El - MA Solutions Limited & another v Rafiki Microfinance Bank Limited & another (Civil Suit E035 of 2023) [2024] KEELC 13650 (KLR) (2 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13650 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT E035 OF 2023

LL NAIKUNI, J

DECEMBER 2, 2024

BETWEEN

EL - MA SOLUTIONS LIMITED ..... 1ST PLAINTIFF

PAMBAZUKO INVESTMENTS LIMITED ..... 2ND PLAINTIFF

AND

RAFIKI MICROFINANCE BANK LIMITED ..... 1ST DEFENDANT

NDUTUMI AUCTIONEERS ..... 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application dated 26th October, 2023. The Court was moved under Certificate of urgency by El - Ma Solutions Limited and Pambazuko Investments Limited, the Plaintiffs/Applicants. The application was brought under the provisions of Order 40 Rules 1, 2, 3 and 4, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya 2010 and all other enabling Provisions of the Law.

2. Upon service of the same, the 1st Defendant/Respondent filed their response through a Replying Affidavit sworn on 12th January, 2024 accordingly.

II. The Plaintiffs/Applicants' case

3. The Plaintiffs/Applicants sought for the following orders:-

    a. Spent.

    b. Spent.

c. That pending the hearing and determination of this suit, the Defendants by themselves or through their agents or servants be restrained by way of an injunction from selling by public auction or otherwise, disposing, selling, transferring, alienating, charging or in any other way dealing with the suit property.

d. That the costs of this application be in the cause.

4. The application by the Applicant is premised on the grounds, testimonial facts and averment made supported by the 35 Paragraphed annexed affidavit of HELLEN NYABONYI OCHWANGI a director of the Plaintiffs/Applicants herein. The Deponent averred that:

a. In or about 2019, the Plaintiffs/Applicants applied for banking facilities with the 1st Defendant/Respondent.

b. The 1st Plaintiff/Applicant applied for a loan facility for the sum of a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) whereas the 2nd Plaintiff/Applicant applied for the sum of Kenya Shillings Fifteen Million (Kshs.15,000,000/-).

c. The Plaintiffs/Applicants jointly offered the 1st Defendant/Respondent the following properties as securities:-

i. KILIFI/MTWAPA/5010 I.N.O NICHOLUS GUDINA KANANA

ii. KILIFI/MTWAPA/4122 I.N.O HELLEN NYABONYI OCHWANGI

iii. KILIFI/NGERENYI/1007 I.N.O CAROLYNE NYANDUKO NDEGE

iv. L.R NO. 18162 SECTION I MAINLAND NORTH I.N.O HELLEN NYABONYI OCHWANGI

v. L.R NO. 9122/663 MTWAPA I.N.O HELLEN NYABONYI OCHWANGI

vi. L.R NO. 2449 SECTION III MAINLAND NORTH I.N.O CHARLES ODHIAMBO ABUTO.

d. The 1st Defendant/Respondent registered legal charges against the aforementioned properties as securities to secure the borrowing and banking facilities offered to the Plaintiffs/Applicants.

e. Over the years and at all material times, the Plaintiffs/Applicants regularly and religiously serviced the banking facilities without fail.

f. In or about the year 2021 the Plaintiffs/Applicants businesses encountered turbulent waters at the onset of the COVID-10 Pandemic.

g. For the last three (3) years the Plaintiffs/Applicants experienced challenges in servicing the banking facilities and throughout this period engaged the 1st Defendant with a view to obtaining a solution to regularize the accounts and or fully settle the banking facilities.

h. In spite of falling in arrears, the Plaintiffs/Applicants kept in touch with the 1st Defendant/Respondent and carried out negotiations and gave proposals for the payment of the banking facilities.

i. On or about 20th January 2023 the Plaintiffs issued a letter to the First Defendant setting out a loan payment plan. She annexed a copy of the letter and marked it “HNO - 1”.

j. In a letter dated 3rd April 2023, addressed to the 1st Defendant, the Plaintiffs requested the 1st Defendant to confirmed the outstanding debt to enable the Plaintiffs present a repayment proposal. She annexed a copy of the letter and marked it as "HNO - 2".

k. In a letter dated 18th April 2023, the Plaintiffs/Applicants requested the 1st Defendant/ Respondent to deal with the Plaintiffs/Applicants advocates, Omondi Waweru & Company Advocates with a view to arriving at an amicable solution over repayment of the banking facilities. She annexed a copy of the letter and marked it as "HNO - 3".

l. On or about 27th April 2023 the 1st Defendant/Respondent issued to the Plaintiffs/Applicants and the respective Guarantors a FORTY (40) days' Notice to sell and demanded payment of a sum of Kenya Shillings Thirty Five Million Eight Sixty Three Thousand Two Twenty Nine Hundred Seventy Cents (Kshs. 35,863,229.70/=) being the outstanding loan facility. She annexed a bundle of the letters and marked it as "HNO - 4".

m. In response to the aforesaid FORTY (40) days' Notice, the Plaintiffs/Applicants issued a letter dated 7th June 2023 to the 1st Defendant/Respondent requesting for a meeting to enable the Plaintiffs/Applicants present their proposals on the amicable settlement of the indebtedness that may be due and owing. She annexed a copy of the letter and marked it as "HNO - 5".

n. The Plaintiffs/Applicants pointed out in the aforesaid letter that the properties offered to the 1st Defendant/Respondent as security had an aggregate value that far exceeds the debt due to the 1st Defendant/Respondent.

o. In an email by the 1st Defendant/Respondent dated 31st July 2023, the 1st Defendant accepted the requested meeting at its Head Office Nairobi which meeting was eventually held on 24th August 2023. She annexed a copy of the letter and marked it as "HNO - 6".

p. At a meeting held on 24th August, 2023 at the 1st Defendant's head office in Nairobi, the Plaintiffs made the following proposal through their advocates:-

    a. The Bank to withhold any precipitate action with regard to advertising the charged property for sale by public auction.

    b. To allow their client Six (6) months to organize its business and pay the banking facilities and or outstanding loan.

    c. To allow their client to sale the charged property by private treaty and remit directly to the Bank the proceeds of sale.

    d. To allow their client to conclude the under listed business and remit the proceeds directly to the Bank:-

        i. A Tender from Kenya Petroleum Refineries for Cleaning LPG Gas tanks.

        ii. A Tender from Kenya Ports Authority for Supply and Delivery of Staff Uniforms.

        iii. Several other projects their client was pursuing with encouraging prospects for good returns

q. The Plaintiffs also at the aforesaid meeting requested to be allowed to sell by private treaty the parcels of land known as KILIFI/MTWAPA/4122 and KILIFI/MTWAPA/5010 for which the Plaintiffs had identified prospective buyers.

r. The Plaintiffs captured the proposals made in the aforesaid meeting in their advocate's letter to the 1st Defendant dated 14th September, 2023. She annexed a copy of the letter and marked it as "HNO - 7".

s. In response to the contents of the Plaintiffs' letter dated 14th September, 2023, the 1st Defendant issued its letter dated 3rd October, 2023 in a surprising rejoinder stating that "your request has internally been reviewed and the Bank would wish to advise as follows":

   a. That the bank has served all the statutory notices which have expired without any agreeable repayment plan from your client on the debt which has been long outstanding.

   b. The bank is at liberty to exercise the remedies availed to it under the law and specifically its statutory powers of sale on the securities 'pledged as collateral to your loan.

t. The aforesaid letter concluded in a penultimate fashion thus:

> "Be advised that you have the right to redeem the charged property at any time before the scheduled date and time of auction by paying the entire loan balance outstanding at. Kshs. 65,745,418.32 together with accrued interest and costs." She annexed a copy of the letter and marked it as "HNO8".

u. In a letter dated 17th October, 2023, the Plaintiffs/Applicants requested the 1st Defendant/Respondent to furnish the Plaintiffs with copies of Valuation Reports prepared in respect of the suit property. She annexed a copy of the letter and marked it as "HNO - 9".

v. In spite of a reminder dated 23rd October 2023 the 1st Defendant/Respondent had refused to share the Valuation Reports with the Plaintiffs/Applicants. She annexed a copy of the letter and marked it as "HNO - 10". The Plaintiffs/Applicants were unable to execute the agreement for sale with two interested buyers due to the 1st Defendant/Respondent refusal to grant authority to the Plaintiffs to sale some of the suit property by private treaty.

w. On 29th August 2023 the 2nd Defendant/Respondent issued a Notification of Sale and noted that the amount claimed by the 1st Defendant/Respondent was a sum of Kenya Shillings Sixty Five Million Five Sixty Six Thousand Four Fifty Nine Hundred and Seventy Two Cents (Kshs. 65,566,459.72/=). She annexed a copy and marked it as "HNO - 11".

x. The 2nd Defendant had advertised the suit property for sale by public auction on 1st November 2023 in an advert that appeared in the Standard Newspaper issue of 17th October 2023. She annexed a copy of the advert and mark it as "HNO - 12".

y. Whereas the Forty (40) days' Notice to sell dated 27th April 2023 issued by the Defendants/Respondent to the Plaintiffs/Applicants and all the Guarantors notes the outstanding debt as a sum of Kenya Shillings Thirty Five Million Eight Sixty Three Thousand Two Twenty Nine Hundred and Seventy Cents (Kshs. 35,863,229.70/=), it is strange that the 1st Defendant's letter dated 3rd October 2023 noted the outstanding sum of Kenya Shillings Sixty Five Million Seven Fourty Five Thousand Four Eighteen Hundred Seventy Two cents (Kshs. 65,745,418.72/=).

z. The 2nd Defendants Notification of Sale dated 29th August 2023 also notes the outstanding sum as Kenya Shillings Sixty Five Million Seven Fourty Five Thousand Four Eighteen Hundred Seventy Two cents (Kshs.65,745,418.72/=).

aa. The had identified two serious buyers in respect of the parcels of land known as KILIFI/MTWAPA/4122 and KILIFI/MTWAPA/5010 with an aggregate selling price of a sum of Kenya Shillings Fourty Five Million (Kshs. 45,000,000/=) but the 1st Defendant has declined to grant the Plaintiff authority to sale by private treaty.

ab. If allowed to sale aforesaid, parcels of land by private treaty, the proceeds thereof of Kenya Shillings Fourty Five Million (Kshs. 45,000,000/-) would in essence fully settle the outstanding debt. She annexed copies of the Agreements and marked them as "HNO - 13" and "HNO - 14".

ac. The 1st Defendant's belated demand of an unexplained sum of Kenya Shillings Sixty Five Million Five Sixty Six Hundred Four Fifty Nine Hundred Seventy Two cents (Kshs. 65,566,459.72/=) which is hugely at variance with the sum demanded in the 40 days' Notice to sell of a sum of Kenya Shillings Thirty Five Million Eighty Sixty Three Thousand Two Twenty Nine Seventy Cents (Kshs. 35,863,229.70/=) was a calculated attempt to clog the Plaintiffs/Applicants' equity of redemption.

ad. The 1st Defendant/Respondent denial to the Plaintiffs/Applicants of authority to sale some of the properties by the private treaty coupled with the 1st Defendant/Respondent's refusal to furnish the Plaintiffs/Applicants with copies of the Valuation Reports is evidence of conspiracy by the Defendants to sale the suit property at throwaway prices.

ae. The Plaintiffs stand to suffer irreparable loss and damage unless the Defendants were restrained from selling the suit property.

af. The Affidavit is sworn in support of the application filed herein.

III. The Response by the 1st Defendant/Respondent

5. The 1st Defendant/Respondent responded to the Notice of Motion application dated 26th October, 2023 through a 41 paragraphed replying affidavit sworn by SAMUEL NJOROGE, the assistant manager – debt recovery unit of the 1st Defendant/Respondent on 12th January, 2024 where he averred that:-

a. The 1st Defendant/Respondent was engaged in the business of providing banking and finance services to its customers, and it specifically offers savings facilities, credit, money transfer services, trade finance, forex and bank-assurance services to its clients.

b. It was the nature of the 1st Defendant/Respondent to secure the obligations of its creditors by registering securities against the facilities. Sometime in 2019, at the request of the 2nd Applicant, the 1st Defendant/Respondent agreed to issue and disbursed credit facilities to the 2nd Applicant to a tune of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-).

c. Additionally, sometime in the year 2020, at the request of the 1st Applicant, the 1st Respondent disbursed credit facilities to the Applicant to the sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-). The Applicants offered the following properties as security to secure their obligation:

a. Killfi/Mtwapa/5010 i.n.o Nicholus Gudina Kanana;

b. Kilifi/Mtwapa/4122 i.n.o Hellen Nyabonyi Ochwangi;

c. Kilifl/Ngereni/1007 i.n.o Carolyn Nyanduko Ndege:

d. L.R No. 18162 Section I Mainland North i.n.oHellen Nyabonyi Ochwangi;

e. L.R No.2449 Section III Mainland North i.n.o Charles Odhlambo Abuto;and

f. L.R NO. 9122/663 i.n.o Hellen Nyabonyi Ochwang.

d. Resultantly, the 1st Applicant maintained two loan accounts with the 1st Respondent, namely account number 0051510000052 (Scounting Business Banking) cnd 0051130000217(Lpo/ Invoice Discounting), while the 2nd Applicant maintained one loan account being account number 0051510000043 (Scounting business banking).

e. The Charge documents together with the facility letter specified the obligations of every party, stated the date of repayment of each instalment of the credit facilities, outlined the event of default, and the remedies of the Bank in the event of default. The Applicants agreed to the terms and proceeded to sign the facility letter and the Charge.

f. To the contrary, the Applicants perennially failed into arrears, and despite numerous accommodations by the 1st Respondent, the Applicants were unable to regularize their credit facility accounts.

g. Despite numerous reminders from the 1st Respondent, specifically through its demand letters dated 23rd June, 2020, 29th September, 2020, and 13th September, 2021, calling upon the Applicants to regularize their accounts, the Applicants adamantly refused to do so prompting the 1st Applicant to exercise its remedies envisaged under section 90 of the *Land Act*. (Annexed in the affidavit and marked as "SN - 1" were the demand letters dated 23rd June, 2020, 29th September, 2020 and 13th September, 2021 respectively).

h. Owing to the incessant default, the 1st Defendant/Respondent commenced the realization process by serving the Applicants with a 90 days' notice dated 17th January,2023, through their respective last known postal address. (annexed in the affidavit and marked as "SN - 2" the 90-days' notice together with the corresponding certificate of postage).

i. Upon receipt of the statutory notice, the 1st Applicant wrote to the 1st Defendant/Respondent through its letter dated 20th January, 2023 outlining its plan on how to settle the outstanding amount owed by both the Applicants as follows:

    a. The LPO for Kenya Petroleum Refineries Limited issued to Harris General Limited was 80% complete and was expected to be cleared in the month of February and the expected proceeds was a sum of Kenya Shillings Three Million Five Hundred (Kshs. 3,500,000/-) to be deposited in the 2nd Plaintiff's loan account.

    b. Contract for Kenya Petroleum Refineries issued to Frejed Engineering Services Limited was 30% done and was to be completed in the month of March. The expected proceeds was a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) additionally to be paid in the 2nd Plaintiff's loan account.

    c. The Contract for Kenya Maritime Authority issued to Frejed Engineering was ongoing and was expected to be completed in the month of April. The expected proceeds was a sum of Kenya Shillings Three Million (Kshs.3,000,0000/-), to be paid to the 2nd Plaintiffs loan account.

    d. It intended to clear the loan owed by the 2nd Plaintiff by the end of March 2023 and commence the payment of the credit facilities owed by the 1st Plaintiff.

j. To the utter dismay of the 1st Respondent, the Applicants failed to honor their commitment as stated in their letter of 20th January, 2023 and no single payment whatsoever was ever received from them as pledged.

k. The last payment received from the 1st and 2nd Applicants was on 19th February 2022 for a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) and 19th November, 2022 for a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/-) respectively, which payments were insufficient to regularize their accounts. (Annexed herein and marked as "SN-4" were the statements of the credit facility accounts held by the 1st and 2nd Applicants respectively).

l. Having failed to honor their obligation upon the lapse of the 90-days statutory notice, the 1st Respondent served the Applicants and their guarantors with a 40-days' notice through their last known postal address. (Annexed in the affidavit and marked as "SN-5" was the 40-days' notice duly served upon the Respondents together with the certificate of postage confirming service).

m. The Applicants ignored the notices and persistently fell into arrears prompting the 1st Respondent to instruct Ndutumi Auctioneers (hereinafter "the 2nd Respondent") to commence the auctioning process over the charged properties.

n. The 2nd Respondent proceeded to serve the Applicants with a 45-days redemption notice dated 29th August, 2023 both by personal service and registered post. (Annexed herein and marked as "SN - 6" the Notification of Sale dated 29th August, 2023).

o. Having failed to redeem the charged properties within the 45-days provided in the auctioneer's notice, the 2nd Respondent proceeded to advertise the properties for sale on 1st November, 2023 via the standard newspaper.

p. On or about the 14th September, 2023 the Applicants through their advocates, Omondi Waweru & Company, requested the 1st Applicant for the following:

    i. to withhold any precipitate action regarding the advertising of the charged properties for sale by public action;

    ii. to allow the Plaintiff 6 months to organize its business and pay the outstanding loan:

    iii. to allow the Plaintiffs to sale the charged properties by way of private treaty:

    iv. to allow the Plaintiffs to conclude their tender business with Kenya Petroleum Refineries for Cleaning LPG Gas tanks, a tender from Kenya Ports Authority for Supply and delivery of staff uniforms and several other projects the Plaintiffs were pursuing;

    v. the Plaintiff to waive any interest to waive any interest and penalties that have accrued against the principal loan, and that the Plaintiffs were willing to pay a sum of Kenya Shillings Thirty Seven Million (Kshs. 37,000,0000/-) in full and final statement of the debt. (annexed in the affidavit and marked as "SN - 7" was the letter from Omondi Waweru Company Advocates dated 14th September, 2023).

q. The proposal was however not agreeable to the 1st Defendant/Respondent as the Applicants were habitual defaulters, and they had not come up with any payment proposal prior to the lapse of the statutory notices. (Annexed herein and marked as "SN - 8" the letter from the 1st

Respondent dated 3rd October, 2023 in response to the Applicants letter dated 14th September, 2023).

r. At all times relevant to the suit, the Applicants were well aware of the credit facilities owed by each of them as the same was communicated to them by the 1st Respondent from time to time, additionally, their loan statements were readily available at their disposal at any time they requested for the same.(Annexed in affidavit and marked as "SN - 9" a letter from the 1st Defendant/Respondent dated 25th January, 2023 stating the amounts owed by both the Applicants).

s. Despite being well aware of the accrued debt, the Applicants never challenged the same, instead through their advocates letter dated 14th September, 2023 request for a waiver of all the penalties and interest and to be allowed to pay a total sum of Kenya Shillings Thirty Seven Million (Kshs. 37,000,000/-).

t. The a sum of Kenya Shillings Thirty Five Million Eight Sixty Three Thousand Two Twenty Nine Hundred Seventy Cents (Kshs.35, 863,229.70/-) stated in the 40 - days' notice dated 27th April, 2023, annexed to the Applicant's Supporting Affidavit, was specific to the amount owed by the 1st Applicant and the same was indicated in the said notice which the Applicants were well aware of.

u. The Applicants had at all times known the debt owed by each of them and the issue of claiming that they are not cognizant of the outstanding amount was a red herring as they have not been repaying their debts.

v. As of 2nd November, 2023the 1st Applicant was in arrears of a sum of Kenya Shillings Twenty Six Million Four Seventy One Hundred Seven Eighty Eight Hundred Nineteen Cents (Kshs. 26,471,788.19/-) and a sum of Fourteen Million Seven Sixty Eight Thousand Three Eighty Seven Hundred and Fourty Eight Cents (Kshs. 14,768,387.48/-) in its loan account numbers 0051510000052 (Scouting Business Banking) and 0051130000217 (LPO/Invoice Discounting) respectively, while the 2nd Applicant was in arrears of Kenya Shillings Twenty Six Million One Fourteen Hundred Four Fifty Six Hundred Twenty Cents (Kshs. 26,114,456.20) bringing the aggregate of the total owed sum to Kenya Shillings Sixty Seven Million Three Fifty Four Thousand Six Thirty One Hundred Eighty Cents (Kshs. 67,354,631.87/-).

w. The 1st Respondent on or about 30th June, 2023, requested Clayton Valuers Limited, duly registered valuers, to conduct a valuation and submit a report over the charged properties. The Valuers conducted the valuation and presented various valuation reports to the 1st Defendant all dated 27th July, 2023 (Annexed in the affidavit and marked as "SN-10" were the various valuation reports submitted in respect to the properties).

x. The 1st Defendant/Respondent had no interest whatsoever in clogging the Applicant's rights of redemption other than exercising its security rights provided under the law.

y. The 1st Defendant/Respondent was further not interested in selling the charged properties at a throw away price as alleged by the Applicants, and the 1st Defendant/Respondent had so far taken the bold step of appointing a valuer to conduct a valuation over the properties to ascertain the market value and the forced sale value of the properties, prior to advertising them for sale.

z. The decision not to serve the Applicants with the valuation reports is not in itself fatal to invalidate the 1st Defendant/Respondent's right of sale that has already matured.

a. The Applicants were belligerent defaulters, who had ignored the need to service the loan and now seek to use the courts to hold the 1st Defendant/Respondent hostage.

ab. The Applicants come to this Court with unclean hands having failed to honour their obligation and pay the credit facilities when as they fall due.

ac. The Statutory notices categorically stated the default by the Applicants, the amounts required to regularize the accounts, and the timelines for making the payments and the same cannot be said to be irregular.

ad. The 1st Defendant/Respondent in good and utmost faith granted the Applicants ample time and accommodation to satisfy their obligation and despite numerous reminders by the 1st Defendant/Respondent, the Applicants perennially failed in doing so and repeatedly failed into arrears.

ae. The Applicants were well aware of the 1st Respondent's rights under the charge which consisted of the right to either sue them for the money due and owing under the charge, appoint a receiver of the income of the premises, and/or sell the premises, but nevertheless proceeded to execute the Charge and render the properties as security. The Applicants would therefore not be prejudiced if the Respondents are allowed to proceed with the right of sale.

af. The charge documents duly executed by the 1st Respondents, Applicants, and the owners of the charged properties is a binding agreement between the parties, and it was clear on the obligation of all the parties, and at no point does it allow the sale of the charged properties by way of private treaty.

ag. No loss that cannot be compensated by way of damages shall be occasioned to the Applicants if the Respondents are allowed to proceed with their right of sale.

ah. The 1st Defendant/Respondent was a financial institution which has no money of its own and depends on funds deposited by one Client to provide financial accommodation to another Client. The 1st Defendant/Respondent would therefore greatly be prejudiced if it was not allowed to proceed to exercise its right of sale, as it will not only suffer irreparable damage but it will also lose the deposit of its Clients who have placed fiduciary trust on it to be a custodian of their funds.

ai. The statutory power of sale had arisen as a result of the Plaintiffs/Applicants' default, hence the 1st Defendant/Respondent was entitled to sell the property by public auction.

aj. It was in the best interest of justice that the instant application be dismissed forthwith with costs in favour of the Respondent and the suit struck out for having no probable cause.

IV. Submissions

6. On 20th June, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 26th October, 2023 be disposed of by way of written submissions and all the parties complied. Unfortunately, by the time of penning down this ruling the Court was only the 1st Respondent had complied. The Honourable Court proceeded to reserve a ruling date on 18th November, 2024 on its own merit accordingly.

A. The Written Submissions by the 1st Defendant/Respondent

7. The 1st Defendant/Respondent through the Law firm of Messrs. Mahida & Maina Company Advocates filed their written submissions dated 19th November, 2024. Mr. Owiti Advocate commenced his submissions by recounting the Plaintiff/Applicant's case and the application. It sought the above stated reliefs. The Applicants' application was based on the grounds that the Respondents had unlawfully advertised the suit property for sale by public auction without issuing the Applicants with the requisite statutory notices and notification of sale, that notices issued by the Defendants (if any) were defective, null and void, the 1st Defendant has refused to furnish the Plaintiff with copies of the valuation report in respect of the suit property, the Applicants challenge the amount owed to the Respondent, the Respondent had refused the proposal to settle the amount due, the Respondent has further refused to allow the Applicants sale the suit properties by way of private treaty, the Respondent was hell-bent on selling the suit property by public auction to persons of their choice at a throwaway price and has intently clogged the Applicant's right of redemption. The assertions were supported by a Replying Affidavit sworn by Mrs. Hellen Nyabonyi.

8. The Learned Counsel informed Court that in Response, the 1st Respondent through its assistant manager-debt recovery unit, swore a Replying Affidavit stating that it issued credit facilities to the 1st and 2nd Applicant to a tune of a sum of Kenya Shillings Thirsty Five Million (Kshs. 35,000,000/=). The securities were secured by legal charges over the suit properties. The Applicants however defaulted in repayment of the said facilities, which prompted the 1st Respondent to commence a realization process against them. It consequently issued the Applicants with the requisite statutory notices via registered post. Further, it instructed the 2nd Respondent to attach and sell the charged properties when the Applicant had failed to comply with the notices. The 2nd Respondent also issued the Applicant with a 45-day redemption notice both physically and by post.

9. It was the 1st Respondent's case that its right of sale had since matured and the Applicants are using the court process to prevent them from exercising their right of sale. It also averred that the Applicant was at all times aware of the amount of time, and a proper valuation was conducted on the property before exercising the right of sale. The matter came up for hearing on 18th January 2024, however, Learned Counsel for the Applicant, Mr. Odunga stated that he had recently taken over the matter and he would require more time to familiarize himself with file and file amended pleadings, he was granted more time to do so. The matter came up for hearing on 6th March 2024, however, the same did not proceed and the Applicant's Advocate requested for more time to comply which was allowed. The suit was subsequently mentioned on 6th May 2024 and 20th June 2024, and in both occasions, the Applicant was yet to comply, consequently, the matter was set for a ruling on 17th July 2024. At the time of filing these submissions, the Applicants were yet to file their submissions, confirming their lack of interest in prosecuting the suit.

10. While opposing the application, the Learned Counsel submitted under the following four (4) issues. Firstly, whether the Applicants were properly served with the requisite statutory notices. Further, whether the notices are defective? The Applicants allege having not been served with the mandatory notices, and if the same were served, they state that the same were defective and/or null or void. The expressive provisions on issuance of notices under the *Land Act*, 2012 were under provision of Sections 90, and 96(1) and (2). They state as follows:

    Section 90:

    90 (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant,

express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

Section 90 (2) of the Act goes ahead to prescribe what should be contained in the notice. It provides that it should state the nature and extent of default, the amount to be paid to rectify the default and the period for paying the same not exceeding 3 months, consequences that accrue in the event of non-compliance, and the right of the Chargor to apply to Court in respect of certain remedies.

Section 96 states:

96

1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

11. The Learned Counsel contended that the upshot of the above provisions was that in the event of default, before a Chargee exercises their right of sale, they must first issue a notice of not less than three months to the Chargor stating the amount due, the remedies to be exercised by the Chargee in the event of non-compliance and the right of the Chargor to apply to Court in respect of some remedies. The Chargor was further tasked to issue a notice to the sale of not less than 40 days to the Chargor upon the lapse of the 90 days' notice.

12. The 1st Respondent issued the Applicants and their guarantors with 90 - day statutory notices dated 17th January 2023 through their last known postal address indicated in the charge documents and correspondences. This was illustrated in annexure "SN - 2" of the 1st Respondent's Replying Affidavit and the Certificate of Postage attached to the said notices confirming service. The notices specified the nature and extent of default, the amount required to regularize the accounts, the bank's remedy in the case of non-compliance, and the right of the chargor to apply to the court in respect of some remedies. Therefore, the notice could be said to be faulty.

13. Additionally, the Learned Counsel argued that upon the lapse of the 90 days, having failed to comply with the initial notice, the 1st Respondent issued the Applicants and their guarantors with a 40 days' notice under provision Section 96 (2) of the *Land Act*, 2012 dated 27th April 2023 through their last known postal address. A certificate of postage was attached to the said notices confirming service. In Paragraph 13 of the Applicants' Supporting Affidavit dated 26th October 2023, the deponent admits to having been served with the 40 days' notice together with the guarantors on 27th April 2023. Additionally, in Paragraph 14 of the said affidavit, the Applicants admit that it was based on the 40 - day notice that they engaged the 1st Applicant with a proposal. It is therefore not in doubt that the Applicant were effectively served with the statutory notices, it is misleading for them to claim that they were never served as such.

14. The Learned Counsel averred that being belligerent defaulters, the Applicants failed to honor the 40 -day notice as well, prompting the Respondent to appoint the 2nd Respondent to attach and sell the charged properties. Consequently, the Applicants and their guarantors were served with a Redemption Notice dated 29th August 2023 both physically and through their postal address (the same was annexed

as Annexure "SN - 6" of the Respondent's Replying Affidavit. It was upon receiving the notice that the Applicants filed the instant suit. On service by way of registered post, it was stated in the case of: "Hellen Jane Achieng' Odegi – Versus - Kenya Commercial Bank [2016] eKLR as follows:-

> " In my considered view, the Certificate of Postage is sufficient proof of posting and I am satisfied that the notice was properly dispatched to the Plaintiff's last known address and therefore service was properly effected".

15. Furthermore, it was the contention by the Learned Counsel that the notice clause in the charge documents allows service by way of registered post to the last known postal address of either party, for instance, Clause 42 of the Charge dated 23rd October 2018 and clause 30.5 of the charge dated 7th May 2018 in the Respondent's list and bundle of documents allow for service of notices by way of registered post. From the foregoing, it is clear that the Applicant was properly served with the prerequisite notices as required by law, and they can therefore not allege otherwise. No evidence whatsoever has been brought forth by the Applicants to rebut the 1st Respondent's evidence.

16. Secondly, whether a valuation was conducted on the suit properties?

One of the grounds that the Applicants seek the Court to rule in their favor, was that they were never served with a valuation report despite requesting for the same. This begged the question of whether a valuation was conducted on the properties before advertisement for sale.

The provision of Section 97 (2) of the *Land Act* states that:-

> " A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."
>
> In the case of "Koileken Ole Kipolonka Orumos vs. Mellech Engineering & Construction Limited & 2 Others [2015] eKLR" Gikonyo J. held that:-
>
> > ".....the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt but reinforces the rights of the chargor to have reasonable value for his property. That is why the duty under Section 97(2) of the *Land Act* is statutory and obligatory. It is not left to the whims of the chargee and its agents, especially the auctioneers".
>
> In the case of "Aquinas Wasike & 2 others – Versus - Sidian Bank Limited (Formerly K-Rep Bank) &another [2016] eKLR" the Court stated that:
>
> > "The statutory duty of care under Section 97 of the *Land Act* is mandatory that a charge not only has to obtain the best price reasonably obtainable at the time of sale; a chargee is obliged to ensure that a forced valuation is undertaken by a valuer before exercising the statutory power of sale."

In the case of "East Africa Ventor Co. Limited – Versus - Agricultural Finance Co-op Ltd & another [2017]eKLR, the court rendered that:

> " The upshot of this application is that the right to exercise the statutory remedy of sale accrues only after the mandatory statutory valuation stipulated under Section 97 of the *Land Act*. Failure by a chargee to comply with the law is a sufficient basis for the court to grant restraining orders in favor of a defaulting borrower."

Under Rule 11(b)(x) of the Auctioneers Rules, a professional valuation of the reserve price must be carried out not more than 12 months before the proposed sale.

17. The Learned Counsel submitted that a proper valuation was conducted on the properties before advertising the same for sale. The valuation reports have been annexed as annexure "SN-10" on the 1st Respondent's Replying Affidavit. The reservation price was arrived at based on the valuation reports. The Respondent complied with the provision of section 97 of the *Land Act*, and could therefore not be faulted for having failed to conduct a valuation on the properties.

18. Secondly, whether there was a discrepancy in the amount due? The Plaintiffs had alleged that there is a discrepancy in the amounts claimed under the 40-day statutory notice and the Auctioneer's Redemption notice. According to the Applicant, the amount stated in the 40-day notice was a sum of Kenya Shillings Thirty Five Million Eight Sixty Three Thousand Two Twenty Nine Hundred and Seventy Cents (Kshs. 35,863,229.70/=) while according to the 45 - day redemption notice, the amount in default a sum of Kenya Shillings Sixty Five Million Five Sixty Six Thousand Four Fifty Nine and Seventy Two cents (Kshs. 65,566,459.72/=).

19. A proper look at the statements annexed as Annexure "SN - 4" of the Respondent's Replying Affidavit indicates that the total aggregate amount owed by both the 1st and the 2nd Applicants as of 2nd November 2023 was a sum of Kenya Shillings Sixty Seven Million Three Fifty Four Thousand Four Thirty One and Eighty Four cents (Kshs. 67,354,431.84/=). The last payment received on the 1st Applicant's account was a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) on 19th February 2022, and the funds received on the account of the 2nd Applicant was a sum of Kenya Shillings Two Million Five Hundred (Kshs. 2,500,000/=) on 19th November 2022.

20. While dealing with the issue of the discrepancy of the outstanding amounts, the Learned Judge in the case of:- "Beakim Limited & 2 others – Versus - Kenya Women Microfinance Bank Plc & another [2022] eKLR" relied on Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725 where it was stated that:-

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to how 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 mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."
>
> In the case of "Son Hardware Limited – Versus - Development Bank of Kenya Limited [2019] KECA 53 (KLR) the Court referred to the case of "Bharmal Kanji Shah And Another – Versus - Shah Depar Devji" where it was stated that:-
>
> "…….the Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage..."

22. The learned bar in the case of:- "John Nduati Kariuki T/A Johester Merchants – Versus - National Bank of Kenya Limited [2006] KECA 219 (KLR) cited the case of:- "J.L. Lavuna & others – Versus - Civil Servants Housing Co. Limited & Another - Civil Appl. No. NAI 14/95" where it was stated as follows:

> " I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that

there is a dispute as to the amount due under the mortgage. The legal position on this point is to be found in Halsbury's Laws of England, Volume 32, 4th edition Paragraph 7255:

> "725 When mortgagee may be restrained from exercising the power of sale.
>
> The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to how the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive." emphasis added".

23. The statutory notices were specific to each borrower and the same was indicative of the title of each notice to which borrower the notice is applicable. Needless to say, the Applicants maintained two loan accounts, the first in the name of El-ma Solutions and the second in the name of Pambazuko Investments Limited. The notices were specific to the amounts owed by each borrower, and the auctioneer's redemption notice conveyed an accumulative sum owed by both Applicants. At all times relevant to the suit, the Applicants were made aware of the total amounts owed by each of them, this was exhibited by the letter forwarded to the Applicant by the Respondent dated 25th January 2023, indicating the amount due by each party. Additionally, the loan statement was readily available to each Applicant upon their request. Also, through the Applicants' Advocate's letter dated 14th September 2023, the Applicants request for a waiver of the penalty and interest and to be allowed to pay a sum of Kenya Shillings Thirty Seven Million (Kshs. 37,000,0000/=) in full settlement of the amount due. This was an acknowledgment that they were aware that the amount due was not sum of Kenya Shillings Thirty Five Million Eight Sixty Three Thousand Two Twenty Nine Hundred and Seventy Cents (Kshs. 35,863,229.70/=) as they had alleged. Clearly, this showed that the Applicants were at all times aware of the amount due. Therefore, disputing the debt amount was a red herring intended to mislead the Court. It is his humble submission that the Respondent should not be stopped from exercising his right of sale on this account.

24. Fourthly, whether the Applicants were entitled to sell the suit property by way of a private treaty? The provision of Section 91 (3) of the *Land Act* indicates the rights the Chargee could exercise in the event of default by the Chargor. It reads as follows:

> (3) If the chargor does not comply within two months afterthe date of service of the notice under, subsection (1), the chargee may-
>
> (a) sue the chargor for any money due and owing under the charge;
>
> (b) appoint a receiver of the income of the charged land;
>
> (c) lease the charged land, or if the charge is of a lease, sublease the land;
>
> (d) enter into possession of the charged land; or
>
> (e) sell the charged land;

The above provision had been echoed in Clause 10.1 of the Charges dated 23rd October 2018 and 18th June 2019 and in Clauses 7.2 and 8 of the Charges dated 7th May 2018 and 4th June 2020 respectively. The provision of Section 90 (3) of the *Land Act* was directive on the remedies available to a Chargee in the event of default by a Chargor. They are not inclusive of the right of the Chargor to sell the charged property by way of private treaty.

25. Additionally, the Chargors and the Borrowers duly executed the charge documents which expressly provided the rights of the Chargee in the event of default. In such instances, Courts had usually insisted that parties perform and stick to their end of the bargain as per the contract. In the case of: "National Bank of Kenya Limited – Versus - Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112 the Court of Appeal expressed itself thus on the matter:-

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud, or undue influence regarding the terms of the charge."

26. The Learned Counsel acknowledged that selling the property by way of a private treaty might fetch a higher value, however, the 1st Respondent had waited long enough for the Applicants to settle the amounts due but they have neglected to do so. The request to have the properties sold by way of private treaty comes at the tail end when the Respondent had issued all the requisite notices and the same has expired. Should the Applicants be allowed to proceed with the sale as intended, they shall greatly be prejudiced as they would be forced to wait even longer for the sale to be complete. Despite being belligerent defaulters, the Applicants was in the habit of issuing false promises, and this could only be perceived as a delaying tactic.

27. Fifthly, whether the Applicants are entitled to the orders of injunction? The law governing the grant of injunction is provided for under provision Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules 2010. The conditions for granting orders of injunction were set out in the case of "Giella – Versus - Cassman Brown & Co. Limited [1973] EA 358" where it was stated:-

> " 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.

28. Further in the case of "Nguruman Limited -Versus - Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR" the Court of Appeal clarified that the conditions are to be applied as separate, distinct, and logical hurdles which an applicant was expected to surmount sequentially. This meant that if the applicant did not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court would consider the other conditions.

29. The issue for consideration therefore was whether the Applicant had satisfied the above conditions so as to warrant this court to exercise its discretion in his favor. In determining what amounts to a prima facie case, it was stated in the case of "MRAO Ltd – Versus - First American Bank of Kenya Ltd & Others Civil Appeal No. 39 of 2002" as follows:

> " In civil case, it 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

It was not in dispute that the Applicants were advanced several loan facilities by the 1st Respondent. Further, that the Applicants had failed to service the said facilities hence being in arrears. The Applicants had disputed service of the requisite notices, however, as indicated above, they were

properly served with the said notices. They had disputed the amount due, however, throughout the suit they were well aware of the amount owed by each of them as illustrated above. They had faulted the Respondent for failing to issue them with a valuation report, yet, a proper valuation was conducted on each of the properties before advertising them for sale.

30. The Applicants had approached this Court with unclean hands having failed to pay their facility when and as they fell due. They had failed to show that they had "a prima facie case" and were therefore not deserving of the prayers sought. Additionally, the Learned Counsel held that no prejudice whatsoever would be occasioned on the Applicants that could not be compensated by way of damages. It was stated in the case of "John Nduati Kariuki T/A Johester Merchants – Versus - National Bank of Kenya Ltd [2006] KECA 219 (KLR) that:-

> " A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it. He offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents. He cannot be heard to say, as he does, that the securities are unique and special to him. We think the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capability has not been challenged."

31. He cited the case of: "Nahasho K Mbatia – Versus - Finance Company Limited (2006) eKLR the court held:-

> " In any event, having charged the property, the Plaintiff converted it to a commercial commodity with a monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation. There is no allegation that the Defendant will not be in a position to meet such an award. I hold, therefore, that the Plaintiff may not suffer irreparable loss."

By issuing the suit properties to be used as security for advances made to them, the Applicants converted the same into a commercial commodity and its loss can be made good by way of monetary damage. The Respondent is a microfinance bank of good repute and no evidence whatsoever has been presented to showcase that they will not be in a position to compensate the Applicants for any loss incurred should the sale proceed. On this limb, the Learned Counsel submitted that the Applicants had failed to prove that they would suffer any prejudice.

32. On whether the balance of Convenience tilted in favor of the applicant, the Learned Counsel submitted that the Applicants had failed to show any goodwill by failing to attempt to settle the debt. It is an indicator that they would continue to default and deny the respondent the sums due to them. The Applicants had come to the Court solely to defeat the Respondent's statutory rights in realization of its securities. They had failed to redeem the charged properties as by law required. Therefore, the balance of convenience lies in favor of the Respondents.

33. In conclusion, the Learned Counsel held that the Applicants had failed to meet the threshold of an injunction. Being that the prayers sought in the main suit were similar to the ones sought in the instant application, he prayed that the Court dismisses the application and the suit in its entirety, and allow the Respondent to proceed and exercise its right of sale which has already matured. He referred Court to the wise words of Professor P.L.O Lumumba, to the effect that a child had already been born, being a midwife, the Court was being called upon by the Applicants to strangle that child. He urged the Court to decline that invitation.

V. Analysis and Determination

34. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has two (2) framed the following issues for determination.

    a. Whether the Notice of Motion dated 26th October, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    b. Who will bear the Costs of Notice of Motion application 26th October, 2023.

ISSUE No. a). Whether the Notice of Motion dated 26th October, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

35. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

> Order 40, Rule 1
>
> Where in any suit it is proved by affidavit or otherwise—
>
> a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

36. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown & Co Limited (1973) EA 358", where it was stated:-

> " 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

37. The three conditions set out in "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR",

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected

to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. 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".

38. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case of:- MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125,

> " So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

39. As the Court previously observed in this ruling, the Applicant in the affidavit supporting the Application avers that the Plaintiffs applied for banking facilities with the 1st Defendant. The 1st Plaintiff applied for a loan facility for the sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) whereas the Second Plaintiff applied for the sum of Kenya Fifteen Million (Kshs.15,000,000/-). The Plaintiffs jointly offered the 1st Defendant properties six in number as security. The 1st Defendant registered legal charges against the aforementioned properties as securities to secure the borrowing and banking facilities offered to the Plaintiffs. Over the years and at all material times, the Plaintiffs regularly and religiously serviced the banking facilities without fail.

40. In or about 2021 the Plaintiffs businesses encountered turbulent waters at the onset of the global COVID-10 Pandemic. For the last three (3) years the Plaintiffs experienced challenges in servicing the banking facilities and throughout this period engaged the 1st Defendant with a view to obtaining a solution to regularize the accounts and or fully settle the banking facilities. In spite of falling in arrears, the Plaintiffs kept in touch with the 1st Defendant and carried out negotiations and gave proposals for the payment of the banking facilities.

41. On or about 20th January 2023 the Plaintiffs issued a letter to the First Defendant setting out a loan payment plan. She annexed a copy of the letter and marked it as "HNO - 1". In a letter dated 3rd April 2023, addressed to the 1st Defendant, the Plaintiffs requested the 1st Defendant to confirmed the outstanding debt to enable the Plaintiffs present a repayment proposal. She annexed a copy of the letter and marked it "HNO2". In a letter dated 18th April 2023, the Plaintiffs requested the 1st Defendant to deal with the Plaintiffs advocates, Omondi Waweru & Company Advocates with a view to arriving at an amicable solution over repayment of the banking facilities. She annexed a copy of the letter and marked it as "HNO - 3".

42. On or about 27th April 2023 the 1st Defendant issued to the Plaintiffs and the respective Guarantors a FORTY (40) days' Notice to sell and demanded payment of a sum of Kenya Shillings Thirty Five Million Eight Sixty Three Thousand Two Hundred Twenty Nine Hundred Seventy Cents (Kshs. 35,863,229.70/=) being the outstanding loan facility. She annexed a bundle of the letters and marked it "HNO - 4". In response to the aforesaid FORTY (40) days' Notice, the Plaintiffs issued a letter dated 7th

June 2023 to the 1st Defendant requesting for a meeting to enable the Plaintiffs present their proposals on the amicable settlement of the indebtedness that may be due and owing. She annexed a copy of the letter and marked it "HNO - 5". The Plaintiffs pointed out in the aforesaid letter that the properties offered to the 1st Defendant/Respondent as security had an aggregate value that far exceeds the debt due to the 1st Defendant/Respondent.

43. The 1st Defendant/Respondent on the other hand has contended that sometime in 2019, at the request of the 2nd Applicant, the 1st Respondent agreed to issue and disbursed credit facilities to the 2nd Applicant to a tune of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-). Additionally, sometime in the year 2020, at the request of the 1st Applicant, the 1st Respondent disbursed credit facilities to the Applicant to the sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-). Resultantly, the 1st Applicant maintained two loan accounts with the 1st Respondent, namely account number 0051510000052 (Scounting Business Banking) and 0051130000217(Lpo/ Invoice Discounting), while the 2nd Applicant maintained one loan account being account number 0051510000043 (Scounting business banking). The Charge documents together with the facility letter specified the obligations of every party, stated the date of repayment of each instalment of the credit facilities, outlined the event of default, and the remedies of the Bank in the event of default. The Applicants agreed to the terms and proceeded to sign the facility letter and the Charge

44. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that;

> "In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd" the court held that;

> "In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

45. In the present case, regarding this first condition though, the Plaintiffs/ Applicants have demonstrated a prima facie case with a probability of successat the trial as enunciated in the case of "Giella -Versus - Cassman Brown & Co. Ltd (Supra)".

46. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Plaintiffs/ Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in "Nguruman Limited (supra)", held that,

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by

which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

47. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants' property is at risk if the Court does not intervene.The Plaintiffs/ Applicants have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

48. Quite clearly, the Applicants would not be able to be compensated through damages as it has shown the court that its rights to the suit property as a legal proprietor and that the Respondents ought to be stopped until such a time the acquire the affected portion(s) in a procedural manner. The Applicants have therefore satisfied the second condition as laid down in "Giella's case".

49. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

50. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an

injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

51. The balance of convenience tilts in the favour of the Applicants. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated;-

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

52. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

53. In the case of:- "Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR" where the court in deciding on an injunction application stated;

> " circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

54. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiffs/ Applicants. In view of the foregoing, I strongly find that the Plaintiffs/ Applicants have met the criteria for grant of orders of temporary injunction.

ISSUE No. b). Who will bear the Costs of Notice of motion application dated 26th October, 2023

55. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

56. In the present case, the Honourable Court elects to have the costs in the cause.

VI. Conclusion & Disposition

57. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Plaintiffs/ Applicants have a case against the

Defendants/ Respondents. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

a. That the Notice of Motion application dated 26th October, 2023 be and is hereby found to have merit and is hereby allowed as per the Court's discretion and the preservation of the suit property.

b. That the Honorable court be and is hereby pleased to issue an order restraining the Defendants/ Respondents by themselves, their servants and/or their agents by a temporary injunction from evicting, demolishing, harassing and/or interfering in any manner with the Plaintiffs/ Applicants occupation of Title No. Kilifi/mtwapa/5010 I.n.o Nicholus Gudina Kanana, Kilifi/mtwapa/4122 I.n.o Hellen Nyabonyi Ochwangi, Kilifi/ngerenyi /1007 I.n.o Carolyne Nyanduko Ndege, L.r No. 18162 Section I Mainland North I.n.o Hellen Nyabonyi Ochwangi, L.r No. 9122/663 Mtwapa I.n.o Hellen Nyabonyi Ochwangi And L.r No. 2449 Section Iii Mainland North I.n.o Charles Odhiambo Abuto pending the hearing of the main suit.

c. HAT for expediency sake, the matter to be heard on 16th December, 2024. There shall be a mention on 5th December, 2024 for purposes of conducting a Pre – Trial Conference trial pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.

d. That the cost of these application will be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF DECEMBER 2024.

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a). M/s. Firdaus Mbula, the Court Assistant.

a. No appearance for the Plaintiffs/Applicants.

b. Mr. Owiti Advocate for the 1st Defendant/Respondent.

RULING: CIVIL SUIT NO. E035 OF 2023 Page 12 of 12 HON. LL NAIKUINI (JUDGE)