



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 27 OF 2012**

**AGNES NDINDA MALUNDU.....PLAINTIFF**

**VERSUS**

**FAMILY BANK LIMITED ..... DEFENDANT**

**R U L I N G**

1. The application is brought pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010, and it seeks for the following prayers as stated on the face thereof:
  1. *That this Honourable Court be pleased to certify the annexed application as urgent and that service thereof be dispensed with at the first instance.*
  2. *That pending inter partes hearing and determination of this Application, this Honourable Court be pleased to issue an interim order for injunction to restrain the Defendant whether by itself, its officers, agents, servants, directors, auctioneers or anybody acting under their authority or otherwise howsoever from exercising its chargee's power of sale or from foreclosing on, selling whether by private treaty or advertising for sale, disposing, developing, or otherwise howsoever alienating or dealing with or interfering with the plaintiff's ownership and quiet possession and enjoyment of suit property known as title number Nairobi/Block 111/601 situate in Komarock Estate.*
  3. *That upon inter partes hearing of this Application and pending the determination of this suit, this Honourable Court be pleased to issue an interim order for injunction to restrain the Defendant whether by itself, its officers, agents, servants, directors, auctioneers or anybody acting under their authority or otherwise howsoever from exercising its chargee's power of sale or from foreclosing on, selling whether by private treaty or advertising for sale, disposing, developing, or otherwise howsoever alienating or dealing with or interfering with the plaintiff's ownership and quiet possession and enjoyment of suit property known as title number Nairobi/Block 111/601 situate in Komarock Estate.*
  4. *That the costs of this Application be borne by the Defendant in any event.*
2. Prayers Numbers 1 and 2 of the application have been dispensed with, and these submissions respect pursuit of prayers numbers 3 and 4 of the plaintiff's application only. The substantive prayer sought is prayer number 3 of the plaintiff's application.

The Plaintiff's Application is based on all the 8 grounds cited on the face thereof and is further supported by the following documents also filed by the Plaintiff:

- i. ***Supporting Affidavit of AGNES NDINDA MALUNDU sworn on the 12<sup>th</sup> January 2012 filed on the 19<sup>th</sup> January 2012 (hereinafter referred to as "the Plaintiff's Supporting Affidavit").***
- ii. ***Further Affidavit sworn by the same AGNES NDINDA MALUNDU sworn on the 27<sup>th</sup> September 2012 filed on 28<sup>th</sup> September 2012 (hereinafter referred to as "the Plaintiff's Further Affidavit").***
3. The application is opposed vide a Replying Affidavit of Joan A. Ombudo dated and filed in court on 25<sup>th</sup> July 2012. The Respondent had also filed a Notice of Preliminary Objection dated 26<sup>th</sup> February 2012. The Preliminary Objection was determined apriori and was dismissed by a Ruling of this court dated 24<sup>th</sup> May 2012 thus paving a way for the hearing of this application.
4. The brief facts of the application as per the Plaint dated 12<sup>th</sup> January 2012 are that the Plaintiff is the registered owner of the suit property. Pursuant to a loan agreement vide a charge dated 3<sup>rd</sup> August 2001 the Plaintiff was allegedly advanced Kshs.200,000/= by the Defendant who also happened to be the Plaintiff's employer. The Defendant alleged that the Plaintiff failed to repay the loan and has threatened to exercise its statutory right of sale under the said charge. The said sale is resisted by the Plaintiff/Applicant through this suit on the grounds that the alleged charge is not valid, and that the alleged Kshs.200,000/= was not drawn down or given to the Plaintiff, and that there can never be a right to exercise Statutory Power of Sale without a validly existing charge. The suit, and this application is to stop the Defendant bank from exercising its statutory power of sale of the suit property.
5. The issues for this court do determine are therefore:-
  - i. ***Whether the Statutory Power of Sale purported to be exercised is due or exercisable.***
  - ii. ***Whether the Charge Document is bad in law, irregular and a nullity.***
  - iii. ***Discrepancies in the Defendant's own bank statements.***
6. With the leave of the court parties filed very detailed and elaborate submissions to the application. The Plaintiff/Applicant filed their submission on 15<sup>th</sup> October 2012 and replying submissions on 18<sup>th</sup> April 2013, while the Defendant/Respondent filed its submissions on 11<sup>th</sup> December 2012.
7. It is important to note that there are at least two other cases between the parties and the issues before the court have been ventilated in other application before the court. I will however not go into the details of those other applications as I do not consider them relevant to this application.
8. The Plaintiff's submissions on relevant issue can be summarised as follows. The statutory power of sale purported to be exercised is neither due nor exercisable. This allegation has been founded on the Plaint filed in this case at paragraphs 7 thereof. The Defendant has purported to exercise a statutory power of sale of all that piece of land known as L.R. No. Nairobi/Block III/601 – Komarock (hereinafter referred to as the "**suit property**") vide a statutory notice that was sent to the defendant through a wrong address. The statutory notice is dated 9<sup>th</sup> August 2011 and it is marked as exhibit AN2 found at page numbered 9 of the annexures of the plaintiff's application. Paragraph 1 of the statutory notice at page 9 relates the subject statutory notice to be founded on a charge dated 3<sup>rd</sup> August 2001. At paragraph 2 thereof, it is stated that the alleged default amount as at 31<sup>st</sup> October 2010 is Kshs. 439,442/-. The Applicant submits very strongly, that the alleged outstanding amount on the statutory notice (otherwise denied) was not secured by the charge document dated 31<sup>st</sup> October 2001. This is the starting point and the essence of the Plaintiff's case.
9. The Plaintiff's contention is that the only loan she ever obtained from the defendant which she recollects was ever secured by the suit property was a school fees loan which was granted on or about the 11<sup>th</sup> January 2005 (This school fees loan alluded though secured by the suit property, was not necessarily subject of the specific charge dated 3<sup>rd</sup> August 2001 as no charge or further charge document was ever drawn specifically respecting this school fees loan for Kshs. 200,000/- taken in January 2005). The Applicant referred to exhibit ANM1 annexed to the Plaintiff's

Further Affidavit filed on 28<sup>th</sup> September 2005. As per the exhibit ANM1 which is a letter of offer dated 11<sup>th</sup> January 2005, it is clear that the the loan was a school fees loan for Kshs. 200,000/-, which loan was secured by a charge for Kshs. 200,000/- over the suit property.

10. Secondly, the Plaintiff submitted that the Charge Document is bad in law, irregular and is a nullity. These allegations have been founded on the Plaintiff filed herein at paragraphs 6 thereof. Reference was made to the Charge Document which has been marked as exhibit AN1. At page 2 of the exhibit Clause (b) thereof provides as follows:

***“The Chargee has at the request of the Chargor agreed to grant credit and banking facilities to the Chargor by way of a loan or by granting the Chargor other financial accommodation from time to time to an aggregate amount not exceeding Kenya Shillings Two Hundred Thousand Only (Kshs. 200,000/-) (hereinafter called “the Secured Amount”) as may from time to time be fixed by the Lender and upon having the same secured in manner hereinafter appearing”***

From a reading of the above clause, the Plaintiff submitted that the mere fact that the above clause made reference to the sum of Kshs. 200,000/- does not necessarily mean that that was the sum that was advanced to the plaintiff on 3<sup>rd</sup> August 2001 as alleged, considering that in any event, the subject paragraph b) of the charge, also referred to by the Defendant in the Replying Affidavit sworn by Joan A. Ombudu in paragraph 6(ii) thereof, was expressed to be for financial accommodation to the plaintiff from time to time for an amount not exceeding Kshs. 200,000/-.

11. The Plaintiff/Applicant further made summarised submissions as follows:-

- i. ***No loan was advanced to the Plaintiff for Kshs. 200,000/- as stated in the charge thus rendering the charge void and unenforceable for want of consideration.***
- ii. ***The charge document, i.e. annexure AN1 at page 7 of the plaintiff’s supporting affidavit to the Notice of Motion Application dated 12<sup>th</sup> January 2012 contains a schedule which narrates that the rate of interest is 18% and further that the repayment period and the amount of each instalment is 36 monthly instalments of Kshs. 2,300/- each. Taking into account that the interest was to be calculated on a reducing balance basis as per clause 2 of the charge, the principal sum would not be the stated Kshs. 200,000/-, but would be much less than the loan purported to be taken of Kshs. 200,000/-.***
- iii. ***In the above circumstance it is probable that the amount on the charge as per the charge’s repayment schedule was altered as is further evidenced by the fact that there are evident obliterations of the principal amount stated in the schedule both in its statement in words and figures.***
- iv. ***The Defendant has deliberately omitted to produce a statement of the plaintiff’s account running from the date of the alleged disbursement of a loan for Kshs. 200,000/- on or about the 3<sup>rd</sup> August 2001. Despite this being raised in the Plaintiff’s Further Affidavit, the Defendant has not responded to the same. This goes further to champion the Plaintiff’s position, that no loan was advanced to the Plaintiff of Kshs. 200,000/- on or about 3<sup>rd</sup> August 2001.***
- v. ***The Plaintiff has averred on oath that she did not appear before the named advocate whether to execute the charge or to have the advocate explain to her the contents of the charge that she had allegedly executed. Looking at the Defendant’s response to this allegation, the defendant merely states in paragraph 6 of the Replying Affidavit sworn by Joan Ombudu and filed on 25<sup>th</sup> July 2012 that the plaintiff was a bank manager who drafted and understood charge documents and even approved the same. To this response, the plaintiff has made a further reply at paragraph 3(vi) to 3(xii). Latently, the Plaintiff submits that the Plaintiff only approved loans as a bank manager but did not draft legal documents respecting loans e.g. charge document. As mandated by law, the Plaintiff had a legal right to be explained to the charge and a certificate signed***

*accordingly. These issues are triable and would well be canvassed at a hearing.*

- vi. As a matter of legal right, the Plaintiff was entitled to be given a legal explanation of the contents of the charge prior to her execution in consonance with the law hence the mandatory legal requirement for certification by an Advocate.*
- vii. The Plaintiff maintains the position that she did not execute the otherwise obliterated charge document as it is and that accordingly, the same can neither be practically and legally enforceable against her. Accordingly, either her signature as appears on the charge document may have been procured by undue influence and misrepresentation or the charge document was maliciously changed after her execution.*
- viii. The charge is accordingly bad in law, irregular and is a nullity for the above various reasons.*

12. On alleged discrepancies in the Defendant's own bank statements and contradictory information at the Credit Reference Bureau, the Plaintiff submitted that the Defendant has provided for different outstanding figures in various instances as is more particularly demonstrated in paragraphs 6 and 7 of the Plaintiff's Further Affidavit. Some of the alleged inconsistencies are as follows:-

- i. The statement produced by the defendant marked as JAO in their Replying Affidavit sworn by Joan Ombudu filed on 25<sup>th</sup> July 2012 runs from 25<sup>th</sup> April 2008. As at this date the Plaintiff had cleared both her check off and school fees loans referenced 211 253 and 211 288 respectively. The only loan she had outstanding was the car loan referenced 211 284.*
- ii. Referring to the entry made in April 2008 in the Plaintiff's bank statement dated 21<sup>st</sup> May 2010 respecting the car loan referenced 211 284 already referred to above found at page 11 of the plaintiff's application dated 12<sup>th</sup> January 2012, the total balance by end of April 2008 inclusive of interest for the month of April is stated to be Kshs. 444,790.10/-.*
- iii. Referring to the Plaintiff's bank statement dated 8<sup>th</sup> July 2011 produced by the Defendant through their Advocate a copy of which has been marked as annex ANM2 annexed to the Plaintiff's Further Affidavit already referred to above, as per the entry made in April 2008 in the Plaintiff's subject bank statement respecting the same car loan referenced 211 284, the total balance by end of April 2008 inclusive of interest for the month of April is similarly stated to be Kshs. 444,790.10/-.*
- iv. Turning to JAO 1 already referred to above annexed by the Defendant in the Replying Affidavit sworn by Joan Ombudu and filed on 25<sup>th</sup> July 2012, the entry made in the statement for end of April 2008 is Kshs. 641,688.39 inclusive of interest charged for the month of April 2008. This is a clear departure from the two earlier statements already referred to above.*
- v. Exhibit JAO 1 referred to above, in any event, bears a different loan reference number and incorrectly presupposes that there were some sums totalling to Kshs. 639,800.45/- that were disbursed on 25<sup>th</sup> April 2008 to the Plaintiff. No such sums were disbursed and in any event, none has been alleged to have been disbursed on the material date.*
- vi. Referring to both the Plaintiff's bank statement annexed to the Plaintiff's Further Affidavit marked as ANM2 already referred to above and the Plaintiff's bank statement found at page 15 of the Plaintiff's Notice of Motion application relating to loan account referenced 211 284, both accounts have similar entries to the effect that by the beginning of May 2010, the outstanding loan balance was Kshs. 495,437.10. Annex JAO on the other hand reflects that the outstanding loan as at May 2010 is Kshs. 797,177.43/-, an obvious departure from the other two statements.*
- vii. Annex JAO narrates that on the 23<sup>rd</sup> July 2010, there was a loan repayment for Kshs. 369,899/-. This narration contradicts the narrations in the other two statements already referred*

*to above respecting the same date.*

viii. ***Strangely and notwithstanding the contradictions in the various statements as partly demonstrated above, all the statements ultimately reflect that the loan outstanding is Kshs. 439,178/-. Unlike the two other statements, JAO 1 on 19<sup>th</sup> November 2010 made an entry for additional disbursements to enable it arrive at the same figure reflected in the other two statements already referred to above.***

In view of the foregoing, the Plaintiff further submitted, the stated figures stated by the defendant and alleged to be the plaintiff's outstanding loan have been manipulated by the Defendant maliciously. As per the record at the Credit Reference Bureau it turns out that the loan amount outstanding, if any, is very minimal. The Applicant appreciated that this court has previously held that contested outstanding loan amounts cannot be the basis for grant of an injunction to restrain exercise of statutory power of sale, but nonetheless beseeched the court to distinguish this particular case having taken all above points of submission into consideration. According to the Plaintiff, the Defendant is coming to this court with unclean hands.

13. In response the Defendant/Respondent submitted that the charge document is lawful, valid and regular by dint of its execution and registration and further submitted in point form as follows:-

- i. ***The Plaintiff was advanced a loan Kshs 200,000/= as on or about September 2001 which amount was to be secured by registering a charge over the property known as Nairobi/Block 111/601 as evidenced by the charge document annexed to the Applicant's supporting affidavit and marked "AN 1".***
- ii. ***It was an express condition of the charge document that the said charge could be a security for financial accommodation from time to time not exceeding kshs 200,000/= as per paragraph b) of the charge contained at page 1 of the charge document which states as follows:- ". . . the chargee has at the request of the chargor agreed to grant credit facilities to the chargor by way of a loan or by granting the chargor financial accommodation from time to time to an aggregate amount not exceeding Kenya shillings two hundred thousand only (kshs 200,000/= (hereinafter "the secured amount") as may from time to time be fixed by the lender and upon having the same secured in the manner hereinafter appearing..." thus the Plaintiff would from time to time be advanced funds not exceeding Kshs 200,000/= which were to be secured by the said charge.***
- iii. ***The Plaintiff is a former employee of the Defendant who at the time of the termination was a branch manager whose key responsibilities included inter alia approving loans by way of charges and mortgages to customers of the Defendant which position she held for several years hence she can not possibly claim that she did not understand the contents of the charge document. Further, the Defendant categorically states that the Plaintiff did indeed appear before an advocate and that she was fully aware of the import of the charge document which she duly executed.***
- iv. ***The Defendant denies that the Plaintiff's signature was procured by undue influence and states that is a vain attempt by the Plaintiff to embellish her claim and ought to be disregarded by this honourable court since no particulars of undue influence or misrepresentation have been set out as required by the law.***
- v. ***The Defendant avers that the veracity of the charge document is not determined by the schedule to the charge and states that the charge document is a valid and legally enforceable document.***

14. In further submission the Defendant states that the Defendant states that paragraph 10 of the said affidavit is a Further falsehood as the Defendant would have no way of knowing that the Plaintiff was indeed the registered owner of that particular property unless the Plaintiff disclosed that information. The Defendant submitted that paragraphs 12 and 13 are scandalous statements meant to cast aspersions upon the integrity of the Defendant since no proof has been attached of the alleged recoveries being made with respect to the alleged sale of the motor vehicle. Indeed, the

- record will clearly show that it is the Plaintiff who is keen on vexing the Defendant and frustrating its efforts to recover the sums due and owing to it by filing numerous frivolous claims in court. Annexed hereto and marked **JAO I** is a true copy of the Plaintiff's reconciled loan statement showing that the Plaintiff owes the Defendant **Kshs 439,178** which debt she has not made any attempt to repay. Further, the Defendant states that it was an agreed condition that once a staff member leaves the employment of Defendant if they had several loans all the outstanding loans would be merged into one loan account for ease of monitoring, management and recovery. At the time the Plaintiff's employment was terminated she had 3 outstanding loans being the school fees loan, check off loan and the car loan which loans were consolidated into one account with effect from 18th November 2005 after the Plaintiff's employment was terminated on 17th November 2005. Through a consent dated 11th March 2010 and recorded in Nairobi HCA NO. 596 OF 2009, the Plaintiff admitted owing the Defendant Kshs.569,953 of which she paid only Kshs 100,000 before defaulting and then filing HCCC No. 381 OF 2010 which was struck off hence she is stopped from claiming that she does not owe the Defendant any money. A copy of the said consent was annexed as **JAO 2**.
15. That in view of the foregoing the Defendant submitted that the Plaintiff has not met the criteria set out by the law for grant of an injunction as she has not established a *prima facie* case with a probability of success, and that indeed should the injunction be granted the Defendant will be highly prejudiced as it will have no means of realizing the sums due and owing to whereas, the Plaintiff's loss, if any, can be adequately compensated by way of damages. In any event, the balance of convenience lies in favour of the Defendant as the Plaintiff has not made any attempts to settle the debts she owes the Defendant despite being given ample time and opportunities to do so.
  16. From the foregoing submissions the above three issues of the validity of the Statutory Notice, the Validity of the said Charge, and the correct amount due to the Defendant remain the issues for determination.
  17. I will start with the issue of the correct amount due. This court cannot at this stage establish the correct amount, if any, due to the Defendant. What is clear however, is that the Plaintiff/Applicant does not deny owing the Defendant some money, as per its submissions at page 11 of the written submissions. As is the tradition of this court, an injunction cannot issue simply on the basis of the contested outstanding loan amounts. A bank cannot be restrained from exercising its Statutory Right of Sale on the basis of the contested amounts due. I therefore dismiss this ground as applicable in supporting the prayer for injunction herein.
  18. The second issue is on the validity of the charge document dated 3<sup>rd</sup> August 2001. The Applicant disputes the validity of the said charge on the grounds which I have stated above. I have looked at a copy of the said charge annexed as **AN1** to the supporting affidavit of the Applicant. There is nothing apparent on the face of the said charge indicating any illegality. The charge is properly drawn, executed and registered. The Plaintiff has alleged that his signature to the said charge was secured unprocedurally, and that his attention was not drawn to Section 74 and 79 of the Registered Land Act, and that indeed, he did not enter into the transaction in full knowledge thereof. The Applicant's allegations may well be correct or true. However, this court must take caution not to unnecessarily impugn legal documents which, *prima facie*, are properly drawn, executed and registered. It is possible that the Plaintiff's claim may be correct, but that can only be proved after a full hearing of the matter where evidence is tendered to prove the allegations. When the documents before the court are *prima facie* valid, the court must proceed from the position that they are indeed valid until proved otherwise. This means that the Applicant contending that the documents are invalid must contend with damages in the event that the documents which are *prima facie* valid before the court are later proved invalid. In this particular matter, I must emphasise that there is no submission before me to convince me of the alleged invalidity of the charge document, and I cannot begin to doubt it, and on that basis issue an injunction to stop the bank from exercising its statutory right to sell the security.
  19. The criteria for granting an injunction was settled in the case of **GIELLA – VS - CASSMAN BROWN AND COMPANY LIMITED [1973] E5 358 at page 360** as follows.

***“that an interlocutory injunction will issue:-***

1. *where the applicant has established a prima facie case with a probability of success;*
2. *where the applicant stands to suffer irreparable loss which cannot be compensated by an award of damages; and*
3. *where the court is in doubt the application will be decided on a balance of convenience.”*

20. In my view, it is doubtful if the Applicant has established a case with high probability of success. I am not convinced of that, and so the next question is whether the Applicant stands to suffer irreparable loss which cannot be compensated by an award of damages. The Applicant has not demonstrated which irreparable loss, if any, she would incur that cannot be compensated by way of damages if the injunction is not granted. As demonstrated above, the Plaintiff has clearly admitted to being indebted to the Defendant which contends that the subject charge is legal and valid, having been duly registered. Indeed, the Defendant is a reputable financial institution which has the capability of promptly paying damages to the Plaintiff in the event that the suit is determined in her favour. On the other hand, if the injunction is issued, the same would highly prejudice the Defendant as it will have no means of realizing the sums due and owing from the Applicant, whereas the Plaintiff's loss, if any, can be adequately compensated by way of damages. It is my view the balance of convenience lies in favour of the Defendant. This is especially in view of the fact that this is not the first time the parties are litigating over the issue of the validity of the charge document. The principal issue in HCCC no 381 of 2010 (which was the earlier suit) was the validity of a charge over the Plaintiff's property known as Nairobi/Block III/601 – Komarock which was the security for Kshs 200,000/= as a staff loan for school fees which was advanced to the Plaintiff by the Defendant. The principal prayer therein was an order directing the Defendant to register a discharge of charge at the lands office in favour of the Plaintiff and to forthwith release the original title document over Nairobi/Block III/601 – Komarock to the Plaintiff. In the instant suit, the validity of the said charge is still being questioned however the Plaintiff is denying that she was advanced kshs 200,000/= as stated in the charge. The prayers in the Plaintiff's suit are a permanent prohibitory injunction restraining the Defendant from interfering with the Plaintiff's ownership and quiet possession of the suit property known as Nairobi/Block III/601 – Komarock, a declaration that the charge document is unlawful and a nullity and order directing the Defendant to register a discharge of charge at the lands office in favour of the Plaintiff and to forthwith release the original title document over Nairobi/Block III/601 – Komarock to the Plaintiff.

21. In the case of **William Ochanda -VS- Housing Finance Co. Ltd & Anor [2005]eKLR**, Anyara Emukule, J quoted the following Court of appeal case and stated as follows:-

***‘Godfrey Nguno Vs Housing Finance Company Of Kenya Ltd (CIVIL APPEAL NO. 134 OF (1987) Where that court Platt, Apaloo JJA and Masime Ag. J.A) held that where a party has a statutory right of action the Court will not usually prevent that right being exercised except that the court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively. In this case, there was no ground for finding that the company had no basis for action and there is no evidence of oppression having in mind that the Appellant is still indebted to the Company putting his case at its highest. . .[‘***

The above case shows that a court will not prevent a party from exercising its statutory power of sale if the applicant has admitted to being indebted to the respondent, as is the case herein. The learned Judge then proceeded to state as follows with regard to what an applicant must prove in order to be granted an injunction:-

***The burden thus put on the litigant seeking the equitable remedy of injunction is a heavy and onerous one. He must establish a prima facie case with a high probability of success. To establish such a case, the Plaintiff must show some ground which prohibits the chargee from exercising its statutory power to sell the property or appoint a receiver over the charged property. The Plaintiff has in my opinion failed to prove any of his claims that the charge is defective invalid and therefore unenforceable in law. I have found that the charge was drawn and registered in a form first before approved by the Chief Land Registrar. . .”***

22. The third issue for me to determine is the validity of the Statutory Notice dated 9<sup>th</sup> August 2011 attached to the supporting affidavit of the Plaintiff as annexure AN 2. The Plaintiff/Applicant alleges that the same is invalid for various reasons among them that the Notice was not served upon the Applicant and that the Notice purports to demand more money than was allegedly advanced. On the second ground that more money than was allegedly advanced that is Kshs.439,442/= my understanding is that whatever money was advanced, it was accruing interest at 18% per annum. If then Kshs.200,000/= was advanced in 2001, a demand of Kshs.439,442/= in the year 2011 is not un reasonable, and is likely to be within the domain. However, the more important issue for me is the allegation that the said Notice was never served upon the Plaintiff. This allegation is important because a Statutory Notice must be served in a verifiable fashion, and a proof thereof, if required, tendered. The Defendant/Respondent has not responded to this allegation. The aforesaid annexure AN2 being a copy of the Statutory Notice shows that it was sent to the Plaintiff vide P.O. Box 77456 – 00200. This is the same addressed stated in the aforesaid Charge document. However, there is no evidence from the Defendant that indeed the Statutory Notice was served upon the Plaintiff. That being so, I am inclined to believe the Plaintiff when she says that the said Statutory Notice was never served upon her. That being so I have no hesitation declaring the said Statutory Notice invalid, which I hereby do. This means that the Defendant cannot proceed with the said intended sale of the suit property on the basis of that Statutory Notice dated 9<sup>th</sup> August 2011.

23. In the upshot I make the following orders:-

- a. ***The Plaintiff's/Applicant's Notice of Motion application dated 12<sup>th</sup> January 2012 is dismissed with costs to the Defendant/Respondent.***
- b. ***The Defendant/ Respondent shall be at liberty to proceed and exercise its Statutory Power of Sale over the suit property, if it still wishes to do that, on the basis of a Valid Statutory Notice to be served afresh upon the Plaintiff/Applicant.***

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Were holding brief for M/s Nungo for the Plaintiff

No appearance for the Defendant

Teresia – Court Clerk