REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 744 OF 2012

KISIMANI HOLDINGS LIMITED ……..…… 1ST PLAINTIFF

COMCARRIER SATELITTE SERVICE LIMITED …… 2ND PLAINTIFF

VERSUS

FIDELITY BANK LIMITED ……..……. DEFENDANT

R U L I N G

1. The 1st Plaintiff herein filed a Notice of Motion dated 27th November 2012 brought under the provisions of **sections 82 (3)** and **97** of the *Land Act (2012)*, **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as **Order 40 Rules 2, 3 and 4** and **Order 51 Rule 1** of the *Civil Procedure Rules, 2010*. The Application, brought under Certificate of Urgency, sought Orders from this Court that, pending the *inter-partes* hearing of the Application, as well as the final determination of the main suit, it should be pleased to issue an interlocutory prohibitory injunction restraining the Defendant, its agents and/or assigns from in any way dealing with, disposing of, selling or otherwise interfering with the title of the suit property being L. R. No. 13544/99 (hereinafter "the suit property"). The Application also sought an interlocutory mandatory injunction compelling the Defendant to issue updated statements of accounts particularising *inter-alia* the chronology of the loan repayments made by the 2nd Plaintiff as well as full details of thereof.
2. The 1st Plaintiff's said Application was supported by Grounds as detailed below:

> **"a. THAT on 18th July 2012, the Defendant/ Respondent herein purported to issue a statutory notice to the Plaintiffs demanding repayment of monies advanced to the 2nd Plaintiff and secured by a charge over the 1st Plaintiff's property No. L.R. No. 13544/99 (the 'suit property').**
>
> **b. THAT yet again on 5th September 2012, the Defendant sent to the 2nd Plaintiff and copied to inter alia, the 1st Plaintiff, a second statutory notice purporting to demand repayment of Kshs.22,490,699.10 on account number 11105608, Kshs.26,940,521.35 on account number 20203840 and US Dollars 45,094.61 on account number 11505609 allegedly advanced to the second defendant failure to which it would exercise its statutory power of sale and sell the suit property to recover the said amounts. The said statutory notice was received by the Plaintiffs on 15th November 2012.**

c. THAT in its said statutory notices, the Defendant/ Respondent purports to demand from the Plaintiffs repayment of Kshs.22,490,699.10 on account number 111055608, Kshs. 26,940,521.35 on account number 20203840 and U.S. Dollars 45,094.61 on account number 11505609, which monies were allegedly advance to the 2nd Plaintiff, failure to which it has threatened to exercise its statutory power of sale over the suit property to recover the said amounts.

d. THAT the said notices are ex-facie defective, illegal, null and void in so far as they purports to demand repayment of Kshs. 26,940,521.35 on account number 20203840 and US Dollars 45,094.61 on account number 11505609 allegedly advanced to the 2nd Plaintiff over and above the maximum amount for which the 1st Plaintiff agreed to secure.

e. THAT the said notices are therefore unlawful and contrary to inter-alia section 82 (3) of the Land Act No. 6 of 2012 Laws of Kenya. The same cannot therefore be enforced by the Defendant/Respondent as the basis of exercising its statutory power of sale.

f. THAT despite the Plaintiffs formal request to the Defendant/Respondent, via their respective Advocates to amend its statutory notices, the Defendant/Respondent has refused and/or neglected to do so.

g. THAT unless the Defendant/Respondent is temporarily restrained from relying on the said statutory notices, the 1st Plaintiff stands to suffer grievous prejudice and financial embarrassment in having to shoulder liabilities which it did not accept or agree to accept. Indeed any proclamations and/or sale based on the said statutory notices shall constitute a violation of the 1st Plaintiff's constitutional right to Property and in any event shall be illegal, irregular, null and void ab initio.

h. THAT the Plaintiff/Applicants suit herein is competent and with a high probability of success".

3. The Chief Financial Officer of the 1st Plaintiff one **Giri Babu** swore a Supporting Affidavit to the Application which was undated but filed on 3rd December 2012. He recorded that that the Defendant by its letter dated 13th January 2011, had agreed to advance a term loan facility to the 2nd Plaintiff as regards its account numbered 20203840 in the maximum principal amount of Shs. 22 million. The loan was conditional upon the 1st Plaintiff agreeing to execute and register a Legal Charge over the suit property in favour of the Defendant. The 1st Plaintiff at the request of the 2nd Plaintiff had agreed to charge the suit property as security for repayment of the facility advanced to the 2nd Plaintiff. The deponent noted that on the 18th of July 2012, the Defendant through its advocates had sent to the Plaintiff's a statutory notice which purported to demand the repayment of three separate amounts being Shs. 22,490,699.10 in relation to the 2nd Plaintiff's account number 1110 5608, Shs. 26,940,520.35 on its account number 20203840 and US$45,094.61 on the account number 11505609. The 1st Plaintiff wrote to the advocates for the Defendant through its own advocates on record, seeking clarification as regards the said statutory notice and information as to what it detailed as "exorbitant interest rates charged" as well as the fact that the liability of the 1st Plaintiff to the Defendant was limited to the repayment of Shs. 22 million only plus reasonable interest thereon. Mr. Babu went on to say that from the face of the Charge document as read together with the facility letter of offer, the Defendant's statutory notice dated 18th July 2012 was irredeemably defective and unenforceable in law. He then went on to say that the 1st Plaintiff had "credible reasons to believe that the Defendant has a preconceived unlawful plan to sell the suit property at a gross undervalue contrary to the express provisions of the law and in breach of the chargee's statutory duty of care." Unfortunately for the deponent, he gave no reasons for such

a belief.

4. The matter came before this Court *ex parte* on 3rd December 2012 and the Plaintiffs were granted an interlocutory prohibitory injunction as against the Defendant from disposing of, selling or otherwise interfering with the suit property pending the *inter-partes* hearing of the Application before Court. Thereafter, the Legal Manager of the Defendant, one **Georgina Muthama,** swore a Replying Affidavit on 17th December 2012. She confirmed that the Defendant Bank's Letter of Offer dated 13th of January 2011, was to extend a Term Loan to the 2nd Plaintiff of Shs. 22 million referenced as number 20203840. She also confirmed that the security of a Charge over the suit property was sought by the Defendant bank. More particularly, Ms Muthama confirmed that the 1st Plaintiff had made it clear that it was offering the Charge as a continuing security for: "(a) The Term Loan of Shs. 22 million extended pursuant to the Letter of Offer with the amounts secured being limited to the principal sum together with interest and other charges; (b) any overdraft facility extended to the 2nd Plaintiff on its current accounts held with the Defendant Bank and (c) any other financial facility with such limits as may from time to time be extended to the 2nd Plaintiff by the Defendant Bank"
5. Ms. Muthama went on to detail that when the 1st Plaintiff's Charge was executed, the suit property was already charged to the Diamond Trust Bank Kenya Ltd. ("DTB") The 2nd Plaintiff had requested the Defendant Bank to extend to it, a temporary credit facility of Shs. 18,039,850/-, to enable it to redeem the financial facilities advanced by DTB. The deponent went on to relate that when the discharge of the DTB's Charge over the suit property was presented to it, DTB refused to execute the same demanding further monies owed to it and eventually it had been agreed that the Plaintiffs would pay DTB Shs. 4.5 million in full and final settlement of the amount owing to DTB. That sum was paid, according to the deponent, by the Defendant Bank. As a result, the 2nd Plaintiff's current account was debited with the said amount which caused the same to be overdrawn. The deponent then went on to relate that the 2nd Plaintiff had requested it to pay an invoice of US$36,304 raised by an American company and had given transfer instructions to the Defendant Bank in this connection. The Defendant Bank duly complied with the request but the 2nd Defendant's US Dollar account did not have sufficient funds to meet the payment. The Defendant Bank had treated the 2nd Plaintiff's instructions as a request for an overdraft which led to the said US Dollar Account being overdrawn. The deponent went on to say that it was clear that the financial facilities granted to the 2nd Plaintiff subsisted at the time of the registration of the Charge dated 14th February 2011, executed by the 1st Plaintiff in favour of the Defendant Bank.
6. At paragraph 20 of the Replying Affidavit, Ms. Muthama recorded that no payment had been made towards liquidating the 2nd Plaintiff's Term Loan since 20th January 2012. No payment had been made into the 2nd Plaintiff's US Dollar account since 19th January 2012. No payment had been made into the 2nd Plaintiff's Current account since 14th May 2012. All these facts were evidenced by copies of the statements of the said accounts attached to the Replying Affidavit. As a result, the deponent noted that interest had accrued at default rates being 10% over and above the commercial lending rate of 30% prevailing on the Shilling facilities as well as the commercial lending rate of 5% on the US dollar denominated facilities. Ms. Muthama went on to record that despite numerous telephone calls, the 2nd Plaintiff had failed to rectify its account arrears leading to the Defendant Bank issuing a formal demand notice to it dated 31st May 2012. Again, this letter had failed to prompt any payment from the Plaintiffs leading to a demand letter from the Defendant Bank's advocates dated 18th June 2012 and shortly thereafter the Defendant Bank's advocates issued 2 Statutory Notices to the Plaintiffs dated 18th July and 5th September 2012. Copies of such Statutory Notices were annexed to the Replying Affidavit. The remaining paragraphs of the Replying Affidavit referred to the advice given to the deponent thereof by the advocates on record for the Defendant bank but significantly at paragraph 26 of the same, the deponent detailed that the amounts outstanding as regards the 2nd Plaintiff's accounts as at 10th December 2012:

> **"a) Ksh 32,108,045/35 on the Term Loan facility;**
>
> **b) Ksh 27,462,065/60 on the overdraft facility of the 2nd Plaintiff's KES current account; and**

c) USD 53,092.61 on the overdraft facility of the 2nd Plaintiff's USD current account."

7. It was agreed by counsel that the 1st Plaintiff's said Application would be dealt with by way of written submissions. The Plaintiff's Submissions dated 1st March 2013 commenced by setting out the facts as per the said undated Affidavit of Mr. Giri Babu. As regards the law applicable to the Application, the 1st Plaintiff drew the attention of the Court to **section 103 (3)** of the *Land Act, 2012* which provided that a chargor may bring an application for relief before Court at any time after the service of a statutory notice or even during the exercise of any of the chargee's remedies. The1st Plaintiff submitted that the *locus classicus* authority in relation to the well settled principles of the granting of interlocutory injunctions was the case of **Giella v Cassman Brown Co. Ltd & Anor (1973) EA 358**. It went on to state that its case was grounded on four main issues:

> **"a) Whether a chargee issue a statutory notice against a chargor in respect of further advances made to a borrower without the chargee's consent.**
>
> **b) Whether the Statutory notices dated 18th July 2012 and 5th September 2012 are valid and enforceable**
>
> **c) Whether the Respondent owes the Applicant a statutory duty of care in exercising its statutory power of sale.**
>
> **d) The Applicable terms of interest on the loan facility."**

8. As to whether the 1st Plaintiff has established a *prima facie* case, the submissions detailed that a chargee was not entitled to issue a statutory notice against a chargor in respect of further advances made to a borrower without the chargee's consent. Referring to the recitals of the Charge instrument, the 1st Plaintiff drew the attention of the Court that it had agreed to secure the loan advances to the 2nd Plaintiff up to a maximum of Shs. 22 million only. There was nothing whatsoever in the Charge instrument that either expressly or implicitly tied the suit property for the repayment of any principle sums lent by the Defendant Bank to the 2nd Plaintiff over and above the principal sum of Shs. 22 million. The 1st Plaintiff went on to refer the Court to **section 82 (1)** as read together with **section 82 (3)** of the *Land Act, 2012*. It maintained that it was now a mandatory statutory condition that a charge instrument could not legally embody an agreement to make further advances to a third party on a continuing account. Any increase of the principal sum for the benefit of the third party could only be made in accordance with the provisions of **section 84** of the *Land Act, 2012*. That section provided that the amounts secured by a Charge could only be increased by a memorandum which (a) must be signed by the chargor (b) must state that the principal funds intended to be secured by the chargee increased to the amount or in the manner specified in the memorandum (c) the covenants, conditions and power is expressed or implied in a Charge instrument were to be varied in the manner specified in the memorandum and (d) the memorandum must be endorsed on or annexed to the Charge instrument. The 1st Plaintiff noted that the said Charge instrument executed by it did not contain any such memorandum of variation.

9. Further, the 1st Plaintiff referred to **section 97** of *the Evidence Act* as regards evidence given by affidavit or otherwise as regards the terms of a contract. It referred to the cases of **Rajdip Housing Development Ltd v Wachira Wambugu Civil Appeal No. 4 of 1991** as well as **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd Civil Appeal No. 95 of 1999** to the effect that a Court of law cannot rewrite a contract between parties. Turning to whether the said Statutory Notices were valid and enforceable, the 1st Plaintiff noted that under **section 90 (1)** of the *Land Act 2012*, a statutory notice is meant to be issued in default of periodic payments or any part thereof due under the Charge instrument. The 1st Plaintiff emphasised its position that there was no express agreement under the Charge instrument for further advances to the 2nd Plaintiff and as a result it maintained that the Statutory Notices were void *ab initio* and unenforceable. The 1st Plaintiff outlined the provisions in relation to Statutory Notices as per **section 90 (3)** of the *Land Act, 2012*. It submitted that as serious consequences flow out of the

statutory notice, the chargee is obliged to ensure that the same is accurate because, once it is issued, the *prima facie* assumption is that the demands made therein are proper, accurate and recoverable. It emphasised that it was mainly on the ground of the defective Statutory Notices that the 1st Plaintiff sought its requested interim injunction. The 1st Plaintiff also emphasised that under **section 97** of the *Land Act, 2012* a chargee now owes the chargor an express statutory duty of care when exercising its statutory power of sale.

10. As regards its complaint concerning interest charges, the 1st Plaintiff submitted that the applicable rate of interest is a matter of fact to be construed from the Charge instrument. In relation to the Charge instrument before Court, the Second Schedule thereof provided details of the interest chargeable classified in 2 categories being normal interest and default interest. The normal interest rate was expressly stated as chargeable on a reducing balance basis on the amount of the Term Loan at an effective rate of 14% per annum. However, the 1st Plaintiff noted that this was without prejudice to the Defendant Bank's discretion/right to vary the interest rate from time to time. With regard to the default rate of interest, the 1st Plaintiff maintained that it was expressly stated as chargeable at a per annum rate which was 10%. There was no discretion given to the Defendant Bank to vary such a rate. It was the 1st Plaintiff's submission that with a flat rate of interest of 10%, there could not be a rational basis for a 40% variation of interest. To this end, it referred the court to the case of **Harilal & Co.v Standard Chartered Bank Ltd (1967) EA 512**. It maintained that the Respondent Bank's argument that the default rate of interest would be charged at 10% above the applicable commercial lending rate was inaccurate and incorrect as there was no express or implied provision in the Charge instrument for the variation of the default interest. As regards whether damages would be an adequate remedy for the 1st Plaintiff, it submitted that the Respondent Bank could only take advantage of such principle where the action is complained of within the law. Where a chargee is plainly acting illegally, it cannot be heard to say that he is in a position to compensate the plaintiff for injury that might have been occasioned. The 1st Plaintiff referred the Court to the case of **Sports Cars Ltd v Trust Bank Ltd LLR No. 342 (CCK)** in this connection. As regards its submission that, on a plain construction of the Charge instrument, the further principal sums claimed by the Respondent Bank were not secured by the suit property, the 1st Plaintiff referred the Court to the Court of Appeal case of **Banana Hill Investments Ltd v Pan African Bank Ltd & 2 Ors. LLR No. 1370 (CAK)**.

11. As regards the balance of convenience, the 1st Plaintiff submitted that the terms of the Charge instrument were plain and unequivocal. Given the nature of the suit property and the fact that further advances were made to the 2nd Plaintiff without the 1st Plaintiff's consent, it maintained that the balance of convenience was in its favour. It noted that these Statutory Notices must comply with the strict terms of the law and the gravity of the sale of the suit property would usually tip the balance of convenience in favour of the charger, where the Court is in any doubt as to the validity of the Statutory Notices. The 1st Plaintiff referred the Court to the case of **Alice Awino Okello v Trust Bank Ltd & Anor LLR No. 625 (CCK)** in which the Court of Appeal had declared:

> **"the balance of convenience is in favour of the Applicant as the sale of one's property is a serious matter that deprives one of a right recognised in law and as such should not be allowed to proceed on doubtful circumstances."**

In its conclusion, the 1st Plaintiff submitted that it had established the 3 requirements for the granting of an interim injunction pending the hearing and final determination of this suit or, alternatively, pending the amendment and service of the Statutory Notices. It maintained that there was sufficient cause for the exercise of this Court's discretion given the tri-partite nature of the Charge instrument herein.

12. The Defendant Bank's written submissions were dated 8th May 2013. As for the 1st Plaintiff's submissions, the Defendant Bank outlined the brief facts in relation to the matter before Court. It then made the rather surprising submission that the Court did not have or no longer has jurisdiction to hear and determine matters relating to land pursuant to *Article 165 (5) (b)* of the

Constitution. It maintained that under **section 13** of the *Environmental and Land Court Act, 2011*, only that Court could hear and determine all disputes relating to land, and as a consequence, the High Court had no further jurisdiction. The Defendant Bank noted that with effect from 20th September 2012, the Chief Justice had issued a fresh practice direction through *Gazette Notice No. 13573* that, as from that date, all new cases which are related to land should now be filed in the nearest Environment and Land Court for hearing and determination. The Defendant Bank submitted that the suit property was located in Nairobi, the suit was filed after the issuance of the practice direction and as a result, the Application before Court was a nullity.

13. Having got its initial substantive submission out of the way, the Defendant Bank noted that the Application was premised on **sections 82 (3)** and **97** of the *Land Act, 2012*. It summarised the 1st Plaintiff's Application as being based on the following grounds:

> "**a) The 1st Plaintiff's Charged properties stand to be disposed of by the Defendant in unlawful circumstances;**
>
> **b) The Statutory Notices are defective as they include three accounts overdue whilst only one overdue account was secured by the Charge;**
>
> **c) The Plaintiffs stands to suffer irreparable loss if the sale of the charged property is sold by the Respondent; and**
>
> **d) The interest rates were unilaterally varied".**

The Defendant Bank then submitted as to the law relating to injunctions referring this Court to the cases of **Giella v Cassman Brown (supra), Moses N. Kahindo v Agricultural Finance Corporation HCCC No. 1044 of 2001, Mrao Ltd v First American Bank of Kenya Ltd & 2 Ors (2003) KLR 125, John Mutere & Anor. v Kenya Commercial Bank Ltd** as quoted with approval in **Housing Finance Company of Kenya v Ngege K. Mondo (2006) eKLR, Francis Ichatha v Housing Finance Company of Kenya Ltd HCCC No. 414 of 2004** as quoted with approval in **Daniel K. Mugambi v Housing Finance Company of Kenya Ltd (2006) eKLR,** and **Jane W. Miriti v Fina Bank Ltd & Anor (2012) eKLR**. The Defendant Bank maintained that the 1st Plaintiff had not made out a *prima facie* case with a probability of success quoting the **Mrao** case as above as per **Bosire JA**:

> **"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 the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."**

It was the Defendant Bank's opinion that the issue raised by the 1st Plaintiff, that the Statutory Notice contained 2 other accounts of the 2nd Plaintiff not specifically secured by the Charge instrument, was insufficient to establish that a *prima facie* case had been made out. It also submitted that that from both the Affidavit in Support of the Application as well as the Replying Affidavit, it was obvious that the Defendant Bank's right to exercise its Statutory Power of Sale had arisen. The 2nd Plaintiff had defaulted on the facilities secured by the Charge instrument. The Plaintiffs had not denied that the 2nd Plaintiff was still indebted to the Defendant Bank. It maintained that all the Plaintiff had sought to do was to impugn the amount claimed on the basis that the Statutory Notices included 2 additional accounts which were not specifically secured. The Statutory Notices clearly provided for how much was due even under the specifically secured amount. The Respondent was asking this Court to hypothetically consider a situation where, if the Statutory Notices had not contained the 2 extra account details, there would be no cause whatsoever for the Court to grant an injunction because the specific secured facility was in arrears.

14. Turning to the applicable interest rates, the Defendant Bank submitted that the Second Schedule of the Charge instrument clearly stated that the Defendant Bank reserved the right to

vary the interest rate in its sole and absolute discretion. This discretion applied to the base lending interest rate and depended upon market conditions. The default interest rate was clearly stated at 10% above the base lending interest rate. The Defendant Bank submitted that these provisions were agreed to by the Plaintiffs and, as a result, they were binding upon them. With reference to the issue of varying interest rates, the Defendant Bank referred the Court to the case of **Fina Bank Ltd v Ronak Ltd (2001) 1 EA 54 (CAK)** in which the Court of Appeal held:

> **"As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis."**

The Defendant Bank further submitted that the issue of interest charged goes into a dispute as to accounts and as per the case of **Mrao Ltd (supra)** such cannot lay ground for an injunction.

As to the question of damages being an adequate remedy, the Defendant Bank submitted that once a property is given as security, the same becomes a commodity and is subject to sale. Accordingly, the value of the same is ascertainable and any loss suffered by the Plaintiff's upon the sale of the same, is remediable by an award of damages. The Respondent Bank referred the Court to the cases of **Andrew M. Wanjohi v Equity Building Society & Anor. (2006) eKLR** and **Andrew Ouko v Kenya Commercial Bank Ltd & 3 Ors (2005) eKLR** to this end. In order to emphasise its position in this regard, the Defendant Bank quoted from **section 99 (4)** of the *Land Act, 2012* which reads:

> **"A person prejudiced by unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."**

The Defendant Bank submitted that any loss occasioned to the Plaintiffs as a result of the Defendant Bank's exercise of its Statutory Power of Sale could be adequately compensated by an award of damages. Further, the Defendant Bank noted the provisions of **sections 97 (1)**, **section 97 (2)** and **section 97 (3)** of the *Land Act, 2012* required the chargee to obtain the best price reasonably obtainable, to ensure that a forced sale valuation is undertaken by a registered valuer and that the chargor was protected from sales at undervalue.

15. Not entirely unexpectedly, the Defendant Bank urged the Court to find that the balance of convenience in this matter tilted in its favour. It pointed to the fact that the Defendant Bank was prejudiced by the fact that it could not recover the sums due and owing to it from the Plaintiffs, more particularly it asked the Court to note that the 2nd Plaintiff had never repaid any monies to the Defendant Bank since this suit was instituted. It referred to the **Andrew Wanjohi** case (supra) in which **Ochieng J.** had stated:

> **"In my considered view if the 1st and 2nd defendants were restrained from selling off until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st and 2nd defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property was sold, the plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd defendants would be able to compensate the plaintiff. In contrast, the stoppage of the intended sale by the chargor would result in the continued growth of debt and thus exposing them potentially substantial irrecoverable losses. I therefore find that**

provided the charge complies with all other legal requirements, he should be permitted to realise the security."

The Defendant Bank urged this Court to find along the same lines as the Judge in the **Andrew Wanjohi** case as above. It was its submission that the Plaintiffs had acted unconscionably and were undeserving of equitable relief from this Court. It maintained that the Plaintiffs, more particularly the 1st Plaintiff, had failed to disclose to this Court that they were in arrears as regards the financial facility that was specifically secured by the Charge instrument over the suit property. The Plaintiffs have been unable to attend to their default relating to the specifically secured amount and that they had failed to disclose that, before the execution of the Charge instrument, the 1st Plaintiff had withheld material information relating to the already existing Charge over the suit property in favour of DTB. Finally, the Plaintiffs had failed to disclose that it was the 2nd Plaintiff who had sought additional facilities from the Defendant Bank after the Charge had been registered. In the opinion of the Defendant Bank these material non-disclosures disentitled the Plaintiffs to any injunctive Orders. To this end, the Court was referred to the **Andrew Ouko** case (supra) as well as the English case of **King v the General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington (1917) 1 KB 486**. The aegis of that case was that the Court will not allow the plaintiff to obtain any advantage from an *ex-parte* injunction which he has improperly obtained. It was the Defendant Bank's view that the interlocutory injunctive Orders currently in force in favour of the Plaintiff had been procured as a result of misrepresentations on their part and asked this Court to set the same aside.

16. When Counsel appeared before Court on 11th June 2013, Mr Awele, for the Plaintiffs, highlighted that there were three main issues for the Court to consider being:

(a) Whether the tripartite the loan agreement such as the one before Court, enables a chargee to realise the security offered by the chargor from monies lent to a third-party borrower without the chargor's express consent.

(b) Whether it is possible under the Land Act 2012 for the chargee to tack on to a Charge instrument further advances that are made to a third party borrower without the chargor's consent and, as a result, whether it is possible to enforce a Charge to cover advances made to any other person.

(c) Whether a Statutory Notice under section 96 (1) of the Land Act can contain demands other than those expressly provided for under the Charge instrument.

Counsel maintained that all the 1st Plaintiff needed to do was to satisfy the Court on any one of the points (a) to (c) above to justify the issue of injunctive Orders. He reminded the Court that the amounts of advance secured by the Charge instrument executed by the 1st Plaintiff was Shs. 22 million and such was capped – see pages 3 and 5 of the Charge instrument. In the view of counsel, the suit property was charged purely for this amount and no more. Further advances could only be made to the 2nd Plaintiff with the express consent of the 1st Plaintiff. Counsel referred the Court to **sections 82 (1), 82 (3)** and **section 84** of the *Land Act* in this connection. The latter section covers the position as to whether it was possible for a Statutory Notice to be issued seeking sums in excess of the amounts secured by the Charge instrument. The 1st Plaintiff invoked the principle of privity of contract and parties must be held to their bargain under contract.

17. Mr. Rimui in reply for the Defendant Bank pointed to the principles as to the granting of injunctive relief as per **Giella v Cassman Brown** and submitted that in a nutshell, the 1st Plaintiff's case was a dispute as to the amount that is owing. The Plaintiffs had maintained that the interest rate was too high and that the monies had been added. Counsel pointed out that on the authority of the **Mrao Ltd** case, the amount owing is not a ground for the granting of injunctive relief. He noted that the 1st Plaintiff was not challenging the Charge over the amount of Shs. 22 million nor indeed, was there any dispute as to the 2nd Plaintiff's account with the Defendant

Bank being in arrears. No payment had been received by the Defendant Bank even of the admitted amount owing. In counsel's opinion, no *prima facie* case had been established by the 1st Plaintiff sufficient to warrant the granting of injunctive relief. Mr. Rimui noted that the same persons who executed the letter of offer dated 13th January 2011 being the directors of both the Plaintiff Companies were the same persons who executed the Charge instrument, again in their capacity as directors of both Plaintiff Companies. Counsel reiterated that damages were an adequate remedy as the security had a value which was therefore quantifiable. He pointed to **section 99 (4)** of the *Land Act* which detailed the Common Law position as to a remedy in damages. Counsel also maintained that the balance of convenience tilts in favour of the Defendant since the Plaintiffs had made no effort to pay the sums due or deposit the same in Court. He prayed that the Application be dismissed as the Plaintiffs had not been servicing the loan and have enjoyed injunctive relief to date while being undeserving of this Court's equitable remedy.

18. I have carefully perused the said letter of offer addressed by the Defendant Bank to the directors of the 2nd Plaintiff dated 13th January 2011. At clause 1 the facilities and amounts are described as:

> **"The aggregate maximum amount of the facilities will be the sum of Kenya Shillings Twenty Two Million Only (Kshs. 22.0M) exclusive of interest and other costs and expenses and available in the manner set out in this Letter ("the Total Facility")**.

Underneath that statement is a sub paragraph a) which reads:

> **"a term loan facility in a maximum principal amount of Kshs 22.0M (the "Term Loan facility")**.

Under paragraph 6 of the said letter of offer, the interest on the amount of the Term Loan is at the (presumably Defendant Bank's) Base Lending Rate (B. L. R.) stated be presently 15 percent minus 1% p.a. being an effective rate of fourteen per cent (14%) per annum. The Defendant Bank by that clause, went on to reserve, in its sole and absolute discretion, the right to vary the basis on which interest should be calculated from time to time. At paragraph 7 of the said letter of offer, it detailed that if the Borrower (defined under 'Definitions' at page 18 of the said letter as the 2nd Plaintiff) failed to pay the sum payable under the said letter of offer on its due date for payment, it would pay default interest at a per annum rate which was the aggregate of ten per cent (10%) per annum and the then subsisting Base Lending Rate under paragraph 6. Such seems quite clear to me and I find that the 1st Plaintiff's reasoning that the default interest rate amounted to a flat 10% per annum under this paragraph, to be in error. However, throughout the said letter of offer, I can find no reference to any other monies being lent to the 2nd Plaintiff by way of overdraft on current account or indeed US dollar account. As a result, I accept the 1st Plaintiff's contention that it was only guaranteeing the term loan facility in the maximum principal amount of Shs. 22 million.

19. I have also carefully perused the Charge instrument dated 14th February 2011 registered at the Lands Registry on 17th July 2012 and, more notably, at the Companies Registry on 15th March 2011 (within the 42 day that the period under **section 96** of the *Companies Act*). At *clause 1 (c)* on page 5 of the said Charge instrument it reads:

> **"….<u>PROVIDED ALWAYS</u> that the total moneys for which this Charge constitutes a security (hereinafter called 'the mortgage debt') shall not at any time exceed the sum of Kenya Shillings Twenty two million (Kshs. 22,000,000/=) to which shall be added interest at the rate aforesaid from the time of the mortgage debt becoming payable until actual payment thereof….."**

Again, this wording is clear, unambiguous and self-explanatory.

20. The Defendant Bank has gone to great lengths to try to convince this Court that the other lending to the 2nd Plaintiff, by way of overdraft on its Current account and US dollar account, was

covered by the Charge instrument. Indeed, it would appear that *sub-clauses 7 (e), (f)* and *(g)* may allow such. The sub clauses read:

> "**(e) That the Lender shall be at liberty without thereby affecting its rights hereunder at any time:-**
>
> > **i. to determine or vary any credit to the Borrower;**
> >
> > **ii. to vary exchange or release any other securities held or to be held by the Lender for or on account of the mortgage debt and interest hereby secured or any party thereof;**
> >
> > **iii. to renew bills and promissory notes in any manner and to compound with, give time for payment, to accept compositions from and made any other arrangements with the Chargor and/or the Borrower or any person or persons liable on bills notes or other securities held or to be held by the Lender for or on behalf of the Borrower;**
>
> **(f) That the security hereby given to the Lender shall be without prejudice and in addition to any other security whether by way of pledge legal or equitable mortgage or charge or otherwise howsoever which the Lender may now or at any time hereafter hold on the property and assets of the Chargor and/or the Borrower or any party thereof for or in respect of all or any part of the indebtedness to the Lender howsoever arising or any interest thereon:**
>
> **(g) That the Lender may at any time and without notice to the Chargor and/or the Borrower combine or consolidate all or any of the accounts of the Chargor and/or the Borrower with any liabilities to the Lender and set off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of the liabilities of any of them to the Lender on any other account or in any other respect whether such liabilities be actual or contingent primary or collateral joint or several and whether such accounts and liabilities be at or to one or more branches of the Lender".**

20. I have perused the letter of warning addressed to the 2nd Plaintiff by the Defendant Bank dated 31st May 2012. It lists the status of 4 accounts held by the 2nd Plaintiff with the Defendant Bank and asks that it do settle the total outstanding at that date of Shs. 71,106,607/-plus further interest accruing from 10th June 2012. The first Statutory Notice dated 18th June 2012 addressed by the Defendant Bank's advocates to firstly, the 2nd Plaintiff but copied to the 1st Plaintiff details three Accounts being Nos. 1110 5608, 2020 3840 and 1150 5609. The first two are Kenya shilling accounts and the last, a US dollar account. The letter demands that the total sums of Shs. 49,401,220/45 and US dollars 45,094.61 should be paid within 14 days from the date of the said letter. Obviously, the Defendant Bank thought better as to the validity of that letter for Statutory Notice purposes which is probably the reason why a second letter was sent by the said advocates dated 18th July 2012, this time addressed to the 1st Plaintiff and forwarded by registered post. Again, this letter refers to the three accounts held by the 2nd Plaintiff with the Defendant Bank as above. This letter purports to give notice under the provisions of **section 90** of the *Land Act 2012* and gives the requisite three months' notice as required by **section 90 (2)** of the *Land Act, 2012*. That sub-section reads:

> " **90. (2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters –**
>
> **a. the nature and extent of the default by the chargor;**

b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

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

d. the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies".

21. It cannot be said that the 1st Plaintiff herein challenged that statutory notice dated 18th July 2012 other than detailing that it referred to other monies than those secured by the Charge Instrument dated 14th February 2011. I concur with the viewpoint of the 1st Plaintiff in this regard and find that the said Statutory Notices of 18th June 2012 and 18th July 2012 refer to monies other than those due and owing under the said Charge instrument. In view of the fact that the 1st and 2nd Plaintiff shared common directors, I have no doubt that the directors of the 1st Plaintiff were fully aware as to the account number which reflected the Term Loan arrangement. Again, unfortunately for the Defendant Bank, the said Statutory Notice details sums that must be paid to rectify the overall default of the 2nd Plaintiff not just the Term Loan default. In my view, the Defendant Bank cannot separate out the Term Loan default from the default on the other two accounts and persuade this Court that the Statutory Notice suffices for the Term Loan default. As a consequence, I hold that both Statutory Notices dated 18th June and 18th July 2012 are invalid and of no effect. To this I must add, that **section 82** of the *Land Act, 2012* specifically provides that there is no right to tack further advances or credit in relation to a charge instrument, otherwise in accordance with that section. Again I find that the Defendant Bank has not complied with the provisions of that section.

22. Counsel for the Plaintiffs pointed to the provisions of **section 84** of the *Land Act, 2012* as regards the variation of interest rates. That section provides that where it is contractually agreed that the rate of interest is variable, the rate of interest payable under a Charge instrument may be reduced or increased by a written notice giving the chargor at least 30 days' notice of the reduction or increase in the rate of interest. As I understood the 1st Plaintiff's complaint in that regard, it had never received any such notice from the Defendant Bank hence it was disputing the 40% contractual rate as claimed by the Defendant Bank in the said Statutory Notices dated 18th June and 18th July 2012. Of course, in relation to paragraph 21 above, **section 84** of the *Land Act, 2012* allows the amount secured by a charge to be reduced or increased but by a memorandum which must be endorsed on or annexed to the Charge instrument which varies the Charge in accordance with the terms of the memorandum. The memorandum must be signed in the case of a reduction by the chargee or, in the case of an increase, by the chargor. It must also state that the principal funds intending to be secured by a charge instrument are reduced or increased, as the case may be, to the amount specified in the memorandum. It is clear that by not specifically (by memorandum) increasing the amount covered by the Charge instrument dated 14th February 2011, the Defendant was in breach of this sub-clause by including in its statutory demand, the amount of the 2nd Plaintiff's current account overdraft and its US dollar account.

23. As a result of the foregoing and with reference to the 1st Plaintiff's Application before Court for injunctive Orders, I hold that it has made out a *prima facie* case with a probability of success. As I have found that both Statutory Notices as above were invalid, the Defendant Bank's statutory power of sale has not crystallised. Accordingly, I am of the opinion that this Court does not need to consider whether damages are an adequate remedy as regards the sale of the suit property. Any

such sale, at the present time, would be illegal as regards non-compliance by the Defendant Bank with the *Land Act, 2012*. Similarly, it becomes clear that this Court is not beholden to consider whether the balance of convenience lies as regards the 1st Plaintiff's Application before Court. However, that is not to say that the Defendant Bank cannot in the immediate future put its house in order through the reissuance of a valid Statutory Notice under the provisions of the Land Act, 2012, as pointed out by the 1st Plaintiff. Should that happen, I have no doubt that the 1st Plaintiff will be inclined to make a further application before Court for interlocutory Orders. As a consequence, I find it necessary to consider the various prayers detailed in the Application before Court. The 1st Plaintiff has raised before this Court other issues apart from the validity of the said Statutory Notices, as can be seen from the prayers in the Plaint. In that regard, I have already held and answered prayers a), b) and c) thereof. Prayers d) through to j) still remain to be determined at the hearing of this suit in due course. In my opinion, those issues raised by the 1st Plaintiff need to be ventilated and considered before Court. As a result, I am inclined to grant prayers 2 and 3 of the Application as prayed.

24. However, before I leave this matter, I need to comment upon the Defendant Bank's submission that this Court lacks jurisdiction pursuant to *Article 165 (5) (b)* of the *Constitution*. As I understood the Defendant Bank's position in the matter, it is saying that as the Environmental and Land Court has now been set up under its own Act in 2011, it is the only Court that shall hear and determine all disputes relating to land. It makes its point even more definite by reference to the issue of practice directions by the Chief Justice on 20th September 2012 through Gazette Notice No. 13573. Those directions were to the effect that all new cases which shall be filed relating to land should now be put before the nearest Environment and Land Court for hearing and determination. The Plaint herein was filed on 30th November 2012 and thus, according to the Defending Bank, it should have been filed in the Environment and Land Court as it relates to the suit property L. R. No. 13544/99, Nairobi. I have considered this point and asked myself as to whether this case really relates to a matter of land or is it based on some other cause of action. In my opinion, the Plaint as drawn, as well as the Defence herein, relate to banking transactions as between the 2nd Plaintiff and the Defendant Bank with the 1st Plaintiff as guarantor therefore. The Plaint raises other issues other than whether the Defendant Bank's statutory power of sale has arisen as regards the suit property such as interest rates applicable to the banking transaction, the extent of the 1st Plaintiff's liability to the Defendant Bank as guarantor, as well as to the amount necessary to be found by the Plaintiffs to redeem the suit property. All these matters related to the tripartite contract as between the parties evidenced by the offer and acceptance of the Defendant Bank's facility letter of offer dated 13th January 2011. In my view, the charging of the 1st Plaintiff's property as security is a secondary issue to the main cause of action being the banking transaction to which I have referred. As a result, I do not consider that the suit before Court is a dispute relating to land. *Article 165 (5) (b)* of the Constitution to which the Defendant Bank refers in its submissions reads that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in *Article 162 (2)* of the *Constitution*. *Article 162 (2)* reads as follows:

> **"(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –**
>
> **a) employment and Labour relations; and**
>
> **b) the environment and the use and occupation of, and title to, land."**

With all due respect to the learned counsel for the Defendant Bank, I do not consider that the suit before this Court involved a dispute as regards to the environment, the use, or the occupation of and title to the suit property. As I see it, the suit property being offered by way of security to the Defendant Bank for the loan facilities availed to the 2nd Plaintiff, the same became a commodity which the chargee, the Defendant Bank, could sell off in order to recover monies lent to the 2nd Plaintiff. To this end, I adopt the finding of **Ochieng J.** in the **Andrew Wanjohi** case (supra) when he stated:

"By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon."

25. Although I have found that the 1st Plaintiff is entitled to injunctive Orders, I am concerned at the revelation contained in the Replying Affidavit dated 17th December 2012 as to the fact that no payments have been made towards the 2nd Plaintiff's Term Loan facility since 20th January 2012 as well as no payments in respect of its US dollar account since 19th January 2012 and its KES Current account since 14th May 2012. Although this is an obligation lying squarely with the 2nd Plaintiff, I have already noted, as above, that the Plaintiffs share common directors. I appreciate that the Plaintiffs are separate legal entities but in my opinion, the 1st Plaintiff must be aware of the defaults of the 2nd Plaintiff and has not been open and straightforward with this Court as regards thereto. In my view, such behaviour by the 1st Plaintiff can only go against it at the hearing of this suit in due course. For now, I do not consider that the 1st Plaintiff is deserving of its costs of its Application before Court and, as a result, I make no order as to costs.

DATED and delivered at Nairobi this 31st day of October, 2013.

J. B. HAVELOCK

JUDGE