



HFC Limited v Kampala International University & 11 others (Environment & Land Case E204 of 2020) [2022] KEELC 3183 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3183 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E204 OF 2020**

JO MBOYA, J

MAY 26, 2022

BETWEEN

HFC LIMITED PLAINTIFF

AND

KAMPALA INTERNATIONAL UNIVERSITY 1ST DEFENDANT

JAMES GATHERU MATHENGE 2ND DEFENDANT

EDITH NDUITA MATHENGE 3RD DEFENDANT

ABDUL ALEEM SIDIQUE 4TH DEFENDANT

MULTI-EQUIPPED LIMITED 5TH DEFENDANT

**PRINCIPAL SECRETARY, MINISTRY OF LAND & PHYSICAL
PLANNING 6TH DEFENDANT**

CHIEF LAND REGISTRAR 7TH DEFENDANT

REGISTRAR OF TITLES 8TH DEFENDANT

DIRECTOR OF SURVEYS 9TH DEFENDANT

**DIRECTOR GENERAL OF PHYSICAL AND LAND USE
PLANNING 10TH DEFENDANT**

ATTORNEY GENERAL 11TH DEFENDANT

NAIROBI CITY COUNTY 12TH DEFENDANT



RULING

1. This ruling relates to two Applications, namely, the Notice of motion Application dated the 8th of October 2020, which is filed by and/or on behalf of the Plaintiff and the Application dated 14th April 2021 filed on behalf of the 5th Defendant.
2. Other than the foregoing Applications, the Ruling herein also relates to the Notice of Preliminary Objections dated the 13th of April 2021 and which preliminary objection, has also been raised on behalf of the 5th Defendant.
3. Vide a Notice of Motion dated 8th October 2020, the Plaintiff seeks the following Reliefs:
 - i.(Spent)
 - ii. A Temporary Injunction be issued restraining the Defendants whether by themselves, their agents, servants, employees, invitees and/or otherwise whomsoever from Selling, Disposing of, Charging, Sub-dividing, Dealing, Alienating, Trespassing, Occupying, Managing, Letting, Advertising for sale, Offering for sale, Registering any Interest prejudicial to the Plaintiff or otherwise using or in any way whatsoever from interfering with all that piece of land known as Land Reference Number 7785/97(Original Number 7785/10/92) and the purported subdivided plots thereto to wit, Certificate No Title IR No. 204894, Land Reference No 7785/1489 (Original Number 7785/99/2) and certificate of title IR NO 204895, Land Reference No.7785/1490 (Original Number 7785/99/3) pending the hearing and determination of this application inter partes.
 - iii. A Temporary Injunction be issued restraining the Defendants, whether by themselves, their agents, servants, employees, invitees and/or otherwise whomsoever from selling, disposing of, charging, subdividing, dealing, alienating, trespassing, occupying, managing, letting, advertising for sale, offering for sale, registering any interest prejudicial to the Plaintiff or otherwise using or in any way whatsoever from interfering with all that piece of land known as Land Reference Number 7785/97(Original Number 7785/10/92) and the purported subdivided plots thereto to wit, Certificate No Title IR No. 204894, Land Reference No 7785/1489 (Original Number 7785/99/2) and certificate of title IR NO 204895, Land Reference No.7785/1490 (Original Number 7785/99/3) pending the hearing and determination of this suit.
 - iv. An order permitting the Plaintiff entry and taking of possession of the charged land, being all that piece of land known as Land Reference Number 7785/97(Original Number 7785/10/92) and the purported subdivided plots thereto to wit, Certificate No Title IR No. 204894, Land Reference No 7785/1489 (Original Number 7785/99/2) and certificate of title IR NO 204895, Land Reference No.7785/1490 (Original Number 7785/99/3) pending the hearing and determination of the Application inter partes.
 - v. An order permitting the Plaintiff entry and taking of possession of the charged land being, all that piece of land known as Land Reference Number 7785/97(Original Number 7785/10/92) and the purported subdivided plots thereto to wit, Certificate No Title IR No. 204894, Land Reference No 7785/1489 (Original Number 7785/99/2) and certificate of title IR NO 204895, Land Reference No.7785/1490 (Original Number 7785/99/3) pending the hearing and determination of the suit.



- vi. In the alternative, an order be issued directing the 1st Defendant within a specified period of time to be fixed by the court to provide alternative security in place of Land Reference Number 7785/97 (Original Number 7785/10/92) for the loan advanced or financial facilities extended to it by the Plaintiff.
 - vii. The Plaintiff be at liberty to apply to the Honourable Court for such further directions and orders for purposes of meeting the ends of justice.
 - viii. The costs of this application be provided for.
4. The subject Application is premised on the various grounds enumerated at the foot thereof and same is further supported by the Affidavit of one, Belinda Ng'ang'a sworn on the 8th of October 2020 and in respect of which the deponent has attached assorted annexures running from pages 1 to 75.
 5. Following the filing and service of the said Application, the 1st Defendant filed a Replying Affidavit sworn by one Christopher Kiplagat Leting and which was sworn on the 9th of June 2021.
 6. On the other hand, the 5th Defendant filed a Notice of Preliminary Objection dated the 13th of April 2021, as well as Grounds of opposition dated on even date.
 7. As concerns the 2nd, 3rd and 4th Defendants, it is not clear whether same have been duly served with the pleadings and whether summons to enter appearance have ever been served on same, even though the Application dated the 5th of May 2021, which sought to effect service by way of substitution means was heard and allowed on the 6th of May 2021. For clarity, no affidavit of service to that effect was discernable and/or obtainable in the court file.
 8. Nevertheless, it is worthy to point out that the 2nd, 3rd and 4th Defendant have not filed any Responses to the Motion dated the 8th of October 2020.
 9. On the other hand, the 6th to the 11th Defendants/Respondents filed a Replying Affidavit and same have controverted the averments contained at the foot of the Supporting Affidavit.
 10. The second Application takes the form of a Notice of Motion dated 14th April 2021, in which the 5th Defendant seeks the following Reliefs:
 - i.(Spent)
 - ii. The Plaint dated 8th October 2020 be struck out.
 - iii. The Costs of this Application and the suit be awarded to the 5th Defendant.
 11. The second Application herein is premised on the grounds contained at the foot thereof and similarly same is supported by the affidavit of one Francis Nyaga Njeru, sworn on the 14th of April 2021.
 12. Upon the service of the said Application, the Plaintiff herein responded thereto vide Replying Affidavit sworn by one Patrick Wainaina on the 5th of May 2021.
 13. Other than the Plaintiff, the 1st Defendant has also filed a Replying Affidavit sworn by Christopher Kiplagat Leting on the 9th of June 2021. Essentially, the Replying Affidavit by and/or on behalf of the 1st Defendant herein does not seem to oppose the subject Application, whereas same is also not conceded.
 14. Other the Plaintiff and the 1st Defendant, neither of the rest of the Defendants have filed any Responses to the Application dated 14th April 2021.



15. Other than the foregoing Application, there is a Notice of Preliminary Objection dated the 13th of April 2021, and which is premised on one ground;
 1. That the Plaint dated 8th October 2020 is premature and the same offends the mandatory provisions of Section 90 of the *Land Act* and should be struck out in the first instance.

Submissions by the Parties:

16. The subject matter came up on 29th July 2021 before Hon. Justice K. Bor, Judge, who issued directions pertaining to the hearing and disposal of the two Applications and the Notice of Preliminary Objection, respectively.
17. For clarity, the Hon. Judge ordered and/or directed that the two Applications and the Notice of preliminary objection be heard and disposed simultaneously. Besides, it was also directed that the Parties were to file and exchange written submissions.
18. Thereafter, the matter herein was ordered and/or directed to be mentioned on 26th October 2021, ostensibly to confirm the filing and exchange of written submissions.
19. Pursuant to the foregoing directions, the Plaintiff filed her written submissions on 7th March 2022, which submissions canvassed the two Applications as well as the Notice of preliminary objection.
20. On her part, the 1st Defendant herein filed her undated submissions on the 4th of April 2022, while on the other hand, the 5th Defendant filed written submissions dated 9th June 2021, but nevertheless the said submissions relate to the preliminary objection dated 13th April 2021.
21. Briefly, it is the Plaintiff's submission that on or about 21st November 2011, the 2nd and 3rd Defendants herein executed a transfer to and in favor of the 1st Defendant relating to all that parcel of land namely, L.R No. 7785/97 (I.R No. 35407/1), whereby the suit property was transferred to and registered in favor of the 1st Defendant.
22. It is further submitted that upon the transfer and registration of the suit property in favor of the 1st Defendant, same was issued with a Certificate of Title duly registered at the Land Title Registry at Nairobi on 8th December 2011.
23. On the other hand, the Plaintiff has further submitted that based on the ownership of the suit property by the 1st Defendant, same (1st Defendant) approached the Plaintiff with a view to procuring a facility in the sum of Kshs.54, 000, 000/= Only.
24. It is further submitted by the Plaintiff that upon the approach by the 1st Defendant, same reviewed the Application/Request and upon being satisfied therewith, same issued a Letter of Offer in favor of the 1st Defendant.
25. Further, it has been submitted that the 1st Defendant herein thereafter proceeded to and perfected security, to secure the Banking facility and in this regard, the 1st Defendant charged the Title of the suit property in favor of the Plaintiff. For clarity, it has been submitted that the charge in favor of the Plaintiff was duly registered and noted against the register on 8th December 2011.
26. Subsequently, it has been submitted that the Plaintiff proceeded to and disbursed the loan to and in favor of the 1st Defendant herein.



27. Nevertheless, the Plaintiff has submitted that upon appropriating the banking facility, namely the disbursed loan, the 1st Defendant lapsed into default and in this regard, the Plaintiff was constrained to engage TransCountry Valuers Ltd to carry out valuation in respect of the suit property, as a precursor to exercising her Statutory powers of sale.
28. Be that as it may, the Plaintiff has further submitted that in the course of conducting and obtaining the searches from the offices of the 7th Defendant, the nominated valuer discovered serious discrepancies in the Title documents, which had been charged in favor of the Plaintiff.
29. The Plaintiff has further submitted that the nominated valuer indeed established and authenticated that the suit property which was charged to and in favor of the Plaintiff vide Charge registered on 8th December 2011, appeared to have been sold and transferred to the 4th Defendant by the 2nd and 3rd Defendants on 8th December 2011.
30. It was the Plaintiff's further submissions that other than the transfer of the suit property to and in favor of the 4th Defendant, the official search procured and obtained by the nominated valuer also authenticated that on the same date, namely, the 8th December 2011, the suit property was transferred to and in favor of the 5th Defendant.
31. Other than the foregoing, the Plaintiff also submitted that subsequently, the suit property was subdivided into two portions, culminating into the creation of L.R No. 7785/99/2 and L.R No. 7785/99/3, respectively and which were registered in the names of the 5th Defendant.
32. It is the Plaintiff's further submissions that the transfer and registration of the suit property to and in favor of the 4th Defendant by the 2nd and 3rd Defendant, was unlawful and illegal, taking into account that the suit property had already been charged to and in favor of the Plaintiff.
33. Similarly, the Plaintiff has also submitted that the consequential transfer of the suit property by the 4th defendant to the 5th Defendant, was also replete with fraud and illegalities. In any event, it is contended that the latter transfer was also calculated to defeat the interest of the Plaintiff.
34. Notwithstanding the foregoing, the Plaintiff has further submitted that the subdivision of the suit property, which was sanctioned and/or authorized by the 7th to the 10th Defendants, was similarly fraudulent and illegal and same was calculated to defraud the Plaintiff.
35. Based on the foregoing, the Plaintiff has therefore contended that by virtue of holding the Charge over and in respect of the suit property, which has been dealt with illegally by the Defendants, same has a prima facie case as against the Defendants.
36. On the other hand, the Plaintiff has also submitted that unless the orders sought are granted, same is disposed to suffer irreparable loss, not compensable in monetary terms.
37. Finally, the Plaintiff has also submitted that taking into account the circumstances of the subject matter and given that the monies which were loaned out to the 1st Defendant do not belong to the Plaintiff, but to various creditors and thus the public, the Plaintiff would thus suffer grave injustice, if the orders of injunction are not granted.
38. In support of the foregoing submissions, the Plaintiff herein has quoted and relied on various decisions, inter-alia *Giella v Cassman Brown & Company Ltd* [1973] EA 358, *Mroa Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, *Ngugi Gichune Njoroge v Cooperative Bank Ltd & another* [2015] eKLR, *Kariuki v National Bank of Kenya Ltd* [2006] 1 E.A. 96 and *Joel Kipkurui Arap Koech v Alice Wambui Magandu & 3 others* [2018] eKLR.



39. Other than the submissions by the Plaintiff in support of the Application for Temporary injunction, the Plaintiff has also submitted on the Preliminary objection raised by the 5th Defendant.
40. According to Plaintiff, the Preliminary objection raised by the 5th Defendant does not meet the threshold for a Preliminary objection, insofar as same seeks to interrogate issue of facts and/or evidence, which cannot be entertained and/or interrogated vide a Preliminary objection.
41. Essentially, the Plaintiff has submitted that the provisions of Section 90 of the Land Act, 2012 which the 5th Defendant has alluded to stipulates the Remedies of a Chargee as against a Chargor who has defaulted.
42. It is further submitted that according to the provisions of Section 90 of the Land Act, 2012, before a chargee can exercised her statutory powers, whether of sale or otherwise, the chargee is obliged to issue and serve various notices, in accordance with the law. In this regard, the Plaintiff has submitted that the issue as to whether or not Section 90 of the Land Act, 2012 has been complied with, would entail adduction of evidence and hence the issue is beyond the scope of a Preliminary objection.
43. In support of the submissions against the preliminary objection, the Plaintiff has relied on various decisions, inter-alia, Mukisa Biscuits Manufacturing Company Ltd v Westend Distributors Ltd [1969] EA 696, Independent Electoral and Boundaries Commission versus Jane Cheperengerer & 2 others [2015] eKLR, Hassan Ali Joho & another v Suleiman Saaid Shabal & 2 others [2014] eKLR, Hassan Nyanje Charo versus Khativ Mwashetani & 3 others [2014] eKLR.
44. Based on the foregoing, the Plaintiff has therefore contended that the Preliminary objection is misconceived and thus legally untenable.
45. Nevertheless, it is evident and/or apparent that the Plaintiff has however not made any submissions in respect of the Application dated the 14th April 2021.
46. On her part, the 1st Defendant has submitted that the Application by the Plaintiff dated 8th October 2020 does not establish a prima facie case, to warrant the grant of the orders sought thereunder.
47. First and foremost, the 1st Defendant submits that the loan facility which was granted to and in favor of the 1st Defendant was granted by an entity known as Housing Finance Company of Kenya and not by the Plaintiff herein. In this regard, the 1st Defendant has disputed the existence of any relationship with the Plaintiff, to warrant the claim at the foot of this suit.
48. Secondly, the 1st Defendant has further submitted that even assuming that there was a re-organization and/or restructure of Housing Finance Company of Kenya, which was the chargee of the suit property, the charge under reference has never been assigned to the Plaintiff herein. In this regard, the 1st Defendant has contended that no Deed of assignment has been exhibited and/or displayed by the Plaintiff.
49. Thirdly, the 1st Defendant has also submitted that the Plaintiff's claim as pertains to the subject matter relates to recovery of the monies that were disbursed to and in favor of the 1st Defendant. Consequently, it has been submitted that whatever loss that the Plaintiff may be disposed to suffer is compensable in monetary terms.
50. Fourthly, the 1st Defendant has submitted that even if the court were to address the issue on the basis of balance of convenience, same does not tilt in favor of the Plaintiff.
51. In conclusion, the 1st Defendant has invited the court to take note of various decisions inter-alia, Jones v Humphrey [1902] 2 KB at page 10, Forster v Barker [1910] 2KB 636, Re-Steel Wing Company Ltd



[1921] 1 CH 349, Walter & Sullivan Ltd v Murphy & Sons Ltd [1955] 2 QB 584, Agricultural Finance Corporation versus Lengetia Ltd [1985] eKLR and finally Paul Gitonga Wanjau v Gatuthis Tea Factory Company Ltd & 2 others [2016] eKLR.

52. On the part of the 5th Defendant, same has submitted that the Plaintiff herein had no contract and/or contractual relationship with the 2nd to the 12th Defendants, as concerns the suit property or at all. In this regard, the 5th Defendant has impleaded the Doctrine of privity of Contract and essentially contended that the Plaintiff's suit does not disclose any reasonable cause of action as against the 5th Defendant.
53. Secondly, the 5th Defendant has similarly submitted that having entered into a Contract with the 1st Defendant, culminating into the registration of a charge in favor of the Plaintiff, the rights of the Plaintiff herein in the event of default are Statutorily provided for and underpinned.
54. In the premises, the 5th Defendant has submitted that where there is default by and/or on behalf of the chargor, the chargee, namely, the Plaintiff herein can only proceed against the Chargor and the Guarantors.
55. Based on the foregoing, the 5th Defendant has thereby submitted that the Plaintiff herein in her capacity as the chargee cannot make and/or lay any claim as against Parties who had no contractual relationship with her.
56. In the premises, the 5th Defendant has therefore implored the court to find and hold that the Plaintiff's suit does not disclose any reasonable action as against her.

Issues for Determination:

57. Having reviewed the Applications dated 8th October 2020, 14th April 2021 and the Preliminary objection dated 13th April 2021 and having appraised the written submissions filed by and/or on behalf of the designated Parties, the following issues do arise for consideration and are germane for determination:
 - i. Whether the Plaintiff's suit discloses a reasonable cause of action as against the 2nd to 12th Defendant and in particular, against the 5th Defendant.
 - ii. Whether the Plaintiff has established a prima facie case as against the Defendants to warrant the grant of the orders of Temporary injunction.
 - iii. Whether the Plaintiff is disposed to suffer Irreparable loss.
 - iv. Whether the Court has the requisite Jurisdiction to compel the 1st Defendant to provide alternative security in the manner sought by the Plaintiff.

Analysis and Determination:

Issue Number 1

Whether the Plaintiff's suit discloses a reasonable cause of action as against the 2nd to 12th Defendant and in particular, against the 5th Defendant.

58. It is common ground that the 1st Defendant herein approached Housing Finance Company Ltd with a request for Banking facility in the sum of Kshs. 54, 000, 000/= only, which facility was thereafter approved and disbursed in favor of the 1st Defendant.



59. Similarly, it is not denied that towards and in a bid to secure the Banking facility disbursed in favor of the 1ST Defendant, the 1st Defendant pledged and offered as security, the Title in respect of L.R No.7785/97, I. R No. 35407/1 otherwise referred to as the suit property.
60. It is also contended by the Plaintiff that in the course of time, Housing Finance Company of Kenya Ltd, who had disbursed the loan facility in favor of the 1st Defendant, underwent a restructure and thereby culminating into the establishment and/or creation of the Plaintiff herein.
61. Other than the foregoing, it has also been stated and there is no denial by the 1st Defendant, that the 1st Defendant herein has since lapsed into default in servicing the loan facility and in this regard, the loan balance due and payable in favor of the Plaintiff amounts to Kshs. 38, 247,182.28/= Only, as at 31st March 2020.
62. Despite the foregoing, the issue that lies for determination at this juncture is whether the Plaintiff herein had any contractual dealings with the 2nd to the 12th Defendants and whether the Plaintiff as a Chargee in the transaction between herself and the 1st Defendant can lay any claim as against the 2nd to the 12th Defendants.
63. The starting point in addressing the issue herein, is by noting that as a Chargee, the law prescribes and circumscribes the nature of remedies that are available to a Chargee, as well as the persons against whom such remedies are availed.
64. In respect of this matter, it is imperative to take note and/or cognizance of the provisions of Section 90 of the [Land Act](#), No. 6 of 2012. For convenience, the said provisions are reproduced as hereunder;

90. Remedies of a chargee:

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



- d. The consequence that if the default is not rectified within the time specified in the notice, the 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 ninety days after the date of service of the notice under, subsection (1), the chargee 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
 - e. Sell the charged land
- (4) ...
- (5) ...

65. My understanding of the import and tenor of the provisions of Section 90 of the *Land Act*, Supra, is that a chargee has prescribed statutory remedies against the chargor and the guarantors, albeit subject to issuance and service of the requisite statutory notices, in the event of default in the repayment of the Charge monies or the interests arising therefrom.
66. In respect of the subject matter, my humble opinion is that the Plaintiff herein can only move as against the 1st Defendant, either in exercise of her Statutory power of sale or by filing of a suit, obviously for recovery of the monies in arrears, inclusive of interests.
67. Short of the foregoing, it is my further observation that the Plaintiff as a chargee has no legal rights and no cause of action as against third parties, with whom same did not enter to any contractual obligations with or at all.
68. Suffice it to observe that the Doctrine of Privity of Contract operates in such a manner that a Contract, in this case the Charge instrument, would only be binding as against the Parties thereto, namely, the Chargee, the Chargor and the Guarantors.
69. For the avoidance of doubt and to understand the import and tenor of the Doctrine of privity of contract, it is imperative to recall and take note of the holding in the case of *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR where the Court of Appeal stated as hereunder;

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give



him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

70. Other than the foregoing decision, the Doctrine of privity of contract was re-visited in the case of Savings & Loans (K) Limited vs Kanyenje Karangaita Gakombe & Another [2015] eKLR;

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] Ac 847, Lord Haldane, LC rendered the principle thus: “My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

71. Based on the foregoing ratio, which has continued to hold sway in our jurisprudence to date, I am constrained to find and hold that the Plaintiff herein cannot legally implead the 2nd to 12th Defendants, in a matter where her rights and/or entitlement only exists against the Contractual Party to the charge instrument.
72. Secondly, it is also my considered view that to the extent that the remedies of a chargee, namely, the Plaintiff herein have been Statutorily circumscribed under the law, the Plaintiff cannot seek to expand the scope of her remedies by going beyond what is statutorily provided for, or at all.
73. In the premises, it is my considered finding and holding that both the Notice of preliminary objection dated 13th April 2021, and the Notice of Motion Application dated 14th April 2021, which are premised on the basis of non-disclosure of a reasonable cause of action as against the 2nd to the 12th Defendants, are meritorious.
74. In coming to the foregoing observations, I must point out that I have anxiously considered whether any amendments to the suit by the Plaintiff can breathe any life by generating a semblance of a cause of action, notwithstanding the prescription of Section 90 of the *Land Act*, 2012.
75. On the other hand, I have also taken into account the caution that striking out of a suit and/or the application of summary procedure, should be exercised sparingly and with necessary circumspection, to ensure that a litigant is not driven away from the seat of justice without a plenary hearing.
76. Finally, I have also taken into account the decision in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another*[1980] eKLR, where the Court of Appeal thus held as hereunder;

“That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments.”

per Lindley L.J. ibi, p. 602.

“It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution.”

Per Lord Justice Swinfen Eady in *Moore v Lawson and Another* (supra) at p. 419.

“It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely



because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in *Lawrence v Lord Norreys*, 15. A.C. 210 at p. 219.

"The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court." per Danckwerts, L.J. in *Nagle v Fielden* [1966] 2 Q.B.D. 633 at p. 646.

"It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly, it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal." per Salmon, L.J., *ibi* at p. 651.

"It is not the practice in Civil administration of our courts to have preliminary hearing as it is in crime.... If it involves the parties in the trial of the action by affidavit's is not a plain and obvious case on its face."

"per Sellers, L.J. in *Wedlock Maloney and Others* [1965] 1 WLR. 1238 at pp. 1242.

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power." per Danckwerts L.J. *ibi* at p. 1244.

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading." *Rayer Carl Zeiss Stiftung v Keeler Ltd. and Others* (No. 3) 1970] Ch. D. 506.

77. In a nutshell, I find and hold that the Plaintiff's suit does not disclose any reasonable cause of action as against the 2nd to the 12th Defendants. Consequently and in this regard, I am minded to uphold the Preliminary objection and the Application dated 14th April 2021, but as against the 2nd to the 12th Defendants only.
78. As pertains to the claim against the 1st Defendant, it is my finding and holding that other than the exercise of the Statutory power of sale and Receivership, the Plaintiff has the liberty to commence recovery proceedings aimed at recovering the outstanding loan sums.
79. Consequently as against the 1st Defendant, the Plaintiff truly has a reasonable cause of action and same is maintainable in law.

Issue Number 2

Whether the Plaintiff has established a prima facie case as against the Defendants to warrant the grant of the orders of Temporary injunction.

80. In respect of the second issue herein, that is ascertaining whether the Plaintiff has established a prima facie case with overwhelming chances of success, it is paramount to ascertain and/or authenticate the definition of a prima facie case.



81. In this regard, it is worthy to take cognizance of the holding in the case *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Honourable Court fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

82. It is also imperative to note that the meaning and import of a Prima facie case was also re-visited by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court observed as hereunder;

“Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. *Ethicon Ltd* [1975] AC 396 is a case in point. The meaning of “prima facie case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Ramanlal Trambaklal Hatt V. Republic* [1957] E.A. 332.

83. Having appraised myself of the meaning and import of what a prima facie case entails, it is now appropriate to delve into the matter and ascertain whether the Plaintiff herein has espoused a prima facie case.

84. Suffice it to note that Housing Finance Company of Kenya Ltd is reported to have disbursed the sum of Kshs. 54,000,000/= only to and in favor of the 1st Defendant, and upon the disbursement of the said monies, a charge was duly registered against the suit property.

85. Nevertheless, the 1st Defendant herein has raised a legal issue about the competence of the Plaintiff to file and mount the suit, in the absence of any Deed of assignment.

86. On the other hand, the 1st Defendant has also challenged the fact that the Plaintiff herein is related to and/or a restructure of Housing finance Company of Kenya Ltd, the latter which is admitted to have disbursed the loan facility in favor of the 1st Defendant.

87. In my humble view, the issues raised by and/or on behalf of the 1st Defendant are issues of facts and/or mixed facts and law, which will have to await a plenary hearing.

88. However, one fundamental issue which has not been contested by the 1st Defendant is the disbursement and receipt of the loan facility, and the fact that there has been default in servicing and/or liquidation of the loan facility.

89. According to the Plaintiff, the 1st Defendant has defaulted and same is currently in arrears of Kes. 38,247,182.28/= only as at 31st March 2020.



90. In the premises, it is my finding and holding that as against the 1st Defendant, the Plaintiff has raised and generated issues which meet the threshold of a prima facie case and therefore deserving of interrogation during a plenary hearing.
91. Notwithstanding the foregoing, it is still important to recall that as against the 2nd to the 12th Defendants, the Court has held presently that no reasonable cause of action has been established.
92. In view of the foregoing, I return the finding that as against the 1st Defendant, the Plaintiff has established a Prima Facie case with overwhelming chances of success.

Issue Number 3

Whether the Plaintiff is disposed to suffer Irreparable Loss.

93. Before delving into the analysis of whether or not the Plaintiff is disposed to suffer irreparable loss, it is important to also appreciate and underscore the meaning of irreparable loss.
94. To this end, I can do no better than to reproduce the holding of the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, where the court observed as hereunder;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy”.
95. Taking into account the meaning and import of what constitutes an irreparable loss, the question that now begs the answer is whether the Plaintiff herein shall suffer irreparable loss.
96. It is worthy to note, that the Plaintiff in respect to the subject matter has indeed proceeded to and quantified the monetary loss that same is exposed to and in this regard, the Plaintiff has underlined that the amount of loan arrears, inclusive of interests stood at Kes. 38,247,182.28/= only as at 31st March 2020.
97. On the other hand, it is also imperative to note that the Plaintiff has also sought to recover the said amounts of money, being the loan arrears as against the 1st Defendant, the recovery of the said monies being one of the Reliefs sought under the Plaint in respect of the matter herein.
98. Based on the foregoing, it is therefore evident and/or apparent that the loss, if any, that the Plaintiff is exposed to is quantifiable and has indeed been quantified in monetary terms.
99. In the premises, I find and hold that the Plaintiff shall indeed suffer loss and prejudice, but the loss that is likely to be suffered does not meet the threshold of irreparable loss.
100. In the circumstances, I am afraid that the prayer for temporary injunction, which has been sought for at the foot of the Application dated 8th October 2020, does not lie.



101. In coming to the foregoing conclusion, I have paid due attention to the holding in the case of Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86, where the court stated as hereunder;

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

Issue Number 4

Whether the Court has the requisite Jurisdiction to compel the 1st Defendant to provide alternative security in the manner sought by the Plaintiff.

102. The Plaintiff herein has sought an alternative prayer, whereby same seeks an order directing the 1st Defendant to avail and/or provide an alternative security in place of L.R No. 7785/97, for the loan advanced or the financial facility extended to it by the Plaintiff.
103. It is common knowledge that prior to and/or before the Plaintiff extended the financial facility in favor of the 1st Defendant, same generated a charge instrument which was duly executed and engrossed by the Parties.
104. Essentially, the relationship between the Plaintiff and the 1st Defendant herein is contractual in nature. For clarity, the Plaintiff and the 1st Defendant agreed on various terms, conditions and covenants, which were thereafter reduced into writing.
105. Having entered into the charge contract, the Parties thereby created a binding document, whose terms regulate their relationship and in the event there is need to vary, revise and/or alter the terms thereof, the Parties to the said Contract are obliged to undertake negotiations culminating into a mutual Memorandum, addendum or otherwise.
106. However, what the Plaintiff herein is inviting the court to do is to re-write the terms of the Contract and the charge instrument.
107. For me, I must state that it is not the duty of the court to re-write, Review and vary a contract on behalf of the Parties and/or otherwise substitute the will of the court in lieu of the will of the Parties.
108. In respect of the foregoing statement of the law, case law abound. Nevertheless, it suffices to refer to the holding in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, where the Court of Appeal observed as hereunder;

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of Fina Bank Limited v Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):



“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

109. Whereas the Plaintiff has the option of demanding from the 1st Defendant provision of an alternative security, such a recourse exists outside the purview of the court. In any event, it is not an order that the court can engage with at an interlocutory stage.
110. In a nutshell, to grant the relief that has been sought herein shall be tantamount to this court usurping the powers of the Parties to the charged instrument and re-writing the contract.

Final Disposition:

111. Having dealt with and addressed all the issues that were outlined hereinbefore, it is now appropriate to render a Dispositive order.
112. Consequently and in the premises, I now make the following Orders;
 - a. The Notice of Preliminary Objection dated the 13th of April 2021 and the Notice of Motion Application dated the 14th of April 2021 be and are hereby allowed.
 - b. The Plaintiff’s suit as against the 2nd to the 12th Defendants be and is hereby struck out.
 - c. The Notice of Motion Application dated the 8th of October 2020 be and is hereby Dismissed.
 - d. Costs of the Preliminary objection, the Application dated the 14th of April 2021 as well as the suit be and are hereby awarded to the 5th Defendant only.
 - e. Costs of the Application dated the 8th of October 2020 shall abide the outcome of the suit between the Plaintiff and the 1st Defendant.
113. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Bwire H/B for Mr. Ohaga Senior Counsel for the Plaintiff/Applicant

Mrs. Omondi H/B for Mr. Odera for the 5th Defendant/Respondent

No appearance for the rest of the Defendants**

