



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 481 OF 2012

MOHAMMED KHALED KHASHOGGI

**T/A LA ROCHE ENTERPRISES
..... PLAINTIFF**

VERSUS

**EQUITY BANK LIMITED
..... DEFENDANT**

RULING

1. The Plaintiff/Applicant brought his Notice of Motion dated 26th July 2012 before this Court under Certificate of Urgency. It was brought under the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act*, **Order 40 Rules 1 (a), 2, and 4** as well as **Order 51 Rule 1** of the *Civil Procedure Rules 2010*. The Plaintiff sought interim orders that a temporary injunction do issue to restrain the Defendant by itself, its officers, servants, agents or otherwise from selling the Plaintiff's property known as L. R. No. Kochia/Korayo/380 (hereinafter "the suit property"), pending the hearing of this Application. Such orders were granted by my learned brother, **Mabeya J.** On 25th September 2012 but the same lapsed as the inter partes hearing of the Application was never fixed as ordered. However, interim orders were granted by Lady Justice Kamau on 25th April 2013 at least until the inter-partes hearing came before Court.
2. Prayer No. 2 of the Application sought the issue of a temporary injunction seeking to prevent the disposal of the suit property pending the hearing and determination of this suit. Prayer No. 3 asked the Court to issue a mandatory injunction restraining the Defendant, its officers, servants or agents from alienating, transferring to any third party or taking possession thereof or evicting the Plaintiff from the suit property until the suit is heard and determined. The Court is a little unaware as to why the Plaintiff sought both prayers particularly as prayer No. 3 seeks a mandatory injunction which is very seldom granted on an interlocutory application.
3. The Application was supported by the annexed Affidavit of the Plaintiff dated 26th July 2012 and was also based on the following grounds:

"1. The defendant/respondent intends, unless restrained by this Honourable Court, to sell by public auction or otherwise on 24th August 2012 or at any other time thereafter, or otherwise dispose of, alienate, transfer and/or interfere with the plaintiff/applicant's interest in the suit property pending the hearing and determination of this suit.

2. The defendant/respondent has acted capriciously fraudulently and

recklessly and has treated the plaintiff/applicant oppressively out of malice and bad faith.

3. The defendant/respondent's statutory power of sale under the Charge created over L.r. No. Kochia/Korayo/380 and issued by the plaintiff/applicant in favour of the defendant/ respondent to secure the plaintiff/applicant's credit facilities with the defendant/ respondent, has not arisen.

4. Accordingly, the purported Statutory Notices are not proper and valid notices in law and cannot therefore entitle the defendant/respondent to exercise its alleged statutory power of sale of the suit property. In the event, proper statutory notices have not been served upon the plaintiff/applicant.

5. The Notice and Notification of Sale, respectively, both dated 20th of June 2012 and purported served upon the plaintiff/applicant have not been served in the mode prescribed by the Auctioneers Rules.

6. In any event, the said Notice by the said Auctioneers does not constitute a valid notice under the said Auctioneers Rules.

7. The defendant/respondent has over the time, applied exorbitant interest rates on the plaintiffs/respondents' respective credit facilities which interest rates are harsh, oppressive and unconscionable and are in the circumstances, highly prejudicial to the plaintiff/applicant.

8. The defendant/respondent has over the time purportedly subjected the plaintiff/applicant's respective credit facilities to varying penal interest rates which interest rates are harsh, oppressive and illegal.

9. The defendant/respondent in utter and flagrant breach of its duty of care and good faith to the plaintiff/applicant, has on numerous occasions, without any justification whatsoever, revoked its acceptance of various proposals made by the plaintiff/applicant towards the liquidation of their respective credit facilities with the defendant/respondent and/or otherwise refused, failed or neglected to formally communicate its acceptance of certain mutually agreed proposals despite having undertaken to do so as result of which the plaintiff/applicant has been greatly prejudiced.

10. Further, the defendant/respondent has in breach of its duty under the Agreements with then failed to render a complete, true and accurate account of my respective accounts maintained at the defendant/respondent's Ngara Branch".

4. In his said Affidavit, the Plaintiff noted that he had an account in the name of his business La Roche Enterprises with the Ngara Branch, Nairobi of the Defendant bank. He entered into an agreement to overdraw such account in the amount of Shs. 600,000/-. One of the conditions of the lending by the Defendant bank was that he should provide security in terms of charging of the suit property to it. Further he was required to register his motor vehicle Mercedes Benz Reg. No. KAX 222Y in the joint names of himself and the Defendant. He then maintained that on the 17th September 2011, the Defendant maliciously and without notice and/or justification terminated the credit facility. He went to see the Defendant bank's branch Manager and its Director of Operations who, he said, confirmed to him that the decision to terminate his credit facility was in error. He would be given one month's grace period to clear the outstanding loan repayments and he would be welcome to move his account to the Equity Centre Prestige in Mombasa where he was promised a further facility. That agreement he said was not honoured. The next scenario was that the Defendant had instructed the firm of Antique Auctions Agencies to sell the suit property with a

- proposed auction sale to be conducted on 24th August 2012. The Plaintiff went on to reiterate that he believed that the Defendant had acted maliciously and in bad faith by terminating the agreement for the provision of the credit facility, without notice. Finally, the Plaintiff noted that the suit property was his ancestral land where his late father's grave lies.
5. The Head of the Defendant's Debt Recovery Unit, one **Purity Kinyanjui**, swore a Replying Affidavit on 27th August 2012. The deponent confirmed that the Applicant had approached the Defendant bank and requested for a financial facility of Shs. 1,100,000/-. This was on 26th August 2011. The Defendant bank put forward a letter of offer dated 26th August 2011 and the deponent noted that the securities offered by the Plaintiff were a Charge over the suit property to secure the sum of Shs. 800,000/- and a joint registration and Chattels Mortgage over the said motor vehicle registration number KAX 222Y. The securities were subsequently perfected in favour of the Defendant and the loan monies disbursed to the Plaintiff. From the letter of offer, Miss Kinyanjui noted that the loan made to the Defendant was to be repaid vide 36 monthly instalments of Shs. 39,768/-. She observed that the Plaintiff had been grossly irregular in honouring the said instalments and had never at any time complied with that particular term of the letter of offer. As a consequence, a warning notice was sent to the Plaintiff on the 12th March 2012 and a Statutory Notice was dispatched the same day, by registered post. The deponent having received no approach from the Plaintiff then instructed Messrs. Antique Auctions Agencies to realise the land security and that firm served on the Plaintiff the requisite notice of sale dated 20th June 2012. The deponent went on to say that the Plaintiff was clearly indebted to the Defendant bank and had breached the terms upon which the loan was granted to him. The Plaintiff had not demonstrated, in his Affidavit in support of his Application, as to how the Defendant had failed to render accounts and, in any event, it was now well settled law that the issue of accounts cannot be a ground to justify an injunction as long as the indebtedness is admitted and/or is *prima facie* evident.
 6. With the leave of the court, the Plaintiff filed a Further Affidavit dated 5th October 2012. He noted that the accounts with the Defendant bank in the name of his business had been overdrawn by the sum of Shs. 770,062/-. It was the Defendant who had proposed to him that the overdraft be changed into a loan and security be provided. He admitted that the Defendant had agreed and offered him a loan facility of Shs. 1,100,000/-. Such would cover the said overdraft amount of Shs. 770,062/-. He further agreed that it was a term of the agreement, as per the letter of offer, that the loan account should not be overdrawn either by cheque, cash or uncleared effects during the tenure of the loan. As a consequence, a new account was opened in the Plaintiff's name to cover the credit facility. Such was to enable the Plaintiff to obtain finances from the Defendant bank to carry on his business as well as to repay the loan. He maintained that there was an agreement between the Branch Manager of the Defendant bank and himself that the Defendant would provide a revolving credit facility to enable him access to finances, such facility being activated on 28th September 2011 (as opposed to 24th June 2011 which the Plaintiff had earlier stated). The Plaintiff stated that he started repaying the loan as agreed with the Defendant bank until the second month, being November 2011. On the 17th November 2011, the Defendant bank unilaterally and without any justifiable cause terminated the credit facility and, as a result, the Plaintiff found himself being unable to finance the loan. The Plaintiff criticised the said Affidavit of Miss Kinyanjui and expressed surprise that she had been unaware of the credit facility. As regards the notice as referred to in paragraph 13 of the Replying Affidavit, the Plaintiff stated that he had visited the General Post Office where his box number was situate and confirmed that the said notice letters were returned to sender on 31st May 2012 – he attached to his said Affidavit a copy of the confirmation in this regard from the Post Office. He maintained that all along, the Defendant had initiated the process of realising its security with the full knowledge that the notices had all been returned back to it on 31st May 2012. Finally, the Plaintiff more or less submitted that the Defendant should not be allowed to benefit from its acts of omission and commission by breaching the terms of the agreement entered into between it and the Plaintiff as regards the revolving credit facility.
 7. On 24th April 2013, the Plaintiff filed a further Notice of Motion seeking the interim orders as detailed above. This had been necessitated as a result of the interim orders lapsing before the Notice of Motion dated 26th July 2012 was heard by this Court. This time, the Application was supported on the following grounds:

- “1) The Applicant is the lawful owner of the suit property in which his ancestral home as well as his father’s grave is situated.**
- 2) The Defendant/Respondent (hereinafter referred to as ‘the Respondent) has caused to be advertised for sale the said property on account of the alleged default of the Applicant to repay a loan given by the Respondent.**
- 3) The said intended sale is scheduled for 3rd May 2013 despite the pendency of the suit.**
- 4) The Respondent has refused and/or neglected to honour a contract agreement between the Applicant and the Respondent thus occasioning the aforesaid suit and the issues arising therein should be determined before the property is disposed off so as not to render the suit nugatory.**
- 5) This Honourable Court ought to uphold the Rule of Law and uphold the present application”.**

That latter Application came before **Lady Justice Kamau** on 25th April 2013, wherein my learned sister granted prayer No. 2 pending the matter coming before **Mabeya J.** for hearing on 29th April 2013. The learned judge noted that the parties herein had failed to comply with his directions given on 25th September 2012 and stated that they should do so within 30 days. Thereafter, the Judge granted an order of Status Quo and directed that the matter should come before this Court for determination. When counsel appeared before me on 10th June 2013, I directed that the Plaintiff would be at liberty to file and serve further submissions in response to those filed by the Defendant on 23rd May 2013. It is to be noted that the Plaintiff had filed his original submissions on 17th May 2013. It should also be understood that the Plaintiff, by Notice dated 25th April 2013, had detailed that he was now acting for himself.

8. In his written submissions dated 12th May 2013, the Plaintiff set out the background to the suit as contained in his two Affidavits as well as setting out the prayers of the suit as well as those of the Application. The Plaintiff again commented that the deponent of the Replying Affidavit had admitted the loan amount of Shs. 1,100,000/-as well as the security therefore. She had further admitted that the loan facility was to be used to cover the overdraft facility of the Plaintiff’s business that he was enjoying. However, the deponent, according to the Plaintiff, had denied the existence of the revolving credit facility since there was no such mention of an arrangement of that nature in either the letter of offer or the Charge document. The Plaintiff had pointed at the existence of the revolving credit facility in his Further Affidavit, which he maintained had been orally agreed with the Branch Manager of the Defendant’s Ngara Branch. The Plaintiff detailed that the said credit facility ran from 28th September 2011 to 17th November 2011 based on the agreement entered into before the execution of the formal letter of offer. As he saw it, the Plaintiff maintained that there were two issues for determination by this Court:
 - i. **Whether there was an oral agreement precedent to the signing of the letter of offer**
 - ii. **If so, whether the Defendant was in breach of a contract.**
9. The Plaintiff then referred the Court to **section 98** of the *Evidence Act* maintaining that he had provided secondary evidence of the existence of a separate oral arrangement with the Defendant bank. He contended that the signing of the letter of offer did not cover the complete intention of the parties as the terms thereof could have been varied by the preceding oral arrangement. He then referred the Court to the cases of **David N. Mbuthia v Charles N. Mukora (2004) eKLR** where **Njagi J.** had stated:

“In the absence of some independent evidence to resolve the impasse between the parties, all one can do is to do one’s best and make inferences from all the surrounding circumstances”

as well as **G Percy Trentham Ltd v Archital Luxfer (1993) 1 Lloyd's Rep 25** in which the English Court (Steyn J.) had stated:

“Third, he stated that the fact that the contract in the case was executed (i.e. performance of a contract was completed) rather than executory was important since the fact that the transaction has been performed by both parties will make it very difficult for an argument to be sustained that there was no intention to create legal relations or that the contract is void for uncertainty.”

The Plaintiff pointed out that the Defendant had opened the account and credited it with money. On the other hand, the Plaintiff said that he maintained the said account through withdrawals and deposits, he was in the course of repaying the loan and simultaneously running his business. The Plaintiff remarked that both parties perform their obligations and, as a result, the Defendant was estopped from denying that there was a contract between the parties. It was undeniable that there existed a cordial and warm relationship between the Plaintiff and the Defendant owing to the fact that the Defendant had previously granted an overdraft facility to the Plaintiff. The existence of that facility had been admitted by the Defendant as per paragraph 10 of the Replying Affidavit. He also maintained that it was undeniable that the Defendant knew that the loan monies advanced to the Plaintiff would be utilised to pay off the overdraft account.

10. In summing up his position, the Plaintiff detailed as follows:

“It is the Plaintiff's humble submissions that there existed an oral agreement since the Plaintiff was allowed to open the new credit facility, on 28th September 2011, on account number 0910198045637. The Plaintiff ran the account uninterrupted until 17th November 2011 when it was unilaterally closed by the Defendant. Needless to say, this credit facility was opened 5 days after the advancement of the loan on 23rd September 2011 and signing of the letter of offer on 9th September 2011.

Why would the Defendant open a new account and credit it with money? Further, how would the Plaintiff have operated the account without the Defendant noticing? Also why did the Defendant charge fees for the oral agreement as indicated in the bank statement? Why did the Defendant not take any legal action against the Plaintiff after the discovery of the credit facility? Had he been running it illegally?

It is therefore the Plaintiff's humble submissions that there existed an oral agreement that the Plaintiff be offered a new credit facility owing to the fact that the account which was credited with the loan couldn't be overdrawn by cheque, cash or uncleared effects as stipulated under clause 6 (5) of the letter of offer. It was well known to the Defendant (based on the nature of their relationship) that the Plaintiff needed more money to operate his business and conversely repay the loan”.

11. The Defendant filed its submissions on 23rd May 2013. It relied upon the averments of the Replying Affidavit pointing out that there was no dispute as to the Charge Document or indeed the securities which were perfected to cover the loan made to the Plaintiff. The Defendant commented that the borrower had enjoyed the loan facility to the full. It seems that his main complaint was that there were other oral arrangements entered into between himself and some staff of the Defendant which were outside the securities taken being the Charge and the Chattels Mortgage over the said motor vehicle KAX 222Y. It was the Defendant's viewpoint that the facilities granted by it to the Plaintiff were governed by the strict terms of the two legal instruments as above as well as the Letter of Offer dated 26th August 2011. It pointed out that it was not in dispute that the Plaintiff had defaulted in repaying his said loan. As a result, the Defendant had served the Plaintiff with the requisite Statutory Notice. The Plaintiff had claimed that the said Statutory Notice had been returned to the Defendant unclaimed. However the card he had annexed to his Further Affidavit showed returned items Nos. 83 and 84, yet the notices were sent as per the registered slip as parcels 183 and 184. The Plaintiff had not denied or disputed that parcels

Nos .183 and 184 had reached him. The Defendant submitted that the Statutory legal notice had been properly served upon the Plaintiff before the recovery process commenced.

12.The Defendant further noted that the Plaintiff had raised the issue of accounts. It submitted that it was now settled law that the issue of disputed accounts could not be a ground for granting injunctive orders. The Defendant noted that the Plaintiff had introduced sentimental issues in relation to his Application by claiming that his late father's grave lies on the suit property. The Defendant submitted that this should not be a factor in considering whether or not the Plaintiff was entitled to the interlocutory Orders that he sought. The Defendant summed up its position as to the Plaintiff failing to meet the basic requirements for the grant of the injunctive orders sought as follows:

“i. It is not in dispute that the Applicant is indebted to the Defendant.

ii. The statutory notice was duly served on the Plaintiff after he defaulted.

iii. The value of the subject securities is known and/or is easily ascertainable upon a valuation and hence the Plaintiff cannot claim he stands to suffer any irreparable loss.”

Finally, the Defendant referred this Court to the cases of Kenya Products and Investments Ltd v Kenya Post Office Savings Bank HCCC No. 2811 of 1995 (unreported), Isaac O. Litali v Ambrose W. Subai & 2 Ors HCCC No. 2092 of 2000 (unreported), Woodcraft Industries Ltd v East African Building Society HCCC No. 602 of 2000, Nancy N. Kinyanjui v Equity Bank Ltd ACC No. 80 of 2010 (unreported) and Mrao Ltd v First American Bank of Kenya Ltd & 2 Ors (2003) KLR 125.

13.The Plaintiff in response to the Defendant's submissions attacked the viewpoint put forward by the Defendant that the requisite Statutory Notice had been properly served upon him by registered post. He defined:

“registered post” as where the sender sends a registered letter to a third party via the third party's Post Office box number letter. On arrival at the post office is given a delivery no. and thereafter if the recipient collects it the letter is released to the recipient on production of his identification which is then duly recorded and further he must sign receiving the letter of the document retained by the Post Office”.

This leaves irrevocable proof of receipt and if the letter is undelivered, it is returned to the sender. The Plaintiff then went into great detail as to why the submissions of the Defendant were in error in relation to the return of the letters of notice. To the Plaintiff's way of thinking, the Defendant would have in their possession proof that he had received the letters/notices and further details of the recipient's identification number and signature when he received the notices. As regards the Defendant's attempt to auction the property with the grave of the Plaintiff's father thereon, based on a service that was never done and further based on unconfirmed evidence of receipt by the Plaintiff would, in his opinion, be a travesty of justice. The Plaintiff concluded that service was never carried out upon him and that the Defendant should be put to strict proof thereof.

14.The Defendant's Statutory Notice was dated 12th March 2012, some 2 months before the provisions of the Land Act, 2012 came into effect. The Statutory Notice was issued under the provisions of the *Registered Land Act* (now repealed) and, in my opinion, was in conformity with **section 74** of that Act. Indeed, the Charge dated 29th September 2011 executed by the Plaintiff in his dual capacity as both Chargor and the Borrower, was drawn up in accordance with the Registered Land Act. Clause 15 of the Charge detailed how notices could be served on the Plaintiff (as Chargor) and service by registered post was one of the methods that the Defendant could adopt in terms of effecting service of the Statutory Notice. The said Clause goes on to read:

“In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by post

four days after posting (notwithstanding that it be undelivered or returned undelivered save where there is express statutory provision to the contrary) or if sent by facsimile on the completion of transmission. Where a notice or demand is sent by registered post it shall be sufficient to prove that the notice or demand was properly addressed and posted.”

Having perused the Replying Affidavit sworn by the said Miss Kinyanjui, I am satisfied as per exhibits “PK 7a” and “PK 7b” that the statutory notice herein was properly served upon the Plaintiff. I see little or no merit in the Plaintiff’s convoluted explanation as to the workings of the Post Office. To my mind, he has executed the said Charge and is bound by the provisions thereof, the Notices clause included.

15. Further, I hold little store by the Plaintiff’s submission that there existed an oral agreement as between him and the Defendant in terms of a new revolving credit facility provided to him by the Defendant on 28th September 2011. The Letter of Offer dated 26th August 2011 was executed by the Plaintiff on 9th September 2011. At paragraph 6 on page 2 under the heading “Conditions of Sanction” conditions nos. 4 and 5 are self-explanatory as follows:

“4. The outstanding loan balance on account 0910597518409 and the overdrawn position on account 0910294321949 to be cleared on drawdown.

5. The borrower’s account not to be overdrawn either by cheque, cash or uncleared effects during the tenure of the loan.”

From the Business Loan statement for the period 1st September 2011 to 8th August 2012 annexed to the Defendant’s Replying Affidavit as exhibit “PK 4”, it appears that the loan was drawn down on 23rd September 2011. It also appears that the Plaintiff made no repayments towards the loan as had been agreed with the Defendant by way of 36 monthly instalments of Shs. 39,768/-each. To me, the intention of the loan so created was quite clear. The Plaintiff was to clear from the loan proceeds all his existing business borrowings from the Defendant bank both as to La Roche Enterprises and Khashoggi Enterprises. Such were then to be solidified into the one loan of Shs. 1.1 million. The account to which the Plaintiff refers in his Supporting Affidavit, is in his personal name not his trading names and is account number 0910198045637. All the entries on that account statement annexed to the said Supporting Affidavit as “MKK 1” detail personal cash and cheque deposits and withdrawals and shows a debit balance on 17th November 2011 of Shs. 1362.62. The Statutory Notice issued by the Defendant dated 12th March 2012 quite clearly details the Plaintiff as trading as Khashoggi Enterprises. Consequently, I find that the Plaintiff’s submissions in this connection to be of no relevance.

16. What is clear from ground No. 7 in respect of the Plaintiff’s Application before Court is that he is disputing interest rates charged by the Defendant detailing them as being “exorbitant”. Accordingly, I agree with the Plaintiff’s submissions that it is now settled law that the issue of disputed accounts and interest cannot be a ground for the issuance of injunctive Orders. To this end, I would refer to the finding of **Kwach JA** in the well-known Court of Appeal authority – **Mrao Ltd v First American Bank of Kenya Ltd & 2 Ors** (supra) as follows:

“The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury’s Laws of England, Vol 32 (4th Edition) paragraph 725 as follows:-

“725 when mortgagee may be restrained from exercising 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 a 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 into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive. (emphasis added).

17. Somewhat unfortunately for the Defendant, prior to its Statutory Notice expiring, the provisions of the *Land Act, 2012* came into effect. Section 78 (1) of the said Act reads as follows:

“(1) This Part applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, and any other charges of land which are specifically referred to in any section in this Part.”

To my way of thinking, this subsection brings into play the provisions of **sections 96 and 97** of the *Land Act* as regards the Chargee’s power of sale and its duty in exercising such power of sale. In this regard, I accept that the letter dated 20th June 2012 from Antique Auctions Agencies to the Plaintiff herein does comply with the provisions of **section 96 (2)** of the *Land Act*. Such provides that a notice to sell must be given at least 40 days before a sale proceeds. The said letter gives a 45 day notice to the Plaintiff but, of course, is in compliance with **Rule 15 (d)** of the *Auctioneers Rules, 1997*. However, it is to be noted that the Defendant’s Statutory Notice dated 12th March 2012, if the *Land Act*’s provisions had been in effect at the time that it was issued, would not comply with the provisions of **section 90 (2) (c)** of the *Land Act*. Where the Defendant comes unstuck is as regards the provisions of **section 97 (2)** of the *Land Act* in that there is no forced sale valuation put before this Court in evidence either in the documents provided by the Plaintiff or in the documents annexed to the Replying Affidavit of the Defendant. In my opinion, the requirement for a forced sale valuation is mandatory and as the Defendant has not come up with one, prayers 2 and 3 of the Plaintiff’s Application before this Court must necessarily succeed although perhaps accidentally, in terms of the Plaintiff establishing a *prima facie* case as required to satisfy the first condition of the principles outlined on the authority of ***Giella v Cassman Brown (1973) EA 360***. These conditions are well known. First, the applicant must make out a *prima facie* case with a probability of success at the trial; secondly, an injunction will not normally issue if the injury feared may adequately be compensated in damages; and thirdly, if the Court is in doubt, it should decide the application on a balance of convenience. The Court should bear in mind that it is not called upon, at this stage, to decide upon the merits of the case with finality. Of course, if a party’s conduct is shown not to meet with the approval of the Court, an injunction ought not to issue in his favour irrespective of other merits.

18. I have commented earlier in this Ruling as to the non-payment by the Plaintiff of even one instalment of the 36 agreed between the parties towards repayment of the loan taken by the Plaintiff from the Defendant. I adopt with alacrity the holding of **Ringera J.** (as he then was) in the ***Kenya Project and Investments Ltd*** case (supra) when with reference to the **Giella** principles he detailed:

“That stand has been so often restated in other decisions of the East African Court of Appeal as well as those of the present Kenyan Appeal Court that this court must decide applications for interlocutory injunction in conformity therewith. All that need be added for the sake of clarity is that the ‘doubt’ mentioned in the third condition must in logic refer to the existence or otherwise of a *prima facie* case. Judicial practice also supports that understanding. It should also be borne in mind that the remedy of injunction is equitable in origin and accordingly the court must decline to exercise its discretion in favour of an applicant whose conduct is shown not to meet the approval of a court of equity. Delay, acquiescence and unclean hands would disqualify an applicant from equitable relief.”

19. I have also commented earlier as to paragraph 22 of the Affidavit in support of the Plaintiff’s Application before Court. The fact that the suit property is the Plaintiff’s ancestral land where his late father’s grave is situate, has no bearing on the matter before this Court. Here again I adopt the holding of **Ringera J.** in the ***Isaac Litali*** case (supra) as follows:

“However, since the plaintiff has in his pleading and affidavit made a mountain out of the fact that he has developed the land in question to a home and its sale would therefore occasion pain and loss which cannot adequately be compensated in damages, I think it would be fair to express a view on the matter. I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful. I say so for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form security. And needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages.”

20. As a result of my finding as regards the provisions of the Land Act, 2012 as above, this Court allows prayer no. 2 of the Plaintiff's Notice of Motion dated 26th July 2012. However, such must be subject to conditions again bearing in mind the inaction of the Plaintiff in paying the agreed monthly loan instalments. By my calculations, the Plaintiff should have paid to date no less than 24 instalments of Shs. 39,768/-each from the date of drawdown, in order to bring his loan account up-to-date (quite apart from the penalty interest owing as per clause 5 of the said Letter of Offer dated 26th August 2011). Accordingly, the interlocutory injunction will issue subject to the following conditions:-

- (a) The Plaintiff to file a written undertaking within 7 days to pay damages to the Defendant should the injunction be found at the trial to have been wrongly granted, and
- (b) the Plaintiff to pay to the Defendant within 14 days the sum of Shs. 954,432/-with interest thereon at 18 percent per annum with effect from 1st October 2011
- (c) in default of the fulfilment of either condition, the injunction will stand dissolved without any application.

DATED and delivered at Nairobi this 19th day of November, 2013.

J. B. HAVELOCK

JUDGE