



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 560 OF 2011**

**INSIGNIA LIMITED.....PLAINTIFF**

**VERSUS**

**ZADOCK EAST AFRICA LIMITED.....1<sup>ST</sup> DEFENDANT**

**FINA BANK (KENYA) LIMITED.....2<sup>ND</sup> DEFENDANT**

**LEAKEY'S AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

This suit was instituted by way of a plaint dated 15<sup>th</sup> December 2011. By the said plaint the plaintiff seeks the following orders:

- (a) Specific performance of the sale agreement entered into with 1<sup>st</sup> defendant**
- (b) Damages – (i) 10% deposit of ksh 1,800,000 including interest at court rates**  
**(ii) Costs incurred in obtaining the mortgage facility of Kshs 15,000,000 including interest at court rates**
- (c) Permanent Injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from interfering with the suit property**
- (d) Any further relief that the court may deem fit to grant**
- (e) Costs of this suit**

Accompanying the plaint was a Notice of Motion dated the same day expressed to be brought under the provisions of Order 40 rule 2 of the Civil Procedure Rules, 2010, section 1A and 1B of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders:

- 1. That service of this Application be dispensed with in the first instance**
- 2. That an interim injunction be issued against 2<sup>nd</sup> and 3<sup>rd</sup> respondents restraining them from selling by public auction or interfering with land registration numbers 12948/54 and 12948/49 Mountain View within Nairobi.**
- 3. That the applicant has a purchaser's interest over the same properties having entered into a sale agreement with the 1<sup>st</sup> respondent who is the registered owner of the properties.**

The application is supported by an affidavit sworn by **Kevin Aruasa Nyamamba**, who describes himself as a director of the plaintiff. The plaintiff's case is that on 21<sup>st</sup> June 2011 the applicant entered into an agreement with the 1<sup>st</sup> respondent for sale and transfer of LR No. 12948/54 and 12948/59 in the sum of Kshs. 18,000,000.00 pursuant to which Kshs. 1,800,000.00 being 10% thereof was to be paid as a deposit, a sum which was duly paid. The applicant applied for and was granted a mortgage facility by Housing Finance in the sum of Kshs. 15,000,000.00. He thereafter requested for the necessary documentation from the 1<sup>st</sup> respondent which confirmed the completed sale agreement including the consent. By a turn of events, however, on 13<sup>th</sup> December 2011 the said properties were advertised for sale on 6<sup>th</sup> January 2012. On seeking clarification from the 1<sup>st</sup> respondent, the applicant received a response which prompted the institution of these proceedings in order to protect its right in the suit property since it stands to suffer should the property be sold.

On its part the 1<sup>st</sup> respondent swore an affidavit through **Caren Moracha**, its director on 8<sup>th</sup> February 2012. That affidavit although entitled "Replying Affidavit" was, in fact, a supporting affidavit. In **Dr. Jane Wambui Weru vs. Overseas Private Investments Corp. & 3 Others Nairobi (Commercial & Admiralty) HCCC No. 83 of 2012** faced with a similar matter I expressed myself thus:

**"It is not in doubt that the 4<sup>th</sup> defendant is not the applicant in these proceedings. Being a respondent, under the above cited provisions, he could only file a replying affidavit if he wished to oppose the application. He, however, could not strictly file a supporting affidavit disguised as a replying affidavit as he attempted to do in this case. In other words, a respondent to an application cannot hijack an application filed by another party in the case as a forum to advance his case and obtain orders favourable to him without filing his own application just as a defendant cannot expect the court to make orders favourable to him unless there is a counterclaim for it, or perhaps, where it is merely the negative of a declaration claimed in the plaint".**

A strict reading of Order 51 rule 14 makes it clear that the filing of a replying affidavit is reserved to "a respondent who wishes to oppose any application". The 1<sup>st</sup> respondent, however contends that by virtue of the provisions of section 1A and 1B of the Civil Procedure Act, it was entitled to place before court all the relevant material to enable the court reach a just determination. That may be so. However, under the aforesaid provision that material is not to be brought by way of a replying affidavit pursuant to the aforesaid provision where the intention is to support the application. Nothing, however, turns on that issue.

According to the 1<sup>st</sup> respondent, **Furniture Systems Limited** (hereinafter referred to as the borrower) applied for a facility from the 2<sup>nd</sup> respondent in the sum of Kshs. 8,000,000.00 on security of the said properties charged to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent. Additional facilities were applied for and obtained on the security of the same properties. A substantial portion of these facilities was meant to finance a contract entered into between the borrower and the Central Bank of Kenya. According to the 1<sup>st</sup> respondent whereas the value of all the facilities was Kshs. 66,500,000.00, the borrower made direct withdrawals in the sum of Kshs. 58,897,653.01 out of which 57,381,080.75 had been repaid. However,

the 1<sup>st</sup> respondent received a statutory notice dated 7<sup>th</sup> April 2011 for a sum of Kshs. 20,415,315.26 and US \$ 310,683.46 and the open market value for the said properties as per the 2<sup>nd</sup> respondent's valuer was Kshs. 18,500,000.00. On behalf of the applicant, however, the valuation was placed at 19,000,000.00. The 1<sup>st</sup> respondent commenced negotiations with the 2<sup>nd</sup> respondent and identified a prospective purchaser (the applicant herein) of both properties in the total sum of Kshs. 18,000,000.00 which, according to it, was higher than the amount indicated as the aggregate forced sale value of Kshs. 16,800,000.00 or the aggregated reserve value of Kshs. 15,500,000.00. According to the 1<sup>st</sup> respondent, it approached the 2<sup>nd</sup> respondent with the said proposal which proposal the 2<sup>nd</sup> respondent found agreeable as they negotiated the terms and conditions for the settlement of the balance. Based on the foregoing an agreement for sale was executed between the applicant and the 1<sup>st</sup> respondent and was sent to the 2<sup>nd</sup> respondent for its consent. Without disclosing its source of information, the deponent states that the applicant obtained financial accommodation from HFCK to finance the purchase price in the sum of Kshs. 16,200,000.00 with a willingness to complete the transaction. Again without disclosing his source of information the deponent avers that the applicant also expressed its willingness to furnish property known as Land Reference 209/14480 as further security for the residual balance. However, while the negotiations with respect to the settlement of the balance was on course the 2<sup>nd</sup> respondent advertised the properties for sale an action which the 1<sup>st</sup> respondent believes was *mala fide* and with the intention of frustrating the applicant's and the 1<sup>st</sup> respondent's attempts to redeem the property. According to the deponent, since a mortgagee is entitled to sale by private treaty, which is the most appropriate in the circumstances, that is the most practical, justifiable and profitable method and in the best interest of the 1<sup>st</sup> and 2<sup>nd</sup> respondent as chargor and chargee. It is further deposed that there are other irregularities in the statements of accounts which make it unclear as to how much is exactly due from the borrower to the 2<sup>nd</sup> respondent. According to the deponent, the 1<sup>st</sup> respondent has a *prima facie* case that raises triable issues that require to be ventilated in a full hearing. Damages, it is contended are not and cannot be a substitute for the loss which is occasioned by a clear breach of the law, yet the balance of convenience tilts in favour of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent, it is contended intends to file a co-defendant's notice in order to claim against the 2<sup>nd</sup> respondent.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents, on the other hand, filed a replying affidavit sworn by **Zakary Muturi Muchai**, the 2<sup>nd</sup> respondent's Senior Relationship Manager-Recoveries on 10<sup>th</sup> February 2012. According to the deponent, the applicant has not complied with the provisions of Order 4 rules 1(1)(f), 1(4) and 5 and Order 3 rule 2(d) of the Civil Procedure Rules. In the absence of due execution of the purported sale agreement by all the parties, it is contended that the alleged sale is not justiciable and offends the express provisions of section 3(3) of the Law of Contract Act. Since the plaintiff does not seek to invalidate the actions of the two respondents, the relief sought in the plaintiff is in vacuum and the relief sought in prayer 2 of the application cannot be granted with any meaningful effect while prayer 3 thereof does not seek any relief that can be completely granted. Following the failure by the borrower to repay the facilities availed to it by the 2<sup>nd</sup> respondent, the latter put in motion the process of realising the securities held by it as it was entitled to do in the lawful exercise of a chargee's statutory power of sale. Since the applicant is not a party to instrument of charge, it has no capacity in law to question the said exercise. It is further deposed that the 2<sup>nd</sup> respondent never consented to the purported sale and that the outstanding banking facilities continue to remain unpaid thus accruing interest and other bank charges. The deponent's view is that the purported sale is a collusion between the applicant and the 1<sup>st</sup> respondent to frustrate the 2<sup>nd</sup> respondent's efforts to recover the outstanding facilities. Since the letter of offer from Housing Finance Company of Kenya Limited lapsed long before the filing of this suit, the same has no probative value, it is contended. The application therefore is not merited.

Although the respondents filed their submissions in compliance with the direction given by **Waweru, J** on 20<sup>th</sup> February 2012, the applicant did not so comply but addressed the court orally when the matter came up on 2<sup>nd</sup> May 2012. In its submissions, the applicant through its learned counsel, **Mr. Waiyaki**, submitted that the applicant having committed itself to the purchase of the suit properties and in fact having made part payment of the purchase price, it has shown that it has an interest as an intending

purchaser and has thereby established a prima facie case for the purposes of an injunction. Since the 2<sup>nd</sup> respondent's actions raise the element of bad faith which will be proved at the hearing, it was submitted that damages cannot be an adequate recompense.

On its behalf, the 1<sup>st</sup> respondent through its learned counsel **Mrs. Kiama**, while reiterating the contents of the said replying affidavit, submitted that whereas there is no dispute that there was a default in payment of the credit facilities by the borrower, it is not clear how much is owed since there are some third party debit entries that have erroneously been passed through the borrowers accounts. It is further submitted that the advertisement of the suit properties for sale by public auction when the parties had agreed in principle that the property be sold to the applicant reeks of bad faith on the part of the 2<sup>nd</sup> respondent and amounts to an attempt to frustrate the 1<sup>st</sup> respondent and the borrower. Where a party has an option to sell by public auction or private treaty, it is submitted, on the authority of **Elijah Kipngeno Arap Bii vs. Samuel Mwehia Gitau & Another Civil Appeal No. 155 of 2006 [2009] eKLR** and **Mbuthia vs. Jimba Credit Finance Corporation** that it must endeavour to sell by the more practical, justifiable and profitable method. Accordingly, it is submitted that the 2<sup>nd</sup> respondent should not benefit from its wrong doings while the 1<sup>st</sup> Respondent continues to suffer. Therefore, it is submitted that the applicant has established a *prima facie* case that raises issues that require to be ventilated in a full hearing in order for justice to be done. Damages will not be an adequate remedy and the balance of convenience tilts in favour of the Applicant and the 1<sup>st</sup> Respondent.

On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants through their learned counsel **Mr. Mutua**, apart from reiterating the contents of the replying affidavit aforesaid submitted that the application is incompetent, firstly, because prayer 3 thereof is not a relief that the Honourable Court can grant within the context and ambit of the provisions of the law pursuant to which its jurisdiction has been invoked or at all and secondly, prayer 2 thereof seeks a perpetual injunctive relief which is not the basis for granting interlocutory injunction. It is further submitted that under the Order 4 rule 1(4) of the Civil Procedure Rules, the plaintiff being an incorporated body, the verifying affidavit accompanying the plaint ought to have been sworn by an officer of the plaintiff duly authorised to do so under seal of the company. Here, it is submitted, the deponent of the verifying affidavit does not even state that he is authorised by the plaintiff to swear the same, yet the authority under seal has not been exhibited. Accordingly, it is contended that the suit which is the foundation of the application is itself incompetent and defective. It is submitted that the basis of the applicant's interest in the suit premises, the agreement for sale, lacks the requisite legal character on the basis of which a party may found a cause of action for failure to comply with the provisions of section 3(3) of the Law of Contract Act since the same was neither signed by the 2<sup>nd</sup> respondent bank as contemplated in the document itself nor is it attested. It is also submitted that the effect of the grant of the orders sought in the present application would be to determine the applicant's entire claim against the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's at the interlocutory stage which is against the policy of the law and reliance is placed on **Monica Wangari Ruthi & Another vs. Kenya Commercial Bank Limited & Another Nyeri HCCC No. 82 of 2009**. It is further submitted that to the extent that the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are premised on both contractual and statutory provisions, the plaintiff, not being a party thereto, has no *locus standi* to seek to restrain such actions in the manner sought in the application or at all and support for this submission is sought from **Nairobi Mamba Village vs. National Bank of Kenya [2002] 1 EA 197**. It is submitted that apart from the foregoing, the plaintiff has not demonstrated that it is in a position to perform the sale agreement since in terms of clause 2.1 thereof, 10% of the alleged purchase price being Kshs. 1,800,000/- was to be paid to the 2<sup>nd</sup> respondent as the chargee of the suit properties but the supporting affidavit seems to suggest that it was paid to the 1<sup>st</sup> respondent instead. Again whereas the balance of the purchase price was to be financed by Housing Finance Company of Kenya Limited, the letter of offer from the said financial institution only confirms a mortgage facility for Kshs. 15,000,000.00 while the balance of the purchase price was Kshs. 16,200,000.00. It is further submitted that the 90 days completion date provided in the said letter of offer lapsed before the applicant came to court and was no longer available. It is further submitted that the application is an abuse of the process of the court since the same is brought in collusion between the applicant and the 1<sup>st</sup> defendant as evidence by the filing of a replying affidavit by the 1<sup>st</sup> defendant which affidavit is contrary to the provisions of Order 51 rule 14 of the Civil Procedure Rules. It is submitted that

a chargor cannot dictate to a chargee the manner in which the later should exercise its statutory power of sale once the same has properly arisen and based on **Mrao Limited vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and Halsbury's Laws of England Vol. 32 (4<sup>th</sup> Edn.) paragraph 725**, it is contended that that a dispute as to accounts is not a ground upon which a chargee may be restrained from exercising its statutory power of sale. In any case, it is submitted the sale could not have been in pursuance of any legitimate commercial transaction since it was for all intents and purposes a disposal of the 2<sup>nd</sup> respondent's securities by way of a private treaty at a cost much below the market price.

Having considered the application, the affidavits on record, the submissions of counsel together with the supporting authorities, this is the view I form of the matter.

On the issue of the competency of the verifying affidavit, under **Order 4 rule 1(4)** of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which good-sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of **Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. However, it is contended that the verifying affidavit does not even purport to have been sworn by a person duly authorised to do so. The applicant, however, counters this submission by stating that since the same is sworn by a director of the applicant authority is presumed. That argument, with due respect, is fallacious. If the Rules Committee intended that a director of a corporation is deemed to have authority to swear a verifying affidavit the provisions of Order 4 rule 1(4) aforesaid would have contained words "a director or any other officer duly authorised under the seal to do so" or words to that effect. The rationale for the requirement that a person swearing a verifying affidavit be duly authorised is to ensure that legal proceedings are commenced at the behest and in the interest of the company and not merely for the benefit of a few individuals masquerading as the company. In this case not only does the deponent not even pretend that he is authorised to swear the verifying affidavit, the affidavit itself is, with due respect, drafted in a very casual manner. For example whereas it is clear that the applicant is a corporation, the verifying affidavit indicates that the contract for sale of land was entered into between the deponent of the said affidavit and the 1<sup>st</sup> defendant. Apart from the foregoing the said affidavit, does not strictly comply with the provisions of **Order 4 rule 1(2)** of the Civil Procedure Rules. As opposed to the former rules what is required to be verified under that subrule is only the averment in **Order 4 rule 1(1)(f)** and not the whole plaint. The verifying affidavit in question here does not even pretend to verify any part of the plaint but seems to verify the affidavit itself. Such affidavit, in my view should not be allowed to stand as it negates the very essence of a verifying affidavit and reduces it to a worthless piece of paper. Accordingly, in the exercise of the inherent powers of the Court reserved under section 3A of the Civil Procedure Act the said verifying affidavit is hereby struck out but in the exercise of the powers conferred upon the Court by sections 1A and 1B of the same Act, I hereby direct the plaintiff to have an appropriate verifying affidavit sworn and filed within the next 10 days in default of which this suit shall stand struck out with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

I, however hold that whereas the resolution is not required to be filed at the inception of the suit, at least, failure to state that the deponent of the same is authorised to swear the same may *prima facie*, be an indication that the authority might not exist and may be taken into consideration in an application for injunction.

The other issue raised is that the application as framed is incapable of being granted since to grant the same would amount to granting the claim in the main suit. It is quite clear that prayer 3 of the Notice of Motion is incapable of being granted at this stage. However with respect to prayer 2 of the motion, whereas I agree that the same could have been better drafted by specifying the period within which the

order sought was to be in existence, the mere fact that it is not indicated that the order is sought pending the hearing and determination of the suit does not necessarily mean that it is a perpetual order. It is expressly stated that what is sought is an interim injunction. According to **Snell's Principles of Equity (21<sup>st</sup> Edn) by R E Megarry and P V Baker at page 578:**

**“A perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant. An interlocutory (or interim) injunction, on the other hand, is granted before the trial of an action; its object is to keep things *in status quo* until the question at issue between the parties can be determined. Accordingly, the plaintiff may obtain it without making out a case which will necessarily entitle him to a perpetual injunction. It follows that a perpetual injunction is so called because it is granted at the final determination of the parties' rights and not because its operation will necessarily last for ever. For example a perpetual injunction may continue only during the currency of a lease”.**

It follows that whereas it is always prudent to indicate the lifespan of the injunction sought, the failure to indicate the same does not necessarily render the application incompetent if it is expressly stated to be interim. I have perused **Makhandia, J's** decision in **Monica Wangari Ruthi & Another vs. Kenya Commercial Bank Limited & Another Case** in my considered view that this case is distinguishable from that case. In that case the plaintiff's suit only claimed a permanent injunction restraining the respondent from selling the suit premises and an order for costs. There was no prayer declaring the intended sale to be unlawful or rectification of a register. It was like an order seeking prohibition to restrain the implementation of an order already made without seeking to quash the order itself. Such a prayer, I agree, would be baseless and of no use to the applicant. Here, however, apart from the permanent injunction sought, the applicant seeks specific performance of the agreement for sale as well as damages.

The applicant's main issue here is the agreement for sale entered into between the applicant and the 1<sup>st</sup> respondent. It is that agreement that forms the basis of the cause of action herein. I have looked at the said agreement dated 21<sup>st</sup> June 2011 between **Zadock East Africa Limited** and **Insignia Limited**. On the face of it the same is not an agreement but just a draft since the signatures of the purported directors of the vendor are not attested. Secondly, it is admitted that though the consent of the 2<sup>nd</sup> respondent, the chargee, was sought, the same was not obtained. Section 3(3) of the Law of Contract Cap 23 Laws of Kenya not only requires that contracts for disposition of interest in land be in writing but must also be signed by all the parties whose signatures should be attested. *Prima facie*, the applicant's application seeking to restrain the 2<sup>nd</sup> respondent from dealing with the suit property is therefore a non-starter and has no legs on which to stand. It has no foundation and if it has, its foundation is quicksand.

The 1<sup>st</sup> respondent, however, contends that the fact that the 2<sup>nd</sup> defendant was at liberty to sell either by private treaty or public auction and there was a buyer already identified by the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent should have acted in good faith by completing the said agreement for sale. Whereas I agree that the chargee in exercising its statutory power of sale, though not a trustee for the chargor, should act in good faith, it is highly doubtful whether the *mala fide* of a chargee can be challenged by a non-party to the contract of charge. In **Nairobi Mamba Village vs. National Bank of Kenya Nairobi Case (Supra) Ringera, J** (as he then was) stated:

**“An interlocutory injunction is an equitable remedy which may be issued at the instance of a party to the suit to protect his legal rights from violation by unlawful acts of another party. In the context of rule (1) of Order 39 of the Civil Procedure Rules, the party seeking to prevent alienation, wastage or damage to the property in dispute therein must establish that he has legal rights in that property which he seeks to protect by the injunction sought... Whereas the plaintiff can legitimately complain of the alleged breaches of the loan agreements and seek other relief in connection therewith, he cannot properly seek to restrain the chargee from selling the charged property for the reason that the intended sale is pursuant to the exercise of the contractual and statutory powers of the chargee which were expressly or impliedly contained in the contract of charge to which the plaintiff is not a party. The only person who can legitimately complain that the power of sale is**

**being exercised unlawfully, irregularly or oppressively is the chargor...Whereas it is true that a guarantor cannot be called upon to pay the debt guaranteed unless the principal debtor is default, the fallacy lies in the proposition that the principal debtor can object to the guarantor being sued or otherwise brought to shoulder his obligations under the guarantee...The mere fact that the plaintiff has an interest in the charged property does not suffice to give him *locus standi* to obtain an injunction against the chargee as the debtor's interest in the property is not proprietary interest therein and cannot question the exercise of the power of sale”.**

**In Venture Capital & Credit Ltd vs. Consolidated Bank of Kenya Ltd. Civil Application No. Nai. 349 of 2003**the Court of Appeal held:

**“Where the suit property does not belong to the applicant, and the owner is not a party to the suit and has not challenged the intended exercise of the statutory power of sale by the bank, the applicant has not shown that if the injunction is not granted, the appeal, if successful will be rendered nugatory so that even if the suit property is sold, the applicant will not lose any proprietary right to the property and in the circumstances, if the appeal succeeds damages would be the only relief appropriate to the applicant if it is not said that the Respondent's bank has no means to pay compensation that may be ordered”.**

It is appreciated that here the proprietor is a party to the suit, but as a defendant and the proprietor is not, at least for now, claiming any relief in the suit. Whereas it has been indicated that the proprietor (the 1<sup>st</sup> respondent) intends to file a notice against a co-defendant (presumably the 2<sup>nd</sup> defendant) it must be appreciated that a claim against a co-defendant under the provisions of Order 1 rule 24(1) of the Civil Procedure Rules is limited in scope and only applies in situations where the defendant claims against the co-defendant:

**(a) that he is entitled to contribution or indemnity; or**

**(b ) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or**

**(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them.**

Whether or not these provisions are sufficient to support a chargor's claim in a suit filed by an intending purchaser is another issue. However, it suffices to state that no such claim has been made and the Court cannot be expected to grant an injunction based of future speculative claims since the court must be satisfied that on the facts and material before the court a *prima facie* case has been made with probability of success at the trial.

With respect to disputes regarding the actual sum due, as rightly submitted by **Mr. Mutua**, 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...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”.**

Even if the 1<sup>st</sup> respondent could challenge the sale on the ground of a dispute on the actual sum due, that right cannot be transferred by the 1<sup>st</sup> respondent to a non-party to the contract, the applicant herein.

It must, however, be remembered that the conditions enumerated in **Giella vs. Cassman Brown Case** which are reproduced in **Mrao vs. First American Bank Case (Supra)** are, 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.

In this case, according to clause 2.1 of the agreement for sale the deposit of Kshs. 1,800,000.00 was to be paid to the 2<sup>nd</sup> respondent upon execution of the agreement. Yet according to the supporting affidavit, the applicant authorised the said sum to be paid to the 1<sup>st</sup> respondent. Again according to the letter of offer issued by Housing Finance, only a sum of Kshs. 15,000,000.00 was approved out of Kshs. 16,200,000.00 and the letter of offer according to the letter of intent was only valid for a period on 14 days from 22<sup>nd</sup> June 2011. This suit was filed on 16<sup>th</sup> December 2011 obviously way after the expiry of the said period. Whereas the 1<sup>st</sup> respondent alleges that the applicant had offered its parcel of land as security for the balance, the applicant’s affidavit is deafeningly silent on the issue.

The totality of the foregoing leads me to the inescapable conclusion that by no stretch of imagination can

it be said that the applicant has established a *prima facie* case under the rule in **Mrao vs. First American Bank of Kenya Case.**

On the issue of irreparable loss, with due respect no convincing argument was advanced along those lines. The only loss that the applicant stands to suffer is the loss of Kshs. 1,800,000.00 paid by it as deposit which sum it has not been alleged that the 2<sup>nd</sup> respondent would be unable to pay. As for the loss that the 1<sup>st</sup> respondent stands to suffer, as already indicated above there is no relief sought in these proceedings by the 1<sup>st</sup> respondent and therefore none can be granted in these proceedings in their present state.

I have said enough to show that the Notice of Motion dated 15<sup>th</sup> December 2011 is devoid of merit. Accordingly, the same is dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**Ruling read, signed and delivered in Court this 24<sup>th</sup> day of May 2012.**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

Mrs. Njoki Gachehe for Mr. Waiyaki for Plaintiff.

Mrs. Kiama for 1<sup>st</sup> Defendant.

Ms. Onyango for Mr. Mutua for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.