Rivalene Limited & 3 others v KCB Bank Kenya Limited & 2 others (Environment & Land Case E283 of 2021) [2022] KEELC 3402 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3402 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E283 OF 2021

OA ANGOTE, J

MAY 26, 2022

BETWEEN

RIVALENE LIMITED .... 1ST PLAINTIFF

ASIR HOLDINGS LIMITED .... 2ND PLAINTIFF

SHABANA AHAMED .... 3RD PLAINTIFF

PLUMBING SYSTEMS LIMITED .... 4TH PLAINTIFF

AND

KCB BANK KENYA LIMITED .... 1ST DEFENDANT

RINGSVIEW APARTMENTS LIMITED .... 2ND DEFENDANT

MBIRA GIKONYO .... 3RD DEFENDANT

RULING

Background

1. Before this Court for determination is the Plaintiffs' Notice of Motion application dated July 30, 2021seeking for the following reliefs;

   a) Pending the inter-partes hearing and determination of the suit, this Honourable Court be pleased to restrain the 1st, 2nd and 3rd Defendants whether by themselves, their employees, assigns, and/or agents from selling, transferring, taking possession of or in any way dealing with the suit properties being Apartment Numbers A9, B1, B2, B4 & C7 at Rings view Estate erected on Land Reference Number 4858/11.

   b) Pending the inter-partes hearing and determination of this suit, this Honourable Court be pleased to restrain the 1st Defendant from charging any additional interest on the loan facility issued to the 2nd Defendant which loan is secured by the suit properties being Apartment

Numbers A9, B1, B2, B4 & C7 at Ringsview Estate erected on Land Reference Number 4858/11.

c) Pending the inter-partes hearing and determination of this suit, this Honourable Court be pleased to issue an order for discovery in respect of the statutory notice of sale, a copy of the Loan Agreement between the 2nd Defendant and the 1st Defendant, and a copy of the letter of offer issued to the 2nd Defendant in respect of the loan in respect of the suit properties being Apartment Numbers A9, B1, B2, B4 & C7 at Ringsview Estate erected on Land Reference Number 4858/11.

d) The Plaintiffs be at liberty to apply for such further orders and/or directions as this Honourable Court may deem fit and just to grant.

e) The costs of this Application be borne by the Defendants.

2. The application is supported by the Affidavit of Muthoni Gathinji, the Executive Director of the 1st Plaintiff dated June 30, 2021.

3. The Executive Director of the 1st Plaintiff deponed that vide respective sale agreements, the Plaintiffs purchased the suit properties herein being apartment numbers B1, A9, C7 & B (2) and (4) situate on Land Reference Number 4858/11 Kileleshwa whose terms were, inter alia, that the 2nd Defendant was to erect apartments including the suit properties and sell the same to the Plaintiffs.

4. It was deponed by the Executive Director of the 1st Plaintiff that upon payment of the purchase price, the 2nd Defendant was to facilitate the transfer of the suit properties to the Plaintiffs and that every apartment owner would simultaneously with the execution of the lease apply for membership and allotment of one (1) share in the management Company.

5. According to the Executive Director of the 1st Plaintiff, the Plaintiffs paid the full purchase price as required; that contrary to the agreements, the 2nd Defendant registered the Plaintiffs' subleases in its name as opposed to the names of the Plaintiffs and that to finance the development of the suit properties, the 2nd Defendant applied for and obtained a loan facility from I&M Bank Limited.

6. It was deponed that the 2nd Defendant being unable to repay the loan facility from I &M Bank applied for and obtained another loan facility from the 1st Defendant in 2018 and that the 2nd Defendant did not seek the consent of the Plaintiffs’ when it sought for and obtained the said loan facility from the 1st Defendant in respect of the suit properties.

7. It was further deponed that the 2nd Defendant was unable to repay the loan facility from the 1st Defendant and that through a letter dated 9th March, 2021, the 1st Defendant sent to the 2nd Defendant a Notice of Default and demanded for the immediate settlement of its arrears within 7 days.

8. It is the Plaintiffs’ case that on 10th March 2021, the 2nd Defendant wrote to them informing them that each of them would be required to pay a sum of Kshs. 75,000.00 per two bedroomed apartment and Kshs. 100,000 per three bedroomed apartment to raise Kshs 1,500,000.00 demanded by the 1st Defendant to avoid the said recovery process.

9. It was deponed by the Executive Director of the 1st Plaintiff that vide a letter to the 1st Defendant dated 27th April, 2021, the Plaintiffs through their advocates informed the 1st Defendant that the said loan facility by the 2nd Defendant was obtained without their knowledge and consent and therefore the suit properties were irregularly and illegally charged and should accordingly be discharged.

10. It is the Plaintiffs' case that there has been no response from the 1st Defendant to the said letter by the Plaintiffs; that on 28th April, 2021, the 1st Defendant issued a statutory notice of sale to the 2nd Defendant; that on 14th June, 2021 the Plaintiffs' Advocates held a meeting with the 1st Defendant in which they requested for copies of documents in respect of the loan inter alia a copy of the charge registered in favour of the 1st Defendant, a copy of the loan agreement between the 2nd Defendant and the 1st Defendant, a copy of the letter of offer issued to the 2nd Defendant in respect of the loan and a copy of the statutory notice of sale issued by the 1st Defendant to the 2nd Defendant.

11. The Executive Director of the 1st Plaintiff finally deponed that the 1st Defendant has not conveyed to the Plaintiffs' advocates the documents set out herein above, save for the said charge which was conveyed to the Plaintiffs' advocates on 26th July 2021 and that the Plaintiffs stand to lose the suit properties through the process of realization by the 1st Defendant which has already issued a notice of sale.

12. In response to the application, the 1st Defendant, through its Senior Recovery Manager, Credit Support Unit Director, filed a Replying Affidavit in which he deponed that the 1st Defendant is a stranger to the averments with respect to the dealings between the Plaintiffs and the 2nd Defendant including the sale agreements and payments in respect thereof.

13. It was deponed by the 1st Defendant's representative that on or about 16th July, 2018, the 2nd Defendant applied for a mortgage facility from the 1st Defendant to the tune of Kshs 90,000,000 for purposes of paying off construction loans and taking over loan facilities from I&M Bank.

14. It is the 1st Defendant's case that the 1st Defendant conducted due diligence and issued the 2nd Defendant with a letter of offer dated 25th July 2018 subject to the agreed terms whose salient features included, inter alia, that the amount of the facility approved was Ksh.90,000,000 and that the facility would be secured by a first legal charge of Kes.90,000,000 over apartments numbers AI, A2, A3, AS, A6, A7, AS, A9, BI, B2, B4, BS, CI, C2, C3, C4, CS, C6, C7, CS and CI2 situate on LR No.4858/ II Ring Road Kileleshwa.

15. It was deponed that the facility was to be repaid in monthly installments of Kshs. 1,481,090 with interest of 3.5% per annum while interest on default would accrue at 10 % over and above the subsisting rate of interest payable by the borrower.

16. According to the 1st Defendant, the 2nd Defendant availed the title in respect of LR No.4858/11 (LR 91673) Ring Road Kileleshwa Nairobi and sub-leases in respect of twenty-one (21) apartments being the charged apartments and that on the strength of all the securitization documents, including the title and the sub-leases aforesaid, a legal charge dated 31st October, 2018 was registered as against the 21 apartments, including the suit properties herein on 1st November, 2018, in favour of the 1st Defendant to secure the principal sum of Kshs. 90,000,000.

17. It was deponed that the 2nd Defendant defaulted in servicing the loan facility as agreed in the letter of offer; that as at 9th March, 2021, the loan account was in arrears of Kshs 4,454,978.49 and the total outstanding debt was 90,679,085.49 and that on 28th April, 2021, the 1st Defendant notified the 2nd & 3rd Defendants of the continued state of default and issued them with a 90 day Notification of Sale advising them to regularize the account to avoid the 1st Defendants' exercise of its statutory right of sale.

18. According to the 1st Defendant, the 2nd Defendant vide its letter dated May 25, 2021, admitted to being in arrears and requested to be granted a six (6) months moratorium to recover rent arrears from its apartments and settle the outstanding arrears; that to date, the 2nd Defendant has neither cleared the outstanding arrears nor deposited any installments to reduce the outstanding debt and arrears and that

the 1st Defendant's interests can only be extinguished upon the 2nd Defendant fulfilling its obligations under the facility.

19. It was deponed by the 1st Defendant's Senior Recovery Manager, Credit Support Unit Director that at all times, the mortgage facility was issued subject to the condition that there were no overriding interests on the title in respect of the charged apartments; that a perusal of the search conducted against the mother title shows the specific apartments that had already been sold and that none of the 21 charged apartments, including the suit properties herein, were among them.

20. It was deponed by the 1st Defendant's Senior Recovery Manager, Credit Support Unit Director that the 1st Defendant being a stranger to the sale agreements between the Plaintiffs and the 2nd Defendant can neither be held liable nor can any orders sought be enforced against it.

21. It is the 1st Defendant's case that the 1st Defendant being the holder of the charge registered against the 21 leases would have first priority over the said apartments as long as the apartments remain charged; that the alleged transfer of the suit properties was neither effected nor were the leases registered in the names of the Plaintiffs and that it's only the 2nd Defendant who has the right to seek to injunct the 1st Defendant from exercising its statutory power of sale.

22. It was finally deponed by the 1st Defendant's Senior Recovery Manager, Credit Support Unit Director that the 1st Defendant continues to suffer colossal irreparable loss from the continued default by the 2nd Defendant whose account's current outstanding amount is Kshs 96,883,570 and that the court should curtail further prejudice upon the 1st Defendant by dismissing the application.

23. In response to the application, the 3rd Defendant, on his own behalf and on behalf of the 2nd Defendant, deponed that he is a Director of the 2nd Defendant; that the 2nd Defendant is a legal entity capable of suing and being sued in its name and that in the absence of a formal application to lift the 3rd Defendent's corporate veil, the 3rd Defendant has been wrongly enjoined in the suit.

24. According to the 3rd Defendant, the 1st Plaintiff is a stranger to the 2nd Defendant's company and has produced an un-executed sale agreement purportedly entered into between a Mr. Ndungu with the 1st Plaintiff's name irregularly inscribed over the same and that no documentary evidence has been produced for the payment of apartment A9.

25. It was deponed that the above notwithstanding, the 1st Plaintiff's director has been illegally occupying apartment A9 and is in arrears of rent; that whereas there exists a sale agreement with respect to the 2nd Plaintiff, the same is inadmissible as it has not been duly stamped in accordance with section 19(1) of the *Stamp Duty Act* and that the 2nd Plaintiff has not honoured its obligations of paying the full purchase price for apartment B1.

26. It was deponed by the 3rd Defendant that one David Gatende has been unlawfully occupying apartment B1 accumulating rent arrears of Kshs 15,000,000 and that one of the 2nd Plaintiffs' Directors who is a signatory to the sale agreement acted for the 1st Defendant's bank in the loan transaction.

27. It was deponed that despite the 3rd Plaintiff adducing a letter indicating that the 2nd Defendant acknowledged full payment of the purchase price, he is unable to trace the payments and no evidence of the same has been adduced; that the 4th Plaintiff has not adduced any evidence showing that it fully paid for the apartments and that the sale agreements were frustrated by the Plaintiffs who failed to pay the full purchase price

28. The 3rd Defendant deponed that the Plaintiffs have not acquired any proprietary rights over the suit properties; that the entire process of securing the loan was transparent and necessary for development

of the suit premises; that the 2nd Defendant began developing Ringsview apartments on or about July, 2011 and that in order to finance the project, it obtained a loan facility of Kshs 118,000,000/= from I&M Bank and secured it by a charge on L.R No 4858/11.

29. It is the 2nd and 3rd Defendants' case that the project was completed in June, 2014; that due to financial difficulties occasioned by fraudulent activities by some purchasers and contractors, the 2nd Defendant was unable to repay the loan to I&M Bank and sought for alternative financing and that on 6th November, 2018, they acquired a discharge of charge from I&M Bank after KCB Limited accepted to take over the loan facility.

30. It was deponed that the loan facility was secured by among others a first legal charge over L.R No 4858/11 and a charge over apartment numbersA1,A2,A3,A5,A6,A7,A8,A9,B1,B2,B4,B5,C1,C2,C3,C4,C5,C6,C7,C7 and C12; that the 2nd Defendant has been engaging with the 1st Defendant with respect to the loan and that successful purchasers have obtained their leases.

31. The 3rd Defendant stated that as the Plaintiffs had not completed the purchases, the 2nd Defendant had every right to charge the properties; that if the Plaintiffs allege default by the 2nd Defendant, they have a remedy under clause 10.2 and that the sale agreements contain arbitration clauses and this court lacks jurisdiction to entertain the dispute.

Submissions

32. The Plaintiffs' advocate submitted that despite the Plaintiffs having fully paid the purchase price, the 2nd Defendant registered the suit properties in its names and went ahead to charge the properties without the Plaintiffs' consent and that where a charge document is invalid, the chargor cannot exercise its powers of sale over the charge as affirmed by the case of *Albert Mario Cordeiro & anor vs Vishram Shamji* [2015] eKLR.

33. It was submitted that the sale of the suit properties will cause the Plaintiffs irreparable harm as they have occupied the suit properties as their homes and their interests therein are more than monetary.

34. Counsel urged the court to consider the Court of Appeal case of *Yellow Horse Inns Limited vs Nduachi Company Limited & 3 others* [2017] eKLR where the court found that the failure to issue an injunction would put the suit properties out of the Applicants' reach and the award of damages would not suffice as adequate remedy.

35. It was submitted that the balance of convenience lies in granting the orders sought because the suit is premised on a charge whose legality is under challenge. Reliance in this respect was placed on the case of *Charles Njagi Miriti vs Leonard Mutembei Girishon & 3 Others*[2021]eKLR where the court reiterated that injunctive orders are meant to preserve property.

36. It was further submitted that the Plaintiffs are entitled to the orders of discovery pursuant to Section 69 of the *Evidence Act* and Article 35 of *the Constitution* which provides for the right to access information. In this respect, counsel relied on the cases of *Oracle Productions Limited vs Decapture Limited & 3 others* [2014] eKLR and *ABN Amro Bank N. vs Kenya Pipeline Company Limited* [2014]eKLR.

37. The 1st Defendant's counsel submitted that the right to exercise the power to sell charged property arises the moment there is a debt which remains outstanding despite demand and that it is upon the party opposing it to prove that there is in fact no debt due.

38. It was submitted that the Plaintiffs have not established a prima facie case as defined by the court in *Mrao Ltd vs First American Bank of Kenya Ltd& 2 others* [2003] eKLR and that the 2nd Defendant

voluntarily applied for a mortgage facility from the 1st Defendant which facility was secured by a duly registered first legal charge over 21 apartments including the suit properties herein which were registered in the 2nd Defendants name.

39. Counsel for the 1st Defendant submitted that the 2nd Defendant has failed to settle the loan despite being issued with the necessary demands; that the remedies that are available to the 1st Defendant include selling the charged properties and that the Plaintiffs' allegations of ownership remain unregistered interests which cannot defeat the 1st Defendant's interest over the charged apartments as affirmed by the Court in *Evans Nyauncho Osinde & Another vs Bank of Africa (Kenya)Limited* [2016]eKLR.

40. Counsel submitted that in any event, a contract as a general rule affects only the parties to it; that the Plaintiffs being strangers to the charge transaction between the 1st and 2nd Defendants are incapable of seeking to injunct the 1st Defendant and that as held by the court in *Nairobi Mamba Village vs National Bank Of Kenya* [2002]1 E.A, the only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively is the chargee.

41. Counsel for the 1st Defendant submitted that the Plaintiffs not being the registered proprietors of the suit properties, the 1st Defendant was not obligated to serve them with any notices and that allegations that the realization process was marred by failure to issue them with notices is unmerited. Reliance in this regard was placed on the case of *Monica Wamguru Kamau & another vs lnnercity Properties Limited & 2 Others* [2020] eKLR.

42. The 2nd & 3rd Defendants counsel submitted that this court has no jurisdiction to determine the present application by virtue of the arbitral clause in the sale agreement between the Plaintiffs and the 2nd Defendant and that Section 10 of the *Arbitration Act* precludes courts from intervening in matters guided by the Act. Reliance in this regard was placed on the cases of *Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, *Ann Mumbi Hinga vs Victoria Njoki Gathara* [2009] eKLR and *Safaricom Limited vs Ocean View Beach Hotel Limited & 2 others* [2010] eKLR.

43. On whether the Plaintiffs have satisfied the threshold for the grant of a temporary injunction, it was submitted that no prima facie case has been established as the Plaintiffs have not proved any legal or equitable right to the suit property and that the allegations of fraud with respect to the procurement of the loan facility and securization of the suit properties has not been shown.

44. It was submitted that the 2nd Defendant has maintained full disclosure of indebtedness to the purchasers; that the loan was necessary to avoid the sale of the suit property by I & M Bank and that the leases have been transferred to the successful purchasers of the suit apartments.

45. In response to the Defendants' submissions, the Plaintiffs vide their submissions of March 29, 2022submitted that courts will not hesitate to lift the corporate veil in instances of fraudulent activities as expressed by the court in *Protus Opwora Wabwoto vs Ken Manda & 2 others* [2020] eKLR and that whereas stamping and payment of stamp duty for the sale agreements is a legal requirement, such non-compliance is not fatal to the enforcement of the sale agreements.

46. It was submitted that the Plaintiffs were never served with the relevant statutory notices at the time of the realization process which is a fundamental breach that cannot be remedied by damages and entitles them to injunctive orders. Reliance was placed on the case of *Elizabeth Wambui Njuguna vs Housing Finance Corporation of Kenya Ltd*[2006] eKLR.

47. The Plaintiffs' counsel submitted that the charge is in any event invalid for the reasons that it was registered illegally and without the Plaintiffs' consent thus contravening the provisions of section 78 of

the *Land Act* and that the 2nd Defendant failed to disclose to the 1st Defendant the Plaintiffs' interests in the suit properties.

48. It was submitted that the Plaintiffs having purchased the suit properties have a beneficial interest therein and are entitled to challenge the 1st Defendant's exercise of its statutory power of sale and that allowing the 1st Defendant to proceed with the sale will extinguish the subject matter of the suit.

Analysis & Determination

49. Having considered the Motion, the Affidavits and submissions by the parties, the issues that arise for determination are;

i. Whether the court has jurisdiction to entertain this application?

ii. Whether the 3rd Defendant is a proper party in the proceedings?

iii. Whether the Plaintiffs have met the threshold for the grant of a temporary injunction?

50. It is trite that jurisdiction is everything and a question on the court's jurisdiction being one that is dispositive in nature must be determined at the first instance. As expressed by Nyarangi JA in the Court of Appeal case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* (1989) KLR 1;

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

51. According to the 2nd Defendant, the Plaintiffs herein have relied on sale agreements in support of their claims, which agreements provide for reference of any dispute arising therefrom to arbitration.

52. In response, the Plaintiffs assert that an arbitration agreement can only bind parties to the agreement and that the present suit in as far as it involves third parties who are not privy to the agreement cannot be bound by the same.

53. The dispute herein is with respect to the grant of temporary injunctive orders which the Plaintiffs seek primarily as against the Defendants, and in particular the 1st Defendant, to stop it from exercising its statutory power of sale. The dispute is not strictly a dispute arising from the sale agreements between the Plaintiffs and the 2nd Defendant notwithstanding the fact that the sale agreements are critical in resolving the dispute.

54. That being so, it follows that the 1st Defendant not being a party to the aforesaid sale agreements cannot be bound by the arbitral clause therein. That is the position that the court took in the case of *Martin Njuguna Ngugi vs Ahmed Noor Sheikh and Another* [2018] eKLR where it held as follows:

> "I do not think that the legal framework in the *Arbitration Act*, and indeed our prevailing jurisprudence, contemplates a scenario where a non-party to an arbitration agreement is to be compelled to submit to arbitration as a party to the arbitral proceedings. An arbitration agreement binds parties to the agreement, not non-parties."

55. Further, Section 6 (1) of the *Arbitration Act*, 1995 provides as follows;

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when the party enters

appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds –

a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

b) that there is not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration".

56. In interpreting the above provisions, the courts have held that a party who wishes to take advantage of the arbitration clause in a contract should do so either at the time of entering appearance or at the earliest opportunity thereafter. As aptly stated by the Court of Appeal in Adrec Limited vs Nation Media Group Limited (supra).

> " Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration."

57. It has equally not escaped the attention of this court that the 2nd Defendant, while contesting this court's jurisdiction on account of the arbitral clause in the sale agreements seeks to impugn the validity of some of the sale agreements. The 2nd Defendant appears to be approbating and reprobating on the fact of reliance on the sale agreements which is unacceptable. In view of the foregoing, the court finds that it is duly vested with jurisdiction to determine the present application.

58. According to the 3rd Defendant, he has been wrongly instituted in these proceedings; that he has been sued in his personal capacity whereas at all material times he was acting in his capacity as the Director of the 2nd Defendant and that the 2nd Defendant is a legal entity capable of being sued in its own name. In response, the Plaintiffs contend that the fraudulent activities by the 3rd Defendant as a Director of the 2nd Defendant warrant the lifting of the corporate veil.

59. It is undisputed that the 3rd Defendant is a Director of the 2nd Defendant. Indeed, the 3rd Defendant has been described in the Plaint as "a Director of the 2nd Defendant..... who was at all material times in charge of running the affairs of the 2nd Defendant".

60. It is a well-known legal principle that a company is a distinct legal entity from its members. This principle, flowing from corporate personality was established in the well-known case of *Salomon vs Salomon* [1897] AC 78 where the House of Lords held that a company is in law a separate person from its members.

61. It is trite that a company as corporate person acts through its agent and the agent of a disclosed principle cannot be sued. This was affirmed by the Court of Appeal in *Anthony Francis Wareheim t/a Wareham & 2 Others vs Kenya Post Office Savings Bank*, NRB CA Civil Application Nos. Nairobi 5 & 48 of 2002, where the learned Judges held as follows:

> " It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Once it was clear that the 1st appellant was acting on behalf of the 2nd appellant, it could not be sued and the suit against him could only be dismissed."

62. The above legal position notwithstanding, the court is alive to the fact that there are certain circumstances where the veil of incorporation may be lifted and personal liability incurred by the agent.

As stated by the learned authors of *Halsbury's Laws of England*, Vol 7 (1) (4th Edition) at Para 90, the lifting of the corporate veil will be done where,

> "there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders."

63. Having perused the Plaint, the court notes that the Plaintiffs herein have pleaded and particularized allegations of fraud and misrepresentation as against the 3rd Defendant. As aforesaid, fraud is one of the instances that may allow the court to lift the corporate veil and attach personal liability on its Directors.

64. That being so, the allegations that no personal liability lies as against the 3rd Defendant whether on account of fraud or otherwise is a matter that can only be determined at trial. In the circumstances, the court is unable to find at this stage that the 3rd Defendant is improperly enjoined in these proceedings.

65. The court will at this juncture, briefly examine the legal principles governing the applications for temporary injunctions. As correctly submitted by the parties, the requisite essentials for an order of injunction to issue were set out in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358 thus:

> "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. The Plaintiffs in this case are expected to meet those three principles and surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court stated thus;

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-
>
> (a) Establish his case only at a prima facie level,
>
> (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86) 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."

67. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined prima facie thus;

> " So what is a prima facie case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter."

68. More recently, the Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others*(supra) while agreeing with the definition of a prima facie case in the Mrao Case (supra) went ahead to further expound as follows;

> " We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

69. The present dispute revolves around the 1st Defendant's right to exercise its statutory power of sale over the suit properties. It is undisputed that the 1st Defendant advanced to the 2nd Defendant a loan facility of Kshs 90,000,000, which facility was secured with among others a legal charge over 21 apartments including the suit properties herein situate on Land Reference Number 4858/11. Indeed, it is undisputed that the said loan has not been repaid by the 2nd Defendant.

70. The Plaintiffs contend that the charge over the suit properties is illegal; that the same was procured without the consent of the Plaintiffs who are the owners of the suit properties and that the 2nd Defendant as the beneficial owner of the suit properties had no right to charge the same.

71. The Plaintiffs have argued that the charge is in any event invalid by virtue of having been registered over specific apartments to the exclusion of the title to the land where the apartments are situated; that pursuant to the sale agreements between the Plaintiffs and the 2nd Defendant, the 2nd Defendant was to issue the Plaintiffs with sub-leases with respect to the property but instead went ahead to fraudulently transfer the same to itself and that consequently, the bank cannot obtain a good title to the property.

72. On their part, the 1st Defendant averred that it is a stranger to any dealings between the Plaintiffs and the 2nd Defendant and that it issued a loan facility of Kshs 90,000,000 to the 2nd Defendant which facility was secured by a charge over 21 apartments including the suit premises situate on the L.R 4858/11, which properties are registered in the names of the 2nd Defendant.

73. The 2nd & 3rd Defendants do not dispute the assertions by the 1st Defendant that the suit properties have been charged. They maintain that it was necessary for them to obtain the loan facility; that the Plaintiffs herein have no rights and/or interests in the suit properties having failed to pay the requisite purchase price and or rent and that they are not entitled to the orders of injunction.

74. In support of the claim of ownership of the suit properties, the Plaintiffs attached on their Affidavit the sale agreements and letters of offer between themselves and the 2nd Defendant. The Plaintiffs also annexed on the Affidavit the letters dated May 15, 2015 allegedly by the 2nd Defendant affirming that the 4th Plaintiff had fully paid for Apartment B2 and B4 and a letter dated 2nd December,2014 allegedly acknowledging receipt of full payment from the 3rd plaintiff for apartment C7.

75. The 2nd and 3rd Defendants have not annexed any document on their affidavits to show that they never authored the letters acknowledging receipt of the full purchase price from the Plaintiffs. Indeed, the 2nd and 3rd Defendants have not adduced evidence to show that they issued to the Plaintiffs a 21 days' notice pursuant to the terms of the sale agreement if at all they were in default in the payment of the purchase price as they claim.

76. Although the 2nd and 3rd Defendants have claimed that some of the Plaintiffs were renting the suit properties, and that they owe them rent, no evidence of tenancy agreements has been exhibited. Further, it is inconceivable that one can accumulate rent arrears to the tune of Kshs. 15,000,000 without the landlord demanding for the same or distraining for rent.

77. Whereas the 2nd Defendant disputes that the Plaintiffs have any interests in the suit properties because they have not fully paid for the apartments, it appears that the Plaintiffs reside on the suit properties, and were indeed in occupation of the suit properties as at the time the suit properties were charged to the 1st Defendant.

78. What is apparent is that as at the time the Plaintiffs purchased the apartments between the year 2013 and 2017, the land on which the apartments stand on was already charged to I & M, a fact that the Defendants were aware of. According to the Plaintiffs, the arrangement they had with the 2nd Defendant was that they will have partial discharges of the apartments registered once the full purchase price was paid.

79. The 1st Defendant took over the said loan portfolio after conducting a search which confirmed that the sub-leases were registered in the 2nd Defendant's name. On that basis, the 1st Defendant advanced to the 2nd Defendant the sum of Kshs 90,000,000. The 2nd Defendant has since defaulted in repaying the loan. However, what is apparent is that as at the time the 1st Defendant charged the various sub leases, the apartments had already been purchased and were being occupied by the Plaintiffs or their agents.

80. The question of priority of interest comes up where there are two or more competing interests over property. One of this interest may be an encumbrance, which is a limiting factor on the land. It is a charge on the property created in favour of a third party, in this case the 1st Defendant.

81. It is trite that the only two categories of interests that may be acquired over land are equitable and legal interests, the former proceeding from the latter. Equitable interests are usually the result of informal,

incomplete or imperfect acquisitions while the legal interests would necessarily have complied with all formalities.

82. There are two basic rules that have been developed for the resolution of these conflicts. The first is the order of creation rule while the second is the order of notice rule. The first rule ranks the interests in order of creation, thus the first in time takes priority. This is encapsulated in the maxim: Qui prior est tempore, potior est jure, meaning, he who is first is stronger in law.

83. The order of creation rule is however subject to the second rule, the order of notice rule. As such, whoever takes an interest in the property even after notice of an earlier interest than his would have his interest postponed as against that of the other interest. The other exception applicable to the order of creation rule includes fraud, estoppel and gross negligence.

84. The evidence before this court shows that the 2nd Defendant had the sub-leases in respect of the apartments that the Plaintiffs had bought between 2013 and 2017 registered in its favour on 6th November, 2018, the same day it charged the said sub-leases to the 1st Defendant. The registration of the sub-leases in favour of the 2nd Defendant was done by the 2nd Defendant without any recourse to the Plaintiffs who, prima facie, had a beneficial interest in the sub leases as purchasers.

85. The fact that the Plaintiffs appear to have purchased the suit properties prior to the apartments being charged to the 1st Defendant, and considering that the Plaintiffs have always been in occupation of the said apartments, it is the view of this court that the 1st Defendant should or ought to have taken notice of the Plaintiffs' interest in the charged apartments.

86. I say so because from the entries in the mother title, it is obvious that notwithstanding the mother title having been charged to I & M on 7th January, 2013, numerous partial discharges were registered before the 1st Defendant charged the apartments in question. The said partial discharges are a pointer that other people had beneficial interest in the property.

87. That being the case, the 1st Defendant was aware, or ought to have been aware that the 2nd and 3rd Defendants had sold the apartments to third parties notwithstanding that the sub-leases which were registered in 2018 were in the 2nd Defendants' name.

88. Indeed, if it turns out at trial that the 1st Defendant was aware or ought to have been aware of the Plaintiffs' interest in the charged sub-leases, or that it colluded with the 2nd and 3rd Defendants to have the sub-leases fraudulently charged, then the 1st Defendant's interest in the sub-leases will have to be postponed in favour of the Plaintiffs. Consequently, it is the finding of this court that the Plaintiffs have established a prima facie case to warrant an order of injunction to issue.

89. If the suit properties being apartments numbers A9, B1, B2, B4 and C7 are sold by the 1st Defendant, the substratum of the suit will not only have been taken away, but the Plaintiffs will incur irreparable damage by losing the homes they have occupied since 2013. The displacement of the Plaintiffs and their families from the said homes before the hearing of the suit will render them destitute and occasion them irreparable injury that cannot be compensated with costs.

90. The Plaintiffs have sought for an order stopping the 1st Defendant from charging any further interest on the loaned amount. This prayer is not available to the Plaintiffs because they were not parties to the loan facility. The issue of the chargeable interest can only be as between the 1st Defendant and the 2nd Defendant.

91. Turning to the prayer for discovery of the statutory notice of sale, a copy of the loan agreement between the 2nd Defendant and the 1st Defendant, and a copy of the letter of offer, the court finds that it is an

unnecessary prayer as the copies of the aforesaid documents, together with other attendant registration documents, have already been provided herein by the 1st Defendant.

92. In conclusion, it is the finding of the court that the Plaintiffs are entitled to temporary orders of injunction pending the hearing and determination of the suit. The Plaintiffs' application dated 30th July, 2021 is allowed as follows:

    a. Pending the hearing and determination of the suit, the 1st, 2nd and 3rd Defendants whether by themselves, their employees, assigns, and/or agents are restrained from selling, transferring, taking possession of or in any way dealing with the suit properties being Apartment Numbers A9, B1, B2, B4 & C7 at Rings view Estate erected on Land Reference Number 4858/11.

    b. The Defendants to pay the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF MAY, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Ms Owano for Kanjama for Plaintiffs

Ms Babu for 2nd Defendant

Ms Cheruiyot for 1st Defendant

Court Assistant – June Nafula