



**Mwangi v Liberty Life Assurance Ltd & another (Civil Suit
102 of 2022) [2023] KEELC 21246 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 102 OF 2022
LL NAIKUNI, J
OCTOBER 12, 2023**

BETWEEN

ROSEANNE WANJIRU MWANGI PLAINTIFF

AND

LIBERTY LIFE ASSURANCE LTD 1ST DEFENDANT

REIXZEN AUCTION 2ND DEFENDANT

RULING

I. Introduction

1. The application before this Honorable Court for hearing and determination is the Notice of Motion application filed under a Certificate of Urgency dated 1st September, 2022. It was brought by the Plaintiff/Applicant, Roseanne Wanjiru Mwangi under the dint of the provisions of Rules 3 (1) of the High Court Vacation Rules & the Judicature Act, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, CAP. 21, Order 40 Rules 1 & 10 of the Civil Procedure Rules 2010, Sections 80, 90, 96 & 97 of the Land Act 2012.
2. Upon effecting service and by way of opposing it, the 1st and 2nd Defendants/Respondents filed replies in form of Replying Affidavit dated 24th October, 2022. I will be dealing with it indepth at a later stage hereinbelow.

II. The Plaintiff/Applicant's Case

3. The Plaintiff/Applicant sought for the following orders: -
 - a. Spent.
 - b. Spent.



- c. That the Honorable court be pleased to issue a temporary injunction to restrain the Defendants/Respondents their employees, agents, servants, assignees or any person working under their express and or implied instructions or authority from selling by public auction or private treaty, alienating, disposing, entering, leasing, appointing a receiver, trespassing, wasting, or in any other way dealing with all that property known as Apartment D2 on Block D erected on land parcel known as L.R No. 1464/IV/MN (Original No. 257) Title No.66600 Mtwapa pending the hearing and determination of this application.
 - d. That this Honorable court do order the 1st Defendant/Respondent to provide the Plaintiff/Applicant with the mortgage facility statement of accounts.
 - e. That the Honorable court be pleased to issue a temporary injunction to restrain the Defendants/Respondents their employees, agents, servants, assignees or any person working under their express and or implied instructions or authority from selling by public auction or private treaty, alienating, disposing, entering, leasing, appointing a receiver, trespassing, wasting, or in any other way dealing with all that property known as Apartment D2 on Block D erected on land parcel known as L.R No. 1464/IV/MN (Original No.257) Title No. 66600 MTWAPA pending the hearing and determination of this suit.
 - f. That costs be provided for.
4. The application by the is premised on the grounds, facts and testimony on the face of the application and further supported by the 24th Paragraphed annexed Supporting Affidavit and eight (8) marked as “RWM – 1 to 8” annexures thereto of Roseanne Wanjiru Mwangi the Plaintiff/Applicant. She deponed that:-
- i. She is the registered proprietor of all that property known as Apartment D2 on Block D erected on land parcel known as L.R No. 1464/IV/MN (Original No. 257). She annexed and marked “RWM – 1” a copy of the official search.
 - ii. On or about 25th day of July, 2018, she leased and later purchased through a mortgage facility from the 1st Defendant/Respondent Apartment No. D2 on Block D erected on property Land Reference Number 1464/IV/MN for a consideration of Kenya Shillings Eight Million and Seventy-Five Thousand (KES 8,075,000/-). She annexed and marked “RWM – 2” copies of the lease.
 - iii. The said suit property was charged in favor of the 1st Defendant/Respondent as security for the mortgage facility which was also advanced on the strength of her pay slip as an employee of the 1st Defendant/Respondent. She annexed and marked as “RWM – 3” is a copy of the charge.
 - iv. She had been employed by the 1st Defendant/Respondent on 6th January, 2014 as a Business Development Executive and at the time of the transaction in question she was the Regional Business Development Manager in charge of the Coast Region.
 - v. However less than a year into servicing the said mortgage facility, the 1st Defendant/Respondent decided to render her position redundant in questionable circumstances and commences redundancy proceedings against her culminating into their parting ways on the 31st day of August, 2019. She annexed and marked as “RWM – 4” a copy of her Certificate of Service.



- vi. The abrupt and unexpected circumstances threw her finances into chaos as she never had any other sources of income and she had made the conscious decision to transform the said acquired home into a business venture.
- vii. On or about 6th day of September 2019, the 1st Defendant/Respondent without any color of right, prior notice and/or maliciously notified me that it had unilaterally sought to increase the mortgage interest rate from 8% to 15% worsening the already heavy burden on her shoulders. She annexed and marked a copy of the letter as “RWM – 5”.
- viii. She vehemently protested the move since she had just been rendered redundant through questionable means, she did not have any other alternative sources of income and she had questioned the termination of my employment which was subject to review.
- ix. No response communication was forthcoming from the 1st Defendant/Respondent and she had commenced litigation to challenge the termination of her employment vide a civil suit “Mombasa Employment & Labour Relations Court Cause No. 80 of 2019; Roseanne Wanjiru Mwangi - Versus- Liberty Life Assurance Co. Ltd.
- x. On or about 17th day of May 2022, she received a 45 Days’ Redemption Notice from the 2nd Defendant/Respondent purportedly demanding Kenya Shillings Ten Million, Five Hundred and Twenty - Six Thousand, Five Hundred and Eighty-Five and Eighty Cents (KES 10,526,585.80/-) being mortgage arrears with the days running to redeem her property or face an auction. She annexed and marked as “RWM – 6” was a copy of the 45 Days’ Notice.
- xi. Further, on or about 29th day of August 2022 the 2nd Defendant/Respondent issued me with another notice to wit a Notification of Sale upon instructions of the 1st Defendant/Respondent with an intention to dispose of the suit property on the 21st day of September 2022 by public auction. She annexed and marked as “RWM – 7” a copy of the Notification of Sale.
- xii. Consequently, the said 2nd Defendant/Respondent went ahead and advertised the suit property in the daily newspaper of the same day.
- xiii. She was aware that she had neither received any communication nor the mandatory ninety (90) days’ notice from the 1st Defendant/Respondent calling in the facility with an option of her redeeming the same in line with the laid down law.
- xiv. The procedures of exercising a statutory notice of sale were well laid down in law/statute and ought to be strictly followed; which was not in the instant case.
- xv. If the actions of the Defendants/Respondents were left to suffice, she was bound to lose her property and suffer immense loss and damages in an exercise clearly that had been carried out ultra vires with malice and ill motives.
- xvi. She was apprehensive that of the orders sought were not granted, the said property may be disposed of at a throw away price and she would be left homeless.
- xvii. She had demonstrated “a prima facie case” with high chances of success and fulfilled the principles as laid down in the celebrated case of “Giella – Versus - Cassman Brown to warrant the grant of the orders sought herein. That it was in the interest of justice that the orders so sought be granted as prayed as they would occasion no prejudice to the Defendants/ Respondents as they would have their day in court.



- xviii. This Honourable Court has powers to issue preservative orders sought herein.
- xix. It was only fair and in the interest of justice that the orders sought herein be granted as the Defendants/Respondents would be granted their day in court.

III. The 1st Defendant/Respondent's Replying Affidavit

- 5. On 24th October, 2022 the 1st Defendant/Respondent filed a 13th Paragraphed Replying Affidavit sworn by RUTH KEMUNTO, the 1st Defendant/Respondent's legal officer who deponed that:
 - a. She was the Legal Officer for the 1st Defendant/Respondent and hence fully conversant to the issues on the matter.
 - b. The Paragraphs 2 to 5 of the Plaintiff/Applicant's supporting affidavit are admitted. Copies of the Plaintiff/Applicant's loan application form, the 1st Defendant/Applicant's loan approval letter dated 5th June 2018 and the 1st Defendant/Applicant's financial undertaking to Doctrans Limited dated 28th June 2018 are at pages 1 to 4 of the exhibit hereto marked RK-1 (the exhibit).
 - c. In response to paragraphs 6 and 10 of the Plaintiff/Applicant's supporting affidavit, the 1st Defendant/Respondent states that:
 - i. The 1st Defendant/Respondent terminated the Plaintiff/Applicant's contract of employment on account of redundancy on 31st August 2019 through a letter dated 29th August 2019. A copy of the letter terminating the Plaintiff/Applicant's employment was at Pages 5 to 7 of the exhibit.
 - ii. The Plaintiff/Applicant was dissatisfied with the termination and thus filed a suit before the Employment and Labour Relations Court at Mombasa being "Cause Number 80 of 2019; Roseanne Wanjiru Mwangi - Versus - Liberty Life Assurance Kenya Limited.
 - iii. The Employment Court delivered its Judgment in the matter on 28th October 2021 in which the court held that the 1st Defendant/Respondent had fully complied with the relevant provisions of the law in terminating the Plaintiff/Applicant's contract of employment and thus dismissed that suit. A copy of the Judgment was at pages 8 to 33 of the exhibit.
 - iv. The issue of the claimant's termination was therefore "Res Judicata".
 - d. In response to Paragraph 7 of the Plaintiff/Applicant's Supporting Affidavit, the 1st Defendant/Respondent stated that at the time of terminating her services, the 1st Defendant/Respondent paid the Plaintiff/Applicant as sum of Kenya Shillings One Million Nine Twenty One Thousand Three Fifty Seven Hundred and Fourty One cents (Kshs. 1,921,357.41) as terminal dues. The 1st Defendant/Respondent also allowed her extended medical cover for three (3) months.
 - e. The 1st Defendant/Respondent denied receiving any protests from the Plaintiff/Applicant on the change of interest rate from staff rates to commercial rates as alleged under Paragraph 9 of the Plaintiff/Applicant's Supporting Affidavit.
 - f. In response to Paragraphs 11 to 16 of the Plaintiff/Applicant's Supporting Affidavit, the 1st Defendant/Respondent states that:



- i. The Plaintiff/Applicant paid her monthly instalments up to 1st December 2019 when she stopped.
- ii. The 1st Defendant/Respondent thus instructed the Law firm of Messrs. Wamae & Allen Advocates to issue the Plaintiff with the 90 days' statutory notice under the provision of Section 90 of the Land Act, 2012. Copies of the 90 days' statutory notice dated 23rd September 2020 together with the Certificate of Postage dated 25th September 2020 were at pages 113 to 116 of the exhibit. Paragraph 14 of the Plaintiff/Applicant's Supporting Affidavit was therefore denied.
- iii. Despite receiving the 90 days' statutory notice, the Plaintiff/Applicant never cleared the arrears. The 1st Defendant/Applicant therefore instructed Messrs. Wamae & Allen Advocates to issue her with the 40 days' statutory notice which they did on 28th January 2021. Copies of the 40 day' notice dated 28th January 2021 together with the Certificate of Postage were at pages 117 to 119 of the exhibit.
- iv. Still the Plaintiff/Applicant never cleared her arrears. The 1st Defendant/Respondent therefore instructed the 2nd Defendant/Respondent on 12th May 2022 to sell the charged property by public auction.
- v. On 17th May 2022, the 2nd Defendant/Respondent issued the Plaintiff/Applicant with the 45 days redemption notice under Rule 15 (d) of the Auctioneers Rules of 1997. Copies of the 1st Defendant/Respondent's letter of instructions to the 2nd Defendant/Respondent and the 45 days redemption notice issued by the 2nd Defendant/Respondent were exhibited as "RWM – 6" in the Plaintiff/Applicant's Supporting Affidavit. Paragraph 11 of the Plaintiff/Applicant's Supporting Affidavit was therefore admitted.
- vi. The Plaintiff/Applicant still failed to regularize her payments and on 29th August 2022, the 2nd Defendant/Respondent issued a notification of sale to be held on 21st September 2022. The 2nd Defendant/Respondent also advertised to sell the suit property by public auction. Copies of the notification of sale and the newspaper advert were exhibited as "RWM – 7" and "RWM – 8" respectively in the Plaintiff/Applicant's Supporting Affidavit.
- g. The 1st Defendant/Respondent therefore complied with the requisite procedures leading to the exercise of its Statutory Power of sale under the Land Act, 2012.
- h. In response to Paragraph 17 of the Plaintiff/Applicant's Supporting Affidavit, the 1st Defendant stated that it was aware of its duty of care to obtain the best price reasonably obtainable at the time of selling the suit property and would endeavor to do that.
- i. The 1st Defendant/Respondent further stated that as of 21st August 2022, the Plaintiff/Applicant was truly indebted to it in the sum of Kenya Shillings Eleven Million Seven Eighteen Thousand Seven Ninety Eight Hundred and Seventy Eight cents (Kshs. 11,718,798.78). This sum continued to accrue interest until payment in full. A copy of the Plaintiff/Applicant's statement of account was at page 120 of the exhibit.
- j. The Plaintiff/Applicant's Notice of Motion Application was devoid of merit and the same should be dismissed with costs to the Defendants/Respondents.



IV. Submissions

6. On 4th October, 2022 the Honourable Court in the presence of all the parties directed that the Notice of Motion application dated 1st September, 2022 should be disposed of by way of written submissions. On 21st November, 2022 the Honourable Court confirmed compliance of its directions and reserved a Ruling date on notice.

A. The Written Submissions by the Defendants/Respondents'

7. On 12th January, 2023 the Defendants/Respondents through the Law firm of Messrs. Hamilton, Harrison & Mathews Advocates, filed their written submissions dated 10th January, 2023. Mr. Mugambi Advocate commenced his/her submissions by providing the Court with a brief introduction and the facts of the matter. He submitted that Prayers 1, 2 and 3 of the Plaintiff/Applicant's notice of motion application dated 1st September 2022 (the application) are spent. The live prayers for the court's consideration were numbers 4, 5 and 6 which sought:
 - a. That this Honourable court do order the 1st Defendant/Respondent to provide the Plaintiff/Applicant with the mortgage facility statement of accounts.
 - b. That the Honourable court be pleased to issue a temporary injunction to restrain the Defendants/Respondents their employees, agents, servants, assignees or any person working under their express and or implied instructions or authority from selling by public auction or private treaty, alienating, disposing, entering, leasing, appointing a receiver, trespassing, wasting, or in any way dealing with all that property known as Apartment D2 on Block D erected on land parcel known as L.R No 1464/IV/MN (Original No.257) title No 66600 Mtwapa pending the hearing and determination of this suit.
 - c. That costs be provided for.
8. The Learned Counsel submitted that the Defendants/Respondents opposed the application through the Replying Affidavit sworn by Ruth Kemunto on 24th October 2022 and filed on 28th October 2022. It was important to state at the onset that the 1st Defendant/Respondent produced a copy of the Plaintiff/Applicant's mortgage facility statement of account at page 120 of the exhibit marked as "RK – 1" annexed to the affidavit of Ruth Kemunto. There was therefore no need for the court to consider the prayer that required the production of the statement of account.
9. The background facts being that the Plaintiff/Applicant was a former employee of the 1st Defendant/Respondent. She left the 1st Defendant/Respondent's employment on 31st August 2019 after the 1st Defendant/Applicant terminated her contract of employment on account of redundancy through a letter dated 29th August 2019. A copy of the letter dated 29th August 2019 was at pages 5 to 7 of exhibit "RK – 1". While still employed by the 1st Defendant/Respondent, the Plaintiff/Applicant took a mortgage facility of a sum of Kenya Shillings Eight Million Seventy Five Thousand (Kshs. 8, 075,000.00/=) from the 1st Defendant to purchase the property referred to as Apartment D2 on Block D erected on land parcel known as L.R No 1464/IV/MN (Original No.257) title No 66600 MTWAPA (hereinafter the suit property). Copies of the Plaintiff/Applicant's loan application form and the 1st Defendant/Respondent's loan approval letter dated 5th June 2018 were at pages 1 and 2 of exhibit "RK-1". The Plaintiff/Applicant charged the suit property to the 1st Defendant/Respondent as security for the mortgage facility. A copy of the charge dated 25th July 2018 was annexed as "RWM – 3" in the Plaintiff/Applicant's Supporting Affidavit.



10. The Learned Counsel submitted that as an employee of the 1st Defendant/Respondent, the Plaintiff/Applicant enjoyed preferential staff interest rate of 8% on the mortgage facility. The rate of interest was indicated on the Plaintiff/Applicant's loan application form and Clause 2 (a) of the charge dated 25th July 2018. In the Plaintiff/Applicant's termination letter, the 1st Defendant/Respondent informed her that her existing loans under the company's loans scheme would continue to accrue interest at the company's staff rates as follows: Development loan, for a limited period of 3 months. Car loans, for a limited period of 6 months. Mortgage, for a limited period of 12 months. On 6th September 2019, the 1st Defendant/Respondent gave the Plaintiff/Applicant a 360 days' notice to increase her mortgage interest rate from 8% to a commercial interest rate of 15% for ex-employees, in line with the 1st Defendant/Respondent's Human Resources Manual. The 1st Defendant/Respondent also informed her that the effective date of the new interest rate would be 1st September 2020. A copy of the letter dated 6th September 2019 was annexed as "RWM – 5" in the Plaintiff/Applicant's Supporting Affidavit whereas a copy of the 1st Defendant/Respondent's Human Resources manual is at pages 34 to 112 of annexure "RK – 1".
11. The Plaintiff/Applicant paid her monthly instalments up to 1st December 2019 when she stopped paying and she had not made any other payment to date. See page 120 of exhibit "RK – 1". The 1st Defendant/Respondent thus instructed the law firm of Messrs. Wamae & Allen Advocates to issue the Plaintiff/Applicant with the 90 days' statutory notice under the provision of Section 90 of the Land Act, 2012. Messrs. Wamae & Allen Advocates acted on the instructions of the 1st Defendant/Respondent and issued the Plaintiff/Applicant with the 90 days' statutory notice through a letter dated 23rd September 2020. The statutory notice was dispatched to the Plaintiff/Applicant through registered post to her postal address which was P.O Box 1217 - 00100. The postal address appears in the Plaintiff/Applicant's affidavit and charge documents. The 90 days statutory notice was at Pages 113 to 115 of exhibit "RK – 1" whereas the Certificate of Postage was at page 116 of the exhibit.
12. The Learned Counsel submitted that the Plaintiff/Applicant nonetheless failed to clear the arrears. The 1st Defendant/Applicant therefore instructed Wamae & Allen Advocates to issue her with the 40 days' statutory notice which they did on 28th January 2021. This letter was also dispatched to the Plaintiff/Applicant through registered post to her Postal address, P.O Box 1217-00100. The 40 days statutory notice is at pages 117 to 118 of exhibit "RK – 1" whereas the Certificate of Postage was at page 119 of the exhibit. Still, the Plaintiff/Applicant failed to clear her arrears. The 1st Defendant/Respondent therefore instructed the 2nd Defendant/Respondent on 12th May 2022 to sell the suit property by public auction.
13. On 17th May 2022, the 2nd Defendant/Respondent issued the Plaintiff/Applicant with the 45 days' redemption notice under Rule 15 (d) of the Auctioneers Rules, 1997. Copies of these documents were exhibited as annexure "RWM – 6" in the Plaintiff/Applicant's affidavit dated 1st September 2022. The Plaintiff/Applicant still failed to regularize her payments and on 29th August 2022, the 2nd Defendant/Respondent issued a notification of sale for a sale which was to be held on 21st September 2022. The 2nd Defendant/Respondent also advertised to sell the suit property by public auction. Copies of the notification of sale and newspaper advertisement were exhibited as annexures marked as "RWM – 7" and "RWM – 8" respectively in the Plaintiff/Applicant's affidavit dated 1st September 2022. The advertisement of the suit property for sale led the Plaintiff/Applicant to file this suit and the present application contending that the 1st Defendant/Respondent did not follow the procedures laid down in law in exercising its Statutory Power of sale. She contends that she never received the 90 days' statutory notice and also accuses the 1st Defendant/Respondent of unilaterally increasing interest rates from 8% to 15% without issuing her any notice.



14. On the issue of determination, the Learned Counsel submitted that there were two issues of determination:
 - a. Whether the Plaintiff/Applicant had met the test for grant of an injunction pending determination of the main suit.
 - b. Who should bear the costs of the application.
15. On the issue of whether the Plaintiff/Applicant had met the test for grant of an injunction pending determination of the main suit, the Learned Counsel submitted that the test to be considered by the court in considering whether to grant the Plaintiff/Applicant the injunction sought was settled in the celebrated case of “Giella – Versus - Cassman Brown & Company Limited(1973) E A 358” where the court set out the following condition’s that a party must satisfy before a court can grant him/her the injunction:

“ Firstly, 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.”
16. In evaluating the above conditions, the court must not make definitive or final findings of either fact or law at this stage, as that was a preserve of the Judge who would hear the main suit. The Court of Appeal in “MRAO Ltd – Versus - First American Bank of Kenya Ltd& 2 others[2003] eKLR” - page 2 of the Defendants bundle of authorities - defined a prima facie case to include but is not confined to a “genuine and arguable case.” It was a case which, on the material presented to the court, a tribunal properly directing itself would conclude that there exists a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
17. The Learned Counsel submitted that the Plaintiff/Applicant was contesting the 1st Defendant/ Respondent’s exercise of its statutory power of sale on two (2) grounds. Firstly, she had accused the 1st Defendant/Respondent of not following the procedures laid down in law in exercising its Statutory Power of Sale. More specifically, she contended that she never received the 90 days’ statutory notice. Secondly, she had accused the 1st Defendant/Respondent of unilaterally increasing interest rates on the mortgage facility from 8% to 15% without issuing her any notice. In response to the first ground, the 1st Defendant/Respondent had shown that it complied with the requisite procedures leading to the exercise of its Statutory Power of Sale under the Land Act, 2012 as follows:
 - a. After the Plaintiff/Applicant defaulted in her mortgage facility repayment obligations, the 1st Defendant/Respondent issued her with the 90 days’ statutory notice under provision of Section 90 of the Land Act, 2012 through the law firm of Messrs. Wamae & Allen Advocates. See pages 113 to 116 of the annexure.
 - b. Through the same law firm, the 1st Defendant/Respondent issued the Plaintiff/Applicant with the 40 days statutory notice. See pages 117 to 119 of annexure as “RK – 1”.
 - c. On receiving instructions from the 1st Defendant/Respondent, the 2nd Defendant/ Respondent issued the Plaintiff/Applicant with the 45 days redemption notice under Rule 15 (d) of the Auctioneers Rules of 1997. See annexure as “RWM – 6” in the Plaintiff/Applicant’s affidavit dated 1st September 2022.



- d. The 2nd Defendant/Respondent subsequently issued the Plaintiff/Applicant with a notification of sale and advertised to sell the suit property by public auction. See annexures as “RWM – 7” and “RWM – 8” respectively in the Plaintiff/Applicant's affidavit dated 1st September 2022.
18. The Learned Counsel asserted that the Plaintiff/Applicant had not controverted all this evidence placed on record. The Counsel stated that on the prima facie, the 1st Defendant had shown that it served the Plaintiff/Applicant with all the notices and as such, the 1st Defendant/Respondent was entitled to exercise its Statutory Power of Sale over the suit property. In answer to the second ground, the court would observe that the 1st Defendant/Respondent gave the Plaintiff/Applicant a three (3) month's holiday from the date of her termination to repay the loan. This was in line with its practice of granting its ex-staff a three (3) month's holiday to give them time to organize their finances and continue repaying their loan immediately the three (3) months holiday lapsed.
19. The Counsel averred that the Court would also appreciate that the Plaintiff/Applicant's mortgage facility was subject to the 1st Defendant/Respondent's Human Resources Manual and the Charge dated 25th July 2018 between the Plaintiff/Applicant and the 1st Defendant/Respondent. A copy of the 1st Respondent/Respondent's Human Resources manual was at pages 34 to 112 of annexure “RK – 1”. Clause 15.7.1 of the 1st Defendant/Respondent's Human Resources Manual provided that interest rate charged on staff loan was subject to changes at the company's discretion and in case of the termination of employment of the employee by the company or should the employee resign, interest reverted to commercial market rates. See page 84 of annexure as “RK – 1”.
20. The Learned Counsel argued that Clause 2 (a) of the Charge provided that the Plaintiff/Applicant would pay interest on all monies due and payable at the rate of eight (8%) per annum. The Charge also provided that the parties could agree on the rate of interest applicable from time to time provided that the rate could not exceed any maximum permitted by law. The Charge further provided that in absence of such agreement, the 1st Defendant/Respondent had discretion to determine the rate of interest applicable provided that the 1st Defendant/Respondent would give the Plaintiff/Applicant at least ninety (90) days' notice of the change in the rate of interest payable. See page 2 of the charge dated 25th July 2018.
21. The 1st Defendant/Respondent accorded the Plaintiff/Applicant the preferential staff interest rate of 8% on her mortgage facility on account of her employment and once the contract of employment was terminated, the preferential staff interest rate went with it. However in good faith, the 1st Defendant/Respondent extended the preferential staff interest rate of interest from 31st August, 2019 to 31st August, 2020. The position in law was that an employer who granted an employee a loan facility on special terms was entitled to vary the terms of the facility once the relationship ceased to exist. To buttress on this point, the Counsel relied on the case of:- “Evans Oliver Olwali – Versus - Standard Chartered Bank Ltd (2018) eKLR” on page 13 of the Defendant/Respondent's bundle of authorities which held that preferential staff interest rates subsisted on account of employment relationship and once the contract of employment was terminated, the fringe benefit of preferential staff interest rates went with it. Similarly, the Counsel cited the case of:- “Joseph Njagi Mwita & 4 others – Versus - Barclays Bank Limited (2019) eKLR” on pages 19 and 20 of the Defendant/Respondents' bundle of authorities which held that the employer's action of applying commercial interest rates on the claimants' outstanding loans was lawful and did not infringe on their rights under the loan agreements as the preferential interest rates on staff loans were for the serving employees and at the discretion of the employer. In the circumstances, the 1st Defendant/Respondent was entitled to review the interest rate on the mortgage facility after the Plaintiff/Applicant's employment ended.



22. The Counsel stated that, in any event it had been held in a number of decisions by the Court of Appeal that the fact that there was a dispute on interest or accounts was not a ground for granting an injunction. The Counsel referred to one such decision being that of:- “Pipeline Company Ltd – Versus - Richard Kioko Kiundi [2015]eKLR” on page 25 of the Defendant/Respondent’s bundle of authorities. The 1st Defendant/Respondent had sufficiently answered the two grounds on which the Plaintiff/Applicant’s entire suit was founded. The Counsel submitted that the 1st Defendant/Respondent had demonstrated that it followed all the required steps leading to the exercise of its Statutory Power of Sale. The 1st Defendant/Respondent had also demonstrated that it was within the law and contract with the Plaintiff/Applicant to vary the interest rate applicable on the mortgage facility from staff rates to commercial rates. In the circumstances, the Plaintiff/Applicant had not established a ‘prima facie case’ with probability of success.
23. In the absence of “a prima facie case”, the application loses meaning and the Court need not consider irreparable injury and/or balance of convenience. See the holding of the Court of Appeal in “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014]eKLR” -page 35 of the Defendant/Respondent’s bundle of authorities-that:
- “If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”
24. Be that as it may, the Plaintiff/Applicant contended that if the injunction sought was not granted, she would lose her property and suffer immense loss and damages. The position in law was that once a property was offered as security it by that very fact became a commodity for sale. There was no commodity for sale whose loss could not be compensated in damages. The Plaintiff/Applicant’s remedy, if any, would therefore be in damages. The Plaintiff/Applicant had not placed any material before the court to show that if she succeeded in her suit against the Defendants/Respondents, an award of damages would not be an adequate remedy or that the 1st Defendant would not be able to pay such damages.
25. On the balance of convenience, as of 21st August 2022, the Plaintiff/Applicant was indebted to the 1st Defendant/Respondent in the sum of Kenya Shillings Eleven Million Seven Eighteen Thousand Seven Ninety Eight and Seventy Eight cents (Kshs. 11, 718, 798.78/=). This sum continued to accrue interest until payment in full. The Plaintiff/Applicant had not repaid her monthly loan instalments from 1st December 2019 and had not demonstrated willingness to settle the debt despite being issued several notices by the 1st Defendant/Respondent. A party who was not repaying her loan was not entitled to an equitable relief of injunction. In the circumstances, the balance of convenience tilted in favour of allowing the 1st Defendant/Respondent to realize its security as allowing the stoppage of sale while the debt continued to accrue would result in the debt outstripping the value of the provided security. The answer to the first issue was that the Plaintiff/Applicant had not met any of the conditions in the test for grant of an injunction pending suit.
26. In conclusion, the Learned Counsel opined that a determination of the first issue in favour of the Defendants/Respondents would inevitably lead the Court to dismiss the application. The general rule was that costs follow the event. Having successfully defended the application, the Defendants/Respondents were entitled to be awarded costs of the application.

IV. Analysis and Determination

27. I have carefully read and considered the pleadings herein being the application dated 1st September, 2022 by the Plaintiff/Applicant herein, the responses by the Defendants/Respondents, the elaborate



written submissions, the myriad of cited authorities which parties decided to rely on, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

28. In order to arrive at an informed, reasonable, fair, just and equitable decision, the Honorable Court has crystalized the subject matter into the finds that the three (3) issues for its determination. These are:-
- a. Whether the Notice of Motion application dated 1st September, 2022 by the Plaintiff/Applicant has met the threshold for the grant of an order of injunction as found under the provision of Order 40 of the Civil Procedure Rules, 2010.
 - b. Whether the parties are entitled to the reliefs sought.
 - c. Who will bear the costs of the application

Issue No. a) Whether the Notice of Motion application dated 1st September, 2022 meets the threshold for grant of injunction under the provision of Order 40 Rule 1 of the Civil Procedure Rules

29. Under this Sub heading, the main substratum is whether or not to grant the orders of temporary injunction. From the records, the application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. The provision of the law 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 y g 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.
30. The principles applicable in an application for an injunction were laid down in the celebrated case of “Giella – Versus - Cassman Brown & Co (Supra)” where the court held that in order to qualify for an injunction.
- a. First the applicant must show a prima facie case with a probability of success.
 - b. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
 - c. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
31. The first issue for determination is whether the Plaintiff has established that he has a prima facie case with a probability of success. A prima facie case was defined by the Court of Appeal in “MRAO Ltd – Versus First American Bank of Kenya Ltd & 2 Others (Supra)” as follows;

“ a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case 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 as to call for an explanation or rebuttal from the latter.”

32. In the instant case, on the issue whether the Plaintiff/Applicant has established “a prima facie case” with a probability of success, the Plaintiff/Applicant averred that on or about 25th day of July, 2018, she leased and later purchased through a mortgage facility from the 1st Defendant/Respondent Apartment No. D2 on Block D erected on property Land Reference Number 1464/IV/MN for a consideration of Kenya Shillings Eight Million and Seventy - Five Thousand (Kshs. 8,075,000/-). The said suit property was charged in favor of the 1st Defendant/Respondent as security for the mortgage facility which was also advanced on the strength of the Plaintiff/Applicant’s pay slip as an employee of the 1st Defendant/Respondent. The Plaintiff/Applicant had been employed by the 1st Defendant/Respondent on the 6th day of January 2014 as a Business Development Executive and at the time of the transaction in question, she was the Regional Business Development Manager in charge of Coast region.
33. However, less than a year into servicing the said mortgage facility, the 1st Defendant/Respondent decided to render the Plaintiff/Applicant’s position redundant in questionable circumstances and commenced redundancy proceedings against her culminating into their parting ways on the 31st day of August 2019. The abrupt and unexpected circumstances threw the Plaintiff/Applicant’s finances into chaos as she did not have any other sources of income and she made the conscious decision to transform the said acquired home into a business venture. Before she could even breathe a sigh of relief, on or about 6th day of September 2019, the 1st Defendant without any color of right, prior notice and/or maliciously notified the Plaintiff that it had unilaterally sought to increase her mortgage interest rate from 8% to 15% worsening the already heavy burden on her shoulders.
34. The Plaintiff/Applicant vehemently protested the move since she had just been rendered redundant through questionable means, she did not have any other alternative sources of income and she had questioned the termination of her employment which was subject to review. On or about 17th day of May 2022, the Plaintiff/Applicant received a 45 Days’ Redemption Notice from the 2nd Defendant/Respondent purportedly demanding Kenya Shillings Ten Million, Five Hundred and Twenty-Six Thousand, Five Hundred and Eighty-Five and Eighty Cents (KES 10,526,585.80/-) being mortgage arrears with the days running to redeem her property of face an auction.
35. On the other hand, the 1st Defendant, deposed that they terminated the plaintiff’s contract of employment on account of redundancy on 31st August 2019 through a letter dated 29th August 2019. The plaintiff was dissatisfied with the termination and thus filed a suit before the Employment and Labour Relations Court at Mombasa being Cause Number 80 of 2019; Roseanne Wanjiru Mwangi versus Liberty Life Assurance Kenya Limited. The Employment Court delivered its Judgment in the matter on 28th October 2021 in which the court held that the 1st Defendant had fully complied with the relevant provisions of the law in terminating the Plaintiff’s contract of employment and thus dismissed that suit.
36. At this juncture, I wish to rely on 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 parties cases.”



37. Similarly, I will cite 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.”

38. In the present case, it is evident that the Plaintiff/Applicant’s proprietary claim over the suit property is anchored on the fact that the Plaintiff/Applicant actually is the legally and absolute registered owner to the suit property and had paid mortgage for it. For this reasons, and in the given circumstances, I find that the Plaintiff/Applicant has established that she has a prima facie case with a probability of success.

39. On the issue whether the Plaintiff/Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. 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.”

40. It is my view that the Plaintiff/Applicant has demonstrated to court, that the loss she stands to lose has no standard by which their amount can be measured with accuracy in that the suit property is the only thing that she owns after her position at the 1st Defendant/Respondent’s company was terminated and she was rendered jobless.

41. On the issue of balance of convenience, I find that it tilts in favour of the Plaintiff/Applicant as she has invested in the suit property by her mortgage remittance and the Defendants will not loose anything if the injunction is granted to preserve the suit property.

Issue No. b). Whether the parties are entitled to the relief Sought

42. Under this Sub heading, the Honourable Court underscores that the main purpose for Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit. The grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this particular case the defendant would be able to be compensated by way of damages if the court finds that the plaintiff did not deserve the grant of the injunction. The damages can be quantified and I take note that the Defendants/Respondents claim that the Plaintiff/Applicant is in mortgage arrears. These are monetary in nature and which can be easily recovered through an auction if the Plaintiff/Applicant claim does not succeed and the Defendants/Respondents present a strong case as against the Plaintiff/Applicant during the trial.

43. At this point, the Court wishes to make a general observation arising from the filed pleadings and as pertains to the entitlement by the parties. The Constitution in Article 162 (2) (b) provides that



Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts. The jurisdiction of the said courts is found in Section 13 of the *Environment and Land Court Act* of 2012 which provides that the court shall hear disputes relating to:

- a. environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. compulsory acquisition of land;
 - c. land administration and management;
 - d. public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
44. The provision of the Act clothes the Environment and land Court with wide power to deal with matters listed above. The court notes that from the Plaintiff that the Plaintiff/Applicant also seeks for declaration that the purported sale of portions of the suit property be declared null and void apart from the injunction restraining the Defendants/Respondent from intermeddling with the suit property.
45. In a long analysis, the Honorable Court having carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, both parties have interest in land and are invested in it as seen from the documents and their aversions, at this point, this Honorable court cannot make a clear determination on which of the three parties owns the said suit property, until both parties are subjected into an intensive hearing during a full trial which will bring out the true proprietor of the suit property.
46. In the meantime court is called to preserve the title to the suit land and protect the interest of all parties, especially the Plaintiff/Applicant who stands to suffer a great deal of loss if her property is auctioned off.
47. Be that as it may, I strongly hold that it would be in the interest of Justice, Equity and Conscience to order that the order of injunction to be in place pending the hearing and determination of the suit. The Court finds that the discharge or varying of the injunction orders would not be appropriate at this time. I also order that the 1st and 2nd Defendants/Respondents comply strictly with the order of injunction and not engage in acts that would degrade the suit land pending the hearing and determination of the suit and to also provide this Honourable Court with the statement of accounts of the mortgage facility of the Plaintiff as it will be material in determining this case at the point of its conclusion. In a nutshell the application must succeed.

Issue No c). Who will bear the Costs of Notice of Motion application 1st September, 2022.

13. It is well established that the issue of Costs is at the discretion of the Court. Without wanting to re – invent the wheel, I have on numerous occasion stated in my previous precedents and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“



“58. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”

48. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the results or outcome of any legal action or proceedings in any litigation. In this case, as Honourable Court finds that the Plaintiff/Applicant has satisfactorily fulfilled the conditions set out under the provision of Order 40 Rule 1 of the Civil Procedure Rules, 2010, hence this application shall be deemed to have been allowed with costs to be in the cause.

V. Conclusion & Disposition

49. Having said that much, the Honourable Court on the principles of preponderance of probabilities and the need to preserve the suit land in the meantime has proceeded to order the following:-

- a. That the Notice of Motion application dated 1st September, 2022 found to be merited and hence be and is hereby allowed in its entirety.
- b. That pending hearing and determination of this suit a temporary injunction do issue restraining the Defendants/Respondents their employees, agents, servants, assignees or any person working under their express and or implied instructions or authority from selling by public auction or private treaty, alienating, disposing, entering, leasing, appointing a receiver, trespassing, wasting, or in any other way dealing with all that property known as Apartment D2 on Block D erected on land parcel known as L.R No. 1464/IV/MN (Original No.257) Title No. 66600 Mtwapa.
- c. That this Honourable court do hereby order the 1st Defendant/Respondent to provide the Plaintiff/ Applicant with the mortgage facility statement of accounts.
- d. That for expediency sake, this suit should be set down for hearing on 9th May, 2024. There should be a mention on 6th February, 2024 for purposes of conducting a Pre – Trial Conference under Order 11 of the Civil Procedure Rules, 2010.
- e. That the costs of this application shall be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 12TH DAY OF OCTOBER 2023.

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HON. JUSTICE L. L. NAIKUNI (MR)
ENVIRONMENT AND LAND COURT
MOMBASA

Ruling delivered in the presence of:



- a. M/s. Yumna, Court Assistant;
- b. No appearance for the Plaintiff/Applicant.
- c. M/s. Lelu Advocate for the Defendants/Respondents.

