REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 79 OF 2009

THARA ORCHARDS LIMITED ……..…….. PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. ……..…… DEFENDANT

R U L I N G

1. What is before Court is an Application brought by the Plaintiff by way of Chamber Summons dated 7 April 2010 seeking an order of injunction restraining the Defendant whether by itself, agents, servants, employees or otherwise from advertising for sale, selling by public auction or private treaty, transferring, alienating or otherwise interfering with the Plaintiff's right of ownership and/or possession of all those parcels of land known as Ngong/Ngong/8197, Ngong/Ngong/18684, Ngong/Ngong/11590, Ngong/ Ngong/11591, Ngong/Ngong/11592 and Nairobi/Block/94/239 (hereinafter *"the suit properties"*), pending the hearing and determination of this suit. The Application is supported by the Affidavit of one **Charles Theuri Maina** the Court copy of which is undated but filed herein on the 27 April 2010. Mr. Theuri describes himself therein as a director of the Plaintiff Company. The Application is supported by 36 grounds, all of which are addressed and repeated in the supporting Affidavit. From the Replying Affidavit of the Defendant sworn by one **Simon T. Gathiari** and dated 24 May 2010, it appears that the copy of Mr. Maina's said Affidavit served upon the Defendant, is dated 27 April 2010. I will refer to this technicality later in this Ruling.

2. As detailed, the Application is opposed by the Defendant, the said Replying Affidavit of Mr. Gathiari, who describes himself therein as a Relationship Manager, being the principal document of opposition to the Application. Both parties have filed written submissions, the Plaintiff's being filed on the 29 June 2010 and the Defendant's on 30 September 2010. Both parties have also filed lists of authorities.

3. The first prayer to the Application asked the Court to certify the matters as urgent and the second prayer requested a temporary injunction pending the *interpartes* hearing of the Application. My learned brother Muga Apondi J first heard the matter *ex parte* on 27 April 2010 but declined to grant any temporary orders. The matter came before Muga Apondi J again on 3 May 2010 with Mr. Kariuki appearing for the Plaintiff and Mr. Munyu for the Defendant. The latter was granted leave to file a Replying Affidavit to the Application. Such came before Njagi J on 27 May 2010 and the learned Judge referred it back to Muga Apondi J for hearing on 7 June 2010. On that day, Mr. Munyu, for the Defendant, informed the Court that the counsel had agreed to put in skeleton arguments for and against the Application and that counsel should come back to highlight the same, at a later date. It was also agreed that the *status quo* be maintained. With the concurrence of Mr. Kariuki for the Plaintiff, the

learned Judge adopted the consent of the parties in that regard as an order of the Court. Thereafter during the remainder of 2010 and for most of 2011, the matter went round and round before finally ending up before me on 2 November 2011. On that day, Mr. Kariuki, for the Plaintiff, highlighted the Plaintiff's submissions and, in turn, Mr. Odera, for the Defendant, highlighted the latter's submissions before me on 29 November 2011. Having thus heard both counsel, I stood the Application over for Ruling on the 26 January 2012 and ordered that the *status quo* be maintained until then.

4. The Affidavit in Support starts off by describing the Plaintiff's decision in or about 1996 to venture into the horticulture business utilizing its land at Ngong for such purpose. The Defendant attached to the said Affidavit a Feasibility Study Report prepared by Deloitte & Touche principally for the purpose of the Plaintiff raising money for the project from the European Investment Fund via the European Investment Bank *("EIB"*). The deponent maintained that , at the time, EIB did not have a local office in Kenya and thus the Defendant was used by EIB for the purposes of disbursing its funds to the Plaintiff. However, from 2 letters exhibited to the said Affidavit, the Defendant advised the Plaintiff that EIB had approved its allocation of Euros 695,615 to the Plaintiff. Those two letters were dated 17 November and 7 December 1998 respectively. Although not specifically referred to in the said Affidavit, it seems as if the terms of the initial lending to the Plaintiff were detailed in a letter to it from the Defendant dated 8 July 1997 which detailed the facility offered to the Plaintiff as follows:

1) Overdraft (KCB) Shs.3,470,000/- at an interest rate of 28.0% per annum

2) Term Loan (KCB) Shs.9,359,000/- at an interest rate of 28.0% per annum

3) Loan (EIB for $821,254) Shs.45,169,000/- at 4.5% p.a. above LIBOR to be fixed for 7 years

The security for the facility was detailed as 1) a Debenture for Shs.58.028 million over the assets of the company 2) Legal charges over the suit properties for Shs.50.84 million 3) Directors' guarantees for Shs 58.028 million each and 4) Appropriate Board of Directors' Resolutions to borrow.

5. Thereafter, Mr. Maina attached to his said Affidavit, copies of the Debenture as between the Plaintiff and the Defendant dated 16 December 1998 in the amount of Shs.57,998,000.00, the Charge dated 27 June 1999 as between the Plaintiff and the Defendant covering the suit properties in the amount of Shs.50,998,000.00 and an undated Guarantee executed by Mr. Maina in favour of the Defendant with the amount thereof being unspecified. Mr. Maina deponed to the fact that both the Debenture and the Charge were invalid in law and null and void and that the Defendant cannot have any recourse to them as security for the monies borrowed by the Plaintiff for the Defendant as well as EIB. The deponent also detailed that the interest rate of 28% on the overdraft facility and the Term Loan was illegal, the same should have been 19% p.a. Thereafter Mr. Maina stated that the parties entered into a Deed of Variation of Charge dated 1 March 1999 to secure increased borrowings by the Plaintiff (as therein detailed) but that such document was also an enforceable on the grounds that it was null and void as the Kajiado District Land Control Board had not given its consent to the same and that it was attested by an advocate who did not hold a valid practicing certificate at the time of execution thereof. Further, the deponent complained that under the Variation Deed, the rate of interest charged on the US dollar loan account (EIB) was over and above the maximum allowed by EIB of 3% above LIBOR of which the Plaintiff had a right to be informed.

6. Over and above the basic complaints of the Plaintiff in relation to the initial borrowing, Mr. Maina deponed to other matters as to which the Plaintiff had been badly and more possibly, illegally treated by the Defendant. These included (*inter alia*):- late disbursement or release of funds, ill advice as to the exchanging of the EIB facility for the more expensive International Finance Corporation ("IFC") funding in 2000, breach of the provisions of the Central Bank of Kenya (Amendment) Act 2001, wrongful cancellation of the loan facility in 2005, ill advice as to the expenditure of more funds for the construction of steel structure greenhouses to replace the less expensive wooden ones, imposition of recommendations and interference and coercion in the decision-making and management of the Plaintiff's project, unilateral variation of interest rates so as to ensure that the Plaintiff remained indebted to the Defendant, miscalculation of interest charges on the Plaintiff's accounts with the Defendant calling-up the Plaintiff's

loan, failing to comply with **section 44A** of the *Banking Act* and wrongfully issuing statutory notices. Finally, the deponent put forward its summarised position in relation to this Application in four paragraphs as follows:-

"37. That further and without prejudice to the foregoing, the Plaintiff states that if any liability accrues to it (which is denied) then it is discharged from the same as the chargor and the Defendant is stopped from exercising its statutory power of sale having compromised, varied and restructured its original arrangement without any justifiable cause and having done so without seeking the Plaintiff's approval.

38. That the Plaintiff is now faced with the risk of having its business interfered with and/or collapsing thereby putting at risk the jobs and livelihood of more than two hundred employees and its properties sold in purported exercise of statutory power of sale which power has not arisen nor become exercisable and is being used in an oppressive and capricious manner.

39. That the suit properties known as L.R No. Ngong/ Ngong/18684, Ngong/Ngong/8197, 11590, 11592 and Nairobi/Block/94/239 Nyari estate are sacrosanct and of unique character to the Plaintiff. The value of the land, development and improvements thereon and its peculiar location in relation to the city of Nairobi and the Jomo Kenyatta international airport greatly outweigh the purported debt or loan account. The parcels of land are of great value, in peculiar location and of great sentimental and commercial value to the Plaintiff. It is impossible to replace them in the event of sale and the Plaintiff would not be adequately compensated by way of damages.

40. That the Defendant does not stand to suffer any prejudice should the injunctive orders be granted pending interpartes hearing of this application and pending hearing and determination of this suit since it holds the title documents to the Plaintiffs suit properties and should the Defendant suffer any prejudice, the same can be adequately compensated by damages".

To my mind what the Plaintiff was doing in terms of the Affidavit in support of the Application and the Grounds in relation thereto, was to detail everything that it could think of to be thrown at the Defendant in order that this Court be persuaded to allow its Application.

7. The Replying Affidavit of **Simon T. Gathiari** is dated 24 May 2010. He maintained that the lending to the Plaintiff was in accordance with the letters of offer exhibited to Mr. Maina's said Affidavit. It was the Defendant which agreed to advance the facility and it was not true that the terms of the lending were agreed between the Plaintiff and EIB. In that regard, the Plaintiff's point that the Defendant was charging interest at a higher rate than the maximum under EIB being 3% above LIBOR was incorrect – the lending was between the Plaintiff and the Defendant and the terms thereof as agreed by the Plaintiff covered the interest rates as per paragraph 4 supra. Further, Mr. Maina's suggestion as per his Affidavit, that the lawful rate of interest was 19% is also incorrect. The agreed rates of interest are as per the letters of offer. In that regard, the parties having contractually agreed rates of interest, there was no need for Ministerial approval therefore. Further, **sections 39, 40** and **41** of the *Central Bank of Kenya Act* were not in operation at the time of lending thus it was incorrect that interest rates were under the control of the Minister for Finance at the relevant time. Thereafter Mr. Gathiari attached a further copy of the Charge document dated 27 January 1999 plus he said, copies of the personal guarantee of Jane Njeri Maina dated 16 December 1998 and the joint guarantee of Mr. & Mrs. Maina dated 2 December 2005. This latter document was not so attached to the Court's copy of Mr. Gathiari's said Affidavit.

8. Mr. Gathiari then proceeded to deny the statements made by Mr. Maina in his said Affidavit as regards proper execution of the security documentation as had been agreed to by the Plaintiff. He exhibited the Resolution for the borrowing executed by the Plaintiff Company and dated 10 November 1998. He maintained that both the Charge and the Deed of Variation were executed as required by law and the requisite advocate's certificate signed but he did not deny that the advocate so certifying did not hold a valid practicing certificate at the time. He further denied any underpayment of Stamp Duty and even if such was the case, the same did not invalidate the securities created in favour of the Defendant as the Stamp Duty Act allowed for an instrument to be stamped out of time upon payment of the appropriate

penalty. He also maintained that as far as the Charge was concerned, the requisite consent of the Kajiado District Land Control Board had been obtained and exhibited a copy of the same as "STG 5". As regards Mr. Maina's suggestions as to why the Debenture was invalid, Mr. Gathiari denied the same and said that he produced as exhibit "STG 6" to his said Affidavit, a copy of the Company's resolution dated 10 December 1998, to this end. Unfortunately, the Court's copy of Mr. Gathiari's Affidavit does not contain any exhibit "STG 6". Further, Mr. Gathiari stated at paragraph 20 of his said Affidavit that he had been advised by the Defendant's advocates on record, that the Deed of Variation of Charge was not a controlled transaction and consequently, did not require Land Control Board consent.

9. Thereafter, Mr. Gathiari proceeded to list paragraph by paragraph the Defendant's response to what I might term the miscellaneous matters raised by Mr. Maina in his Affidavit and to which I have referred in my paragraph 6 above. All those matters will no doubt be raised at the hearing of this suit in due course but, to my mind, don't relate to this Application which is based upon the threat made by the Defendant to sell the suit properties as per the Statutory Notice sent to the Plaintiff by the Defendant's advocates dated 5 March 2010 (see pages 178/9 of the Exhibit to Mr. Maina's said Affidavit in support of the Application). However and finally, Mr. Gathiari did attach to his said Replying Affidavit the Defendant's Statements of Account. As regards the current account, the statements cover the period 4th December 1998 through to 31st May 2008. As at that latter date, the Statement shows a debit balance of Shs.6,035,879/57. The statements for the US $ Loan Account extend from 16th March 1999 to 31st March 2008 and show a debit balance at the latter date of US$ 299,985.90. These balances do not match up to the Kenya shilling and US dollar amounts demanded in the statutory notice of 5 March 2010 which details Shs.7,878,789.00 and US $ 364,448.63 respectively.

10. The Plaintiff's Skeleton Submissions filed on the 29 June 2010 recited the history of the relationship as between the parties and the borrowing agreed by the Plaintiff from the Defendant. Thereafter, the submissions went into the principles governing the granting of injunctions as outlined in **Giella v Cassman Brown** (1973) EA 358.On the 1st principle as regards establishing a *prima facie* case, the Plaintiff submitted that the Defendant was not the lender to the Plaintiff as such, that was the EIB. The Defendant was merely disbursing funds obtained from EIB. Secondly, the Plaintiff maintained that the interest and penalty charges levied by the Defendant Bank were usurious and unconscionable and governed by the provisions of the Central Bank of Kenya Act. It listed the various Kenya Gazette notices during the relevant period in which the Central Bank of Kenya had published minimum and maximum rates of interest that could be charged by banks under **section 39** of the Banking Act. Further, the Plaintiff ran though the legislative history of the *Central Bank of Kenya (Amendment) Act* of 2000 as replaced by the *Central Bank of Kenya (Amendment) Act of 2004*. The Plaintiff submitted that during the period of the loan, the rate of interest charged by the Defendant as per the facility letters, far exceeded the permitted upper rate of interest under the Acts more particularly under the 2004 Amendment Act where the maximum rate of interest was 4% above the 91 day Treasury Bill rate and consequently, illegal. It also pointed out that the provision in the Charge document whereby the Defendant was at liberty to fix and vary the interest rates applying to the borrowing was unlawful. To this end, I was referred to a number of cases in this vein, including **Gichobi vs. Kenya Commercial Bank Ltd & Another** *HCCC 25 of 1999,* **G Okallo Ingari & Another Vs. Housing Finance Co. Ltd** *HCCC 79 of 2007,* **Chanzu vs. Equity Bank Ltd & Another** *HCCC 762 of 2009,* **Murithii M'Mbui vs. Housing Finance Co. Ltd** *HCCC 247 of 2006*and **Zachariah M Maangi vs. Housing Finance Co. Ltd.** *HCCC 598 of 2007.*

11. The next point made in the Plaintiff's submissions was as regards the invalidity of the Charge and Debenture documents. To my mind this is where the real challenge as to a litigant making out a *prima facie* case is concerned. The Plaintiff submitted that by paragraphs 11 and 12 of the Supporting Affidavit, the deponent thereof had pointed out the inadequacy as regards form and procedure. In this regard, the Plaintiff indicated that the Charge document exhibited to the Replying Affidavit was not witnessed nor attested to by any witness and the certificate explaining the effect of **sections 74** and **79** of the Registered Land Act, had not been completed. There was no resolution of the Plaintiff's Board of Directors authorizing the borrowing on behalf of the company and affixing its Common Seal to the charge documentation. To this end, the Court was referred to the case of **Joseph M. Gichanga vs. Co-operative Bank of Kenya Ltd** *HCCC No. 74 of 2000*(Mombasa).This Court was urged by the Plaintiff to find that the Charge and Debenture herein are defective in substance thus cannot confer on the Defendant the

power to sell the suit properties.

12. The Plaintiff's next paragraph of its submissions covered its allegation that the Plaintiff had misrepresented a better *"deal"* for the Plaintiff in changing from borrowing from the EIB lending to that of the IFC. Such advice had cost the Plaintiff dear. On top of that, the Plaintiff accused the Defendant of interfering in the management and control of its business again occasioning losses for the Plaintiff. Obviously, these are all matters that will be canvassed at the hearing of this suit in due course but, to my way of thinking are indicators of a *prima facie* case but with a probability of success? – I have my doubts under this heading but then I am not trying this suit at this stage.

13. The next topic of the Plaintiff's submissions dwelt upon the point of the Defendant's non-compliance with **section 44** of the *Banking Act*, in that it failed to determine the date that the Plaintiff's loan became non-performing. The section, according to the Plaintiff, came into operation as **section 44A** on 20 April 2007. The Defendant, according to the Plaintiff's submission has not only failed to determine the date but failed to detail to the Plaintiff the purported principal amount and the interest accruing thereon. I was referred to the case of **Duncan N. Wamae vs. Housing Finance Co. Ltd.** *HCCC 298 of 2008*in this regard.

14. Turning to the 2nd requirement under the principles of injunction as per **Giella v Cassman Brown** (supra), the Plaintiff submitted that the Defendant's argument that the suit properties have a determinable value and should be offered as a commodity for sale takes no cognizance of the fact that the Plaintiff's entire business is operated therefrom and should the suit properties be sold off, the Plaintiff will suffer irreparable harm. The Plaintiff also submitted that the Defendant's statutory power of sale had not arisen nor become exercisable. Such power of sale was not in the Plaintiff's submission available to a party which is in breach of the law. In the opinion of the Plaintiff, the Defendant should not be pardoned for its unlawful conduct. I was referred to the cases of **Lucy Njoki Waithaka vs. Industrial & Commercial Development Corporation** but not given the case citation therefore. However, the Plaintiff also pointed me to the case of **Joseph Mbugua Gichanga vs. Co-operative Bank Ltd.** (supra)and **G. Okallo Ingari & Anor. vs. Housing Finance Co Ltd** (supra).

15. On the third leg of **Giella**, the Plaintiff submitted that it had established a *prima facie* case with a probability of success and that damages cannot compensate the Plaintiff for any loss suffered should this Court not grant an injunction. The balance of probabilities tilted, in the Plaintiff's view, in its favour and it would be more convenient to save the suit properties from sale than it is to allow the Defendant to sell the same *"and when the suit succeeds to do a reconveyance"*. The Plaintiff urged this Court to adopt the sentiments expressed in the case of **J. K. Khatri & Another vs. Giro Commercial Bank Ltd.** (again no case citation given) where the Plaintiff maintained that if the defendant were to dispose of the property whilst the suit was still pending, the case would be no more than an academic exercise. Finally in urging me to grant the injunction prayed for, the Plaintiff stated that the Defendant is not likely to suffer any loss if the injunction is granted. The suit properties are and still will be charged in its favour and if the suit does not succeed at the trial, the Defendant will be at liberty to sell the same in accordance with the law. I find this last sentiment, I can only call it that, somewhat incongruous when one bears in mind that the large part of the Plaintiff's submissions herein were devoted to pointing out to this Court the inadequacy, nay illegality, of the Defendant's security in this matter.

16. In its turn, the Defendant confined its submissions to 6 specified headings as follows:-

"a) Whether the Defendant bank was a lender for all purposes or a disbursing bank;

b) Whether the interest charged is in accordance with the terms of lending agreed upon between the parties;

c) Whether the charge and debenture documents are valid;

d) Whether the Plaintiff is truly indebted to the Defendant;

e) Whether a dispute as to amount due can be used to stop a chargee from exercising its statutory power of sale:

f) Has the Plaintiff made out a case for grant of an injunction".

As covered by Mr. Gathiari in the Replying Affidavit, the Defendant maintained that it was not a disbursing bank in this transaction with the Plaintiff but a lender. The Defendant agreed to advance the facility to the Plaintiff partly under funds availed to it by EIB but also its own funds in respect of the overdraft and term loan facilities. It was not a mere conduit for passing on funds. For all purposes, the Defendant maintained, the loan was advanced by the Defendant and the Plaintiff is indebted to it by virtue of the contracts entered into between the two parties.

17. As I have set out in paragraph 4 above, the facility letters addressed to the Plaintiff by the Defendant contained two rates of interest – 28% on the overdraft and term loan facilities and 4.5% above LIBOR for the US dollar facility (EIB). The Defendant points out that these rates of interest were agreed to by the Plaintiffand submit that the Plaintiff'ssuggestion that interest was at 18% is incorrect. The Defendant points out that such being an agreed contractual rate of interest, the Court cannot just step in and re-write the contract between the parties which the Plaintiff is asking it to do. The Defendant continued in its submissions that **section 55** of the Banking Act cannot apply to the transaction as at the time such was agreed upon, **sections 39, 40** and **41** of the *Central Bank of Kenya Act* had to be applied and weren't in effect. The Plaintiff, it stated had not demonstrated any breach of the contractually agreed interest rates sufficient to show a *prima facie* case. To this end, the Court was referred to the cases of **Ramji H. Devani Ltd vs. Kenya Commercial Bank Ltd.** *HCCC 482 of 2005*and **National Bank of Kenya Ltd vs. Cador Investment Ltd.** *HCCC No. 2105 of 2000.*The Defendant also noted that the *Central Bank of Kenya (Amendment) Act of 2000* was subsequently declared unconstitutional by this Court in **Albert Ruturi, Kenya Bankers' Association and Others vs. Minister for Finance & Another** (2002) 1KLR 61. This Court was also referred to the provisions of section 52(1) of the Banking Act as well as the 3 cases of **Kvangavo vs. Kenya Commercial Bank Ltd & Another**(2004) 1 KLR 126, **Waudi vs. National Bank of Kenya Ltd** (2002) 2KLR 254and **Ishmael K. Thande vs. Housing Finance Co Ltd** *HCCC No. 336 of 2003.*In any event, the dispute as regards the rate and therefore the amount of interest charged does not raise, in the Defendant's submission, a *prima facie* case for granting an injunction. It only raises a dispute as to the amount payable which is not a ground for granting an injunction.

18. As regards the position as to whether the Charge and Debenture are valid and enforceable, it was the Defendant's submission that both documents were properly executed by the Plaintiff by the affixing of its Company Seal and the signature of two directors. This was as provided for in the Memorandum & Articles of Association of the Plaintiff Company. Thereafter, the Defendant's submissions spelt out the Resolution of the Plaintiff's Board of Directors at its meeting on the 10 December 1998. Unfortunately for the Defendant there has been no copy of such Resolution put before this Court, either as an Exhibit to the Replying Affidavit nor in the Defendant's list of documents filed herein on 22 January 2010. The Defendant further submitted that both the Charge and the Deed of Variation of Charge were executed properly and the requisite advocate's certificate completed. The Defendant also denied that the Stamp Duty on the Charge was underpaid and even if it were, such was curable by late stamping and the appropriate penalty paid. It also maintained that the Kajiado Land Control Board's consent had been obtained, the letter of consent being dated 9 March 1999. As regards the resolution of the Plaintiff's Board of Directors as to the execution of the Debenture, the Defendant referred this Court to documents at pages 123 & 124 of its List of Documents filed on 22 January 2012. I have examined those documents and am not satisfied that either of them amount to any sort of Resolution of the Plaintiff Company to borrow monies as per the Debenture or Charge. The extract on page 123 reads:

"The Board of Directors resolved that a loan of Kshs.100 million maximum be borrowed by the company from EIB through Kenya Commercial Bank Limited to facilitate the development of a floriculture project at Ngong".

The document at page 124 is a letter from the Plaintiff Company to the Defendant returning the latter's

facility letter dated 8 July 1997 duly signed. Such cannot be considered as a Board Resolution by any stretch of the imagination. Two further points as regards security documentation were made by the Defendant. Firstly, it pointed out that the Deed of Variation of Charge was not a controlled transaction and thus did not need the consent of the Kajiado Land Control Board. Secondly, the Defendant maintained that for the duration that the Plaintiff was enjoying the said facilities, it had not raised any issues as regard thereto but the alleged shortcomings in respect of the Deed of Variation of Charge were being raised now as an afterthought to escape the consequences of the Plaintiff's breach and as such, this Court should not be used as a shield to assist a defaulting party to get away with its failure or refusal to honour its contractual obligations.

19. Thereafter the Defendant commented upon the indebtedness of the Plaintiff to the Defendant and the true amount thereof. As regards the Interest Rates Advisory Centre's (IRAC) interest calculations, the Defendant drew this Court's attention to the case of *HCCC No. 230 of 2008,* **Popat Investments Limited & Another vs. Barclays Bank of Kenya Ltd.** in which this Court found that the veracity of the said IRAC report *"needs to be tested and in a full trial…."*. The Defendant reiterated that in its view, the Plaintiff was indebted to the Defendant in the sums of KShs.7,878,789.00 and US$ 364,448.63 as per the Defendant's statutory notice of 5 March 2010 which sums continue to attract interest at 18% p.a. and 11% p.a. respectively.

20. The Defendant submitted that the Plaintiff had not made out a *prima facie* case with a probability of success. It pointed to the decision in **Habib Bank A.G. Zurich v Pop In (K) Ltd.** (1983) LLR 3069 (CAK)as authority that the allegation of a dispute as to the outstanding sum cannot constitute an impediment to a chargee's statutory power of sale. It also pointed out that in its opinion, damages would be a sufficient remedy for the Plaintiff in the event that it was successful in the suit hearing in due course. There was nothing special about the suit properties as the Plaintiff would have this Court believe and the same had already been charged to the Defendant. It referred to that ever popular finding of **Lord Diplock** in **American Cynamid Co. v Echicon Ltd** (1975) AC 396 or (1975) 1 AllER 504 as follows:

"The object of interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial ….. If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage".

The Defendant submitted that once a property has been charged to secure financial accommodation, it becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages.

21. As to the balance of convenience, the Defendant maintained that lay in favour of refusing the injunction application. It concluded its submissions by saying that the Plaintiff had failed to satisfy the criteria for the granting of an injunction as per the **Giella** case and that the Defendant should be allowed to exercise its statutory power of sale as the Plaintiff is truly indebted to it. It requested the Court to dismiss the Plaintiff's Application with costs.

22. I have perused the various authorities produced to me by both the parties. Most of them are on point and have assisted me in arriving at a decision in this matter which I feel is best arrived at by addressing points raised in the parties submissions as follows:

(a) Breaches of the Banking Act by the Plaintiff. **Section 52 (1)** of the Act reads:

"(1) For the avoidance of doubt, no contravention of this Act or the Central Bank of Kenya Act shall affect or invalidate in any way any contractual obligation between an institution and any other person"

Against this, the Defendant would do well to consider **Section 52 (3)** of the Act which reads:

"(3) This section shall not permit any institution to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of this Act or the Central Bank of Kenya Act".

I remain unconvinced by the Plaintiff's arguments in this connection. It has not in its Affidavit in Support pointed to specific instances where the Defendant has debited interest and bank fees and charges directly contrary to the Banking Act but merely points to the interest rates in the facility letters. To my mind, those points are arguable and should be canvassed at the hearing of this suit in due course.

(b) Associated with sub paragraph (a) above is the Plaintiff's submission with regard to **section 44A** of the Banking Act. There has been no denial by the Defendant in that it has failed to determine the date upon which the Plaintiff's loan became non-performing nor did it detail the principal amount of the non-performing loan and the interest accruing thereon. Certainly, the Statutory Notice dated 5 March 2010 does not particularize this. Indeed if one examines the Statements of Account exhibited to Mr. Gathiari's Affidavit in Reply dated 24 May 2010, it would appear that the Kenya Shilling account continued to be operated right up until 16 January 2008 and the US$ account up till 3 January 2006. However, I am very aware of the persuasive Ruling in this regard per Kimaru J in Duncan N. Wamae vs. Housing Finance Co. of Kenya Ltd. (supra) in which the learned Judge clearly addressed matters arising under **Section 44A** of the Banking Act as follows:

"Further, the clause relating to the rate of interest applicable was varied and modified by the enactment of Section 44A of the Banking Act which provided the maximum amount of interest that is chargeable by a bank. Of particular importance to this application is Section 44 A (3) of the Banking Act which provides:

"If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of the subsection (1) shall be determined with respect to the time the loan last became non-performing".

Section 44 A (6) of the said Act provides that:

"This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following –

(a) The principal and interest owing on the day this section comes into operation; and
(b) Interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and
(c) Expenses incurred in the recovery of any amounts owed by the debtor".

The above section of the Banking Act came into operation on 1st May, 2007 vide Legal Notice No. 52 of 20th April, 2007. The above section of the Banking Act introduces two concepts which modified the contract between a mortgagee (the defendant) and a mortgagor (plaintiff). The first concept introduced was the concept of a non-performing loan. The mortgagee is required to determine the date that the loan becomes non-performing. Upon determining this date, the interest shall cease to be applied on the loan if the amount owing exceeds the principal loan advanced. The second concept created by the said amendment is the concept of the limitation of the amount that can be claimed by a mortgagee in respect of a loan which has been declared to be non-performing. In both instances, the mortgagee is required to notify the mortgagor of the date that the loan became non-performing according to the said section of the Banking Act and secondly of the amount that the mortgagee is demanding. This requirement of the law applies to loans which were advanced before the amendment came into operation provided that such a loan became non-performing after the coming into operation of the said amendment to the Banking Act.

In the present case, it is clear that even though the loan became non-performing after the coming into effect of the said amendment, the defendant failed to issue a notice setting out the date when the said loan became non-performing, and secondly issuing a further notice declaring the amount that was owed by the plaintiff at the time it purported to exercise its statutory power of sale. This declaration of the amount must separately state the principal amount and the accrued interest claimed. I therefore hold that the plaintiff has established that since the defendant failed to give the said notices as required by Section 44A of the Banking Act, the right to sell the suit property in exercise of its statutory power of sale had not accrued. The Plaintiff therefore establishes a prima facie case".

What Kimaru J has pointed out in his said Ruling is on point with the position in this case and I am of the opinion that the Plaintiff on this point alone has established a prima facie case.

(c) The Plaintiff had submitted that the Defendant was merely a conduit through which EIB (and presumably later on IFC) funds were to be distributed to it and was not a lender. From the facility letters exhibited to the Affidavit in support of the Application, it is quite clear to this Court that that submission cannot be correct. The Defendant has lent monies to the Plaintiff both for overdraft and term loan purposes. I do not believe that anything turns on this point.

(d) I have no doubt that the Plaintiff is indebted to the Defendant. The question to be determined at the hearing of this suit in due course is just how much? The Plaintiff has a dispute as to the amount of interest charged to its accounts and has attached an IRAS report which concludes that the plaintiff's loan accounts would have been paid off in March 2006 if the statutory interest had been charged instead of the contractual interest that was charged by the Defendant. Again, all these matters should be canvassed at the hearing in due course, as this Court is reminded of its proper function in this regard guided by the following words of Ringera J (as he then was) in **Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya Ltd. & 2 Others** – *HCCC No. 937 of 2001* (unreported) as adopted by Ochieng J in the **Khatri** case (supra):

"In answering that question the court is to remember that it is not required – indeed it is forbidden – to make definitive findings of fact or law at the interlocutory state particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here".

So it is the case in this matter as to questions of what amount is owed, I am bound to follow the finding of Kwach JA as he then was in **Lavuna & Others vs. Civil Servants Housing Co. Ltd. & Another** (1995) UR 3021 (case):

"Notwithstanding the stand taken by Mr. Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale on the ground that there is a dispute as to the amount due under the mortgage".

Apart from Kwach JA's findings, I am also bound by the finding of the Court of Appeal in:

In **Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd & Others** being *Civil Appl. No. Nai 227 of 1995*(unreported)in which the Court stated:

"Finally, it will bear repetition, we think, if we were to re-state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage" .

I am also persuaded by my learned brother **Njagi J's** finding in **Beatrice E. Wambugu vs. Savings &**

Loan Kenya (supra)when he noted that:

"There is abundant case law in this country, and it is now well established that a dispute as to the amount payable is not an adequate ground for granting an injunction restraining the sale of mortgaged or charged property in order to realize the security thereof".

Accordingly I find myself unable to uphold the Applicants' submissions for an interim injunction to be granted on this ground.

(e) The next matter for this Court to consider is whether the Debenture and Charge documents are valid. The first point to note is that the Charge dated 27th January 1999 is made supplemental and collateral to the Debenture dated 16 December 1998. To my mind therefore, if the Debenture herein is defective for any reason, the Charge must also be so. From the copy of the said Debenture provided under the Defendant's List of Documents filed herein on 22 January 2010, it is apparent that the same has been fully stamped and is correctly issued under the appropriate clause of the Memorandum of Association of the Defendant as well as the appropriate Article of Association. However in the document itself and indeed as observed above, the same does not seem to have been backed up by a Resolution of the Board of the Defendant Company which, at the hearing of this suit in due course, may prove that the Document and the powers arising thereunder are fatally defective. Further, there is no evidence currently before this Court as to whether the Defendant Company's Seal was affixed thereon although it does seem to have been registered at the Company Registry on 22December 1998.

(f) Turning now to the Charge dated 27 January 1999, there is evidence that the document was registered at both the land Registry at Kajiado and at the Companies Registry. However, I do not consider that just because the document was registered that makes the same valid and legal. From the copies of the said Charge both exhibited to the Affidavit in Support of the Application as well as in the Defendant's said list of documents, the Certificate of the Advocate explaining to the directors of the Chargor (the Plaintiff) the effect of **Sections 74** and **79** of the *Registered Land Act* is incomplete. Again this may not, at the hearing of this dispute in due course, prove fatal as regards the validity of the said Charge and this Court takes on board the view of Owuor JA in **Kenya Commercial finance Co. Ltd. vs. Ngong & Another** (2002) 1 KLR 106, in that regard. Furthermore, there is no evidence currently before Court that there was any Resolution of the Board of Directors of the Plaintiff Company authorizing the directors to execute the Charge. My comments above as regards the affixing of the Plaintiff's Company Seal to the Debenture also apply as far as the said Charge is concerned. There is the further point that it has become customary for the advocate certifying as above to also witness the signatories of the directors as to the affixing of the Company Seal.

(g)As regards defects in security documentation, I draw comfort from the decision of Maraga J (as he then was) in **Joseph M. Gichanga vs. Co-operative Bank of Kenya** (supra). In line with the observation by the learned judge in that case, I note that the Plaintiff herein at paragraph 12 of the Plaint maintains that the said Charge is invalid in law and thus null and void, for a number of reasons stated. In the words of Kimaru J:

"As I have not heard the evidence in this case I cannot and should not make any definitive findings that may prejudice either party at the hearing of this case. Suffice it to say that having carefully considered this matter I am satisfied that the Plaintiff has made out a prima case with a high probability of success".

(h) One further matter that requires comment as regards the Plaintiff making out a strong prima facie case is the necessity or otherwise for the Defendant to have obtained the consent of the Land Control Board at Kajiado to the Deed of Variation of Charge dated 1 March 1999. It is Mr. Munyu's submission on the part of the Defendant that such does not so require consent. **Section 6 (1)** of the *Land Control Act (Cap 302)* reads:

"Each of the following transactions –
(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with

agricultural land which is situate within a land control area; ……..

Is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act".

To my way of thinking, the question of whether that section applies to the said Deed of Variation of Charge is a matter to be aired and determined at the hearing of this suit in due course.

23. This now brings me back to the point as to whether the Plaintiff has made out a case for the granting of an injunction pending the interpartes hearing of this suit. On the basis of my observations in sub-paragraph 22 (b), (e) and possibly (f) above, I am satisfied that the Plaintiff has satisfied the first principle as regards establishing a prima facie case as outlined in **Giella v Cassman Brown** (supra). I am however not entirely convinced that having established that, such excuses this Court from having to look at the second principle enunciated in **Giella v Cassman Brown** as to whether the Plaintiff will be adequately covered by damages to be awarded should the injunction be not granted. (See **Joseph M. Gichanga vs. Co-operative Bank of Kenya Ltd.** (supra)). I am not convinced as to the Defendant's argument that the suit properties have a determinable value and should be offered as a commodity for sale. I agree with the submissions of the Plaintiff in this regard that the Plaintiff's entire business is operated from the suit properties. If such were to be sold the business would have to close down with all the resultant consequences that such will undoubtedly involve, including the termination of employment of some 200 plus employees. Such factual allegations made by the Defendant were not controverted by the Defendant. I have no reason to believe that the Defendant will suffer irreparable harm if the injunction is not granted. As I am in no doubt as to the first two principles enunciated in **Geilla v Cassman Brown**, there is no necessity for me to consider the issue of the balance of convenience.

24. Accordingly, I grant an injunction in the terms of prayer 3 of the Plaintiff's Chamber Summons dated 27 April 2010 with costs of the Application to the Plaintiff.

DATED and DELIVERED at NAIROBI this 26th day of January 2012.

J. B. HAVELOCK
JUDGE