



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 44 OF 2013

KWANZA ESTATES LIMITEDPLAINTIFF/APPLICANT

VERSUS

DUBAI BANK KENYA LIMITEDDEFENDANT/RESPONDENT

RULING

The application by way of a Notice of Motion dated the 25th day of April, 2013 is expressed to be brought under order 40 rule 1 and order 51 rule 1, order 20 rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A and Section 63(c) and (e) of the Civil Procedure Act chapter 21 of the Laws of Kenya, Section 78, 103 (3) and (4), 104 and 106 of the Land Act No. 6 of 2012 and all other enabling provisions of the law.

It seeks the following orders;

1. Spent.
2. That pending the hearing and determination of this application interpartes, a temporary injunction be issued restraining the Defendant/Respondent, its servants employees and or agents from advertising for sale selling, entering into, accessing, alienating, transferring, interfering with and or in any manner whatsoever altering or dealing with the Applicants properties known as Title Nos. CR Nos. 11589, 11590, 11732, 11609, 11610, 12531, 12668, 11739, 11740, 11741 and 13086 (also known as portions `Nos. 28, 32, 33, 34, 36, 49, 52, 53, 54, 55 and 64) Watamu Kilifi (County) District.
3. That pending the hearing and determination of the application interpartes a temporary injunction be issued restraining the Respondents, its servants, employees and or agents from taking any action whatsoever, and exercising and or invoking of its rights whether accrued or otherwise under the charge dated 11th April, 2013 and the Debenture dated 13th April, 2013 issued by the Applicant in favour of the Respondent.
4. That pending the hearing and determination of the suit a permanent injunction be issued restraining the Respondents, its servants and or agents from advertising for sale, selling, entering into, accessing alienating, transferring, interfering with and or in any manner whatsoever, altering or dealing with the applicants properties known as Title Nos. CR. No. 11589, 11590, 11732, 11610, 12531, 12668, 11739, 11740, 11741 and 13086 (also known as portions Nos. 28, 32, 33, 34, 36, 49, 52, 53, 54, 55 and 64) Watamu, Kilifi District.

5. That pending the hearing and determination of this suit a permanent and or mandatory injunction be issued restraining the Respondent, its servants, employees and or agents from taking any action whatsoever and excersing and invoking any of its rights whether accrued or otherwise under the charge dated 11th April, 2013 and debenture dated 13th April, 2013.
6. That a mandatory injunction be issued compelling the Respondent to release to the applicant a sum of Ksh. 167,000,000/= together with interest thereon in total Ksh. 197,801,205.48 as at 31st March, 2013 being the applicants call deposit owed to the applicant by the Respondent and in the alternative have the money deposited in Court or in a joint interest earning account of the parties herein or their duly appointed agents.
7. That a mandatory injunction be issued compelling the Respondent to furnish and provide the applicant with a complete proper and accurate statement of account in respect of account No. 81147035, MI207281002 and MI 206881003 all in the name of the Applicant.
8. That the applicant be granted a period of eight months or any such reasonable period that the Court may deem just to grant within which to settle any outstanding amount if at all on the loan accounts.

The grounds for this application are found in the body of the application itself and in the supporting affidavit of Geoffrey Makana Asanyo a Director of the Applicant.

They are reproduced as below;

1. That the applicant is the duly registered owner of all the parcels of land known as title Nos. 11589, 11590, 11732, 11609, 11610, 12531, 12668, 11739, 11740, 11741 and 13086 (also known as portions Nos. 29, 32, 33, 34,. 36, 49, 52, 53, 54, 55 and 64) Watamu Kilifi which properties were charged to the Defendant to secure loan and overdraft facilities advanced by the Respondent to the applicant.
2. By a Debenture dated 13th April, 2013 the Respondent agreed to grant to the applicant an overdraft facility and or banking facilities in the aggregate sum not exceeding Ksh. 160 million upon having repayment thereof secured on the terms of and conditions set out in the said debenture.
3. That the granting of the facility secured by the above debenture was conditional upon the applicant creating and delivering to the bank a first legal charge for Ksh. 160,000,000/= or the equivalent thereof in any other currencies exclusive of interest and other charges over the applicants properties above mentioned.
4. That before the above noted financing was searched and the securities perfected the chairman and director of the Respondent, one Hassan Zubeidi entered into a memorandum of agreement with the Managing Director of the applicant one Geoffrey M. Asanyo for purposes of procuring financing arrangements for a project known as Talent Youth Academy project between the Government of Kenya and Point Streak Technologies of Canada which financing was to be procured on or before 19th March, 2012.
5. That under the said memorandum of agreement the said Hassan Zubeidi received a sum of US dollars 2,500,000 from the applicant's Managing Director which money was to be appropriated as commission and all negotiation fees in the event that the financing was procured.
6. That the said Hassan Zubeidi failed to procure the financing as agreed the applicants managing Director gave instructions that the said sum of US dollars 2,500,000/= at the exchange rate of Ksh. 80/= be deposited into the applicants account No. 81147035 held with the Respondents Bank and the said amount in the sum of Ksh. 200 million was to be paid thereafter to the National Bank of Kenya through their Advocates M/s Rachuonyo & Rachuonyo Advocates to meet some of the Applicants financial obligations at the said national bank of Kenya.
7. That the said amount was remitted to the National Bank of Kenya but the respondent instead of crediting the Applicants account and thereafter debiting the same, opted to only debit the applicants account with the sum of Ksh. 200 million thereby creating a huge overdraft in the account leading to enormous charges on interest and penalties which could not have happened if the Respondent had credited the account as instructed
8. That the said transaction totally distorted the correct financial position of the account which should stand at a sum of Ksh. 3,917,489.19 to the sum claimed by the Respondent of Ksh.

200,185,051.98.

9. That on or about the 18th day of March, 2013 the Respondent through its agents known as Stima Auctioneers issued the Applicant with a Notice of redemption dated 18th March, 2013 notifying the Applicants of the Respondents intention to sell the Applicants parcels of land known as Title Nos. CR 11589, 11590, 11732, 11609, 11610, 12531, 12668, 11739, 11740, 11741 and 13086 (also known as portions Nos. 28, 32, 33, 34, 36, 49, 52, 53, 54, 55 and 64) Watamu, Kilifi and thereby gave notice of 45 days within which to pay the sum of Ksh. 200,185,051.

The said notice of redemption is said to be illegal for the following reasons;

(a) That the Respondent has never and has actually declined to furnish the Applicant with a proper statement of account for the subject loan account despite several demands and reminders when indeed the only sum that may be due and owing is Ksh. 3,917,489.

(b) That the Respondent has not served the applicant with a reasonable notification of sale and or statutory notice as required by law and particularly section 90 of the Land Act No. 6 of 2012.

(c) That the Respondents statutory power of sale over the suit properties has not accrued since the applicant has not been served with the requisite Statutory Notice and is therefore effectively not indebted to the Respondent as purported.

(d) That the Respondent is holding the Applicants money in the sum of Ksh. 167,000,000/= on call deposit which amount was deposited on 6th and 8th March, 2012 and continues to accrue interest at the rate of 18% and which stood at Ksh. 197,801, 205 as at 31st March, 2013.

(e) That the Redemption notice issued by the Respondent is irregular and invalid and void ab initio.

(f) That the Respondent acting unilaterally, fundamentally altered the original contract as set out in the letter of offer particularly on the debiting of the said sum of Ksh. 200 million, rate of interest and penalties applied on the subject account and now demands a sum of Ksh. 200,185,051 when the correct amount that may be due and owing is Ksh. 3,917,489.19

10. That on the 16th day and 8th March, 2012, the Applicant placed a total sum of Ksh. 167,000,000/= on call deposits with the Respondent which call deposit was duly acknowledged by the Respondent by its letter dated 7th March, 2012 and thereby issued the Applicant with receipts CDR/FDR No. 002201 dated 6th March, 2012 and CDR/FDR No. 002203 dated 8th March, 2012. The said sum together with the accrued interest thereon has never been released to the Applicant despite several demands.

11. That at all material times, section 44 of the Banking Act prohibited the increase of interest by the Respondent of its rate of banking except with the approval of the Minister for Finance but in flagrant breach of the said Act the Respondent purported to charge interest at 40% without the permission of the Minister for Finance.

12. That in view of the express provisions of the law., the contractual stipulation that interest was variable at the instance of the respondent was null and void. That the unilateral decisions to charge different rates are contrary to contract and the demand for Ksh. 200,185,051 is not due and therefore illegal and the Respondents statutory power of sale cannot be deemed to have accrued.

13. That the Respondents intention of selling the suit properties by public auction is accentuated and or tainted with malice, fraud and bad faith on the part of the Respondent and capricious for reason that;

(a) The first ten properties in which the Hotel lies together with improvements thereon were valued in June, 2010 by Tyson Ltd. and the open market value was placed at Ksh. 540 million and forced sale value of Ksh. 420,000,000/=.

(b) That the second property being title No. CR 13086 (also known as Kilulu Island portion No. 64 Watamu) was valued by the same valuers at Ksh. 350 million in June, 2010 and forced sale value placed

at Ksh. 280,000,000/=.

(c) That the current Valuation Report done by Defendant's agent M/s Hectares & Associates on 8th February, 2013 suggests that the value of first ten properties is Ksh. 310,000,000/= whereas the forced value is Ksh. 220,000,000/=.

(d) That a similar valuation report of the same date by the Defendants said agents gives the value of Title No. CR No. 13086 (also known as Kilulu Island portion No. 64 Watamu) as Ksh. 364,000,000/= and the forced sale value as Ksh. 237,000,000/=.

(e) that there is gross undervaluation.

(f) That even if the Respondent's current valuation report were to be of any substantial reliance with the said gross undervalue of the two sets of properties, then only one property according to those reports is capable of raising a sum of Ksh. 200,185,000 on forced sale without necessarily selling the two sets of properties. However the correct amount due and owing as at 31st March, 2013 is only Ksh. 3,917,489.

(G) That the Respondents Notice for the intended sale of the suit properties aforesaid by public auction is therefore aimed at unjustly enriching the Respondent to the detriment of the applicant and unfairly capriciously and maliciously extinguish the applicants equity of redemption, which is immoral, unjust and contrary to the law.

14. That the suit properties are unique in character and in peculiar location, duly developed and currently valued at Ksh. 890,000,000/= and of great sentimental and commercial value to the applicant and it is impossible to replace same in the event of sale and would not be compensated by way of damages.

This application is strenuously opposed by the Defendant. Its Chief Finance Officer Nicodemus Kikolya in his replying affidavit depones that on or about the 27th day of February, 2012 the plaintiff applied for and opened three accounts with the Defendant at the Defendants Kenyatta Avenue Branch being current account No. 81147035 (Ksh), 81147043 (USD), and 81147051 (STG).

6. By a letter dated 5th March, 2012 addressed to the Defendant, the plaintiff applied for a bridging loan facility of Ksh. 143,000,000/= to enable it purchase part of the purchase price of Watamu Beach Hotel and Kilulu Island. The plaintiff in support of its application for financing annexed to its application an agreement for sale dated 5th July, 2012 between National Bank of Kenya Limited and itself. The plaintiff further advised the Defendant that it had paid a deposit of Ksh. 33 million to the lender and the purchase price was Ksh. 330 million and that it had given instructions to Housing Finance Company of Kenya to transfer Ksh. 167,000,000/= to its account with the Defendant to cover the requisite balance of the purchase price.
7. That on the 6th and 8th of March, 2012 the Defendant received the sum of Ksh. 165,000,00/= and Ksh. 1,500,000/= respectively from HFCK by way of RTGS from the plaintiff. The aforesaid funds were duly credited to the plaintiffs current account No. 81147035 held at the Defendants Kenyatta Avenue Branch. Further on 8th March, 2012 the Defendant on instructions of the plaintiff placed the aforesaid sums of Ksh. 165,500,000/= and Ksh. 1,500,000/= in a call deposit bearing interest at the rate of 18% per annum. The Defendant duly issued the plaintiff with cash Deposit receipts CDR Nos. 002201 and 002203 respectively as evidence of receipt.
8. That by a letter dated 13th March, 2012 addressed to M/s Rachuonyo & Rachuonyo Advocates and copied to the plaintiffs Advocates M/s Wagara Koyyoko & Co. Advocates the Defendant advised M/s Rachuonyo & Rachuonyo Advocates that it had received the sum of Ksh. 167 million from HFCK and that it was ready and willing to grant a facility of Ksh. 130 million to the plaintiff to finance the purchase price of the suit properties.
9. That by a letter dated 19th March, 2012 M/s Wajara Koyyoko & Co. Advocates confirmed that the plaintiff had remitted the sum of Ksh. 167 million to the Defendant and noted that the Defendant had agreed to grant the plaintiff a bridging facility of Ksh. 130,000,000/= to enable it to finance the center balance of the purchase price of Ksh. 297,000,000/=. The Defendant was

- instructed to pay the entire balance of the purchase price in the sum of Ksh. 297 million to M/s Rachuonyo & Rachuonyo Advocates.
10. That on 21st March, 2013 the Defendant on the instructions of the plaintiff transferred the sum of Ksh. 200 million to M/s Rachuonyo & Rachuonyo Advocates by debiting the plaintiff's current account No. 81147035. The balance of Ksh. 97 million would be paid subject to completion of the contract documentation.
 11. That on 23rd March, 2012 the Defendant duly paid interest of Ksh. 9,405.73 and Ksh. 1,176,135.24 on the plaintiff's call deposits under CDR Nos. 002201 and 002203 by crediting the plaintiff's current account No. 81147035, the call deposit of Ksh. 167 million and Ksh. 1,500,000/= and duly cancelled the CDR No. 002201 and CDR No. 002203 issued to the plaintiff.
 12. That by a letter dated 3rd April, 2012 the plaintiff applied for an enhancement of the bridging finance facility for purchase of the suit properties from Ksh. 143,000,000/= to Ksh. 160,000,000/=.
 13. That by a sanction letter dated 4th April, 2012 the Defendant agreed to advance a maximum facility for Ksh. 160,000,000/= on terms and conditions.
 14. That after the disbursements of the facility, the plaintiff failed or neglected to operate the facility within the sanction limit of Ksh. 160 million forcing the Defendant to issue demands.
 15. That the plaintiff failed to regularize its account as advised and by a letter dated 26th September, 2012 the Defendant duly cancelled the facility under the sanction letter dated 4th April, 2012 and made a formal demand for payment of the outstanding overdrafts of Ksh. 171, 892,042 as at 26th September, 2012 and further gave the plaintiff 10 days to pay the said sum.

Counsel for the plaintiff in his submissions has cited the authority of **Giella Vs Casman Brown Ltd. (1973) E.A** where conditions for interlocutory prohibitory injunction were well settled.

- I. First the applicant must show a prima facie case with a probability of success.
- II. An interlocutory Injunction will not be granted normally unless the applicant might otherwise suffer irreparable injury which would not be compensated by way of damages.
- III. If the Court is in doubt, it will decide the application on the balance of convenience.

On interlocutory mandatory injunction counsel has cited the Court of appeal decision in **Kenya Breweries Ltd. & Anor. Vs Washington O. Okeyo Civil Appeal No. 332 of 2000**. Where it cited with approval the English decision of **Locabail International Finance Ltd. Vs Agroexport & Others 1986/All E.R 901**.

Where it was held that;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than is required for a prohibitory injunction”.

On the issue as to whether prima facie case with probability of success has been made out by the plaintiff Counsel submits that after the sanction letter dated 4th April, 2012 from the Defendant to the plaintiff whereby the Defendant offered to provide credit facilities to the plaintiff in the sum of Ksh. 160 million. It was a requirement that the plaintiff provides various securities in the form of parcels of land which he did. But before the perfection of the said securities for the financing, the chairman and Director of the Respondent one Hassan Zubeidi, entered into a memorandum of agreement dated 5th March, 2012 with the Managing Director of the plaintiff one Geoffrey Asanyo for purposes of procuring financing arrangements for a project known as talent Youth Academy project between the Government of Kenya and Point Streak Technologies of Canada which financing was to be procured on or before 19th day of March, 2012.

When the said Hassan Zubeidi failed to procure the financing as agreed he Applicants Managing Director vide a letter dated 21st March, 2012 gave instructions that the said sum of USD 2,500,000/= be deposited into account No. 81147035 held with the Respondent bank which sum of Kssh. 200,000,000/= was to be paid to M/s Rachuonyo & Rachuonyo Advocates to meet the Applicants financial, obligations with the National Bank of Kenya.

It is further submitted that the Respondents decision to only debit the applicants account without first crediting it as per instructions created a huge overdraft leading to enormous charge on interest and penalties.

Further that the Respondent merely denies the authenticating of the memorandum of agreement dated 5th March, 2012.

The Applicant also maintains that on 6th and 7th March, 2012 the applicant placed a total sum of Ksh. 167,000,000/= on call deposit, which call deposit was acknowledge by the Respondent vide a letter dated 7th March, 2012 and thereby issued the applicant with receipts CDR/FDR No. 002201 and CDR/FDR No. 002203.

The applicant submits that the said sum of Ksh. 167 million with the interest accrued has never been released to the Applicant. That no instructions were given to the Defendant to set off the same as alleged by the Defendant and that if there was any cancellation of the call deposit such cancellation could only have been done on the original receipts and not photocopies of the same and applicant wound have been notified accordingly.

It is the contention of the applicant that the Respondent has mischievously attempted to hide behind the facade of contract by alleging at paragraphs 4 and 5 of its replying affidavit that the account opening forms incorporated rules and regulations which allowed it to exercise unwarranted control over the applicants account without any notice to the applicant. Counsel cited the case of **Captain J.N. Wajubwa Vss Housing Finance Co. Of Kenya (2012) eKLR** where justice Ogola deprecated the conduct of banks thus,

“ Banks cannot just hide behind the contracts they make, regardless of how unjust they are to literally destroy their customers; without the customers the banks cannot operate

It is submitted that the Respondent is indebted to the Applicant in the sum of Ksh. 167,000,000/= on account of call deposit together with interest thereon and this amount together with the interest should be released to the Applicant and or in the alternative it be used to offset the alleged debt.

Counsel for the Applicant has submitted the provisions of section 90(1) of the Land Act No. 6 of 2012 which provides that if a charger 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 charger a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

Further that such notice not be less than three months.

The applicant further relies on the case of **Joseph Siro Mosioma Vs Housing Finance Company of Kenya & 3 Others** where Justice Warsame rendered himself thus,

“my Humble view is that a mortgagee cannot exercise the statutory power of sale unless and until a notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of the mortgage money for three months after such service”.

It also relies on the case of **Sharok Kher Mohamed Ali & Another Vs Southern Credit Banking Corporation Ltd. (2008) eKLR.**

The plaintiff denies having been served with a statutory notice and that though there is an allegation that in the replying affidavit that a certificate of postage was annexed there was none.

Still on the issue of service of statutory notice the plaintiff cites the Court of appeal decision in **Nyangilo Ochieng & Another Vs Fannel B. Ochieng & 2 others (1996)** where it was held,

“It is for the chargee to make sure that there is compliance with the requirements of section 74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the charger alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”.

The applicant maintains that it was not served with the statutory notice as required by law or the Respondent has not produced evidence to the contrary and therefore the Respondents statutory power of sale has not coalesced.

Further that contrary to the provisions of section 44 of the Banking Act which prohibited the increase of interest without the approval of the Minister for Finance the Respondent purported to charge interest at 40%.

On the issue of damages not being adequate compensation Counsel has submitted that the properties are unique in character, in a peculiar location, fully developed and valued at Ksh. 890,000,000/= being of sentimental and commercial value .

Balance of convenience

The applicant submits that the balance of Convenience tilts in its favour in that unless restrained the Respondent will proceed and conclude arrangements for sale and transfer the suit properties to a third party.

The Defendant submits prayer 4 in the nature of a permanent injunction prayer 5 seeks a permanent injunction or a mandatory injunction.

Prayer 6 seeks a mandatory injunction for release of a sum of Ksh. 197,801,205. Prayer 7 also seeks a mandatory injunction for Defendant to furnish statements of accounts. It is also submitted that there is no prayer for temporary prohibitory injunction in the application. It is conceded that the principles for the grant of mandatory injunctions are set out in the English case of **Locabail International Finance Limited Vs Agro Export & Others 1986/ALL ER 902.**

Where it was held that mandatory injunctions can only be granted in **special circumstances** and in clear and obvious cases and on the other hand permanent injunctions can only be granted after a full trial of the case. It is further submitted that the case of **Giella Vs Cassman Brown & Co. Ltd 1973 E.A 358** which relates to interlocutory prohibitory injunctions has no relevance to the present application.

It is submitted that the court lacks jurisdiction to grant orders which have not been specifically prayed for in the motion. The Respondent has cited the authority of the Court of appeal decision **Peris Wakiuri Gaita Vs Grace Wanjiru Mbugua (2010) eKLR** at page 2 where it was held ,

“The applicant is represented by Counsel. Neither a stay of execution of decree nor an injunction was prayed for. A stay can only issue where practicable on the facts and circumstances of this case an order for stay is not grantable. Perhaps had the applicant applied for stay of execution of decree, this Court would have possibly, in exercise of its powers under section 3A and 3B of the appellate jurisdiction Act which deal with the overriding objective principle in civil litigation, considered whether a stay of execution

of decree should be granted to enable her pursue her claim. However, the way the motion is worded, the applicant has applied for an order of stay of the order dismissing her objection to attachment. A party is bound by the prayers of her motion and the Court cannot properly grant any other order without being seen as having descended into the arena of litigation”.

On the issue of a prima facie case.

It is submitted that the allegations contained in paragraphs 10 -18 of the plaintiff submissions are clearly misconceived as the plaintiff did by express admissions and conduct admitted the sums claimed.

That at clause 14 of the sanction letter under the heading **“Existing Liability”** admitted indebtedness to the bank as of 31st March, 2012 in the sum of Ksh. 33,925,804.08.

That as per the statement of the account it is reflected that as of 1st April, 2012 the plaintiff Account had a debit balance of Ksh. 33,925,804 which is the same sum admitted by the plaintiff in the sanction letter.

That in a letter dated 1st August, 2012 and others dated 17th September, 2012, 30th September, 2012 the plaintiff did admit the overdraft facility of Ksh. 160 million. Further that as there is admission there is no requirement that the Respondent prove the facts alleged.

It is further submitted that the memorandum of Agreement and letter dated 21st March, 2012 are false and fraudulent documents as deposed by Mr. Hassan Zubeidi in his affidavit and that the Respondent is not a party to the alleged agreement.

Further that the claim of Ksh. 200 million is a mere fabrication and an after thought manufactured with the sole intention of deceiving this Court to grant injunction orders.

On the issue of the call deposit of Ksh. 167,000,000/=. Its submitted that pursuant to an agreement for sale dated 5th July, 2010 the plaintiff advised the Defendant that it had given instructions to HFCK to transfer Ksh. 167 million to its account with the Defendant to cover the requisite balance of the purchase price which was Ksh. 167 million and which was the plaintiffs contribution toward the purchase price of the suit properties.

It is further submitted that the Defendant having paid the sum of Ksh. 200 million to M/s Rachuonyo & Rachuonyo it had a contractual right under clause 3 of its rules and regulations to recover its money by setting off the debit balance in the plaintiffs account against the call deposit of Ksh. 167,000,000/= and the accrued interest at clause 3 gave the Defendant the right of set off without notice. It is the contention by the Respondent that no prima facie case has been made out on the issue of the call deposit.

On the issue of the statutory power sale. It is submitted that he Defendant duly issued and served upon the plaintiff a statutory notice and the Defendant statutory power of sale has duly accrued. That the statutory notice was served by way of registered post on 16th November, 2012.

It is further submitted that if the Court finds that the plaintiff was not only served with statutory notice then the Court should not grant an injunctive relief but instead **locus poenitentia** be created, for the Defendants to issue a fresh statutory notice in compliance with section 90 of the Land Act. The Defendant relies on the Court of appeal decision in **National Bank of Kenya Ltd. Vs Simmers Plaza Ltd.** Civil Appeal No. 26 of 2012 (2009) eKLR where it was held,

“The duration of an order of injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. In this case , the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law, we venture to say that where the Court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale SOLELY on the ground that the mortgagee

has not issued a valid notice then the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law”.

The respondent also submits that section 44 of the Banking Act is not relevant to this case as it does not regulate interest rates charged by banks but only covers banking or other charges and further that there was no increase or variation on the rate of interest set out in the sanction letter dated 4th April, 2012.

Further that the argument on interest rate is about the amount due but the legal position is that such cannot be the basis of restraining a mortgagee from exercising the statutory power of sale. The respondent relies on the **Halsburys Laws of England 4th edition Vol 32 paragraph 725** where it is stated,

“When the mortgagee may be restrained from exercising his power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun redemption action or because the mortgagor objects to the manner in which the sale is being arranged he will be restrained, however, if the mortgagor pays the amount claimed in Court, that is the amount which the mortgagee claims to be due to him, unless under the terms of the mortgage the claim is excessive”.

On the issue of under valuation of the suit properties. It is contended that the valuation of Reports by Tysons Limited are more than three years old and do not reflect the current market value and forced value of the suit properties and that they were grossly inflated and or exaggerated as the plaintiff had purchased the properties for Ksh. 330 million from the National Bank of Kenya and could not be reasonably worth three times within a span of two years.

Further that the compliant has complied with rule 11(1) (b) of the Auctioneers rules as to the reserve price of the land based on professional valuation carried not more than 12 months prior to the proposed sale. Further that the complaint by the plaintiff is premature and speculative as the auction has not yet been held and in the event the suit premises fetch higher prices then section 101 of the Land Act 2012 and the legal charge herein clearly regulate the manner in which the surplus monies are to be distributed.

Further that the complainant on undervaluation is essentially an objection to the manner in which the sale is being arranged which is not a ground for granting an injunction.

On the cancellation of the overdraft facility. It is submitted that this is not pleaded in the plaint and neither is it found in the motion and its an afterthought. Further that the sanction letter dated 4th April, 2012 provided that the Defendant had a right to cancel the overdraft facility under clause 4.

Damages as adequate compensation. It is submitted that damages are an adequate remedy. That sentimental nature of the suit properties is not adequate ground for grant of an injunction. The Defendant places reliance in the case of **Thathy Vs Middle East Africa Bank (K) Ltd. 2002 KLR** at page 604.

Balance of Convenience

That the balance of convenience tilts in favour of restoring the injunction as the plaintiff had admitted being indebted to the Defendants in the sum of Ksh. 160,000,000/= and the plaintiff is not repaying the outstanding sum which continues to accrue interest. Further the plaintiff has admitted owing a sum of Ksh. 3,917,489.19 which sum has not been paid.

In its response to the Defendants submission it is submitted that prayers Nos. 4 and 5 of the applicants notice of motion dated 25th of April, 2013 are for injunction to last pending the hearing and determination of the suit.

Further that the application is brought under order 40 rule 1 of the Civil Procedure rules 2010 which specifically provides for **“Temporary Injunctions”** which are by nature interlocutory and at the

determination of the suit to be either confirmed or vacated.

Further that the issue of the word permanent was by inadvertence and does not in any way prejudice the Respondent in comprehending the application by the applicant.

The plaintiff relies on the decision in the case of **Jemutai Tanui vs Juliana Jeptepkeny and 5 others 2013 eKLR** where the judge while confronted with a similar question observed that although, the application as drawn seeks a “**permanent injunction**” it was apparent that the plaintiff in that case was seeking an interlocutory injunction pending the hearing and determination of the suit. The judge proceeded to grant an injunction pending the hearing and determination of the suit.

The plaintiff also relies on article 159(2) of the Constitution of Kenya 2010 which enjoins the Court to administer justice without undue regard to technicalities.

Provisions of section 1A, 1B and 3A of the Civil Procedure Act.

Its further submitted that the principles set out in the case of **Giella Vs Casman Brown and Co. Ltd (1973) E.A 358** are relevant to this case.

As to whether a prima facie case has been established its submitted that the facts as set out in the applicants application and submission demonstrate a prima facie case has been established.

As for the USD 2,500,000 deposited with the Respondent's Chairman and Director Mr. Hassan Zubeidi its submitted that same has not been challenged as to its the authenticity of the signature upon the memorandum of agreement dated 5th March, 2012.

While admitting to have executed the sanction letter dated the 4th day of April, 2012 its submitted that the primary purpose was to document the grant of an overdraft facility of Ksh. 160,000,00/= and that its not a document of account stated between the applicant and the Respondent.

In its submissions the Defendant correctly noted that the nature of injunctions sought in the application were three namely that in prayer 4 the plaintiff was seeking a permanent injunction restraining the Defendant from exercising its statutory power of sale over the suit properties.

In prayer No.5 the plaintiff seeks a permanent injunction, or a mandatory injunction restraining the Defendant from taking any action and exercising any of its rights whether accrued or otherwise under the first legal charge dated 11th April, 2013 and the Debenture dated 13th of April, 2013. In prayer 6, the plaintiff is seeking a mandatory injunction for the release of a total sum of Ksh. 197,801,205.48 to the plaintiff or to the Court.

And in prayer 7 the plaintiff is seeking a mandatory injunction for the Defendant to furnish statements of account in respect of account numbers 81147035, MI 207281002 and MI 1206881003.

The Defendants submission was that there was no prayer for temporary prohibitory injunction restraining the Defendant from excessing its powers under the legal charge and debenture dated 11th and 13th April, 2013.

The Defendants submission is that the case of Giella Vs Cassman Brown & Company is not applicable .

The authority of **Peris Wakiura Gaita Vs Grace Wanjiru Mbugua** has been cited.

I have perused it and I am satisfied that it was dealing with a stay and rule 5(2) (b) of the Court of Appeal rules and that not an application for injunction under order 40 of the Civil Procedure Rules 2010 hence its distinguishable.

A reading of the prayers No. 4 and 5 of the application indicate that the injunctions sought are for the

duration pending the hearing and determination of the suit.

Order 40 rule 1 of the Civil Procedure Rules specifically deals with “**Temporary injunctions**”. It is apparent that the word “**permanent**” was used by mistake or inadvertence and this has not in any way prejudiced the Defendant by obscuring their understanding of the application. Indeed they have mounted a spirited defence to the prayers sought. Article 159(2) of the Constitution requires of every Court to administer justice without undue regard to technicalities.

The Court is also to be guided by the provisions of section 1A, 1B and 3A of the Civil Procedure Act which relate to the overriding objectives of the Act which are the facilitation, proportionate and affordable resolution of the civil dispute. The use of the word “**permanent**” in the prayers leans more to the form and technicalities rather than the substance of the application. I am therefore of the considered view that the application comes under the purview of temporary injunctions and or interlocutory ones and therefore lends itself to the principles set out in the case of **Giella Vs Casman Brown & Company Ltd. 1973 E.A. 358.**

Prima facie case

It is the plaintiff's case that the chairman and Director of the Respondent Mr. Hassan Zubeidi entered into a memorandum of agreement dated the 5th day of March, 2012. That Hassan Zubeidi did acknowledge receipt of the sum of USD 2,500,000 paid to him in cash by the Applicants Managing Director which money was to be appropriated as commission and all negotiation fees in the event that the financing was procured on or before the 19th day of March, 2012. Mr. Hassan Zubeidi did file a statement denying having signed the memorandum of agreement dated the 5th day of March 2012 and denying the receipt of USD 2,500,000 and states that the memorandum of agreement was a forgery. Further in answer to the memorandum of agreement the Defendant submits that the plaintiff had admitted indebtedness to the Defendant in the sum of Ksh. 160 million and there is no reason to prove the debt as there is admission already.

The plaintiff's contention is that in the absence of proof to the contrary the memorandum of agreement remains a valid and binding contract that the said agreement and the letter dated 21st March, 2012 were received under the Respondent's Bank Stamp, further that Hassan Zubeidi is an authorized Attorney of the Respondent bank by virtue of a power of attorney registered as number 45114/1 and further that he executed the charge and Debenture in that capacity.

I am satisfied that the question of the sum of USD 2,500,000 has not sufficiently been dislodged by the Defendant. That the Respondent failed to credit the applicants' account with the said sum which is equivalent to Ksh. 200,000,000/= as directed by the letter of the applicant of 21st March, 2012.

The applicants' contention is that on 21st March, 2012 when the Respondent remitted the sum of Ksh. 200,000,000/= to M/s Rachuonyo & Rachuonyo on the applicants' instructions no overdraft facility had been established between the applicant and the Respondent. Further that the Applicant did not request for an overdraft facility on the said date nor did he authorize of any. Further that on the 21st March, 2012 when the Respondent remitted the sum of Ksh. 200 million to Rachuonyo & Rachuonyo the Applicants' account had a credit of only Ksh. 4,750/= remittance of the money therefore created an unauthorized debit of Ksh. 199,995,250/=

It is the submission of the plaintiff that the remittance of Ksh. 200,000,000/- was secured by and based on the USD 2,500,000 deposited with the Respondent's Chairman.

On the call deposit for Ksh 165,500,000 and Ksh. 1,500,000/= respectively the submission that on 21st March, 2012 they were intact uncalled and liquidated remaining so until the 26th day of March, 2013 is not far fetched as the original certificates of deposit Nos. CDR/FDR No. 002201 and CDR/FDR No. 002203 are still held by the applicant. It is the applicants' concession that the copies purportedly canceled by the Respondent were plucked from copier attached to the applicants' Advocates Demand letter dated 8th August, 2012.

It is further concluded that the funds remitted from Housing Finance Company of Kenya to the Respondent bank in the sum of Ksh. 167,00,000/= and subsequently placed on call are distinct and separate from the sum of USD 2,500,000 given by the Applicants Managing Director to the Respondents chairman and the Respondent has no good reason for failing to pay the sum of Ksh. 167,000,000/= placed on call by the applicant with the Respondent as demanded. The allegation of set off is denied on the basis that clause 3(a) of the rules and regulations does not apply as the rules and regulations were never signed by the applicant and therefore not binding on it. Without evidence to the contrary I find that the applicant has a prima facie case.

On the issue of services of the statutory notice dated 15th November, 2012 . It is common ground that its a mandatory requirement under section 90 of the Land Act No. 6 2013. Annexure “NK 18” exhibits the statutory notice. Service is said to have been by registered post. There is no evidence that the Applicant was indeed served with that statutory Notice. The Defendants contention is that even if the court was to hold that there was no service it should not grant an injunctive relief but instead a locus poenitentiae be created for the Defendant to issue a fresh statutory notice in compliance with section 90 of the Land Act. Defendant relies in the court of appeal decision in **National Bank of Kenya Limited vs Shimmers Plaza**.

That authority is distinguished from the present case. In that case the Court of appeal was dealing with the sole ground that the mortgagee had not issued a valid notice.

In the present case there are numerous other grounds apart from the statutory notice as exemplified by the affidavit evidence and submissions.

It is common ground that the ten properties in which the Watamu Beach Hotel lies together with improvements were valued in June 2010 by Tysons Ltd. With the open market value being placed at Ksh. 540,000,000/= and the forced value at ksh. 420,000,00/=.

The second property known as Kilulu Island portion No. 64 Watamu was valued at Ksh. 350,000,000/= and a forced sale value of Ksh. 280,000,00/= .

The valuation by the Defendants Agent M/s Hectares associates on February 2013 valued the ten properties at Ksh. 310,000,00/= whereas the forced sale value was placed at Ksh. 220,000,000/=. It was also noted by the plaintiff that the valuation report excluded one property being title No. CR No. 11589 (portion No. 28).

The Defendants agent also valued the Kilulu Island property at Ksh. 364,000,000/= and gave a forced value of Ksh. 237,000,00/=.

It does not take rocket science to discover that there is a huge disparity. It is a fact of common notoriety that land does not depreciate and more so beach land. The question which comes to mind is why the huge disparities in the valuation of the suit properties.

It is also conceded by the plaintiff that the valuation report prepared by M/s Hectares & Associates did make glaring mistakes by omitting one of Applicants properties known as portion No. 28 and incorporated another not owned by the applicant being No. 51.

The defendant denies fraud undervaluation conspiracy and unjust enrichment and further states that a dispute as to the amount and or a challenge to the mode or manner of the exercise of the statement power of sale are not sufficient grounds in land for granting an injunction and relies on Haliburys Laws of England, whereas that could be true I find no good reason why a party should not point out glaring irregularities which may verge on malice, ill-will or fraud. The intention to sell all the Applicants properties charged when one set of the properties could comfortably offset the amounts claimed smirks off ill -will and malice.

There is no law cited to the effect that all properties under one composite charge must be sold to recover

alleged amounts; coupled with the fact that there was no sufficient prove that a statutory notice was served on the Applicant, I am in agreement with the Applicants contention that this was an intention to steal a match against the applicant.

I am satisfied that the applicant has made a prima facie case.

On the issue as to whether damages are adequate compensation. I am in agreement with Justice Warsame who in the case of **Joseph Giro Morsioma Vs Housing Finance Company of Kenya 2008 eKLR** held that damages are not automatic remedy when deciding whether to grant an injunction or not, and cannot be substitute for loss occasioned by a clear breach of the law.

In the case of Sharok Kher Mohamed Ali vs Southern Credit banking Corporation Limited. It was held,

”I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage. In any case a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and or loss that would be suffered by the plaintiff would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention”.

Balance of Convenience

There is real and imminent damage of the Respondent making arrangements for sale of the Applicants suit properties to a third party. The statutory power of sale has not arisen and or accrued.

On the issue of mandatory injunctions.

The test is that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and that such an injunction will only be granted in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a match on the plaintiff.

I am satisfied that the applicant has demonstrated sufficient special circumstances for the grant of the same.

The prayers for mandatory injunction is for the release of the sum of Ksh. 197,8011, 205 to the plaintiff or to the court. If orders are granted for the deposit of the amount in Court no prejudice would be suffered as the release out of Court would be predicated upon receipt of evidence by the Court from both parties.

I am satisfied that the applicant has established a prima facie case with high chances of success.

I accordingly grant prayer 4. But not for a **permanent** injunction but an interlocutory basis pending hearing and determination of the suit.

Prayer 5 is also granted but not in terms of a permanent injunction but a mandatory one pending hearing and determination of the suit.

In respect of prayer 6 same is granted but amount will be deposited in Court within 45 days from today. Prayer No. 7 is granted as prayed. I decline to grant prayer 8 for its lack of clarity and legal footing.

Costs to the applicant.

Dated and delivered this **2nd** day of **August, 2013**.

.....

M. MUYA

JUDGE

2ND AUGUST, 2013

In the presence of:-

Miss Lisase holding brief Nyachoti for the plaintiffs

In the absence of Goal for the Defendant