REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL SUIT 501 OF 2011

ALFRED MWAI KARIUKI……..…….……...…….....1ST PLAINTIFF

HANNAH WAITHIRA MWAI…….……2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK OF KENYA LIMITED..…… 1ST DEFENDANT

JOSEPH GIKONYO T/A GARAM INVESTMENT…….2ND DEFEDANT

RULING

Before the Court is an application dated 9th November, 2011 brought by way of Notice of Motion seeking the following orders:

"1. THAT the application be certified urgent.

2. THAT a temporary order of injunction do issue ex-parte in the first instance restraining the 1st defendant by itself or by its servant or agent the 2nd Defendant or any other servant or agent from advertising offering for sale, selling, transferring, charging or howsoever dealing with or disposing off or alienating Plaintiff's right and title to ownership possession and use of property Title Number IR 41466 LR No. 209/10352/21 Kariba Estate within Nairobi Area pending hearing and determination of the application.

3. THAT an order do issue restraining the Defendants their servants or agents from advertising of offering for sale selling transferring charging or howsoever disposing off or alienating Plaintiff's right and title to ownership possession and use of the property Title No. IR 41466 LR No. 209/10352/21 Kariba Estate within Nairobi City Area or howsoever interfering with the Plaintiff's possession use and ownership thereof pending hearing and determination of this suit.

4. The Honourable Court be pleased to make any other orders deemed necessary for the ends of justice.

5. Costs thereof be provided for".

The motion is supported by an affidavit sworn by **Alfred Mwai** the 1st plaintiff herein on 9th November, 2011. According to the deponent, the 2nd plaintiff is his wife and that in the July 2005 they were offered a loan of Kshs. 2,000,000.00 by Savings & Loan Kenya Ltd (hereinafter referred to as the loanee) to enable them purchase Land Tile No. IR 41466 LR No. 209/10352/21 situated at Kariba Estate within the City of Nairobi which is their matrimonial home (hereinafter referred to us the suit property).

After fulfilling the required conditions including the payment of Kshs. 20,000.00 appraisal fees, Kshs. 45,698.00 equivalent of one month's instalment placed on call deposit with the loanee attracting interest, first premium mortgage protection insurance, Legal fees, Valuation fees and Kshs. 700,000.00 being the difference between the loan facility and the purchase price, the loan was eventually disbursed in December 2005 after the registration of the charge on the suit property. However, the plaintiffs have been unable to obtain a certified copy of the said charge document. In or about December 2008 the loanee served on the plaintiffs a chargee's statutory notice pursuant to **section 69A** of the provisions of *Transfer of Property Act* which was followed by the notification of sale and public auction notices.

Thereafter the plaintiffs made certain proposals which, according to the deponent, were acceptable to the loanee and the intended sale was suspended. When the 1st defendant herein was amalgamated with Savings & Loan in 2009, the said facility vested in the 1st defendant. During the whole period, the deponent contends, they endeavoured to repay the said facility with the result that as at 31st October 2011, the same had been reduced from Kshs. 2,009,519/- to Kshs. 507,725.79. Despite this the 1st defendant put the property on sale and scheduled the same for 5th November 2011 without issuing a fresh statutory notice. According to the plaintiff, based on his advocate's advise, the statutory notice offends the provisions of **section 69A** of the *Transfer of Property Act* and that its defect by form and by expressions are fundamental and negate not just the chargee's statutory power of sale but violate the plaintiffs' fundamental constitutional rights to protection by the Law and their very fundamental rights to property. According to the deponent that action is arbitrary if not reckless and oppressive. To make matters worse, the 2nd defendant has been allowed by the 1st defendant to freely demand and levy extortionate charges of un-agreed and untaxed costs which costs are un-regulated by anyone. According to the deponent the said charges are becoming a heavy burden and a hindrance to reasonable redemption of the mortgage account. According to the deponent, the 1st plaintiff, I suppose that must be himself, though convalescing in hospital, like the 2nd plaintiff remains committed to the accord for repayment of the mortgage debt. Unless the court intervenes, the deponent believes their matrimonial home will be sold to the detriment of the plaintiffs and their young children who stand to suffer irreparable loss and damage by the arbitrary exercise of statutory power.

The 1st defendant opposed the application through an affidavit sworn by **Kennedy Kasamba**, a Relationship Manager with the 1st defendant. According to the deponent, based on advise from his advocates, the entire application is fatally defective as the prayer for interlocutory injunction is in vacuuo. According to the deponent, on 28th February 2011, the applicants applied for a mortgage facility of Kshs. 2,000,000.00. The said facility was granted subject to terms whose fulfilment led to the transfer of the suit property and simultaneous with the said transfer, a legal charge was created over the said property. However, the applicants failed to repay the sums secured despite being notified of the position leading to the issuance of the statutory notice. Despite the issuance of the said notice, the deponent states, a sum of Kshs. 509,926.19 remains outstanding as at 31st October 2011. The issue of accord and satisfaction, according to the deponent is a red herring and since the debt is admitted there is no prima facie case established

According to the deponent, the plaintiffs proposed to sell the suit premises by private treaty which proposal was accepted but bore no fruits. Since the debt is unpaid and the notices have been given, it is the deponent's contention that the applicants have not approached the court with clean hands and the prayers sought are undeserved. In the alternative, it is deposed that the defect in the statutory notice, if any, is curable by issuance of another valid notice since the indebtedness is admitted.

The application was prosecuted by way of written submissions which were highlighted by counsel. In their submissions the plaintiffs through their learned counsel **Mr. Wamalwa**, *clause 10(a)* of the charge documents negates the provisions of **section 69(3)** of the *Indian Transfer of Property Act* in so far as it purports to donate to the chargee the power to waive or extend the manner of giving a statutory notice mandated by **section 69A** of the *Transfer of Property Act*. Repudiation of the mandatory requirement for the giving of notice and other incident of the exercise of the power of sale is on the plain reading of **section 69(3)** of the said Act neither a variation nor an extension of the exercise of the statutory power its incidents and consequences. It is therefore submitted that equity would frown on such exercise of arbitrary power if a chargee having secured a debt due to it with a promise to pay were to proceed to sell the security without giving any opportunity by notice to a chargor thereof to redeem which conduct, it is submitted, would be clearly oppressive.

The plaintiffs accordingly contend that *clause 10* of the Charge between the loanee herein and the plaintiffs negates the requirement for giving statutory notice without which the statutory power of sale could not arise without the intervention of the court. Accordingly, it is submitted that the statutory notice served by the loanee in the absence of any provision on the charge for the giving thereof was an exercise in futility and of no legal consequence as the charge instrument was wanting by its express negation of provisions of **section 69A** of the *Transfer of Property Act* with the result that the chargee had to seek intervention of the Court for an order to sell the security before putting in place the motions for sale thereof. The plaintiffs rely on **Mulla, The Transfer of Property Act** in support of their case.

It is further submitted that the statutory notice issued required the plaintiffs to redeem the charge security within the date of expiry of notice, not after expiry of notice effectively contradicting provisions of section 69A of Indian Transfer of Property and thereby abridging the period required to redeem the security. It is therefore submitted that the statutory notice served is in those terms inconsistent with express statutory provisions and must fail for the reason of its inconsistency with statutory provisions and is therefore null and void. In support of this contention the plaintiffs rely on **Trust Bank Ltd vs. Eros Chemists Ltd & Another Civil Appeal No. 133 of 1999.**

It is further submitted that the charge document itself was rendered meaningless in that whereas the same was registered on 22nd May 2006, the lumpsum repayment was expected on 30th April 2005 before the registration. Accordingly the lumpsum mode of redemption is equally rendered inapplicable. According to the plaintiffs it is from a month after the actual date of advance of the principal debt that the 6 years fixed by the charge for redemption begins to run under the original scheme of redemption and runs thereafter for 6 years.

The foregoing, coupled with the fact that the initial intention to sell the charged property was suspended and based on the said suspension the defendant and the loanee received substantial sum in repayment, it is the plaintiff's contention that the conduct of the defendant in the circumstances disentitles it to proceed with the sale.

The foregoing issues cumulatively, it is submitted establish a prima facie case under the **Giella vs. Cassman Brown** principles regarding interlocutory injunctions.

It is submitted that as the security constitute the plaintiffs' residence together with their children and taking into account the fact that the loss of the security to this middle class family approaching their twilight years of working which would be a blow from which they could never recover and a loss for which any award of damages could never adequately recompense. The balance of convenience, accordingly tilts in favour of the plaintiffs, it is further submitted.

Lastly it is submitted that since all these issues cannot be fully and fairly addressed or resolved by mere affidavits, the application should be granted pending the hearing and determination of the case.

On their part, defendants, through their learned counsel **Mr. Mwanyale** submitted that the original offer lapsed partly due to the fact that the registration of the charge required the transfer from the name of the original owner to the plaintiffs first. It is therefore submitted that the plaintiffs' contention that the

registration of the charge in 2006 denied them the right of redemption on 30th April 2005 is a red herring and an academic exercise.

It is further submitted that although the plaintiffs' application is based on **Order 40 rules 1** and **2** of the *Civil Procedure Rules, 2010*, rule 1 is inapplicable. Rule 2 on the other hand would not assist the plaintiffs without a substantive prayer for injunction in the main suit. Accordingly the injunction sought has no legs to stand on and is in vaccuo. Reliance is placed on **Paul Muhoro Kihara vs. Barclays Bank of Kenya HCCC No. 33 of 2002** and **Morris & Co. Ltd vs. Kenya Commercial Bank Limited [2003] EA 600.**

According to the defendant, there is no defect in the statutory notice. The issues of charge *clauses 10(a)* and *(b)* of the charge instrument negating the provisions of the *Transfer of Property Act*, it is submitted, are not founded on the pleadings and are hence non-issues. However, it is submitted that **section 69(3)** of the said Act donates the power to vary and/or extend the provisions of the Act and therefore the variations contained in *clauses 10(a)* and *(b)* of the Charge instrument are consistent with the provisions of the Act. The provisions of *clause 10(a)(i)* are incorporated in the agreement are actually provisions of **section 65(d)** of ITPA while *clause 10(a)(ii)* as incorporated in the agreement is provided for under section 69A(b) of the TPA. Accordingly, it is submitted *clause 10(a)* and *(B)* of the Charge instrument are founded in ITPA and thus do not affect the validity of the charge.

On the issue of the validity of the notice, it is submitted that service thereof is not disputed. It is further submitted that whereas **section 69A** of the ITPA provides for the exercise of the power of sale pursuant to an issue of a statutory power of sale, **subsection (b)** of the same section provides for exercise of power of sale when there are arrears in interest under the loan in which case the mortgagor does not have to issue a notice. The cases of **Seed and General Limited vs. Small Enterprises Finance Company Limited NBI HCCC No. 1519 of 2000** and **Southern Credit Banking Corporation vs. Charles Wachira Ngundo NBI HCCC No. 1980 of 2000** are cited in support of that submission.

It is therefore submitted that the exercise of the statutory power of sale was pursuant to **subsection (b)** a mortgagor and hence notice was unnecessary and this position is confirmed by the plaintiffs' acknowledgement of indebtedness.. It is however submitted that should the court find that the exercise of statutory power was pursuant to **subsection (a)** aforesaid, the following in the footsteps of **Kommossai Plantations Limited vs. Bank of Baroda Kenya Limited [2003] 2 EA 35**, the respondent be at liberty to issue a compliant statutory notice.

It is submitted that the plaintiff has failed to establish a prima facie as defined by **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 135 at 137**. Since the principles for granting of an injunction in **Giellla Case** are sequential, as long as the first principle is not established, the court need not address its mind to the second and third principles and reliance on this submission is placed on **Kenya Commercial Finance Co. Ltd. vs. Afraha Education Society [2001] 1 EA 87 at 89**.

Accordingly, it is the defendant's case that the application should be dismissed.

I have considered the application, the affidavits both in support of and in opposition to the application, submissions both written and oral. Having done so, I form the following view of the matter.

The first issue for determination is the competency of the application. It is submitted that it is an express requirement of the rule that the suit in which the temporary injunction is sought must be one for restraining the Defendant from committing a breach of contract or committing the tort in question and that an application would be incompetent and ought to fail where the same has been brought under the said provisions in a suit where the relief of a permanent injunction has not been sought. That submission is hinged on the case of **Kihara vs. Barclays Bank of Kenya Ltd [2001] 2 EA 420**. It is important to understand clearly the basis upon which the provisions of Order 40 of the Civil Procedure Rules are predicated. **Order 40** is a rule made by the Rules Committee pursuant to the powers donated to the Rules Committee under the provisions of **section 81** of the *Civil Procedure Act*. Obviously therefore, the rules must have, as a basis of their existence, a justification under the parent Act. The Rules, it is provided

under the said section, must not be inconsistent with the Act but are subject thereto. The section from which **Order 40** emanates, in my considered view, is **section 63** of the *Civil Procedure Act*. That section provides:

"In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

(a) ……

(b) ……

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

(d) ……

(e) make such other interlocutory orders as may appear to the court to be just and convenient".

In my view, the main consideration in the grant of a temporary injunction or any interlocutory orders is the need to prevent the ends of justice from being defeated.

These are not the only provisions in the *Civil Procedure Act* in which we have such symbiotic relationship. Such relationship is to be found between **section 80** of the same Act and **Order 45** of the *Civil Procedure Rules*. In interpreting the latter relationship Farrell, J in **Sardar Mohamed Vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, which view, I respectfully share:

"In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules "not inconsistent with the provisions of this Ordinance". If a rule is inconsistent it is to that extent *ultra vires;* and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires.* If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle *"út res magis valeat quam pereat*". If the words "Or for any other sufficient reason" can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review".

I would adopt the said holding with respect to the provisions of **section 63** of the *Civil Procedure Act* as read with **Order 40** of the *Civil Procedure Rules* and apply the same reasoning *mutatis mutandi*. Accordingly, it is my view and I do find that the findings in **Kihara's Case** and **Morris's Case** aforesaid, though a factor to be taken into account whether or not to grant an injunction, is not the sole factor since the aim of **section 63** aforesaid is to ensure the ends of justice are not defeated. It would be going contrary to the parent legislation for a Court of law to interpret a delegated legislation in such a way as to defeat the parent legislation. I would adopt the holding in **Royal Media Services Ltd. vs. Telkom Kenya Ltd. & 2 Others Nairobi (Milimani) HCCC No. 15 Of 2000 [2001] 1 EA 210** where it was held that whereas an application coming under **Order 39** of the *Civil Procedure Rules* there has to be a suit first filed, an application should not be dismissed because it does not conform to the procedural requirement and that a formal defect should not be fatal to an application when it can be cured by amendment.

Again the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to **section 1A(2)** "*the Court*

shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009,** Nyamu, JA on 20/11/09 held *inter alia* that:

"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

The same Judge in**Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case".

In **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court of Appeal expressed itself as follows:

"t*he applicant's submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act...*The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.*In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives".

It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not mean that all precedents are ignored but must be interpreted in a manner that gives effect to the said objective.

The conditions necessary for the grant of interlocutory injunction in this country is generally accepted to be the ones laid down in **Giella Vs. Cassman Brown & Co. Ltd. [1973] EA 358** in which Spry, VP who delivered the leading judgement of the Court stated as follows:

"The granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially…The conditions for grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".

The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of **section 1A(2)** of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under **section 1A(1)** of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

Therefore, the first issue for consideration by the Court is whether a prima facie case has been made out. It was held by the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that:

"A 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...In the instant case what in effect the appellant is saying that he took the money from the respondent, it has not paid it back but the respondent is precluded from realising the security because both the charge and debenture are invalid. This kind of attitude, prima facie, shows that when the appellant took the money on the strength of those securities it had no intention of repaying it under the terms agreed with the respondent. This was a clear case of default, and as the appellant admitted this, there was no basis, on the authorities, upon which the appellant could obtain an order of injunction against the respondent. [Underlining mine]... Both lines of authorities agree completely upon the proposition that the company is not entitled to any time to raise the money: this is not in contemplation of either party...It the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences seen in recent times for instance challenging contractual interest rates, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. [Underlining mine]. **The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by**

the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case".

The 1st issue raised by the plaintiff is that the charge document did not provide for a notice. Therefore the issuance of the statutory notice was anomalous since **section 69A** of the *Transfer of Property Act* aforesaid was thereby rendered inoperative. According to the plaintiffs' the only option available was to seek the court's intervention in recovering whatever was deemed due to the defendant by the plaintiff. The argument impressive as it sounds seems to ignore the well known principle that parties cannot contract outside the legal regime regarding a particular transaction. Where for example parties purport to agree that the issuance of statutory notice is unnecessary where the law expressly provides otherwise, it is my considered view that the court will be reluctant to enforce such a contract. In my view, the court would imply into the said contract the provisions of the law relating to the said transaction. Accordingly, the plaintiffs' argument that as the charge document did not stipulate that a statutory notice was to be issued, even if true, would not constitute a prima facie case as contemplated in **Mrao's case** cited above.

I wish to refer to Pall, J's decision (as he then was) in the case **Muhani & Another vs. National Bank Of Kenya Ltd [1990] KLR 73** in which he stated as follows:

"**The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale".**

The other issue raised is that the defendant by not registering the charge document in the year 2005 deprived the plaintiffs of the opportunity to redeem the charge in the year 2005 and hence their conduct disentitles them to proceed in the manner complained of. It is not in dispute that the charged property was before the registration of the charge registered in the name of a different person. It was necessary that that a transfer into the plaintiffs' names be effected before or at the same time as the registration of the charge. There is no evidence that the plaintiffs informed the defendant that they were ready to repay the amount earlier than the year 2006. In the premises, I am unable to find that the issues establishes a prima facie case.

A similar issue is raised with respect to the suspension of the initial sale by the defendant on receipt of repayment proposal from the plaintiffs. That according to the plaintiffs did not entitle the defendants to rely on the earlier statutory notice and the court should take into account the substantial payments made thereafter in finding that the defendant's conduct is inequitable. In the **Mbuthia vs. Jimba Credit Finance Corporation and Another [1986-1989] EA 340; [1988] KLR**the Court of Appeal held that section 74(1) of the Registered Lands Act did not impose on the chargee the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the chargor any time a sale was suspended to accommodate him. If such were the legal requirement, no chargee in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting mortgagor. If after demand, the sale is stopped on receipt of a cheque for the amount due under the mortgage, but the cheque is afterwards dishonoured, the right of sale and the running of notice having been only suspended

revive, and the power may be exercised without serving a new notice.

In the case of **Nathakal Monji Rai vs. Standard Chartered (K) Ltd. & Another Nairobi (Milimani) HCCC No. 830 of 1999** it was held that where the auctioneer has given a notice of 45 days and the sale is subsequently stopped by the Court, the auctioneer need not give another notice ***just like the chargee is not required to give another notice under section 74 of the Registered Land Act every time a sale is suspended to accommodate the chargor.***(Emphasis mine).

The same position was taken by the court in **Aprotech Services Limited vs. Savings & Loan Kenya Ltd. Nairobi (Milimani) HCCC No. 1858 Of 2001** where it was held inter alia that indulgence does not vitiate a statutory notice once validly issued.

Accordingly, I do not find merit in the argument that the defendant's conduct after the suspension of the earlier sale establishes a prima facie case for the purposes of an interlocutory injunction.

The other issue raised is the validity of the statutory notice. The notice in question was dated 2nd December 2008 and was clearly addressed to the plaintiffs. That it was received is not in doubt. The said notice at the material paragraph states as follows:

"TAKE NOTICE *that unless the aforesaid amount, together with further interest that will accrue as aforesaid is paid to the Bank within* ***THREE (3) MONTHS*** *from the date of service of this notice the bank shall, at the expiry of this notice commence sale of the charged property for the recovery of the amount outstanding and remaining unpaid together with interest thereon at the rate(s) stated above plus all costs and other charges ensuing therefrom".*

This is the notice the plaintiffs contend was not valid and they rely on **Trust Bank Ltd vs. Eros Chemists Ltd**. In **Trust Bank Ltd vs. Okoth [2001] 1 EA 274** Gicheru, JA (as he then was) stated that the mortgagee's statutory power of sale under section 69(1) of the Transfer of Property Act of 1882, of India, as applied in Kenya ***"Cannot be exercised unless and until: notice requiring payment of the mortgage-money has been served on the mortgagor or one or two or more mortgagors, and default has been made in payment of the mortgage-money, or part thereof, for three months after such service"***. My understanding, of the said decision is that the notice must be expressed so as to give the mortgagor three months or more after service and therefore notice that requires that payment be made **within three months** according to the said decision would, *prima facie*, be an invalid statutory notice. In the case of **GIMALU ESTATES LTD & 4 OTHERS VS. INTERNATIONAL FINANCE CORPORATION & ANOTHER NAIROBI (MILIMANI) HCCC NO. 606 OF 2003** the phrase ***"The Bank as Chargee shall, after the expiry of THREE (3) MONTHS from the date of service of this notice, sell the mortgaged property",*** was, in my view, correctly upheld.

The question is whether the notice that was given herein complies with the provisions of section 69A of the said Transfer of Property Act. The first part of the notice clearly required that payment be made **within** three months. What followed was a warning that unless the sum due was paid after he expiry of the said notice the bank would commence the sale of the charged property. The question then is when was this notice to expire? Whereas in the case in **Gulamali's Case** the notice specifically stated that the sale of the charged property would take place after the expiry of the three months from the date of service of the notice, in this case the defendant threatened to commence the sale of the charged property after the expiry of the notice which notice itself gave the plaintiffs less than 3 months. In my view, the notice in this case did not comply with the law as the law requires that the notice be for not less than 3 months.

The defendant contends that it was not under an obligation to give the notice because the plaintiffs were in arrears with respect to the payment of interest for a period of more than 2 months. That may be so but since in this case the defendant decided to give a notice, it had to comply with the law. In **Jagjit S. Thathy Vs. Middle East Bank Kenya Limited & Another Nairobi (Milimani) Hccc No. 302 Of 2002 [2002] 1 KLR 595** Ringera, J (as he then was) was of the view, which view I subscribe to that:

"If the power of sale is intended to be exercised on the basis that some interest under the mortgage

is in arrear and unpaid for two months and/or that the mortgagor is in breach of his obligations under the mortgage or under the T.P.A. other than payment of mortgage money or interest thereon it is not necessary to give any notice as none is required by the provisions of Section 69A (b) and (c) of the said Act. If the mortgagee despite the existence of the conditions specified in paragraph (b) and (c) chooses to proceed to exercise its statutory power of sale by invoking the machinery of a notice under paragraph (a) of the same Section, he is obliged to comply strictly with the requirements of that paragraph and if he opts to sell the mortgaged property by public auction through a licensed auctioneer, the Auctioneers Rules, 1997 become relevant and applicable and a valid notification of sale should be served on the mortgagor. Statutory notice in order to pass muster must specify that the security would be realised if the mortgagor does not make payment of the charged property within 3 months after his receipt thereof".

Accordingly, I find that with respect to the validity of the statutory notice, the plaintiffs have established a prima facie case with probability of success.

With respect to the issue of irreparable loss, from the letter dated 7th January 2011, it is manifest that the plaintiffs themselves were at one time contemplating disposing of the charged property. Surely they must have planned where they were going to shift their family in that eventuality. It must have been dawned on them that the suit property was a commodity for sale. It therefore cannot lie in their mouths to now claim that they stand to suffered irreparable loss which cannot be compensated by an award of damages. Accordingly, I do not find that the plaintiffs have satisfied the said condition in **Giella vs. Cassman Brown Case**.

The next issue that the court has to deal with is what is the appropriate remedy in the circumstances of this case? Whereas the plaintiffs have failed to satisfy the court on one of the grounds necessary for the grant of interlocutory injunction, the court having found that the sale is based on a notice which is, prima facie invalid cannot be expected to give the said notice a seal of approval by allowing the said sale to proceed. The law as I understand it is that normally injunction will not be granted unless the plaintiff stands to suffer loss that cannot be compensated by an award of damages. It is not the law that where the defendant can pay damages injunction is never to be given. As was aptly put by Ringera, J (as he then was) in **Martha Khayanga Simiyu vs. Housing Finance Co. Of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540:**

"A statutory notice which does not give the plaintiff a period of three months from the date of service to redeem the charged property as required by Section 74(2) of the RLA is defective…The chargee has no lawful power to sell the charged property for default in payment of charge debt unless and until the chargor has been served with a notice in writing demanding such payment and the chargor has failed to comply within three months of the date of service of such notice…The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice…Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the R.L.A and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly contended that the chargor's remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor…Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantums of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils".

On the other hand the Court must take cognizance of the fact that the debt is undisputed. The requirement of the service of statutory notice was not meant to enable borrowers escape from their obligations but was meant to enable the borrowers have sufficient time within which to redeem their charged properties. Accordingly, I associate myself with Nyamu, J (as he then was) in **Komassai Plantations Ltd vs. Bank of Baroda Case** and hold that the Notice of Motion dated 9th November 2011 is allowed in terms of prayers 3 and 4 of the motion. For avoidance of doubt the injunctive orders are specifically directed to any sale pursuant to the statutory notice dated 2nd December 2008. With respect to prayer 4 aforesaid, I further hold that the defendant is at liberty to issue a fresh notice which complies with **section 69A(a)** of the Transfer of Property Act should they want to realize their security in that manner. I will not make any orders as to costs since both parties are partially successful.

Ruling read, signed and delivered in Court this 20th day of April 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Mr. F N Wamalwa for Plaintiffs
Mr. Masinde for Mr. Mwanyale for Defendant