Karinge & another v Sidian Bank Limited(Formerly K-rep Limited); Kiama (Interested Party) (Environment & Land Case 209 of 2021) [2022] KEELC 2356 (KLR) (12 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2356 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 209 OF 2021

LL NAIKUNI, J

JULY 12, 2022

BETWEEN

MARY WAITHERA G. KARINGE ..... 1ST APPLICANT

PETER GITHUTHA KARINGE ..... 2ND APPLICANT

AND

SIDIAN BANK LIMITED(FORMERLY K-REP LIMITED) ..... DEFENDANT

AND

GRACE WANJERA KIAMA ..... INTERESTED PARTY

RULING

I. Introduction

1. The Plaintiffs/Applicants filed a Notice of Motion application dated 15th October 2021 for the determination by this Honorable Court hereof. It is brought under the provision of Sections 13, 14 and 19 of the *Environment & Land Act*, No. 19 of 2011, Sections 28 (h), 68, 69 and 101 of the *Land Registration Act*, No. 3 of 2012 and Section 7 (i) of the *Land Act*, No. 6 of 2012.

II. The Plaintiffs/applicants Case

2. The Plaintiffs/ Applicants seek for the following orders. These are:-

    a. Spend.

    b. Spend.

    c. That pending the hearing and determination of this application "inter parties" the Honorable court be pleased to issue an order of injunction restraining the Defendant/Respondent and the Interested party and their servants, agents, assigns and hireling from selling, transferring,

charging/mortgaging and having any dealings with including constructing, renovating the suit property being Plot No. L.R No. 2627/VI/MN.

d. That the order in 2 and 3 above be served upon the Land Registrar, Mombasa and Changamwe Police Station.

e. That the cost of this application be provided for.

3. The application is premised on the grounds, testimony, the facts on the face of the application and averments made out in the 22 Paragraphed Supporting affidavit of Mary Waithera G. Karinge, the 1st Plaintiff sworn and dated on 15th October, 2021. She averred that she was the registered proprietor of Land Reference Numbers No. MN/VI/2627 after acquiring it, in a public auction on 18th November 2011 for Kenya Shillings Thirteen Million Eight (Kshs. 13, 800,000.00) on 7th May 2014. She charged the suit property to the Defendant for Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) repayable in ten (10) years. However, she was unable to keep up with the charge and defaulted. After paying Kenya Shillings Twelve Million Three Ninety Nine Five Sixty Eighty Ninety Seven (Kshs. 12, 399, 568.97/=) towards offsetting the charge. She negotiated with the Defendant on 7th May 2018 to allow her pay them a sum Kenya Shillings Seven Million (Kshs. 7,000,000.00/=) as the final settlement of the charge. She claimed that the defendant went against this agreement and sold off the suit property vide public auction to the Interested Party for Kenya Shillings Ten Million (Kshs. 10,000,000/=). The 1st Plaintiff contended that despite a Valuation report carried out by Attic Realtors Limited on 12th August 2021 valuing the suit property at Kenya Shillings Twenty Four Million Seven Hundred Thousand (Kshs. 24,700,000/=) the Defendant undervalued the same and sold it for a mere sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=).

4. Further Mrs. Karinge claimed that the Interested Party had only paid up a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500,000/=) contrary to the condition that the balance of a sum of Kenya Shillings Eight Million Five Hundred Thousand (Kshs. 8,500,000/=) be paid up within thirty (30) days from the 27th August 2021. She also claimed that the Interested Party had since changed the structures on the suit property from a school to a one bedroom house. She maintained that the Defendant had no reason to sell off the suit property having written off the debt in the year 2018. She urged court to allow the application and grant the orders as prayed from the filed application hereof.

III. The Defendant's Case

5. The Defendant filed their response to the application vide a 65 Paragraphed Replying Affidavit dated 22nd November 2021 sworn by Jackline Ndung'u the Legal Officer for the Defendant and 41 annextures marked as "SBL 1 to 41". She averred that the 1st Plaintiff began a relationship with the Defendant. On 18th November 2011 she was declared the highest bidder at a public auction of the suit property, Land reference No. 2627/VI/MN together with the development thereon. Eventually, the suit property was sold for a sum of Kenya Shillings Thirteen Million Eight (Kshs. 13,800,000/=) of which the 1st Plaintiff paid up a sum of Kenya Three Million Four Fifty Thousand (Kshs. 3,450,000/=) on the fall of the hummer. On 21st December 2011 the Plaintiffs trading in the names and style of "Discovery Ventures" approached the Defendant for a loan of a sum of Kenya Shillings Ten Million Two Twenty Seven Thousand (Kshs. 10,271,000/=). The bank accepted and disbursed the facility amount to the Plaintiff on 27th December 2011. The Defendant proceeded to transfer the suit property to the name of 1st Plaintiff. On 4th May 2014 they charged and used it as security for the facility advanced.

6. She further averred that the plaintiffs defaulted in regularizing the facility with the bank barely four months later, which prompted the bank to issue demand letters. On 1st August 2012, the defendant wrote to the Plaintiffs demanding a sum of Kenya Shillings Eleven Million and Ninety Nine Four Ninety Four (Kshs. 11,099,494/=) failure to which the bank would proceed to exercise its statutory power of sale. With the passage of time, the Plaintiff persistently defaulted in repaying the loan. On 20th November 2014, the Defendant issued a 90 day Statutory Notice under the provision of Section 90 of the *Land Act* for the recovery of a sum of Kenya Shillings Ten Million Five Sixty Two Thousand Eight and Five (Kshs. 10,562,805/=). On 17th December 2014, the Plaintiffs wrote to the bank making a request to allow them dispose of the suit property within 90 days and clear the outstanding balance. The bank was agreeable to the request but informed them that the statutory notice would continue to run.

7. When the default persevered, the bank issued a 40 day Statutory Notice to sell the suit property on 26th January 2015 by which time the loan had stood at a sum of Kenya Shillings Eleven Million Six Forty Six Thousand Two Ninety Seven (Kshs. 11,646,297/=). The Plaintiffs did not remedy the default within the prescribed time which prompted the bank to exercise its statutory power of sale, by instructing auctioneers trading in the names and style of Garam Investment Auctioneers to sell the property by public auction on 29th June 2015 to recover a sum of Kenya Shillings Twelve Million Four Twenty Seven Thousand Seven and Five Eighty Six (Kshs. 12,427,705.86/=). On 16th June 2015, the Plaintiff wrote to the bank to stop the sale on the promise that they would deposit a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) towards the settlement of the loan. The bank rejected the offer, proceeded with the auction unfortunately the same was not successful.

8. On 13th July 2015, the Plaintiff wrote to the bank once more to reconstruct the loan on a proposal to be paying a monthly installment of Kenya Shillings Two Hundred (Kshs. 200,000/=) for 5 years. In addition she sought a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) to enable her renovate the development on the suit property. The bank agreed to her proposal and restructured the loan vide a letter of offer dated 20th July 2015 requiring the Plaintiffs to pay a sum of Kenya Shillings Thirteen Million Three Thirty Thousand Six and Five Twenty three (Kshs. 13,330,608.23/=) within 58 months in installments of Kenya Shillings Two Eighty Nine Seven Seventy Thousand (Kshs. 289,770/=). The offer was accepted by the Plaintiffs on 29th July 2015. Unfortunately, and despite of all this, the Plaintiffs defaulted again and the bank issued them with a 40 day Statutory Notice under Section 96 (2) of the *Land Act* on 22nd October 2015 demanding a sum of Kenya Shillings Fourteen Million Seventy two Three Seventy (Kshs. 14,072,370/=). This prompted the bank to instruct an auctioneer firm trading as Keysian Auctioneers to sell the suit property by public auction on 18th March 2016, but the sale was not successful. The deponent further averred that after the two unsuccessful bids, the bank instructed a valuation firm known as Adept Realtors Limited to conduct valuation of the suit property. On 19th August 2016 the same was valued at a sum of Kenya Shillings Twenty Three Million (Kshs. 23,000,000/=). On 4th November 2016, the bank tried for a third time to sell off the suit property with another auctioneers Thaara Auctioneers but once again it was unsuccessful.

9. Taking that the Plaintiffs were still defaulting, the bank again instructed Leakeys Auctioneers to sell the suit property. The auctioneers issued the Plaintiffs with a 45 days Redemption Notice dated 10th November 2017 demanding a sum of Kenya Shillings Nineteen Million Seven Eighty Seven Thousand Six and Nine Twenty Eight (Kshs. 19,787,609.28/=). While the Notice was pending having been published in the local dallies, on 16th January 2018 the Plaintiff wrote to the bank requesting for a one off payment of Kenya Shillings Seven Million (Kshs. 7,000,000/=) as the full and final settlement of the outstanding amount. The bank allowed the Plaintiffs request for the payment of the proposed

sum as full and final settlement of the outstanding amount of Kenya Shillings Twenty One Million Three Eighteen Thousand Two Thirty Nine and Fifteen (Kshs. 21,318,239.15/=) vide a letter of Supplementary Letter of Offer dated on 7th May 2018. The bank agreed to the proposed settlement agreement. It provided the Plaintiffs to settle the amount within 60 days with effect from 8th May 2018. However, the bank reserved that in the event of breach of the agreed terms, the Supplementary Letter of Offer stood null and void and the outstanding amount of Kenya Shillings Twenty One Million Three Eighteen Thousand Two Thirty Nine and Fifteen (Kshs 21,318,239.15/=) together with any further accrued interest and penalties would become due and the bank would be at liberty to resort to its legal remedies. The Plaintiffs agreed to the bank's offer. However, despite all this they failed to settle the amount and the bank resorted to its legal remedies. On 9th August 2018 the bank instructed another auctioneers Watts Auctions to sell off the suit property vide public auction for the recovery of a sum Kenya Shillings Nineteen Million Seven Eighty Seven Thousand Six and Nine Twenty Eight (Kshs. 19,787,609.28/=). However, once again the same was not successful.

10. The bank instructed another land valuers firm - Attic Valuers Limited to conduct another valuation of the suit property. On 10th November 2018, and on 31st January 2019, the bank instructed Kinyua & Co Auctioneers to sell the suit property by public auction on 20th March 2019 and recover Kenya Shillings Nineteen Million Seven Eighty Seven Thousand Six and Nine Twenty Eight (Kshs 19,787,609.28/=). However, once again the same was not successful. The bank yet again instructed the auctioneers - Kinyua & Co Auctioneers to auction the suit property on 10th August 2021 to recover Kenya Shillings Nineteen Million Seven Eighty Seven Thousand Six and Nine Twenty Eight (Kshs. 19,787,609.28/=) and the Land Valuers known as Attic Valuers to revalue the suit property which was in a depleted state. The auctioneers placed an advert for the public auction of the suit property in the local daily "The Star Newspaper" on 12th August 2021, while the valuers reported the suit property to be worth Twenty Four Million Seven Thousand (Kshs. 24,700,000/=) on the same day. On 27th August 2021, the auctioneers were successful and thus able to auction the suit property to the Interested Party who were the highest bidder for a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) as seen from the Memorandum of Sale dated 27th August 2021.

11. The deponent asserted that the Plaintiffs were not entitled to an injunctive orders as they had no prima facie case with a high probability of success. Besides, they did not stand to suffer irreparable injury which could not be compensated by damages. On the ground that the Plaintiffs defaulted in paying the loan and the bank was in order when it exercised its rights to statutory power of sale after abiding with all the pre-requisites. She asserted that that the Plaintiffs understood that the suit property was a commodity of sale in the event of defaulting the loan payments, which was not sold to the interested party who was an innocent purchaser for value. The deponent urged court to find that the Plaintiffs were not going to suffer irreparable damages, as the value of the suit property was quantifiable and determinable. The deponent argued that the application lacked merit and ought to be dismissed with costs to the bank.

IV. The Interested Party's Case

12. The Interested Party filed her response to the application vide a 19 Paragraphed Replying Affidavit dated 27th October 2021 and sworn by Grace Wanjera Kiama. She deposed that the application was misconceived and an abuse of the Court process. She averred that she is the owner of the suit property having bought it through a public auction and took possession of the same. She paid a deposit of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2, 500, 000.00). She further averred that upon taking possession, she realized that the suit property was vandalized and dilapidated as the windows and doors were removed. In short, the whole premises had not been in a habitable state. She had spend

all her time repairing and renovating it. So far, she had spent almost a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) on repairs and renovation. She was currently in occupation. She argued that the injunction orders sought by the Plaintiffs would amount to an order of eviction from the suit property which was detrimental to her, yet she had nothing to do with the loan advanced to the Plaintiffs by the Defendant. She opined that the Plaintiffs were perpetual deferment and the sale was due to the default. She argued that the Applicants ought to leave her out of this proceedings as she had nothing to do with the issue on the decision to cause the sale by public auction. She urged court to dismiss the application with costs as the orders sought were unreasonable and unattainable taking that the Applicants had never occupied the suit property.

13. Further to this, the Interested party further filed a Notice of Preliminary Objection on 7th January 2022, seeking the suit to be struck out for offending the provision of Section 99 of the *Land Act* as it sought to reverse the sale by auction of all that parcel of land Known as Land Reference Number Plot No. LR No. 277/VI/MN to the interested party.

V. The Plaintiff's Supplementary Affidavit.

14. The Plaintiffs filed a 14 Paragraphed further affidavit in response to the Defendant's Replying Affidavit filed on 24th January 2022 sworn by Mary Waithera Karinge. She deponed that the Defendant sold off the suit property despite writing it off and failed to follow the mandatory provisions while doing so. She claimed that the Defendant sold the suit property at Kshs 10,000,000/= which is way below the forced sale value of a sum of Kenya Shillings Eighteen Million Five Twenty Five Thousand (Kshs. 18,525,000/=) as stated in the Valuation report. Further she claimed that the auctioneers who conducted the public auction failed to notify her of the sale. She maintained that she had an arguable case since the suit property had not been transferred into the name of the interested party.

VI. Submissions

15. On 28th October, 2021 when all the parties were present in Court, they were directed to dispose off the application by way of written submissions. Pursuant to that the parties obliged and the Honorable Court reserved a date for ruling.

A. The plaintiff/applicant's written submissions.

16. On 24th January 2022, the Learned Counsel for the Plaintiffs/Applicants the Law firm of Messrs. Odhiambo SE & Company Advocates filed their written submissions in support of the application. Mr. Odhiambo Advocate urged court to preserve the suit property so that neither the Defendant nor the Interested Party dealt with it pending the hearing and determination of the suit. He argued that the Plaintiffs had- raised pertinent issues that could only be dealt with after all matters were heard and determined. That issues raised touched on the issuance of notices to the Plaintiffs/Applicants in compliance with the provisions of Sections 96 and 97 of the *Land Act*, whether the debt was written off by the Defendant and whether the Interested Party complied with the terms and conditions of the sale.

17. The Learned Counsel submitted that the Plaintiffs/Applicants would not deal with the suit property which was in possession, occupation and use by the interested party. He urged court to find that the advertisement for public auction ought to be published in a local daily with wide national circulation and readership and not in "The Star" newspaper which was not a widely read newspaper as required by Section 90 of the *Land Act*. Further the Learned Counsel submitted that the fact that damages could be awarded should not be a reason to deny the Plaintiffs injunctive orders as they were seeking cancellation of the sale. The Counsel urged court to find that the Interested Party did not compete the

purchase price within 90 days as declared the Defendant's letter of instruction of the auctioneers dated 10th August 2021. Counsel urged court to allow the application and grant prayer 3 of the application.

B. The defendant's written submission

18. On 8th February 2022, the Learned Counsel for the Defendant the Law firm of Messrs. Munyao, Muthama & Kashindi Advocates filed their written submissions in opposition of the application. M/s. Gitari Advocate first and foremost provided a brief history of the case. He submitted that the Plaintiffs had not established "a prima facie case" with a probability of success and the application ought to be dismissed for lack of merit. The Counsel argued that that the Plaintiffs' equity of redemption was extinguished at the fall of the hammer, during the public auction conducted on 27th August 2021 when the suit property was sold to the Interested Party. To buttress its case, the Counsel relied on the case of "*Kamulu Academy Limited – Versus - British American Insurance (K) Limited & 2 others* (2018)eKLR, where it was held that the sale of public auction extinguished the equity of redemption at the fall of the hammer whether the property was transferred to the purchaser or not. That in such a circumstance, the court would not grant an injunction restraining a bank from completing the sale in his exercise of power of sale. Further, the Counsel cited the provision of Section 99 of the *Land Act* to submit that unless the Plaintiffs could only nullify the sale on the account of fraud, misrepresentation or dishonest conduct, which was not the case herein. The Counsel insisted that the injunctive orders could not be granted simply because the debt was written off or that the property was sold at an undervalue.

19. The Learned Counsel made reference to the principles set out in the famous case of "*Giella –Versus - Cassman Brown* (1973) E.A 358", to the effect that the Plaintiff/Applicant had no prima facie case with a probability of success as declared in the case of "*Mrao – Versus - First American Bank of Kenya Limited* (2003) KLR 125. In these cases, it was held that 'a prima facie case' had to be genuine and an arguable case. The Counsel observed that the Defendant had issued several notices to the Plaintiff over the years from the years 2014 to 2018 whenever the Plaintiffs/Applicants defaulted in paying the loan. Therefore, the Plaintiffs/Applicants could not fault the bank's auctioneers for failing to issue the requisite notices prior to the sale of the suit property. The Learned Counsel submitted that the Plaintiffs/Applicants could not expect the bank to issue fresh statutory notices on all the different occasions when the suit property was being put out for sale by auction. Further the Learned Counsel contended that the bank never wrote off the loan as alleged by the Plaintiffs/Applicants but rather offered to do so on condition that the Plaintiffs would settle the loan within certain terms but which the Plaintiffs/Applicants failed to comply with altogether.

20. On the second limb of whether the Plaintiffs/Applicants would suffer any irreparable loss, the Learned Counsel submitted that there was no loss that the Plaintiffs/Applicants could suffer that could not be compensated by an award of damages. That the claim that the suit property was sold at an undervalue proved that the loss could be quantified. This position was the ratio in the case of:- "*Sammy Ghannam – Versus - SBM Bank Kenya Limited & another* (2021) eKLR, where the court held that the suit property which was voluntarily charged by the Plaintiff to the bank was a property whose value was quantifiable. On the last limb of balance of convenience, the Learned Counsel submitted that the same did not favour the Plaintiffs/Applicants, who were fully aware that the suit property would become a commodity of sale in the event of default. Thus, the balance of convenience tilted in favour of the Interested Party who was the bona fide purchaser for value. They were protected by the provision of Section 99 of the *Land Act*. The learned Counsel urged court to dismiss the application with costs to the bank.

C. The interested party's written submissions

21. On 21st February 2022, the Learned Counsel for the Interested Party, the Law firm of Messrs. HK Ndirangu & Company Advocates filed their written submissions to oppose the application. Mr. Otwoma Counsel submitted that it was trite law that the equitable remedy of redemption extinguished the sale of the charged property. They relied on the Court of Appeal decision in '*George Gikubu Mbuthia – Versus - Jimba Credit Finance Corporation & Anor* (1986-1989) I EA 340 CAK, where the court held:- 'A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagee's exercising the power of sale as a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities.' The Counsel submitted that the suit property having been sold to the Interested Party, the Plaintiffs' rights to redeem the suit property was extinguished. The Counsel argued that the Interested Party was protected by Section 99 of the *Land Act*, which protects a person who has purchased a charged property from the chargee and that the only available remedy to the Chargor was to claim damages as against the chargee as outlined under Section 99 (4) of the *Land Act*.

22. On the sought order of injunction, the Learned Counsel submitted that the Plaintiffs/Applicants could not reverse the sale and relied on the case of "*Micheal Gitere & another – Versus - Kenya Commercial Bank Limited* (2018) eKLR, where the court considered whether or not to grant an injunction in a matter involving a charged property. The court held that:- '... once a property is given as security it becomes a commodity of sale and there is no commodity of sale to which a value cannot be attached.' The Learned Counsel argued that the application did not meet the threshold for a grant of interlocutory injunction as well as offending the statutory provisions of the *Land Act*. They urged the court to discharge the status quo orders and dismiss the application with costs.

VII. Analysis and Determination.

23. I have keenly considered all the filed pleadings, the written submissions, *the Constitution* and relevant statutory provisions. Be that as it may, before embarking on the analysis this case, this Honorable court will not consider the Notice of Preliminary Objection filed on 7th January 2022, by the Interested Party which seeks to strike out the suit for allegedly for offending the provision of Section 99 of the *Land Act*. In saying so, and notwithstanding the provision of Article 159 (2) (d) of *the Constitution* of Kenya, the Court relies on the ground that the Interested Party has quoted a different land parcel a total departure from the one dealing with herein suit. The said notice of the Preliminary Objection states that the suit property as being land Reference Plot No. LR No. 277/VI/MN, yet the suit property herein is Land Reference Plot No. LR/2627/VI/MN. There is such a wide variance here for that reason alone, from the very onset, the said Preliminary Objection be and is dismissed with no order as to costs.

24. Suffice to say, now turning to the issues before court for determination. In order to arrive at an informed, fair and just decision, the Honorable Court has formulated the following issues for its consideration. These are:-

    a. Whether the Plaintiffs/Applicants through its Notice of Motion application dated 15th October, 2021 have met the threshold to issue an order of injunction to restrain the Defendant and the Interested Party from dealing with all that parcel of Land known as Land reference Plot No. LR/2627/VI/MN

    b. Whether the parties herein are entitled to the relief sought.

    c. Who will bear cost of the application.

ISSUE No. A). Whether the Plaintiffs/Applicants through its Notice of Motion application dated 15th October, 2021 have met the threshold to issue an order of injunction to restrain the Defendant and the Interested Party from dealing with all that parcel of Land known as Land reference Plot No. LR/2627/VI/MN

Brief facts.

25. Prior to proceeding with the analysis of the above issues, it is significant that the Honorable Court provides brief facts of the case. On 23rd December 2011, a loan facility of Kenya Shillings Ten Million (Kshs. 10,000,000/=) was first advanced to the Plaintiffs/Applicants by the Defendants for the purchase of all that suit property known as Land reference numbers 2627/VI/MN. The suit property was then charged as security for the facility by the Defendant on 7th May 2014 for a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/=). The Defendant claimed that the Plaintiffs/Applicants defaulted in making payments, a few months into the facility. On 10th May 2012 they wrote to the Plaintiffs/Applicant informing them that their loan repayment was due. This was followed by three other demand letters issued on 22nd May 2012, 10th July 2012 and 1st August 2012 respectively. The Defendant claimed that the Plaintiffs/Applicants default persisted and on 20th November 2014, they issued a 90 day statutory notice under Section 90 of the *Land Act* demanding Kenya Shillings Ten Million Five Sixty Two Thousand Eight and Five (Kshs. 10,562,805/=) together with interest. This was the start of the Defendant's numerous attempts to exercise their statutory power of sale over the suit property was marred by continued unsuccessful sales until the last one whereby the suit property was acquired by the Interested Party herein though a public auction. Further, it was full of numerous correspondences exchanges between the Plaintiffs/Applicants and the Defendant but to no avail whatsoever.

26. The first notice to sell was issued to the Plaintiffs by the Defendants on 26th January 2015. However, the auctioneers Garam Auctioneers were unable to sell of the suit property on 21st April 2015. This prompted the Plaintiffs to write to the Defendant on 13th July 2015 requesting for an additional loan of Kenya Shillings Two Million (Kshs. 2, 000, 000.00) to renovate the suit property to make it viable for rental income. The Defendant restructured the loan on 20th July 2015 and reduced the monthly installment to Kshs 289,770/= to be repaid in 58 months. Despite the readjustment the plaintiffs still defaulted on the loan and on 22nd October 2015, the defendant issued the defendant with a Notice to sell under Section 96 (2) of the *Land Act*. However, the bank was unsuccessful in recovering Kshs 14,072,370.91 as Keysian Auctioneers failed to auction the suit property on 18th March 2016. The third attempt by the defendant to sell the suit property was by Thaara Auctioneers who also unsuccessfully tried to sell the suit property on 17th October 2016. The 4th attempted to sell the suit property similarly unsuccessfully conducted by Leakey's Auctioneers on 13th October 2017.

27. The Plaintiffs/Applicants approached the Defendant for a second time in an effort to settle the loan once and for all. On 7th May 2018 the Defendant presented to the Plaintiff a Supplementary Letter of offer, and the Plaintiffs/Applicants accepted to pay a sum of Kenya Shillings Seven Million (Kshs. 7,000, 000.00) within 60 days with effect from 8th May 2018 as the full and final settlement of the outstanding liability of Kshs 21,318,239.15/=. Failure to settle the loan meant that the offer would be null and void and the amount due would become due and the bank would result to its legal remedies. The plaintiffs' argument that the defendant had completely written off the debt was therefore not the correct position. The true position was that, the loan would be written off if the plaintiff would repay the Kshs 7,000,000/= within 60 days, failure to which the whole amount would become due. The plaintiff unfortunately failed to adhere to the agreement entered into on 7th May 2018, and the defendants made a fifth unsuccessful attempt to auction the suit property through the firm of Watts

Auctions on 26th October 2018. The defendant instructed the firm of Kinyua & Co Auctioneers on 31st January 2019 to auction the suit property for the sixth attempt. The auctioneers attempt to auction on 20th March 2019 was unsuccessful after the highest bidder pulled out the last minute.

28. The seventh and final attempt by the defendant to auction the suit property was on 10th August 2021 when they instructed firm of Kinyua & Co Auctioneers to recover Kshs 19,787,609.28/= from the plaintiffs. In that letter, the defendants confirmed to the auctioneers, that the plaintiffs have been served with all requisite statutory notices and further instructed them issue a 14 day courtesy notice which would run concurrent with the newspaper advert. These instructions were followed by a valuation report by Attic Realtors Limited who valued the suit property at a market price of Kshs 24,700,000/= and a forced sale value of Kshs 18,525,000/=. On 27th August 2021, the suit property was sold by public auction to Grace Wanjera Kiama, the Interested Party for Kshs 10,000,000/=, and was issued with a Memorandum of Sale dated 27th August 2021. In the supporting affidavit, Mary Waithera the 1st plaintiff deponed that they were not notified of the public auction that took place on 27th August 2021, where the suit property was sold by Kinyua & Co Auctioneers to the interested party. She claimed that she was never served with the legal notices before the sale took place as required by the law. That is adequate on facts.

29. Now turning to the issues under this sub – heading. On whether the Plaintiffs/Applicants have fulfilled the requirements of a grant of temporary injunction as melted out in the famous case of "Giella – Versus - Cassman Brown Co Limited (1973) EA 358 (Supra), 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."

30. A prima facie case was defined in '*Mrao Limited – Versus - First American Bank of Kenya Ltd & 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." The Plaintiffs/Applicants case is rather a common textbook case of a defaulting Chargee. They bought an auctioned property which hosted a primary, without honestly in my view, a calculated move of how they would run a school. The previous owner moved all the pupils to his new school which is adjacent to the suit property, leaving the Plaintiffs/Applicants with nothing but a building to show off. The Plaintiffs soon after began defaulting in repaying the charge and so did the cat and mouse chase between them and the bank began as it is well demonstrated from the numerous correspondences exchanged between the parties herein.

31. The Defendant tabled evidence before court of the numerous attempts made to auction the property. To be specific the chargor tried at least six (6) times since 2014 with different auctioneers to sell the suit property, until they managed to do so on 27th August 2021. In my view, the Plaintiffs/Applicants have failed to establish a prima facie case with a likelihood of success, for the reason that their equity of redemption was extinguished at the fall of the hammer at the auction sale. The charge was a contract agreement and since time was of essence and it had been made known to the chargee by the chargor on several occasions, yet the Plaintiffs/Applicants defaulted in paying. The bank had even agreed to accept Kenya Shillings Seven Million (Kshs. 7,000,000/=) for full settlement of the charge. But despite all this, the Plaintiffs/Applicants failed to pay up, resulting the bank to exercise its statutory power of sale. From the empirical evidence herein, undoubtedly, the Plaintiffs/Applicants were granted reasonable chances over the years to redeem and save their land but still they failed to do so. Hence, the Honorable Court holds that the Plaintiffs/Applicants have no prima facie case with no chances of succeeding at all.

32. The next issue is whether the Plaintiffs/Applicants have proved that they stand to suffer irreparable injury which would not adequately be compensated by an award of damages. Ringera, J (as he then was) in the case of "*Martha Khayanga Simiyu v Housing Finance Co. of Kenya & 2 Others* Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540 held that:

> " Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantum of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils".

33. Once a property has been given as security, it becomes a commodity of sale, and there is no commodity of sale to which a value cannot be attached. The suit property was valued on 12th August 2021 by the land Valuers - Attic Realtors Limited at Kenya Shillings Twenty Four Million Seven Thousand (Kshs. 24,700,000/=) and a forced market price of a sum of Kenya Shillings Eighteen Million Five Twenty Five Thousand (Kshs. 18,525,000/=). The Honorable Court has taken judicial notice to the effect that the Defendant is a reputable bank with the financial resources adequately capable of paying the Plaintiffs/ Applicants damages, if they became successful at the full trial. It is trite law that where damages maybe an appropriate remedy, an interlocutory injunction should never be issued. This legal position was affirmed by the Court of Appeal in case "*Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR," where it was held 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."

34. It is the Defendant's case that the Plaintiffs, were served with numerous statutory notices and notification of sale over the years when they attempted on several occasions to exercise their statutory power of sale over the suit property. The Counsel for the Defendant argued that it would have been unreasonable for the Plaintiffs to require the bank to issue fresh statutory notices on all occasions when the suit property was not sold at the public auction of when the sale was suspended at the request of the Plaintiff. The Plaintiffs/Applicants claim that not only did the Defendant not notify them of the sale, they also sold the suit property for Kenya Shillings Ten Million (Kshs. 10,000,000/=) when the valuation report placed the suit property's forced sale value at Kenya Shillings Eighteen Million Five Twenty-Five Thousand (Kshs. 18,525,000/=).

ISSUE No. B). Whether the parties herein are entitled to the reliefs sought.

. To respond to the issues under this Sub – heading, there will be need to look at the relevant provisions of the law. The provision of Section 90 (1) of the *Land Act* states that:

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 in 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.

The Defendant fully complied with this requirement by issuing the Plaintiffs with a 90 day notice on 20th November 2018. When the Plaintiffs/Applicants herein failed to comply with the 90 day notice, the Defendant on two diverse dates; on 26th January 2015 and 22nd October 2015; issued a 40 day Notification of sale as required by Section 96 (2) of the *Land Act*, which states that:

> "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.

35. In my view, these two statutory notices required by Section 90 (1) and 96 (2) of the *Land Act* are mandatory in nature and only need to be issued once, for the reason that the Plaintiffs/Applicants were in default and ever since they were served with these statutory notices they are yet to pay up the amount due. The purpose of the notices were to notify the Plaintiff of the default and the consequences thereof, they served the purpose and there was no need of issuing fresh statutory notices every time the sale did not go through, so long as the Plaintiffs/Applicants were in default.

36. The other notice that was meant to be issued to the Plaintiff was the one provided for under Rule 15 of the *Auctioneers Rules*, which states that:

> Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—
>
> a. record the court warrant or letter of instruction in the register;
>
> b. prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
>
> c. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
>
> d. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
>
> e. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

37. The Defendant has over the years since the Plaintiffs/Applicants defaulted, has used different auctioneers to try auction the suit property. From the reading of the above Rule, before an auctioneer could proceed with a sale of an immoveable property, it had to issue a 45 day Redemption Notice

to the chargee. In this case we examine whether the Plaintiffs were issued with this notice, the first auctioneers to be instructed were Garam Auctioneers who issued their 45 day notice on 25th April 2015, Keysian Auctioneers on 18th December 2015, Thaara did not issue, Leakey's on 10th November 2017 and the last was issued by Watts on 13th August 2018. However there is no prove that Kinyua & Co Auctioneers issued the Plaintiffs with notification when they were instructed by the Defendant on 31st January 2019.

38. The question before court was whether the sale that was conducted by Kinyua & Co Auctioneers ought to suffice, given that they never issued the Plaintiffs with the 45 day redemption notice as required by Rule 15. In the case of *Joseph Kiarie Mbugua & another – Versus - Garam Investment Limited & another* (2006)eKLR the court was tasked with the issue of whether or not a 45 day notification of sale was mandatory even when there was a previous one, in relation to a sale which was halted, either by the consent of the parties or by an order of court. The Court held that, "If it was mandatory that 45 days notification of sale be issued every single time when the chargee or the judgement-creditor wished to publicly auction immovable property, borrowers and judgement-debtors would never persuade their creditors to put off sales, so as to allow the debtors an opportunity to redeem their properties. Thus a strict application of Rule 15 of the *Auctioneers Rules* would actually be counter-productive to the borrowers and judgement-debtors." I concur with the interpretation of the court in this case, when it further held that, "Rule 15 (d) of the *Auctioneers Rules* does not impose an obligation on the chargor or the auctioneer to issue notice every time before the charged property can be put up for sale. It says that a notice will be issued; and that is singular. The time of issuance is when the auctioneer received the letter of instruction."

39. What is clear before this court is that, at the time the Defendant had instructed Kinyua Auctioneers, the Plaintiffs were still in default. A perusal of the evidence presented to court, in particular MWK-8, the plaintiffs' bank account No. 0100100042861, Account Name Mary & Peter JT T/A Discovery Venture reveal that a month to the auction on 27th July 2021 the Plaintiffs/Applicants owned the Defendant Kshs 373,454.98/= The bank had on several occasions accommodated their plea for indulgence and all went affronted. In my opinion though the Plaintiffs/Applicants owned the bank less than Kshs 400,000/= at the time of the sale, taking into account the default they had persistent with other the years, the same can have no validity on the sale to a bonafide purchaser of value.

40. The Plaintiffs maintained that they were neither served with the statutory notices nor with the notification of sale, making the auction improper. Therefore, the court ought to grant an injunction. As stated above, from the evidence before court, the Defendant fully complied with the provisions of Sections 90 and 96 of the *Land Act*, and issued the Plaintiffs/Applicants with a 90 statutory notice as well as the 40 day notification of sale. From the reading of these two sections, the chargor does not need to issue the chargee with multiple notices, so long as the chargee was in default. The notices would suffice. The purpose of the notices was to inform the chargee that they were in default and its persistence would led to sale of the suit property, therefore so long as the default continues, the notices were valid. The Court of Appeal in "'*George Gikubu Mbuthia – Versus - Jimba Credit Finance Corporation & another*[1988] eKLR, held that:

> "It is plain that section 74 did not impose on the chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting mortgagor.

But in so far as the requirement of a second notice is supposed to be based on common law principles, this is less than correct. The legal position at common law is stated at page 308 of Fisher & Lightwoods Law of Mortgages 8th Edn. at p. 308 as follows:-

"If after demand, the sale is stopped on receipt of a cheque for the amount due under the mortgage, but the cheque is afterwards dishonoured, the right of sale and the running of notice having been only suspended revive, and the power may be exercised without serving a new notice."

41. From all these reasoning, and having found the Plaintiffs/Applicants have neither demonstrated a prima facie case with a likelihood of success nor established they irreparable injury they stand to suffer, I see no need to determine the issue of balance of convenience. therefore the Honorable Court finds that on the preponderance of probability that the Plaintiffs/Applicants are not entitled to the relief sought here at all.

ISSUE No.C) Who should bear the costs the application.

42. It is trite law that the issue of Costs is at the discretion of the Honorable Court. Costs means the award granted to a party after the end of any action or proceeding in any litigation. The proviso of Section 27 (1) holds that Costs follow events. By events, the law envisages the result of the said action or proceedings. In the Instant case the Notice of Motion application filed by the Plaintiff/Applicants against the Defendant has not been successful. For that reason therefore, both the Defendant and the Interested Party are awarded the Costs of the said application to be borne by the Plaintiffs/Applicants herein.

VI. Conclusion & Disposition

43. In view of the above, it is evident that the Plaintiffs/Applicants took for granted the numerous chances they had to redeem the suit property before the same was auctioned to the Interested Party on 27th August 2021, when the bank finally exercised its statutory power of sale. Therefore, the upshot of the elaborate and indepth analysis of the framed issues herein, the Honorable Court makes the following orders:-

    a. That the notice of the Preliminary Objection dated 5th January, 2022 by the Interested party herein be and is hereby dismissed with no order as to costs for erroneously stating that the suit property as being land Reference Plot No. LR No. 277/VI/MN, and not Land Reference Plot No. LR/2627/VI/MN.

    b. That the Notice of Motion application dated 15th October 2021 by the 1st and 2nd Defendants be and is found to be without merit for failing to meet the threshold for granting a temporary injunction. Thus, it is the 1st and 2nd Plaintiffs/Applicants hereby dismissed with costs to the Defendant and Interested Party.

    c. That for expediency sake, this case should be heard and eventually disposed off within the next one eighty (180) days from this date. There should be a mention date on 4th October, 2022 for conducting a Pre - Conference under Order 11 of the *Civil Procedure Rules*, 2010 and taking a hearing date thereof.

    d. That the 1st and 2nd Plaintiffs/Applicants herein to bear the costs of the application.

44. It Is Ordered Accordingly.

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS ..... 12TH .....DAY OF .....JULY.....2022.

JUSTICE HON. MR L. L. NAIKUNI, (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:-

M/s. Yumnah Hassan, Court Assistant.

Mr. Odhiambo Advocate for the 1st & 2nd Plaintiffs/Applicants.

M/s. Gitari Advocate for the Defendants.

Mr. Otwoma Advocate holding brief for Mr. Ndirangu for the Interested Party.