



REPUBLIC OF KENYA



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**Gakure v Gulf African Bank Ltd & another (Environment & Land Case E385 of 2022) [2022] KEELC 15548 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15548 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E385 OF 2022**

**JO MBOYA, J  
DECEMBER 20, 2022**

**BETWEEN**

**JANE WANGARI GAKURE ..... PLAINTIFF**

**AND**

**GULF AFRICAN BANK LTD ..... 1<sup>ST</sup> DEFENDANT**

**ELITE INTELLIGENT TRANSPORT SYSTEMS LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction and Background**

1. Vide Notice of Motion Application dated the 17<sup>th</sup> November 2022, the Plaintiff/ Applicant herein has sought for the following Reliefs/ Order
  - i. That this matter be certified urgent and service of the same be dispensed with in the first instance;
  - ii. That pending the hearing and determination of this application inter partes, this honourable court be pleased to issue a temporary order of injunction restraining the 1st defendant/respondent, its servants, agents, and/or employees, including garam investments ltd, as the 1<sup>st</sup> defendant/respondent's auctioneer, from selling by public auction or by private treaty the suit property identified as land reference no. 1160/339 (original number 1160/178/3);
  - iii. That pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary order of injunction restraining the 1<sup>st</sup> defendant/respondent, its servants, agents, and/or employees, from selling by public auction or by private treaty, or appointing a receiver of the income or entering into possession of the suit property identified as land reference no. 1160/339(original number 1160/178/3);



- iv. That this honourable court be pleased to refer the parties herein to a court annexed mediation to be completed within a strict timeline of ninety (90 days);
  - v. That the costs of this application be provided for.
2. The instant application is premised and anchored on the various grounds which have been enumerated at the foot thereof. besides, the application is further supported by the affidavit of the plaintiff/applicant sworn on even date.
  3. Upon being served with the instant application, the Defendants/Respondents duly responded to and filed various Replying affidavits.
  4. For completeness, the 1<sup>st</sup> Defendant/Respondent filed a Replying affidavit sworn on the 21<sup>st</sup> November 2022 whilst the 2<sup>nd</sup> Defendant/Respondent filed a Replying affidavit sworn on the 4<sup>th</sup> December 2022. For clarity, both Replying affidavits have contained various annexures thereto.
  5. On the other hand, it is also imperative to note that the subject application came up for hearing on the 22<sup>nd</sup> November 2022, whereupon the Parties agreed to dispose of and canvass the Application by way of written submissions.
  6. Pursuant to and in line with the agreement by the advocates for the respective Parties, the Honourable court issued directions pertaining to and concerning the filing and exchange of written submissions. In this regard, the Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent, duly complied and filed their respective written submissions.
  7. Notwithstanding the foregoing, the 2<sup>nd</sup> Defendant/Respondent failed and or neglected to file written submissions. However, on the return date, counsel for the 2<sup>nd</sup> Defendant/Respondent indicated that same shall be adopting the submissions filed on behalf of the Plaintiff/Applicant.

### **Submissions by the Parties:**

#### **a. Plaintiff's/Applicant's Submissions**

8. The Plaintiff/Applicant filed written submission dated the 22<sup>nd</sup> November 2022 and wherein the Plaintiff/Applicant has highlighted and addressed three(3) Issues for consideration.
9. First and foremost, counsel has submitted that the Letter dated 28<sup>th</sup> February 2022 which was generated and executed by the 1<sup>st</sup> Defendant, albeit on a Without Prejudice basis is admissible in evidence.
10. Premised on the foregoing, counsel for the Plaintiff/Applicant has therefore submitted that even though the impugned letter was issued on a Without prejudice basis, the Plaintiff/Applicant was induced to and indeed acted upon the impugned letter on the basis of a legitimate expectation that the 1<sup>st</sup> Defendant/Respondent shall issue partial discharge to each and every purchaser, who paid the requisite deposit.
11. Further, counsel for the Plaintiff/Applicant has submitted that the contents of the Letter dated the 28<sup>th</sup> February 2022, therefore constitutes a Promissory Estoppel to be applied against the 1<sup>st</sup> Defendant/Respondent.
12. To this end, counsel for the Plaintiff/Applicant has cited and quoted *inter-alia*, the decision in the case of *Mumias Sugar Company Ltd & Another v Beatrice Akinyi Omondi* (2016)eKLR and *Lochab Transport v Kenya Arab Orient Insurance Ltd* (1986)eKLR.



13. Secondly, the counsel for the Plaintiff/Applicant has submitted that the Plaintiff/Applicant lawfully and duly entered into a Sale Agreement with the 2<sup>nd</sup> Defendant/Respondent whereby the 2<sup>nd</sup> Defendant/Respondent sold to and in favor of the Plaintiff/Applicant a portion marked B, out of L.R No. 1160/339 (original number 1169/178/3).
14. Consequently and in this regard, counsel for the Plaintiff/Applicant has therefore contended that the Plaintiff/Applicant has accrued Legitimate Purchasers rights to and in respect of the sold portion.
15. Based on the purchase of the named portion of the suit property, counsel for the Plaintiff/Applicant has therefore contended that the Plaintiff/Applicant has established a *prima facie* case with overwhelming chances of success.
16. In the premises, counsel for the Plaintiff/Applicant has therefore implored the Honourable court to find and hold that indeed the Plaintiff/Applicant has a worthy case that merits interrogation by the court during the plenary hearing.
17. Thirdly, counsel for the Plaintiff/Applicant has submitted that the dispute beforehand merits being referred to mediation through the Court annexed mediation, so as to enable the Parties to resolve the dispute amicably.
18. To this end, counsel for the Plaintiff/Applicant has submitted that it shall therefore be in the interests of all the Disputants, to have the subject dispute referred to mediation. In this regard, counsel for the Plaintiff/Applicant has invited the Honourable court to take cognizance of and apply Section 59C of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
19. In a nutshell, counsel for the Plaintiff/Applicant has therefore implored the Honourable court to find and hold that the instant Application meets and satisfies the requisite threshold to warrant the grant of the orders sought thereunder.

#### **b. 1<sup>st</sup> Defendant's/Respondent's Submissions**

20. The 1<sup>st</sup> Defendant/Respondent filed written submissions dated the 1<sup>st</sup> December 2022, and same has isolated, identified and highlighted Four (4) issues for consideration by the court.
21. The first issue that has been raised by and on behalf of the 1<sup>st</sup> Defendant/Respondent relates to the fact that the Plaintiff/Applicant has not acquired or accrued any legitimate rights or interests to and in respect of the suit Property or any portion thereof.
22. In the absence of any legal or any equitable rights to and in respect of the suit Property or any portion thereof, counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that no Prima facie case has therefore been established or proved by the Plaintiff/Applicant.
23. In any event, counsel for the 1<sup>st</sup> Defendant/Respondent has added that even the consent upon which the Plaintiff/Applicant relied upon, had long lapsed and expired prior to and before the entry and execution of the impugned Agreement between the Plaintiff/Applicant and the 2<sup>nd</sup> Defendant/Respondent.
24. In short, counsel for the 1<sup>st</sup> Defendant/Respondent has contended that the Plaintiff/Applicant has therefore failed to exhibit, demonstrate, or to establish the existence of a Prima facie case.
25. Secondly, counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that the contract/sale agreement which was (sic) entered into and executed between the Plaintiff/Applicant and the 2<sup>nd</sup> Respondent has a known/stipulated consideration.



26. Besides, counsel has further added that the only amount which the Plaintiff/Applicant contends to have paid to and in favor of the 2<sup>nd</sup> Defendant/Respondent is Kshs.2, 500, 000/= only.
27. In the premises, counsel for the 1<sup>st</sup> Defendant/Respondent has therefore submitted that the loss/damage, if any, to be suffered by the Plaintiff/Applicant, is capable of being reckoned and computed in monetary terms.
28. Additionally, counsel for the 1<sup>st</sup> Defendant/Respondent has also added and contended that the impugned damages/loss, would similarly be compensable in monetary damages, by the person who entered into and executed the impugned contract with the Plaintiff/Applicant.
29. Thirdly, counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that the 1<sup>st</sup> Defendant/Respondent advanced to and in favor of the 2<sup>nd</sup> Defendant/Respondent various sums of moneys, which were secured on the basis of a Charge registered over the suit property.
30. In any event, counsel has added that upon being advanced the monies in question, the 2<sup>nd</sup> Defendant/Respondent was obliged/obligated to repay the monies in the manner agreed and covenanted *vide* the Charge instrument.
31. Nevertheless, it has been submitted that despite the terms of the charge instrument, the 2<sup>nd</sup> Defendant/Respondent has since failed and neglected to repay the monies at the foot of the Banking facility. For clarity, counsel has stated that currently the sum of Kshs.280, 000, 000/= only remains due, outstanding and payable.
32. Based on the foregoing, counsel for the 1<sup>st</sup> Defendant/Respondent has therefore submitted that the Balance of convenience tilts in favor of the 1<sup>st</sup> Defendant/Respondent and not otherwise.
33. Fourthly, counsel for the 1<sup>st</sup> Defendant has submitted that the Plaintiff/Applicant herein is guilty of concealment and non-disclosure of material information and therefore same is not entitled to partake of or to benefit from the Equitable discretion of the Honourable court.
34. In this respect, counsel has submitted that the Plaintiff/Applicant herein had previously entered into and executed a sale agreement with the 2<sup>nd</sup> Defendant/Respondent, over and in respect of the same portion of the suit property.
35. Similarly, counsel for the 1<sup>st</sup> Defendant/Respondent has added that the previous Sale Agreement which was entered into and executed between the Plaintiff/Applicant and the 2<sup>nd</sup> Defendant/Respondent, was the subject of a previous suit, wherein the High Court declined to grant orders of temporary injunction.
36. Notwithstanding the foregoing, it has been contended that the Plaintiff/Applicant failed and neglected to disclose the existence of the previous suit and in particular, the fact that the previous Agreement was one of the subjects/ Issues of the named suit before the high court.
37. In view of the foregoing, counsel for the 1<sup>st</sup> Defendant/Respondent has therefore submitted that the conduct of the Plaintiff/Applicant does not meet the Equitable threshold to warrant the grant of orders of Temporary Injunction.

### **c. 2<sup>nd</sup> Defendant's/Respondent's Submissions**

38. Though the 2<sup>nd</sup> Defendant/Respondent duly filed a Replying Affidavit sworn on the 4<sup>th</sup> December 2022, same however, did not file any written submissions in respect of the subject application.



39. Be that as it may, it is imperative to observe and state that counsel for the 2<sup>nd</sup> Defendant/Respondent informed the court that same would not be filing any written submissions, but instead same shall adopt and rely on the written submissions filed by the Plaintiff/Applicant.

### **Issues for Determination**

40. Having reviewed the Application dated the 17<sup>th</sup> November 2022, together with the supporting affidavit thereto and having reviewed the Responses thereto and upon consideration of the written submissions filed by the Parties, the following Issues do arise and are thus germane for Determination;
- i. Whether the Plaintiff/Applicant has established and demonstrated a Prima facie case with overwhelming chances of success.
  - ii. Whether the Plaintiff/Applicant is disposed to suffer Irreparable loss if the orders sought are not granted.
  - iii. In whose favor does the balance of convenience tilts.

### **Analysis and Determination**

#### **Issue Number 1.- Whether the Plaintiff/Applicant has established and demonstrated a Prima facie case with overwhelming chances of success.**

41. It is common ground that the subject application seeks to procure and obtain primarily an order of temporary injunction to restrain and prohibit the 1<sup>st</sup> Defendant/Respondent from exercising her statutory power of sale over and in respect of the suit property.
42. To the extent that the subject application seeks to accrue an order of temporary injunction, it therefore behooves the Plaintiff/applicant to establish and demonstrate inter-alia, the existence of a *prima facie* case with overwhelming chances of success.
43. Given the import and significance of a *prima facie* case, in an application for temporary injunction, it is therefore appropriate to ascertain and authenticate the meaning and tenor of a *prima facie* case.
44. In this respect, it is imperative to observe that the meaning of what constitutes a *prima facie* case has been the subject of various court decisions and wherein the meaning has been delineated, underscored and duly emphasized.
45. Without belaboring the point, I beg to restate and reiterate the meaning that was assigned to the term prima facie case by the Court of Appeal in the case of *Mrao Ltd v First American Bank Ltd* (2003) eKLR, where the Court of Appeal stated and observed as hereunder:

“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.”



46. Additionally, the meaning and tenor of what constitutes a prima facie case was re-visited by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen* (2014) eKLR, where the Court of Appeal observed as hereunder:

“Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the *American Cyanamid Co. Ethicon Ltd* [1975] AC 396 is a case in point. The meaning of “prima facie case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Trambaklal Hatt v Republic* [1957] E.A. 332.

Recently, this court in *Mrao Ltd. v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“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.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

47. Having ascertained and authenticated the meaning and import of a prima facie case, it is now appropriate to interrogate whether or not the circumstances captured vide the subject application reflect and espouse a *prima facie* case on the part of the Plaintiff/Applicant.
48. To start with, there is no dispute that the suit property out of which the plaintiff/applicant and the 2<sup>nd</sup> defendant/respondent, were dealing with and transacting upon is duly charged to and in favor of the 1<sup>st</sup> defendant/respondent.
49. On the other hand, there is also no gainsaying that where a property, the suit property not excepted, is charged to a financial/banking institution, then such a property cannot be dealt with, sold and or alienated in any other manner, without the express consent of the chargee.
50. In this respect, the plaintiff/applicant has contended that the 1<sup>st</sup> defendant/respondent indeed issued a consent/authority to the 2<sup>nd</sup> defendant/respondent to engage in subdivision and sale of the resultant subdivisions to interested purchasers.
51. It has further been contended that premised on the consent by the 1<sup>st</sup> defendant/respondent, the 2<sup>nd</sup> defendant/respondent indeed entered into and executed (sic) a sale agreement with the plaintiff/applicant dated the 23<sup>rd</sup> August 2022.



52. Be that as it may, it is evident from the letter/document which the Plaintiff/Applicant has alluded to, that the same related to a specific timeline. For clarity, the impugned consent only allowed the 2<sup>nd</sup> Defendant to proceed with the sale pertaining to and in respect of those purchasers who had made the requisite deposit on or before the 3<sup>rd</sup> March 2022 and not otherwise.
53. Clearly, by the time the Plaintiff/Applicant was entering into and executing the impugned sale agreement, the terms of (sic) the authority vide Letter dated the 28<sup>th</sup> February 2022, had long lapsed and extinguished,
54. In the circumstances, it is not open to the Plaintiff/Applicant to contend that the impugned Sale Agreement entered into and dated the 23<sup>rd</sup> August 2022, was entered into with the express Consent of the chargee/1<sup>st</sup> defendant/Respondent.
55. To my mind, the express consent or authority of the 1<sup>st</sup> Defendant/Respondent was essential and constituted a pre-requisite conditions to be complied with and or adhered to before entry into or execution of the impugned sale agreement. See Section 88 of the Land Act No 6 of 2012 (2016).
56. Secondly, even assuming that letter dated the 28<sup>th</sup> February 2022, which the Plaintiff/Applicant has relied upon had not lapsed and become extinguished, there is yet another issue that militate against reliance on the said letter.
57. For clarity, the impugned letter dated the 28<sup>th</sup> February 2022 was crafted and issued on a Without prejudice basis. In this regard, it therefore means that the contents of the impugned letter was meant to regulate and facilitate negotiations between the 1<sup>st</sup> Defendant/Respondent and the 2<sup>nd</sup> Defendant/Respondent.
58. However, where no compromise was effectively reached and/or arrived at between the 1<sup>st</sup> Defendant/respondent and the 2<sup>nd</sup> Defendant/Respondent (and indeed none was reached), then the said letter is inadmissible in evidence as against the 1<sup>st</sup> Defendant/Respondent.
59. In this respect, it is important to take cognizance of the decision in the case of Ocean bulk Shipping and Trading SA V TMT Asia Limited and 3 others [2010] UKSC 44, where the court considered the legal principles pertaining to "without prejudice" Rule.
60. For coherence, in a Majority decision of the Supreme Court of the United Kingdom, the Judges stated-

“The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations.

The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute”.



61. Additionally, the scope and circumstances under which a document issued on a without prejudice basis can be admitted, was also underscored and reiterated in the case of *Walker v Wilsher* (1889) 23 QBD 335 at 337, where the learned judge stated and observed as hereunder;

“The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] Ch 290 at 306;

‘That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course failure to respond to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co V Drayton Paper Works Ltd* (1927) 44 RPC 151 at 156 be encouraged fully and frankly to put their cards on the table ....The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.”

62. In respect of the instant matter, it is common ground that the impugned letter dated the 28<sup>th</sup> February 2022 stipulated a timeline within which the 2<sup>nd</sup> Defendant was to act. For clarity, the timeline lapsed.
63. On the other hand, it is also common ground that as a result of the lapse, the 1<sup>st</sup> Defendant/Respondent was constrained to and indeed proceeded to advertise the suit property for sale vide public auction.
64. Premised on the foregoing, it is my finding and holding that the impugned letter which was issued on a without prejudice basis would not be admissible in respect of the subject matter, either in the manner adverted to or proposed by the Plaintiff/Applicant.
65. Thirdly, it is also not lost on the Honourable court that the impugned letter upon which the Plaintiff/Applicant hinges her case on was also not addressed to the Plaintiff/Applicant. Consequently, the impugned letter does not, in my view, create any privity of contract between the Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent.
66. To this end, I beg to adopt and reiterate the observation vide *Halsbury's Laws of England*, 3<sup>rd</sup> Edition, Volume 8, paragraph 110, which states as hereunder;

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”



67. Additionally, the import and tenor of the doctrine of privity of contract has also been amplified and highlighted in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, where the Honourable court stated and observed as hereunder;

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

68. In my humble view, the impugned letter, could only be invoked and relied upon, if at all, by the addressee thereof. However, such reliance would be subject to the Without Prejudice Rule.

69. Fourthly, though the Plaintiff/Applicant has alluded to and contended that same entered into and executed a sale agreement with the 2<sup>nd</sup> Defendant/Respondent, it is common ground that the impugned sale agreement, did not on the face of it, culminate into and/or give birth to any legal rights or interests to the suit property.

70. In any event, there is no gainsaying that the impugned sale agreement was never registered, insofar as the suit property is still duly and lawfully charged in favor of the 1<sup>st</sup> Defendant/Respondent.

71. Premised on the foregoing, the question that then arises is whether the Plaintiff/Applicant has since accrued and acquired any lawful interest or rights over the suit property capable of being protected under the law.

72. I am afraid that in the absence of the sale agreement being sanctioned by the 1<sup>st</sup> Defendant/Respondent and in the absence of registration thereof, the Plaintiff/Applicant does not appear to have acquired any legal or legitimate rights capable of protection under the law.

73. Having considered the various albeit numerous perspectives that have been alluded to *vide* the preceding paragraphs, I find and hold that the Plaintiff/Applicant has neither established nor demonstrated a *prima facie* case with overwhelming chances of success.

**Issue Number 2.- Whether the Plaintiff/Applicant is disposed to suffer Irreparable Loss if the orders sought are not granted.**

74. It is appropriate and worthy to recall that the Plaintiff/Applicant contended that same entered into and executed a sale agreement with the 2<sup>nd</sup> Defendant/Respondent, whereby the 2<sup>nd</sup> Defendant/Respondent sought to sell a portion of the suit property to the Plaintiff/Applicant.

75. Further, the Plaintiff/Applicant averred that the purchase price over and in respect of the named portion of the suit property was agreed in the sum of Kshs.25, 000, 000/= only.

76. Other than the foregoing, the Plaintiff/Applicant added that same proceeded to and indeed paid a Stakeholder sum/deposit in the sum of Kshs.2, 500, 000/= only.

77. From the foregoing, what becomes apparent and evident is that the named portion of the suit property, which was being sold to and in favor of the Plaintiff/Applicant, has a known, ascertained and stipulated Market price.



78. In the circumstances, assuming that the sale contract between the Plaintiff/Applicant and the 2<sup>nd</sup> Defendant/Respondent, aborts and does not materialize, then the Plaintiff/Applicant would no doubt be entitled to recoup the stakeholders sum, together with Liquidated damages, if any, stipulated at the foot of the Sale Contract.
79. In the premises, it is worthy to state and observe that the Plaintiff/Applicant herein shall be entitled to recovery of known Damages, including Liquidated Damages, in the event of Breach or Frustration of the impugned sale agreement.
80. In a nutshell, it is my finding and holding that the losses/damages to be suffered by the Plaintiff/Applicant, if any, are ascertainable, quantifiable and compensable in Monetary terms.
81. To the extent that the Losses and Damages, if any, to be suffered by the Plaintiff/Applicant are compensable in monetary terms, it is therefore evident and apparent that the Plaintiff/Applicant shall not be exposed to suffer Irreparable loss.
82. In the absence of Irreparable Loss, I am afraid that no order of Temporary Injunction can issue to and in favor of the Plaintiff/Applicant, either in the manner sought or at all.
83. To this end, it is appropriate to adopt and re-echo the dictum of the Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86, where the court stated as hereunder;

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage.

If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

84. In short, it is my finding and holding that the loss/damages to be suffered by the Plaintiff/Applicant, if any, are certainly measurable and compensable in monetary terms.

**Issue Number 3- In whose favor does the balance of convenience tilts.**

85. It is common ground that the 2<sup>nd</sup> Defendant/Respondent herein approached the 1<sup>st</sup> Defendant/Respondent with a view to procuring and obtaining a Banking facility. For clarity, a banking facility was thereafter offered/granted in favor of the 2<sup>nd</sup> Defendant/Respondent.
86. Pursuant to and inline with the banking facility that was granted in favor of the 2<sup>nd</sup> Defendant/Respondent, same was obligated to repay the banking facility in the manner prescribed and underlined vide the ensuing Charge Instrument.
87. Nevertheless, evidence abound and indeed the 2<sup>nd</sup> Defendant/Respondent has conceded that same has variously defaulted in the payment of the Banking facility, which was granted in her favor.
88. In any event, there is also evidence that the 2<sup>nd</sup> Defendant herein has variously filed previous suit, inter alia, Milimani HCC No. E240 of 2020 and Milimani HCC E133 of 2022, respectively, where same sought to restrain the 1<sup>st</sup> Defendant from exercising her right foreclosure.



89. Without venturing into details, there is evidence that the 1<sup>st</sup> Defendant/Respondent and the 2<sup>nd</sup> Defendant/Respondent indeed entered into a consent vide Nairobi ELC No 240 of 2020, which inter alia allowed the 1<sup>st</sup> Defendant/Respondent to proceed with the exercise of statutory power of sale in the event of default to comply with the agreed terms.
90. Additionally, there is also evidence that the 2<sup>nd</sup> Defendant/Respondent also returned to court vide Milimani HCC E133 of 2022, wherein same sought various reliefs including an order of injunction.
91. Suffice it to point out that in the latter suit, the 2<sup>nd</sup> Defendant/Respondent also filed an interlocutory application seeking to restrain the 1<sup>st</sup> Defendant/Respondent from exercising her statutory powers of sale.
92. It is important to note that various reasons were stated and stipulated in the said application. However, one of the grounds related to the fact that portions of the suit property had been sold to Third parties, including the current Plaintiff/Applicant.
93. Notwithstanding the foregoing, the honourable Judge of the High court proceeded to and dismissed the application for temporary injunction filed by Milimani HCC No. E133 of 2022, after considering inter alia, the legal implications, if any, of the Sale Agreements to the named Third Parties.
94. Other than the foregoing, it was also stated that to date the 2<sup>nd</sup> Defendant/Respondent owes to and in favor of the 1<sup>st</sup> Defendant/Respondent the sum over of Kshs.280, 000, 000/=, which remains due, outstanding and payable.
95. Premised on the foregoing, it is my humble position that it would not be in the Interest of Justice and Fair play to grant the impugned Temporary injunction, to and in favour of the Plaintiff/ Applicant and by extension, help the 2<sup>ND</sup> Defendant to avert complying with her part of the Bargain.
96. Consequently and in view of the foregoing, I similarly come to the conclusion that the balance of convenience tilts in favor of the 1<sup>st</sup> Defendant/Respondent, who is owed the colossal sum of money by and at the instance of the 2<sup>nd</sup> Defendant/Respondent.
97. Contrasted as against the Plaintiff/Applicant, the level of inconvenience, if any, to be suffered is neither comparable nor commensurate with the one to be suffered by the 1<sup>st</sup> Defendant/Respondent.

#### **Final Disposition:**

98. Having evaluated and analyzed the thematic issues and perspectives that were highlighted in the Body of the subject Ruling, it is evident and apparent that the instant application falls short of satisfying the requisite threshold for granting an order of temporary injunction.
99. Suffice it to point out, that the loss/ damage, if any, to be suffered by the plaintiff/applicant is not only quantifiable and ascertainable, but same is also compensable in monetary terms.
100. Consequently and in the premises, the application dated the 17<sup>th</sup> november 2022 is devoid and bereft of merits.
101. In a nutshell, the impugned application herein be and is hereby dismissed with costs to the 1<sup>st</sup> defendant/respondent only.
102. Having found and held that the instant application is devoid of merits and having come to the conclusion that same merits dismissal, it is now imperative that the interim orders of status quo, which were hitherto granted be and are hereby discharged.



103. In short, the interim orders of status quo which were granted on the 22/11/2022, be and are hereby discharged. for the avoidance of doubt, the costs of the auctioneer attendant to the aborted public auction, shall be taxed and certified by the deputy registrar of the honourable court and once certified, the same shall be off-set by the monies which was deposited in court.
104. On the other hand, if there shall be any Balance after satisfaction of the Auctioneers Charges, the said Balance, shall be refunded to the Plaintiff/ Applicant.
105. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2022.**

**OGUTTU MBOYA**

**JUDGE.**

In the Presence of;

Benson - Court Assistant.

Mr. Davidson Makau for the Plaintiff/Applicant.

Mr. Paul Ogunde for the 1<sup>st</sup> Defendant/Respondent.

Mr. Chebii for the 2<sup>nd</sup> Defendant/Respondent.

