that the 1<sup>st</sup> Defendant's purported exercise of its statutory power was unlawful for want of a forced sale valuation of the

- premises.
13. The Plaintiff was emphatic that the overdraft facility was never availed and that the overdrawn position of its account arose from punitive interest and charges that arose from the sum of Kshs 9,100,000/= which it had repaid. It termed the 1<sup>st</sup> Defendant's actions as seriously oppressive and not in accordance with the recognised principles of law and of commercial practice. It therefore sought orders to restrain the 1<sup>st</sup> Defendant from selling its properties.
  14. It said that it was ready to furnish a suitable undertaking as to damages, if any, which would be suffered by the Defendants as a condition for the grant of the orders it had sought.
  15. In its written submissions dated and filed on 16<sup>th</sup> April 2014, the Plaintiff submitted that the Charge was not validly attested in line with Section 3(3) (b) of the Law of Contract Act Cap 23 (laws of Kenya). It also argued that there was failure of consideration. To buttress its argument, it relied on **Chitty on Contracts 13<sup>th</sup> Edition** where in the case of **Moses vs Macferlan (1760) 2 Burr 1005, 1007** Lord Manfield posited that the action for money had and received:-

**“... lies for money paid by mistake; or upon a consideration which happens to fail (emphasis Plaintiff); or money got through imposition (express or implied); or extortion; or an undue advantage taken of the claimant's situation, contrary to the laws made for the protection of persons under those circumstances.”**

16. It referred the court to Section 69 (A) (i) of the Indian Transfer of Property Act 1882, Sections 90 (2)(b) and 96 of the Land Act and several cases set out in its Amended List of Authorities dated and filed on 13<sup>th</sup> May 2014 where the common thread was that a chargee could not exercise its statutory power of sale without serving the mandatory statutory notice- See **Trust Bank vs Okoth (2000) EA 274** and **A.S. Sheikh Transporters Limited & Another vs Barclays Bank of Kenya Limited & 3 Others** (unreported).
17. It contended that Section 97 (2) of the Land Act mandated a chargee, before exercising its power of sale, to ensure a forced sale valuation of the charged property was done, which it said had not been done in this case. It referred the court to the case of **Mohammed Khaled Khashoggi vs Equity Bank Limited (2013) eKLR** where the court therein granted an injunction as the chargee therein did not furnish the court with such a valuation report.
18. It therefore submitted that it had demonstrated a *prima facie* case with a probability of success and that having satisfied the test in the case of **Giella v Cassman Brown (1973) EA 360**, it was entitled to the orders that it has sought in its present application.

## **1<sup>ST</sup> DEFENDANT'S CASE**

19. On 21<sup>st</sup> March 2014, the 1<sup>st</sup> Defendant filed a Replying Affidavit that had been sworn by Gilbert Rono, its Branch Manager on even date. He swore a Further Affidavit on 5<sup>th</sup> May 2014. The same was filed on the same date. Its purpose was to correct the anomaly of the marking of the exhibits in his Replying Affidavit. A Further Supplementary Affidavit was filed on 14<sup>th</sup> May 2014. It was sworn by its advocate, Ruth Lem Lem Kithua on the same date.
20. The 1<sup>st</sup> Defendant's case was that since there was “no movement” regarding L.R. No 12672/47, the Plaintiff offered it L.R. Nairobi/ Block 82/2042 as security instead. It said that the Plaintiff deposited with it the titles for L.R. No Nairobi/Block 82/2042 and L.R. No Nairobi/Block 82/2039 which were subsequently charged after being discharged.
21. It contended that the said Ruo Maina was present when Lilian Sogo, a legal officer at NIC Bank executed the Discharges of Charges and when the said Ruth Lemlem Kithua took the Charge documents to the Plaintiff's offices where he and Lynn Muiya, a co-director in the Plaintiff Company executed the said documents. It therefore denied that the Legal Charge was obtained by fraud.
22. Its argument was that the sum of Kshs 9,100,000/= was disbursed on 1<sup>st</sup> July 2011 upon perfection of the securities and valuation of L.R. No Nairobi/Block 82/2042 and L.R. No Nairobi/Block 82/2039 by Dayton Valuers which showed that the value of the two (2) securities was sufficient to secure its facilities. It pointed out that it was aware of the legal provisions that

- required it to conduct a forced market sale valuation before it disposed of the said securities.
23. In respect of the Cheminova LC, it stated that due to the delays by the Plaintiff to address the issue of its interest in the insurance cover for the consignment, the said consignment was returned to Denmark. As regards the Xinxiang Yatelan Food Company Limited, it contended that the said company had not obtained an Inspection Report, a fact that was well within the Plaintiff's knowledge but that when a local inspection of the food was done, the transaction was eventually concluded.
24. It therefore averred that it was lawfully seeking to realise the security and it was not undertaking any illegal action. It said that the Plaintiff's application was geared towards delaying it from exercising its rights under the law.
25. In its written submissions dated and filed on 8<sup>th</sup> May 2014, the 1<sup>st</sup> Defendant argued that the Plaintiff had not established a *prima facie* case with a probability of success as had been set out in the case of **Giella vs Cassman Brown Co Ltd** (Supra) for the reason that the Letter of Offer dated 3<sup>rd</sup> December 2010 was clear that the First Legal Charges over L.R. No Nairobi/Block 82/2042 and L.R. 12672/47 were for the full credit facility of Kshs 29,100,000/=. It submitted that the amount sought to be secured by L.R. No 1272/47 was for the full sum of Kshs 29,100,000/= and not for Kshs 9,100,000/= only as had been contended by the Plaintiff.
26. It pointed out that the Plaintiff had failed to disclose to the court the Letter of Offer dated 3<sup>rd</sup> December 2010 was amended on 8<sup>th</sup> December 2010 and that the same was initialed at the bottom. It said that it was clear that the First Legal Charges were to be over L.R. No Nairobi/Block 82/2042, L.R. No Nairobi/Block 82/2039 and L.R. 12672/47 for the full credit facility of Kshs 29,100,000/=. It was its submission that the Legal Charge was registered over L.R. No Nairobi/Block 82/2042 and L.R. No Nairobi/Block 82/2039 with the full knowledge and consent of the Plaintiff as had been stated in the Further Supplementary Affidavit of Ruth Lemlem Kithua.
27. It contended that the valuation by Dayton Valuers was in respect of the combined properties and that the combined value of Nairobi/Block 82/2039 and Nairobi/Block 82/2042 was sufficient to have secured its facility and that there was therefore no failure of consideration for the reason that there could be no failure of security where the primary contract was to lend money and not for the purchase of L.R. 12672/47.
28. It said that the Plaintiff had not been truthful as it utilised the sum of Kshs 9,100,000/= when it withdrew several payments which were itemised in Paragraph 27 of its Replying Affidavit and as a result, the Plaintiff could not have utilised the said funds and then purported to say that the monies were not due and payable to it. It pointed out that the Plaintiff had admitted that a sum of Kshs 7,984,630/= could not be posted as its account was underfunded and consequently, that would not have amounted to a payment.
29. It argued that the Plaintiff had come to court with unclean hands and the various unsubstantiated and virulent claims against it were an attempt to muddy the waters. It relied on the case of **Mrao vs First American Bank Limited & 2 Others (2003) KLR** where the Court of Appeal held that a dispute as to accounts was not a ground for injunction and further stated as follows:-

**“A *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”**

30. It averred that if the Plaintiff was to succeed at the end of the trial, it could be compensated by way of damages. It referred the court to Section 99 (4) of the Land Act 2012 and the case of **Anthony M. Wanjohi vs Equity Building Society & Another (2006) eKLR** where the court held that the charged suit premises were commodities whose value could be ascertained and be compensated by way of damages. It submitted that the balance of convenience lay in its favour as time could reach when the debt could continue to accrue leading to the said premises not being sufficient to service the loan.
31. It submitted that the Plaintiff was not entitled to an equitable relief of an injunction as it was hell bent on punching holes in a transaction it participated in and now wanted to run away from. It was its submission that it posted the Statutory Notice to the Plaintiff's last known address and that the Plaintiff's contentions in respect of the said Notice and the valuation showed that contrived

arguments surrounded the Plaintiff's application. It therefore prayed for the dismissal of the said application.

## **LEGAL ANALYSIS**

32. The court found it necessary to set out the parties' respective cases in view of the numerous issues that had been raised by the Plaintiff to advance its argument as to why it was entitled to an injunction. It will only consider the prayers that had been sought under the Civil Procedure Rules and not those under the Environmental & Land Court Act as the matter was referred to the High Court of Kenya Milimani Law Courts Commercial & Admiralty Division.

33. From a 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 L.R. Nairobi/ Block 2039 was not part of the securities that was to be charged by the 1<sup>st</sup> Defendant for it to secure the credit facilities in the sum of Kshs 29,100,000/=.**
- b. **THAT the 1<sup>st</sup> Defendant deposited a sum of Kshs 9,100,000/= for the purchase of L.R. 12672/47 before it received the completion documents in respect of the same contrary to what was intended.**
- c. **THAT it had fully paid the monies due and owing to the 1<sup>st</sup> Defendant.**
- d. **THAT the 1<sup>st</sup> Defendant was responsible for the losses it incurred following the cancellation of the Letter of Credit facilities in respect of Cheminova A/S and the 1<sup>st</sup> Defendant's failure to obtain requisite documents including an Inspection report in respect of Xinxiang Yatelan Food Company Limited.**
- e. **THAT the 1<sup>st</sup> Defendant did not serve it with the mandatory Statutory Notice.**
- f. **THAT the Defendants had not undertaken a forced sale valuation of the subject property before they advertised it for sale.**

34. As regards the question as to whether or not L.R. Nairobi/ Block 2039 was part of the securities that the 1<sup>st</sup> Defendant relied upon before it disbursed the sum of Kshs 29,100,000/= to the Plaintiff, the court looked at the terms of the Letters of Offer dated 3<sup>rd</sup> December 2010. The same provided as follows:-

**"1. First Legal Charge over the property L.R. No Nairobi Block 82/2042 for Kshs 29,100,000/=**

**2. First Legal Charge over the property L.R. No 12672/47 for Kshs 29,100,000/=..."**

35. It is worthy of note that the Plaintiff failed to disclose the existence of the Letter of Offer dated 8<sup>th</sup> December 2010 which was brought to the attention of the court by the 1<sup>st</sup> Defendant in its Supplementary Affidavit. The same stipulated as follows:-

**"1. First Legal Charge over the property L.R. No Nairobi Block 82/2042 and L.R. No Nairobi Block 82/2039 for Kshs 29,100,000/=**

**2. First Legal Charge over the property L.R. No 12672/47 for Kshs 29,100,000/=..."**

36. The existence of security of L.R. No Nairobi Block 82/2039 to secure the sum of Kshs 29,100,000/= could not have been clearer than what was shown in the Letter of Offer dated 8<sup>th</sup> December 2010. This is what led to the culmination of the Instrument of Charge dated 6<sup>th</sup> April 2011. The Plaintiff's contention that it did not provide the titles to the said parcels of land to the

- 1<sup>st</sup> Defendant or that it only executed page 20 of the said Instrument of Charge would not in any way negate the fact that the Plaintiff's director's voluntarily executed the same.
37. It is irrespective whether or not the 1<sup>st</sup> Defendant obtained the documents directly from NIC Bank Limited. In any event, there was already in existence of a Charge over the said properties and for which the Plaintiff could not have been given the titles directly. The role of the 1<sup>st</sup> Defendant's advocates was therefore critical in the transaction of the discharging of the charges and registering a charge over them by the 1<sup>st</sup> Defendant. No evidence of coercion or fraud was demonstrated by the Plaintiff. This is merely a red herring to detract the court from unravelling the real facts of the case herein.
38. A perusal of the Letter of Offers dated 3<sup>rd</sup> and 8<sup>th</sup> December 2010 show that the purpose of the Mortgage Loan facility in the sum of Kshs 9,100,000/= was to be utilised in the purchase of the aforesaid L.R. No 12672/47 Runda, Nairobi.
39. A major contention by the Plaintiff was that the Letter of Offer dated 3<sup>rd</sup> December 2010 clearly stipulated that the sum of Kshs 9,100,000/= was for the purchase of L.R. 12672/47 Runda, Nairobi and that without receiving the completion documents, the 1<sup>st</sup> Defendant ought not to have deposited the said sum in its account.
40. Whereas the Plaintiff contended that the crediting by the 1<sup>st</sup> Defendant credited in its account with the sum of Kshs 9,100,000/= was in clear breach of the terms of the Letter of Offer, it did not provide this court with any documentation to show that indeed they were of *ad idem* as to the time when and to whom the said monies were to be paid for the said Mortgage facility.
41. The Plaintiff referred the court to pages 98-131 of its Supporting Affidavit to demonstrate that it notified the 1<sup>st</sup> Defendant to rectify the anomaly of the said sum of Kshs 9,100,000/= which it said the 1<sup>st</sup> Defendant failed to do. Notably, the monies were credited to the Plaintiff's account on 1<sup>st</sup> July 2011. The court did not find any single letter that the Plaintiff had asked the 1<sup>st</sup> Defendant to rectify the anomaly after 1<sup>st</sup> July 2011. In fact, the correspondence that was alluded to by the Plaintiff to buttress its argument was exchanged between the parties between 2013- 2014.
42. The two (2) Letters of Offer dated 3<sup>rd</sup> and 8<sup>th</sup> December 2010 provided as follows:-

**“Conditions Precedent to Drawdown**

- 1. Receipt of the Letter of Offer duly executed in line with the Borrower's Memorandum and Articles of Association**
  - 2. Fire and Burglary...**
  - 3. The security documents duly executed and registered in favour of the Bank.”**
43. The Instrument of Charge dated 6<sup>th</sup> April 2011 in respect of L.R. No Nairobi/Block 82/2042 and L.R. No Nairobi Block/ 2039 was duly registered at the Lands Office on 26<sup>th</sup> June 2011 as was evidenced in a copy of the same contained on page 160 of the Plaintiff's Supporting Affidavit. The said Letters of Offer were duly executed by the directors of the Plaintiff.
44. The question that arises is whether the 1<sup>st</sup> Defendant was to await completion documents before it disbursed the monies. While the court noted the Plaintiff's submissions and case law on the failure of consideration, the same were not relevant in the circumstances of the case. There was no privity of contract between the 1<sup>st</sup> Defendant and the Vendor of L.R. No 12672/47 and so failure of consideration by the said Vendor had no legal basis in the 1<sup>st</sup> Defendant's claim against the Plaintiff.
45. Consequently, in the absence of any evidence to the contrary, the court finds that the 1<sup>st</sup> Defendant having not been a party to the transaction between the Plaintiff and Ite Farmers Co-operative Society Limited, it was under no obligation to await the completion documents in respect of L.R. No 12672/ 47 before it disbursed the monies. Its duty was limited to disbursing the monies as had been contemplated in the Letter of Offer. i.e. upon the execution of the letter of offer and registration of the charge.
46. The court was thus not persuaded by the Plaintiff's assertions that the 1<sup>st</sup> Defendant's action of crediting its account with the sum of Kshs 9,100,000/= was unfair unconscionable, without any

justification or intended to justly enrich itself.

47. The court carefully considered the Plaintiff's contentions that it had fully paid the monies due and owing to the 1<sup>st</sup> Defendant. Its letter of 4<sup>th</sup> February 2012 to the 1<sup>st</sup> Defendant contained on page 139 of its Supporting Affidavit shows that there were outstanding amounts that it undertook to remit to the Plaintiff. The said letter stated in part:-

**“We have attached hereto cheque no 500431 for Kshs 7,984,630/= being the full and final settlement against the balance on Kshs 9,100,000/= credited into our account in “error” on 1<sup>st</sup> July 2011.**

**According to our records, our current account has a small overdrawn position...**

**We are expecting a rather large payment of Kshs 10,000,000/= from Kenya Seed Company Limited before the end of January 2012 from which we give our irrevocable instructions for the bank to recover the said cheque amount of Kshs 7,984,630/= in full and credit the balance of Kshs 2,015,370/= to our current account to reduce the overdraw position...”**

48. It is the cheque of Kshs 7,984,630/= that the 1<sup>st</sup> Defendant declined to post into the Plaintiff's account, a fact that was admitted by the Plaintiff, as the said account was overdrawn. The facility of Kshs 9,100,000/= was only one of the credit facilities that were advanced to the Plaintiff by the 1<sup>st</sup> Defendant.

49. Whilst it was adamant that it had fully paid the different facilities due to the 1<sup>st</sup> Defendant, the Plaintiff did not provide any proof to show that it had done so. The duty was on the Plaintiff to discharge this burden by evidencing statements, cheques and banking slips which this court finds that it did not do.

50. As has been held severally, a dispute of accounts is not a ground for granting an injunction. The Plaintiff ought to reconcile the accounts with the 1<sup>st</sup> Defendant and pay what is due. On 3<sup>rd</sup> July 2013, reconciliation was done and interest refund credited to the Plaintiff's account. It does appear to this court that this is not something that is difficult to achieve even without a court order. However, the 1<sup>st</sup> Defendant would suffer no prejudice if the court was to direct it to furnish the Plaintiff with the Statement of Accounts as the Plaintiff had sought with a view to resolving this matter.

51. The Plaintiff's assertions that the 1<sup>st</sup> Defendant was responsible for the losses it incurred following the cancellation of the Letter of Credit facilities in respect of Cheminova A/S and the 1<sup>st</sup> Defendant's failure to obtain requisite documents including an Inspection report in respect of Xinxiang Yatelan Food Company Limited are not issues that would be for determination in an application for an interlocutory injunction. The court risks delving into the merits of the case at this interlocutory stage if it tried to analyse the same.

52. Suffice it to state that any cause of action arising out of the negligence by the 1<sup>st</sup> Defendant as alleged by the Plaintiff or otherwise would not be a ground which would entitle the Plaintiff to an interlocutory injunction. The dispute relating to the said issues would best be canvassed in a full trial.

53. The court has carefully noted the Plaintiff's assertions that the 1<sup>st</sup> Defendant did not serve it with the mandatory Statutory Notice. On its part, the 1<sup>st</sup> Defendant annexed to its Replying Affidavit, Exhibit No “GR 8” being a Statutory Notice dated 15<sup>th</sup> October 2013 from its advocates, M/S Kale, Maina & Bundotich Advocates. It was indicated that the same was sent by registered mail.

54. The 1<sup>st</sup> Defendant was categorical that it sent the Statutory Notice to the Plaintiff through P.O. Box 10170 00100 Nairobi. This is the same postal address that was given in the Instrument of Charge. However, the Plaintiff was insistent that it was not served with the same and that the 1<sup>st</sup> Defendant did not furnish it with a Certificate of Postage.

55. Indeed, in a letter dated 24<sup>th</sup> February 2014, through its advocates M/S Mbugua Ng'ang'a & Co Advocates seen on page 158 of its Supporting Affidavit, the Plaintiff did request for the same. In the said letter, the said advocates wrote as follows:-

**“Our client has not been served with a statutory notice of sale and we would appreciate if you could urgently send as (sic) a copy together with the Certificate of Postage. We would appreciate if the said documents can reach us by 26<sup>th</sup> February 2014, time being of the essence.”**

56. Service of such a notice cannot be underrated. No sale by a chargee of a chargor's charged property can take place unless a Statutory Notice has been duly served upon a chargor. It was therefore incumbent upon the 1<sup>st</sup> Defendant to have provided the same to the Plaintiff's said advocates or in its Replying Affidavit as the Plaintiff had raised the issue in Paragraph 30 of its Supporting Affidavit. If the same was available, nothing would have been easier than for the 1<sup>st</sup> Defendant to have furnished the Plaintiff or the court with the same as it ought to have been issued with a certificate of postage at the time of postage.
57. A plaintiff is entitled to a right of redemption until the very last minute before his property is sold hence, the importance of the said statutory notice cannot be understated. In the absence of any plausible explanation by the 1<sup>st</sup> Defendant as to why it did not furnish the said certificate of postage, this court finds that there was no proper of service of the Statutory Notice.
58. 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;**

59. So long as the Plaintiff remains indebted to the 1<sup>st</sup> Defendant, the monies must be paid failing

which the latter is entitled to exercise its statutory power of sale. However, the 1<sup>st</sup> Defendant is required to fully comply with the provisions of the land. Duty is bestowed upon a Mortgagee to exercise care towards the Mortgagor. 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).**
- bh. 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 1<sup>st</sup> Defendant had not fully complied with the provisions of the law which has to be done before it can exercise its Statutory power of sale.
- bi. The importance of compliance of this provision has been considered by several courts. This court dealt with the issue of valuation 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.
- bj. Be that as it may, while the 1<sup>st</sup> Defendant 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 Co Ltd** (Supra) as this is an issue that can be remedied without any prejudice being suffered by the Plaintiff and without interfering with the 1<sup>st</sup> Defendant's statutory power of sale of the subject property. The 1<sup>st</sup> 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.
- bk. The Plaintiff had come to court seeking an equitable relief. It, however, came with unclean hands. It was guilty of non-disclosure of material facts as can be seen hereinabove. From the evidence presented to this court, it does appear that the Plaintiff was truly and justly indebted to the 1<sup>st</sup> Defendant.
- bl. It cannot keep the subject property and keep the 1<sup>st</sup> 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** (Supra) 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...”**

65. 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.”**

66. 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 an 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.

67. The Plaintiff utilised the funds and now purports to rely on technicalities to run away from its obligations arising under the Charge. If its directors executed the execution page of the Charge without seeing the whole document, but which this court was not convinced was the case, then it can only be liable for its own omissions, negligence or folly as the amounts that were being disbursed to it were no small change.

68. 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 it 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 its favour. Indeed, the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant is at liberty to exercise its statutory power of sale provided that it fully complies with all the provisions of the law.

69. For the avoidance of doubt, the 1<sup>st</sup> Defendant shall not exercise its statutory power of sale of the subject property until it re-issues a Statutory Notice and conducts a valuation of the said property. It is hereby directed to fully comply with the provisions of the law.

#### **DISPOSITION**

70. For the reasons foregoing, the Plaintiff's Notice of Motion application dated and filed on 10<sup>th</sup> March 2014 is not merited and the same is hereby dismissed. The injunctive orders issued by the court on 12<sup>th</sup> March 2014 are thus hereby vacated and set aside. However, the court hereby grants Prayer No (4) of the Plaintiff's application.

71. Costs will be in the cause.

72. It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of September 2014**

**J. KAMAU**

**JUDGE**