REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 507 OF 2012

ANNE NJERI MWANGI …… PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA …… DEFENDANT

R U L I N G

1. The Plaintiff's Notice of Motion dated 8 August 2012 is before this Court for determination. The same is brought under the provisions of **Order 40 Rule 1 (a)** and **Order 51 rule 1** of the *Civil Procedure Rules, 2010* as well as under **sections 1A, 1B and 3A** of the *Civil Procedure Act* and **sections 90, 96, 97 and 102** of the *Land Act, 2012*. The Application seeks a Temporary Injunction Order restraining the Defendant, its servants and agents from advertising for sale, selling, taking possession, alienating, disposing of, conducting and/or concluding any sale of L. R. No. 209/7755/19 (I. R. No. 35726) Nairobi (hereinafter "the suit property"), pending hearing and determination of this suit. The Grounds in support of the Application were more or less repeated *in toto* in the Supporting Affidavit thereto as to the extent they referred to matters of fact rather than law.
2. The Application is supported by the Affidavit of the Plaintiff sworn on 8th August 2012. The deponent detailed that she had entered into an agreement to purchase the suit property from Mr. and Mrs. Essajee (hereinafter "the Vendors") dated 8th April 2010 for a sum of Shs. 17,000,000/-. Thereafter, she secured a mortgage facility from the Defendant in the amount of Shs. 13,000,000/-. The deponent gave details of the salient features of the Defendant's Letter of Offer dated 19th August 2010. As the purchase of the suit property progressed, the deponent noted that the Defendant had caused its lawyers, Sichangi & Co, to issue an irrevocable Professional Undertaking dated 19th October 2010 which read in its second paragraph as follows:

> **"On the financiers instructions, please let us have the completion documents listed under clause 11 of the Agreement for Sale dated 8th April 2012 against our Irrevocable Professional Undertaking to pay to you, or as directed by you, the financed balance of the purchase price of Ksh 13 million within (14) fourteen days of successful registration of the Transfer in favour of the purchaser and the Charge in favour of the financier."**

Miss. Mwangi noted that the Vendors' advocates accepted that Professional Undertaking on 25th

November 2010. The Transfer in favour of the Plaintiff as well as the Charge in favour of the Defendant were then registered against the title of the suit property on 22nd December 2010.Thereafter the Plaintiff detailed that in response to a letter notifying the Defendant's advocates of the registration of the said Transfer and Charge as above, the said advocates wrote back on the 11th January 2012 confirming payment of the secured balance as per the Professional Undertaking. As it turned out, no such payment had been effected, as alleged. This greatly complicated matters with the vendors of the suit property.

3. As if by the way, the Plaintiff then gave details of the suit that she had instituted as against the vendors of the suit property being HCCC No. 879 of 2010 later being renumbered to *HCCC No. 49 of 2011*. That suit was brought, according to the Plaintiff, as the vendors of the suit property attempted to irregularly and illegally rescind the said Agreement for Sale dated 8th April 2010. The Plaintiff deponed to the fact that she had established on 2nd February 2011, at an interlocutory hearing of the above suit, that the Defendant had sent the balance of the purchase price to the vendors' advocates on 31st January 2011. Later the Plaintiff's advocate had received a copy of the Defendant's advocates' letter dated 15th February 2011 addressed to the said vendors' advocates enclosing a Banker's cheque for Shs. 13 million in discharge of the advocates' obligations as regards their Professional Undertaking. Thereafter, it transpired that a Consent Order was entered into between the Plaintiff and the vendors of the suit property on 13th May 2011 to the effect that the said sum of Shs. 13 million, being the balance of the purchase price of the suit property, was to be deposited in a Joint Interest earning account in the names of the advocates for the Plaintiff and the vendors respectively. Such was pending the hearing and determination of either the Appeal by the Plaintiff against the Ruling of the Court or the hearing of that suit, whichever was earlier. The Plaintiff deponed to the fact that the said suit was still continuing part heard before Court while in the meantime, "*the secured amount remain with the defendant bank which has been trading and profiteering of it at my detriment*".
4. Concluding her Supporting Affidavit, the Plaintiff stated that she had been served with a 45 day Notification of Sale by Dalali Traders Auctioneers dated 13th June 2012 on 14th June 2012. Upon enquiry at the Defendant bank the next day, the Plaintiff stated that she was served with a Statutory Notice dated 27th December 2011. She had been advised by her advocates on record that the two notices were illegally and/or irregularly served, sufficient to clog the Plaintiff's equity of redemption. She gave particulars of such illegality and clogging of her equity of redemption as follows:

> **"i. Failure to serve the statutory notice dated 27th December 2011.**
>
> **ii. Frustrating completion of the Agreement for sale dated 8th April 2010.**
>
> **iii. Breaching the Professional Undertaking in the letter dated 19th October 2010.**
>
> **iv. Misrepresenting facts in the letter of 11th January 2011 causing me to take over vacant possession of the suit property on the 26th January 2011 prior to completion of payment of the purchase price.**
>
> **v. Failing to effect payment of the secured balance to the vendor within the undertaken time.**
>
> **vi. Refusing to release the secured funds of Kshs. 13 million as per the consent order of 13th May 2011 or at all.**
>
> **vii. Demanding for repayment of a loan prior to disbursement or drawdown of the loan proceeds.**
>
> **viii. Failure to act in good faith.**

ix. The Statutory Notice and Notification of Sale demand payment of Kshs.16,082,975 whereas Kshs.13 million thereof is held themselves.

x. The Notification of Sale contravenes the Land Act 2012 and the Land Registration Act 2012 which came into force on 2nd May 2012.

xi. The coming into force of the Land Act on 2nd May 2012 entitles me to statutory protections, reliefs and procedural prerequisites which the defendant is statutory bound to comply with prior to exercising the statutory power of sale including issuing fresh compliant statutory notices.

xii. The provisions of the Land Law 2012 apply retrospectively by virtue of Section 78 which binds the defendants to comply with Section 90, 96, 97 and 102 of the Land Act 2012 were all contravened herein.

xiii. The defendant's actions contravene the provisions of Section 52 of the Indian Transfer of Property Act (now repealed) in so far as its applicable.

xiv. No leave of court has been sought to alienate the subject land in Civil Division HCCC No. 49/2011".

5. The Defendant's Replying Affidavit was sworn by its Mortgage Finance Officer **Pius Kiptoo** on 25th September 2012. He detailed that initially the Plaintiff had applied for financing for the purchase of the suit property from Diamond Trust Bank Ltd but the same "botched" and she sought facilities from the Defendant in the amount of Shs. 13 million. Thereafter, he stated that the Plaintiff, through her advocate's letter dated 1st October 2010 misled the vendors, as above, to believe that the Defendant would finance the balance of the purchase price yet the Defendant had only agreed to finance the amount of Shs. 13 million. The deponent admitted the giving of the professional undertaking by its advocates as referred to above. He maintained that such professional undertaking was a separate agreement between the said vendors' advocates and the Defendant's advocates, the Plaintiff not being privy or a party to the said undertaking. The deponent confirmed the successful registration of the Transfer of the suit property in favour of the Plaintiff as well as the Charge in favour of the Defendant on 22nd December 2010.
6. At paragraphs 16 and 17 of the Replying Affidavit, Mr. Kiptoo clarified that the Defendant's letter dated the 10th January 2011 had requested of its advocates to which account to RTGS the loan amount and on 1st February 2011 the Defendant had notified the Plaintiff that her loan account had been activated and that she was expected to service the same as from 30th (?) February 2011. Thereafter, the Defendant had issued a cheque for Shs. 13 million to its advocates on 11th February 2011. The deponent maintained that its advocates had tried to forward the said amounts to the vendors' advocates but had been informed that the Agreement for Sale had been rescinded and, as such, the advocates would not accept the said amount. The deponent maintained that that it was apparent, that despite the effort by the Defendant's advocates on their professional undertaking to the Vendors' advocates, the monies had been refused due to the alleged to rescission of the said Agreement for Sale. Mr. Kiptoo then maintained that Defendant by advancing the principal amount to the vendors' advocates had discharged its obligations that had been vested upon it as per the Loan Agreement and it was at that point that the Plaintiff's loan account was activated. He went on to say that as at 19th December 2011 the amount due on the account stood at Shs. 15,264,956.81. The Defendant had called upon the Plaintiff to regularise her Loan Account by sending her two demand letters dated 13th June 2011 and 20th December 2011. Thereafter, the Defendant caused to be served upon the Plaintiff, a statutory notice sending it by way of registered post and the deponent attached a copy of the Certificate of Posting stamped 4th January 2012. Interestingly enough, Mr. Kiptoo did not attach to his said Affidavit a copy of the statutory notice preferring instead to refer to the Supporting Affidavit of the Plaintiff exhibit "ANM 13". It is interesting to note that the copy of the alleged Statutory Notice as exhibited to the Supporting Affidavit of the Plaintiff has a receipt stamp from the Director of the Credit Management Division of the Defendant dated 3 January 2012, although the notice is issued by the

Defendant's Legal Department.

7. The Defendant's Replying Affidavit continued by detailing that it had instructed Dalali Traders, Auctioneers to sell the suit property and they issued a notification of sale dated 14th June 2012 to the Plaintiff. The deponent recorded that the Plaintiff visited the Defendant's offices on 15th June 2012 detailing that she would forward to the Defendant a proposal as to how she intended to repay the loan amount. It was noted that she had rented the suit property at the monthly rent of Shs. 150,000/-and that she intended to use the rent to pay off the debt. The Defendant noted that the Plaintiff thereafter failed to redeem the security and did not offer any proposal by way of repayment. It was for this reason that the Auctioneers advertised the sale of the suit property by public auction on 1st August 2012. Thereafter, the deponent summed up the Defendant's position thus:

> **"a) That the Plaintiff has admitted existence of the debt and even offered to pay the initial amount secured.**
>
> **b) That the purpose of the loan was to ensure that the suit property was transferred to the Plaintiff which was successfully done vide the Transfer registered in 22nd December 2010 and as such she benefited from the funds and from the Defendant's resources.**
>
> **c) That the Plaintiff by her conduct has not demonstrated by way of bank statements that she was willing to redeem the security.**
>
> **d) That the undertaking was a contract between the Defendant's conveyancing advocates and the Vendors' advocates and the Plaintiff is not privy to it.**
>
> **e) That indeed the professional undertaking was honoured by the Defendant.**
>
> **f) That the breach of the undertaking, if at all, does not preclude the Plaintiff from servicing her loan account.**
>
> **g) The application before this honourable court is unmeritorious as the applicant was given opportunities to redeem the property to no avail.**
>
> **h) That the plaintiff has also admitted service of the auctioneers notices.**
>
> **i) That in the premises, an injunction cannot issue where there is a debt due and a statutory notice has been served.**
>
> **j) That the applicant has not established a prima facie case with the probability of success as she has not established any damage she may suffer or that such damage cannot be compensated by damages.**
>
> **k) That the plaintiff has come to court seeking an equitable remedy whilst peddling falsehoods.**
>
> **l) That without prejudice to the above, should the amount not have been released to the Vendors' advocates, the cause of action herein lies with the vendors and not the Plaintiff and as such she has no locus standi on that basis".**

8. Mr. Kiptoo concluded the Replying Affidavit by referring to the various matters upon which he had been advised by the advocates on record for the Defendant. However, paragraph 36 of the Replying Affidavit is significant:

"36. THAT it is apparent that the Plaintiff did benefit from the Defendant's resources and the agreement of sale was completed and she is now the owner of the suit property and further she is earning rental income from the suit property, yet she has no intention to repay the loan amount."

9. Moving onto the parties' submissions, the Plaintiff in her submissions filed herein on the 16th April 2013 having set out the prayers of the Application before Court, detailed what she termed "Undisputed facts" as follows:

"i. The Defendant is aware as admitted in the replying affidavit that the plaintiff entered into an Agreement for sale dated 8th April 2010 with Muzaffer Musafee and Husseina Muzaffer for purchase.

ii. At execution of the above Agreement the financier was initially Diamond Trust Bank.

iii. The Plaintiff filed a loan Application form dated 24th July 2010 with the defendant offering the suit property as security for a loan of Kshs.13,000,000.

iv. The defendant issued a Letter of Offer which the plaintiff accepted by executing and returning to the defendant.

v. On or about 19th October 2010 the defendants conveyancing lawyers Messer Sichangi & Advocates issued an Irrevocable Professional Undertaking to the vendors to the suit property to release the completion documents to them on their undertaking to pay the vendors advocates or as directed by them Kshs. 13,000,000 within 14 days of successful registration of the transfer in favour of the plaintiff and the charge in favour of the defendant.

vi. The Vendors lawyers accepted the undertaking on 25th October 2010 and released the completion documents to the defendants conveyancing advocates.

vii. The Transfer and charge were successfully registered on 22nd Defember 2010.

viii. The defendant failed to honour its undertaking within the Agreed time or at all but misrepresented to the plaintiff in a letter dated 11th January 2011 that it had already paid the Kshs. 13 million.

ix. The loan proceeds have up to date never been released by the defendant.

x. By a Statutory Notice dated 27th December 2011 the defendant issued notice of intention to exercise its power of sale of the sum of Kshs. 15,264,956/81 was not paid within 3 months.

xi. On or about 13th June 2012 the defendants agent Dalali Traders issued a 45 day notification of sale in the event the sum of Kshs. 16,082,974 is not paid.

xii. The suit property was advertised for sale on the daily newspaper of 1st August 2012 prompting the institution of this suit.

xiii. The defendant is aware of HCCC No. 49/2011 as its advocate has testified as a witness".

Thereafter, the Plaintiff outlined what she thought to be the issues arising for determination by Court

again as follows:

> **"i. Has the defendant's right to exercise of its statutory power of sale arisen.**
>
> **ii. Is the suit property in this suit the subject matter of Milimani HCCC No. 49/2012.**
>
> **iii. Can this suit and or application for injunction in this suit which is subsequent to HCCC No. 49/2011 be determined prior to determination of the said suit.**
>
> **iv. Is the suit property protected by the LIS pendens doctrine in section 52 of the I.T.P.A.**
>
> **v. Has the Plaintiff satisfied the prerequisite for grant an interlocking injunction as laid out in the Giella vs Casman Brown case.**
>
> **vi. Was the Professional Undertaking herein binding and was it honoured".**

10. The Plaintiff thereafter spent some time submitting as regards the Professional Undertaking as issued to the advocates for the vendors by the advocates for the Defendant. She noted that the undertaking that had been given was to the extent that the Defendant's advocates would pay the balance of the purchase price for the suit property to the vendors' advocates within 14 days of the registration of the Transfer of the suit property in favour of the Plaintiff and the Charge in favour of the Defendant. The Plaintiff maintained that on 11th January 2011, the Defendant's advocates wrote to the Plaintiff's advocates confirming payment of the secured balance as per the undertaking. However, in reality, the balance of the secured amount was sent by the Defendant's advocates to the vendors' advocates on 31st January 2011. According to the Plaintiff the lateness in forwarding the monies soured the Agreement for Sale and relationship between the Plaintiff and the vendors. She then went on to note that the failure by the advocate to honour a professional undertaking makes him liable to pay for the breach of the undertaking. As a result of the default, such made the Defendant liable. The Plaintiff then referred to the case of the **Industrial and Commercial Development Corporation v Evans Ongicho, Advocate (2012) eKLR** in which my learned brother **Musinga J.** (as he then was) found that:

> **"If the undertaking had been honoured in time this suit would have been unnecessary but because of the defendant's failure to honour his undertaking the plaintiff was forced to file this suit."**

The Plaintiff would have this Court believe that she placed reliance upon the undertaking and that the Defendant could not deny the existence thereof. Unfortunately, that submission does not lie with the facts. Even though the money as covered by the Professional Undertaking was forwarded to the vendors' advocates late, it was long before that date of 31st January 2011, that the vendors had rescinded the said Agreement for Sale. As a result, this Court believes that the Plaintiff's submissions in relation to the Professional Undertaking are no more than a red herring to divert attention away from the fact that the Plaintiff has failed to honour agreed repayments of the Defendant's loan monies.

11. Continuing in her submissions, the Plaintiff then dwelt upon the point as to whether the doctrine of *lis pendens* applies in this case. She pointed out that **section 52** of the *Indian Transfer of Property Act* prohibited the dealing in property in dispute in civil proceedings. The Plaintiff referred to the authority of **Bernadette Muriu v National Social Security Fund Board of Trustees & 2 Ors (2012) eKLR** in which the Court quoted from **Mulla** on the **Transfer of Property Act 1882 9th Edition**. It was the Plaintiff's submission that this principle affects the suit property in light of the filing herein of *HCCC No. 49 of 2011* as between the Plaintiff and the vendors. She maintained that it was important to preserve the suit property so that this Court is not seen to act in vain, should the Plaintiff's Application be dismissed and the Defendant sells off the

suit property.

12. The Plaintiff then turned her attention as to whether her Application before Court merited an interlocutory injunction. It noted that the first condition for the issuance of such an injunction was that the Plaintiff had to establish a *prima facie* case. To this end, the Plaintiff referred to the Professional Undertaking given by the Defendant's advocates and which had been acted upon too late. It was her view that she had made out such *prima facie* case based on sound principles of law with a probability of success. She noted that the Statutory Notice of sale was issued prematurely under **section 90** of the *Lands Act 2012*. The Court found this submission interesting bearing in mind that the said Statutory Notice was dated 27th December 2011 long before the Lands Act 2012 came into force. The Plaintiff submitted that she stood to suffer irreparable damage if the injunction was not granted as the Defendant had not pleaded to offering any security should the Plaintiff win her case as against it. She then quoted from the cases of **Mosiomo v Housing Finance Company of Kenya (2007) eKLR** and **Kioko & Anor. v Kenya Commercial Bank Ltd (2012)eKLR** in stating that damages could not be a substitute for loss which was occasioned by a clear breach of the law. The Plaintiff's parting submission was that the Defendant's statutory power of sale had not arisen because, to date, the loan proceeds had not been released by the Defendant.
13. The Defendant's submissions opened by setting out the uncontroverted facts more or less along the same lines that had been outlined by the Plaintiff in her submissions. The issues for determination as far as the Defendant is concerned were set out as follows:

> **"(a) Is the Professional Undertaking a ground for injunction?**
>
> **(b) Whether the parties in HCCC No. 49/2011 will suffer any prejudice based on the outcome of the injunctive application.**
>
> **(c) When does the doctrine of Lis pendens apply.**
>
> **(d) Whether the Defendant has the statutory right to exercise its statutory power of sale.**
>
> **(e) Whether the Applicant has satisfied the conditions for grant of the interlocutory orders sought".**

Interestingly, the Defendant went straight to pose the question as to whether the Professional Undertaking issued by the Defendant's advocates was a ground for injunction. It drew the attention of the Court to the fact that the Professional Undertaking was between the advocates for the vendors and the advocates for the Defendant. The same was completely silent and no reference was made to the Plaintiff or her advocates. The Defendant submitted that its advocates in the transaction were thereby making a representation to the vendors' advocates and not to the Plaintiff's advocates. Consequently, the Plaintiff was neither privy nor party to the said Undertaking and could therefore make no claim based upon it. The Defendant then queried as to whether there had been any breach of the Professional Undertaking. It noted that the Defendant had issued a cheque for Shs. 13 million to its advocates on 11 February 2011 in performance of its obligation. Subsequently, its advocates tried to forward the said amount to the vendors' advocates. However, the vendors' advocates then informed the Defendant's advocates that they could not accept the said amount as the Agreement of Sale had been rescinded resulting in the aforementioned case *HCCC No. 879 of 2010* (now *HCCC No. 49 of 2011*) been filed in this court. The Defendant spent some time submitting as regards to just which party could enforce a professional undertaking. In this regard it referred to the case of **Havi & Co. Advocates v J. M. Njagi & Co Advocates (2012) eKLR**.

14. As regards the prejudice that the Plaintiff stands to suffer should the injunction not be granted, the Defendant pointed to the fact that there was no benefit to the Plaintiff accruing from the enforcement of the Professional Undertaking. The loan proceeds had been disbursed by the Defendant. However the loan had not been serviced by the Plaintiff and this assertion was based upon the following grounds:

"a) It is on the strength of the undertaking the Vendor's Advocates released completion documents to the Financier's advocates.

b) A transfer was registered, whose effect is that the Plaintiff is now the proprietary owner of the suit premises and a charge created in favor of the Defendant over the suit property.

c) That the Plaintiff loan account was activated in accordance to the terms and conditions and that she was expected to service the same as from 30th February 2011.

d) The Plaintiff has therefore benefited from the loan as the purpose of the loan was to ensure that the suit property was transferred to the Plaintiff which was successfully done vide the transfer registered in 22nd December 2010 and as such she benefited from the funds and from the Defendant's resources.

e) She is earning rental income Kshs.150,000 from the said property.

f) She has admitted the existence of the debt and the same has not been denied in the application or the Plaint.

The Defendant concluded this part of its submissions by stating that the Plaintiff could not come before this Court to maintain that, despite the fact that she is benefiting from the loan from the Defendant and out of it the suit property was transferred to her, she cannot choose not to service the loan due to an alleged breach of the Professional Undertaking. She was not a party to that Undertaking and could not seek an equitable remedy on that basis. To this end, the Defendant referred to the Maxim of: **"One who seeks equity must do equity"**. The Defendant referred to the well-known case of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Ors** (**1996) eKLR** in that regard.

15. The Defendant submitted that there was a proper security created in favour of the loan amount and that the Plaintiff had fallen into arrears resulting in an amount outstanding at Shs. 15,264,956.81. It then submitted that it was trite law that an injunction cannot issue where there is a default and the outstanding debt remains unsettled. The Defendant referred to the Court of Appeal's decision in **Kunguru v Kenya Commercial Bank Ltd Civil Appl. No. 101 of 2001** were the Court had found that any dispute as regards the amount due is no ground to stop an auction sale. Further, the Defendant referred the Court to the case of **Pelican Investment Ltd v National Bank of Kenya Ltd HCCC No. 570 of 1998** (unreported). Unfortunately for the Defendant, it failed to attach a copy of this authority to its submissions and as a result, this Court can take no cognizance of the same. However, the Defendant went on to submit that the loan had been admitted and, in fact, the Plaintiff had commenced making repayments with regard thereto. It also maintained that the Plaintiff had defaulted in the payment of the loan amount and the effect of such default, being the remedy provided at law, was for the Defendant to exercise of its statutory power of sale. To this end, the Defendant referred to the case of **National Bank of Kenya v Riako (2012) eKLR** as well as **section 69, Transfer of Property Act** in that parties are bound by the terms of the contracts that they enter into. As a result, the Plaintiff was entitled to exercise her right to redemption but not in this case where the Plaintiff had failed to pay the outstanding loan amount to redeem the suit property. The Defendant referred to the case of **Giro Commercial Bank Ltd v Mutesi Civil Appeal No. 342 of 2000 (unreported)** in which the Court of Appeal had stated:

> **"It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute, or that the mortgagor has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. See Halsbury's Laws of England, Volume 32, paragraph 725. In view of the admitted facts, and in view of the fact that the debt was admitted as due and further that the loan was not being serviced, the**

> **superior court should not have granted the injunction. The first principle as laid down in *Giella v. Cassman Brown* guidance was not satisfied, that is to say, the respondent had not made out a prima facie case with a probability of success."**

16. The Defendant's submissions as regards the doctrine of *lis pendens* were brief. It maintained that the doctrine did not apply as it was not provided for under the Land Act. The Defendant did not specify as to which Land Act did not provide for the same. If as may be presumed, the Land Act referred to was the 2012 Act, then as the Defendant says, a court can by its own order dispose of such an issue. Similarly, with regard to the injunctive application in *HCCC No. 49 of 2011*, the Defendant remarked that the causes of action are different, the parties are different and the prayers sought are different. For that reason, the suits had not been consolidated.
17. As regards the Plaintiff having a *prima facie* case, the Defendant referred the Court to the well-known authority of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Ors (2003) KLR 125**. **Bosire JA** had observed in that Appeal as follows:

> **"But as I earlier endeavoured to show, and I cited ample authority for it, a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."**

As regards irreparable injury, the Defendant argued that the Plaintiff had not been able to demonstrate that she could not have been compensated for, in damages. The Defendant further submitted that the question of the Balance of Convenience did not apply as firstly, the Plaintiff had not established a *prima facie* case and secondly, she had not shown that she could not be compensated for any losses, in damages.

18. Turning to the issues as detailed by the Plaintiff for determination by this Court, I will endeavour to answer the same as follows:

i. I consider that the Defendant's right to exercise its statutory power of sale had arisen. Although the Defendant maintains that this suit has little or nothing to do with HCCC No. 49 of 2012, that is not quite the case. The common factor is the suit property. What the Defendants (and the vendors) in HCCC No. 49 of 2012 are saying is that the Agreement for Sale dated 8 April 2010 as between them and the Plaintiff (in both suits), was rescinded. The Defendant herein agreed to provide financing to the Plaintiff related to that Agreement for Sale. What the record in HCCC No. 49 of 2012 shows is that there was a consent Order entered into between the parties in that suit being the Plaintiff herein and the vendors to the extent that pending the determination of the suit, the whole of the purchase price as agreed under the said Agreement for Sale was to be placed in an interest earning account in the joint names of the advocates for the Plaintiff and the advocates for the vendors. Such purchase price included the sum of Shs. 13 million as provided by way of a loan to the Plaintiff from the Defendant herein. As a consequence, the Defendant herein no longer has those monies, the evidence shows that the loan has not been repaid. As a result, I find that the Defendant's statutory power of sale has arisen.

ii. As above, I confirm that the suit property is the same in this case as it is in HCCC No. 49 of 2012.

iii. In response as to whether this suit and/or the application for injunction herein can be determined prior to HCCC No. 49 of 2012, I find that the position of both the Plaintiff and the Defendant in this suit is dependent upon the outcome of the other suit.

iv. In my opinion, the suit property is protected by the *lis pendens* doctrine, upon which I shall discuss further as below.

v. I am not satisfied that the Plaintiff herein is entitled to the grant of an interlocutory injunction along the lines of the principles set out in the **Giella v Cassman Brown** case.

vi. I am satisfied that the Professional Undertaking given by the advocates for the Defendant herein to the vendors' advocates was binding but I find that the Plaintiff herein cannot rely upon the same. In my opinion, the Plaintiff was not a party to the same and thus had no right to enforce it. Further, I do not accept the Plaintiff's contention that it suffered immensely as a result of the undertaking amount not been paid within 14 days of the registration of the Transfer of the suit property to the Plaintiff and the Charge thereon to the Defendant. However, I do find that the undertaking amount of Shs. 13 million was eventually offered for payment to the vendors, whose advocates refused to accept the same. However, those same advocates eventually agreed that the said sum of Shs. 13 million should be accepted, more or less as a payment into court, in the suit HCCC No. 49 of 2011. I find that the sum being part of the monies deposited in the said joint interest bearing account in the names of the advocates for the Plaintiff and the advocates for the vendors, amounted to a disbursement of the loan proceeds. As a consequence, I find that the said undertaking was (eventually) honoured.

19. As a result and at the risk of repeating myself, I find it necessary to also answer the issues raised by the Defendant as referred to above as follows:

a. I do not find that the said Professional Undertaking is a ground for injunction.

b. I do not find that the parties in HCCC No. 49 of 2011 will suffer any prejudice as a result of the outcome of the injunctive application in this suit.

c. I believe and hold that the doctrine of *lis pendens* does apply in these circumstances.

d. Having found that the loan proceeds have been disbursed by the Defendant, I do find that its right to exercise its statutory power of sale has arisen. However, as a result of my finding that the doctrine of the *lis pendens* applies to this suit, the Defendant's statutory power of sale has necessarily to be suspended, pending the determination of HCCC No. 49 of 2011.

e. With relevance to (a) above, I am not satisfied that the Applicant herein has satisfied the conditions necessary for the grant of an interlocutory Orders. I find this particularly with regard to the authorities quoted by the Defendant being **Giro Commercial Bank Ltd v Mutesi** (supra) and **Ichatha v Housing Finance Company of Kenya Ltd Civil Appl. No. 108 of 2005** as quoted by my learned brother **Ochieng J.** in **Mugambi v Housing Finance Company Ltd (2006) eKLR** as follows:

> **"A plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayments to the Defendant/Respondent a debt which he expressly undertook to pay."**

20. This Court has been impressed by the thorough review of the position in relation to the doctrine of *lis pendens* as contained in the Ruling of **Nambuye J** in the case of **Bernadette Muriu v National Social Security Fund Board of Trustees & 2 Ors** (supra). The learned Judge detailed as follows:

"As for the doctrine of "Lis pendens", this is enshrined in section 52 of the ITPA (Indian Transfer of Property Act). It provides:

"During the active prosecution in any court having authority in British India, or established beyond the limits of British India by the governor-general in council of a contentional suit or proceedings in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the right of any other party thereto under any decree or order which may be made therein

except under the authority of the court and in such terms as it may impose …..”

This provision has been construed and crystallized by case law and legal texts. See Mulla on the Transfer of Property Act 1882 ninth Edition Lexis Nexus Butter-worth at page 366 pr.2, observations on this doctrine runs thus:

“Pendency of a suit or proceedings shall commence from the date of the presentation of the plaint or the institution of the proceedings in a court of competent jurisdiction and to continue until the suit or proceedings has been disposed of by a final decree or order and complete satisfactory or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation preferred for the execution thereof by any law for the time being in force”.

At page 369 pr.3. of the same text of Mulla it is stated:

“It is intended to strike at attempts by parties to a litigation and prevent them from circumventing the jurisdiction of the court in which the dispute on rights or interests in immovable property is pending. To be prevented are private dealings that may remove the subject matter of litigation from the ambit of the power of the court and prevent the court from deciding a pending dispute or to frustrate its decree.

On case law, there is the case of METHI AND SWANI FARMERS CO. OP SOCIETY LTD VERSUS THE CO-OP BANK OF KENYA LTD & MAKINDI LTD NAIROBI HCCC 2603/95 wherein S.E. Bosire J as he then was now JA held inter alia that:

“Section 52 ITPA prohibits dealing in property in dispute in civil proceedings ….”

The case of MAWJI VERSUS US INTERNAITONAL UNIVERSITY AND ANOTHER (1976) KLT 185 wherein it was held inter alia that:

“The court has power to prevent a breach of the provision of section 52 of the Transfer of Property Act in proceedings before it in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in pending the final determination of the proceedings except under the authority of the court and upon such terms as it may impose”.

There is the case of FREDRICK JOSES KINYUA AND PETER KIPLANGAT KOECH VERSUS G. N. BAIRD NAIROBI HCCC NO. 4819 OF 1989 and Consolidated with Nairobi HCCC NO 6587 OF 1991 GEORGE NEIL BAIRD AND WANDIE BAIRD VERSUS FREDRICK JOSES KINYUA AND PERTER KIPLANGAT KOECH decided by g. S. Pall, on 10/12/1993. In this case the learned judge as he then was drew inspiration from the case of BELLAMY VERSUS SABINE IDEJ 566 and then ruled that:

“The doctrine of Lis pendens intends to prevent not only the defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suits so as to defeat the rights of the other party …..

The effect of the maxim is not to annul the conveyance but only to render it subsequent to the rights of the parties subject to litigation”.

At page 15 line 8 from the top the learned Judge as he then was went on:

“The doctrine of lis Pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on

expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interest of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other ….".

At page 16 line 14 from the bottom the learned judge quoted with approval the decision in the case of MAWJI VERSUS INTERNATIONAL UNIVERSITY (SUPRA) where it had been observed inter alia that:

"Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit".

This court has given due consideration to the afore assessed case law and in its opinion since the case law emanates from decisions of court of concurrent jurisdiction, they are not binding on this court. This Court is entitled to revisit the relevant sections, construe it on its own and then arrive at its own conclusion on the matter. The court has done so and in its opinion the afore assessed decisions made a correct construction of the said doctrine or maxim. The principles extracted there from by this court are as follows:

i. **The applicability of the doctrine or maxim of Lis Pendens starts right from the time the proceedings are initiated and remains applicable until the initiated proceedings are finally determined and decree issued and executed.**

ii. **It operates to prevent the initiated proceedings from being rendered null and void by protecting and preventing the subject of the proceedings from becoming extinct.**

iii. **It binds not only parties to the litigation but 3rd parties who may acquire an interest in the subject matter of the proceedings during the pendence of the proceedings irrespective of whether they had notice of litigation or not.**

These extracted principles have been applied to the rival arguments herein and the court proceeds to make the following findings on the reliefs sought".

21. The Plaintiff herein is shielded by the *lis pendens* doctrine in view of the fact that the suit property is the subject of ongoing litigation in the *HCCC No. 49 of 2011*. Indeed, the Defendant herein is bound by the said doctrine irrespective of whether it had notice of the litigation or not. The Defendant herein will derive title from the Transfer of the suit property to the Plaintiff and the subsequent Charge to the Defendant. If that Transfer is upset in *HCCC No. 49 of 2011*, then the Charge is also set aside and the Defendant's statutory power of sale cannot be said to have arisen. However and obviously, if the said Transfer and Charge are not set aside, then the Defendant's statutory power of sale will accrue. In any event, that position will need to be further explored once the suit *HCCC No. 49 of 2011* is determined.
22. As a result, the Plaintiff's Notice of Motion dated 8th August 2012 is allowed in part to the extent that prayer 3 thereof is granted, not pending the hearing and determination of this suit, but pending the hearing and determination of *HCCC No. 49 of 2011* as above. In all the circumstances, there shall be no order as to costs.

DATED and delivered at Nairobi this 23rd day of July, 2013.

J. B. HAVELOCK

JUDGE