REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 251 OF 2017

WOODCREST INVESTMENT CO. LTD............................1ST PLAINTIFF

MAWA FAMILY LIMITED...2ND PLAINTIFF

PATRICK WAWERU MAINA..3ND PLAINTIFF

VS

JAMII BORA BANK LIMITED.......................................1ST DEFENDANT

MURANG'A UNIVERSITY COLLEGE.........................2ND DEFENDANT

JUDGMENT

1. The 1st to 3rd Plaintiffs vide a plaint dated 25th July 2016 and filed on the 27th of that month sued the 1st and 2nd Defendants for the following reliefs;

a. A permanent injunction restraining the defendants or its agents from interfering with the ownership, occupation, use, possession of rights of egress and ingress, quiet possession and enjoyment of the Plaintiffs' properties; **LOCII/MARAGI/7960, LOCII/MARAGI/7961 & LOC. II/MARAGI/7964** (suit lands).

b. A mandatory injunction compelling the 2nd Defendant to allocate students to the plaintiff's hostel, collect rents and remit the same to the 1st Defendant until any outstanding amount if any, is cleared.

c. A declaration that the Plaintiffs have performed their obligations under the agreement and an order directing the 1st Defendant to discharge the Plaintiffs' property.

d. Damages for breach of contract.

e. Cost of the suit.

2. The Plaintiffs aver that on 25/6/14 the Defendants put up an invitation in the print and electronic media that the 1st Defendant (the bank) in partnership with the County Government of Muranga and the 2nd Defendant would develop additional hostels at the College. In the said partnership, the 1st Defendant would provide affordable finance up to 80% to the investors and the 2nd Defendant would provide development space and manage the hostels for the investors.

3. Following the invitation, the 1st Plaintiff approached the 1st Defendant for loan facilities to construct the hostels on its property namely Loc11/Maragi/7960. The request was accepted by the 1st Defendant, who duly informed the 1st Plaintiff that the terms of the agreement with the investors were to be married to the public –private partnership agreement with the 2nd Defendant which required all investors to build the hostels as per the pre-approved plans.

4. Based on the terms of agreement, the 2nd and 3rd Plaintiffs agreed to guarantee the loan facility to the 1st Plaintiff with their properties namely Loc11/Maragi/7961 and Loc 11/Maragi/7964.

5. The 1st Defendant then issued an offer letter to the 1st Plaintiff which was duly executed by the parties herein consequently legal charges

were created over the securities in the sum of Kshs. 17,000,000 to wit Loc11/Maragi/7960 and Loc11/Maragi/7961 on the first part belonging to the 2nd Plaintiff and the other part to parcel number Loc11/Maragi/7964 owned by the 3rd Plaintiff. That the 1st Plaintiff later applied for a further facility of Kshs. 6,700,000/- in order to complete the construction secured by a further charge against parcel number Loc11/Maragi/7960.

6. The Plaintiffs further stated that 1st Defendant maintained that the public private partnership agreement between itself and the 2nd Defendant was in force and that the 2nd Defendant (the University) would allocate students to the hostel upon completion of the construction works. Based on that assurance the Plaintiff duly serviced the interest to the loan of Kshs.255,000/- and upon completion of the construction works promptly informed the 1st Defendant of the same with expectation that the same would be relayed to the 2nd Defendant in order to proceed to meet its obligations under the agreement by allocating students to the Plaintiff's hostel. Unfortunately, that did not happen and the hostel has been wasting away to date, the 1st Plaintiff avers.

7. Upon default on the repayment of the loan, the Plaintiff would on 17/06/2016 receive a notice of sale from Keysian auctioneers threatening to sell the charged 2nd Plaintiff's property Loc11/Maragi/7960 on the 26/8/16 unless the 1st Plaintiff pays Kshs. 27,273,598.77 being the outstanding loan facility.

8. It is the contention of the Plaintiffs that they fully fulfilled their obligations under the loan agreement and have not defaulted to warrant the 1st Defendant's exercise of statutory power of sale. That the notifications of sale as issued by the 1st Defendant are illegal and an attempt to infringe on the Plaintiffs' equity of redemption. The Plaintiffs are apprehensive that the said notices are intended to coerce them to succumb to payment of monies that have not fallen due as per the loan agreement. That the 1st Defendant seeks to apply the power of sale to a use it was not designed for. The Plaintiffs seek for orders to compel the 2nd Defendant to allocate students to the hostels to which rent will be collected from them and be remitted to the 1st Defendant to avoid occasioning any further loss to the 1st Plaintiff and the 1st Defendant. The Plaintiffs accused the 1st Defendant of breach and fetter of their equity of redemption.

9. The 1st Defendant denied the Plaintiffs claims and stated that at the request of the 1st Plaintiff, the 1st Defendant extended loan facilities to it vide two letters of offers in 2014 and 2015. Vide the letter of offer dated the 22/9/14 the bank advanced a sum of Kshs 17 Million at the interest rate of 18% repayable over a period of 120 months with a 18 month moratorium, the monthly repayment being capped at Kshs 255,000/- and thereafter Kshs 326,509/-. An additional facility, SME Mortgage loan facility, was advanced to the 1st Plaintiff in the sum of Kshs 6.7 Million on the 27/8/15 at the interest rate of 22.5% reducing balance. The facility was repayable over 120 months with a moratorium of 18 months on principal repayment during which interest of Kshs 444,375/- was payable monthly and thereafter at Kshs 523,009.29.

10. The two facilities were secured with the suit lands. Thereafter the Plaintiffs and the bank executed the deeds of assignment of rent income where the Plaintiffs agreed to assign the rent income in favour of the bank. Through various Company resolutions the Plaintiffs accepted the terms and conditions of the loan facility.

11. The 1st Defendant denied executing any private partnership agreement with the Plaintiffs and contended that the said agreement is non existent and if it exists, then it is a stranger to its contents. That the 1st Plaintiff failed to honour its obligations under the loan agreement consequently the bank issued the 90-day statutory notice and the 45 days' redemption notice vide registered post and thereafter instructed the Keysian auctioneers to issue the 45 days notification of sale following continued non-compliance by the 1st Plaintiff. That all the requisite statutory notices were procedurally issued. It denies the particulars of breach and fetter of the plaintiff's equity of redemption.

12. The 1st Defendant denies knowledge of any public private partnership agreement and avers that the same does not exist. That it is not a party to the said agreement. It averred that the 2nd Defendant is also not party to that deed and the bank should therefore not be blamed for the failure to remit the alleged rental income as per the deed.

13. The 1st Defendant thus contends that it is entitled to proceed with the intended sale of the charged properties to recover the outstanding debts following persistent default by the 1st Plaintiff and the 1st Plaintiff is estopped from challenging the debt based on its previous admission of the same and that they have neither challenged the validity of the charge. And prays for dismissal of the plaintiffs' suit with costs.

14. The 2nd Defendant in its defence dated 24/08/2016 denies having entered into any contract with the plaintiffs to allocate students to the hostels and to collect rent and remit to the 1st Defendant and in absence of any evidence of such an agreement the suit against itself by the plaintiff is hopelessly defective, it ought to be struck off under Order 2 Rule 15 of the Civil procedure Rules for disclosing no reasonable cause of action.

15. That each hostel owner was required to recruit students on their own for their respective hostels without the involvement of the 2nd Defendant. The tenancy agreement for the students and the hostel owner was inclusive of collection of rent are as per the University accommodation policy. That the posting of students to the hostels happens periodically which the Plaintiffs ought to have waited for while servicing their loans instead of dragging the 2nd Defendant to Court. That the 2nd Defendant is not a guarantor to the loans for any of the hostel owners. That the choice of hostel solely depends on the student and the University cannot force students to occupy a particular one to the loss of all other hostel owners, thus the orders sought stand to prejudice other hostel owners

16. At the hearing PW1- Josephine Mukami a Director of the 1st and 2nd Plaintiff testified for the Plaintiffs' case. She adopted her witness statement and the list of documents and largely reiterated the averments made in the plaint. That they borrowed the money to build the hostels with the understanding that the University would allocate students to the hostel and collect the rents to repay the loans. The first facility was in the sum of Kshs 17.0 million and later added Kshs 6.7 million to complete the hostels.

17. She admitted that she did not produce the tripartite agreement relating to the private public partnership between them and the Defendants. She admitted that they are in default of the payments and attributed this to low student numbers after the 2nd Defendant failed to allocate students to their hostel. Following failure to repay the loan as scheduled she informed the Court that statutory notices were issued to them. She was cognizant of their duty to repay the loan and the 1st Defendant's right to sell the properties in the event of default.

18. Further the witness stated that they did not clarify the 2nd Defendant's role/obligation with them in respect to allocation of students to their hostel, collection and remittance of the rents to the bank. It was her testimony that they proceeded with the belief that the 2 nd Defendant would allocate students to their hostels. She admitted that there was no agreement to admit/allocate students between them and the 2 nd Defendant. She informed the Court that neither was the 2nd Defendant a party to the charge between them and the bank. That the 2nd Defendant owed them no indemnity in respect to student allocation, collection of rent nor remittance of the said rent to the bank.

19. In respect to the system of student allocation to the various hostels by the 2nd Defendant, she testified that at the beginning of each semester the University accords all the hostel owners space at the University grounds to advertise themselves and market their hostels to the students. That it is the University that has listed all the hostels alongside the rentals on its website and their hostel appears as No 15 on the list. That all hostel owners are allowed to source for students on the opening day of campus. That at no point did the 2nd Defendant collect rents on its behalf. She admitted that they still owe the 1st Defendant monies pursuant to the loan agreement.

20. DW1 - Morgan Kinyanjui the head of compliance and debt recovery with the 1st Defendant testified for the 1st Defendant who adopted his statement dated 27/06/2019 and produced his list of documents.

21. He was unaware of any public private partnership agreement between the bank and any of the parties in the suit. That there existed no agreement between the bank and the 2nd Defendant to collect rent at all as the rent was remitted by the Plaintiffs pursuant to the deed of assignment between the bank and the Plaintiffs.

22. He confirmed that the loan was advanced for the construction of hostels at the University not for the University and was not aware that the University was to collect rent for the hostel owner. That the plaintiffs are in arrears hence in breach of the terms of the letters of offer and the bank is determined to realize the security as opposed to restructuring the loan. He produced the loan statements showing that the Plaintiffs were in arrears to the tune of Kshs 29.1 Million over a period of 284 days as at 6/9/2016 which amounts continue to accrue monthly in default. He informed the Court that the 1st Plaintiff has admitted the debt and despite the promises to repay it has continued in default. He made reference to the meeting held on the 28/12/15 between the bank and the Directors of the borrower which bore not fruit. As a result of which the bank issued the necessary statutory notices to recover the loan.

23. Further he informed the Court that the University was not among the guarantors of the loan and no contract of indemnity by the University to the bank and nor commitment to service the loan by the University was agreed. Referring to the public private partnership advertisement, the witness stated that the hostels were to be constructed at the 2nd Defendant's University and not for the university. That the University was to provide the space for development however in the current case the hostels were built by the 1st Plaintiff on their land and not at the University's land.

24. Next to take the stand was DW2 – Prof Beatrice Mugendi, the Deputy Vice Chancellor -Finance and Development Division, Murang'a University who testified on behalf of the 2nd Defendant. She adopted her statement dated the 27/6/19. That her role in the University is to advice the Vice Chancellor on issues financial management and resource mobilization among others.

25. She explained that the University has a shortage of student hostels and only about 400 students can be accommodated at the current University hostels. That the rest seek accommodation in other privately owned hostels. That the current student population stands at 5300. To meet the shortfall and to assist with smooth accommodation of students the University has collaborated with the private hostel owners in several ways; The University vets the hostels and if satisfied that it meets their minimum standards, uploads it in its website. The owners are availed space during the admission and registration week in the University grounds so that students engage them in respect to the hostel space available. That the University does not collect rent for the hostel owners neither does it recommend or force any student to take up any of the hostels. It is entirely left to the student to choose which hostel to rent. The rent is however pre-agreed with the University and the hostel owners.

26. DW3 –James Miano, the Chairman of the off-campus accommodation committee testified that that there is an organized system for the private hostel owners to advertise online and pitch for students when the University resumes. They became operational in 2015. Rents are not collected on behalf of the hostel owners and that there are no formal agreements with the owners. That he accredits the hostels by doing a physical inspection of the hostels.

27. The Plaintiffs submit that in oral evidence their witness reiterated the averments made in the plaint in terms of the invitation to the public by the county government of Murang'a to the *one billion shillings hostel project* through print and social media which culminated to a meeting where investors were briefed on the project that was to be financed by the 1st Defendant to be serviced through rents collected from the students. That there was a Memorandum of Understanding (MOU) between the 1st Defendant, the 2nd Defendant and the Murang'a County Government on the financing for the investors, the allocation of students to the hostels and remittance of rent to the 1st Defendant in repayment of the loans. They claim that after completion of the hostel, the University failed to allocate students to their hostels immediately causing them to fall back on their loan with the 1st Defendant. That they relied on the representations from the Defendants to take up the loans thus the Defendants are estopped from denying their responsibilities under the MOU. That the said MOU was aimed at benefiting the Plaintiffs thus the doctrine of privity of contract was surpassed and the Defendants are called upon to honour their promise under the common law doctrine of estoppel by representation. That their reliance on the Defendant's representations has established a prima facie case and the consequent informal agreements entered into by the parties establish special conditions warranting the grant of the mandatory injunction orders.

28. The 1st Defendant submits that they did demonstrate through account statements that the debt is still outstanding. That a dispute over the actual outstanding debt cannot be a ground for injunction. That the Plaintiffs have failed to demonstrate the irreparable loss they stand to suffer if injunction orders are not given whilst the properties in issue were actually offered as security for loan to be sold in the event of default. That injunction orders were issued for 30 days to allow the Plaintiffs to repay the debt which they failed and the said orders have since lapsed and that their failure to pay is in fact contempt to the said orders. That injunction orders if granted will inflict great difficulty to the 1st Defendant as its loan will continue to accrue interest which might cause the outstanding debt to even surpass the security, that the bank stand to suffer more if the injunction is granted thus the balance of convenience tilts in favour of the 1st Defendant. Further that the Plaintiffs are seeking equitable remedies with tainted hands for failing to disclose material information to the Court and failing to honour the Court orders of the 24/01/2018, and has painted the Plaintiffs as not deserving of the injunctive orders.

29. The 2nd Defendant submits that the Plaintiffs failed to tender any evidence in support of prayers (a) and (e) of the plaint as against the 2nd Defendant and prays for the same to be dismissed. That the prayer (b) and (f) are also not tenable as against the 2nd Defendant because the Plaintiff failed to establish any tripartite agreement between itself, the 1st Defendant and the 2nd Defendant, and contends the same did not exist. That the Plaintiffs admitted to have received students from September 2016 to date and collecting rent for themselves without the influence of the 2nd Defendant. That the 2nd Defendant's witnesses clearly set out the procedure followed in allocating students to hostels where hostel owners are allowed to pitch for their hostels after uploading their details on the University website, the rents payable are capped by the hostel owners themselves and the only role the University plays is a supervisory role to ensure hostels are habitable. In the premises the 2nd Defendant avers that orders cannot issue to compel them in the manner prayed neither can damages be payable in absence of evidence of a valid contract between the Plaintiffs and the 2nd Defendant. That the suit in its entirety is between the Plaintiffs and the 1st Defendant and ought to be dismissed against the 2nd Defendant with costs.

30. Having considered the pleadings, the evidence adduced on trial, the written submissions and all the materials placed before me the issues for determination are ; whether there was any privity of contract between the Plaintiffs and the 2nd Defendant; whether the 2nd Defendant can be compelled to allocate students to the Plaintiffs hostel; whether the Plaintiffs are entitled to the orders of permanent injunction; are the Plaintiffs entitled to damages for breach of contract; and if so from whom? Who meets the cost of the suit?

31. It is not in dispute that the 1st Plaintiff sought and was advanced two loan facilities in the sum of Kshs 17 Million and an SME loan in the sum of Kshs 6.7 Million per the letters of offer and thereafter the securities were charged vide a charge executed by the parties and registered on the 16/1/2015. The purpose was expressed as construction of a hostel block for Muranga University students and to take over existing loan facilities from Cooperative Bank of Kenya Limited. A further charge dated the 22/9/15 was registered to secure the additional Kshs 6.7 Million SME loan.

32. In addition to the lending covenants, the parties agreed in the letters of offer as well as the charge and the further charge on the events of default. These are captured in extenso under para 9 of the charge instrument. This shows that the events of default were clearly spelt out by the parties in their covenants.

33. To secure their obligations under the charge aforesaid the Plaintiffs executed with the bank deeds of assignment of rental income where the Plaintiffs undertook to remit the rent to the bank to meet the loan repayments.

34. It is not in dispute that the hostels were constructed to completion and the Plaintiffs defaulted in the repayment of the loans forcing the bank to issue statutory notices in exercise of its statutory power of sale.

35. The Plaintiffs case against the Defendants is that sometime in 2014 the Defendants in conjunction with the County Government of Muranga invited potential investors who owned land within the locality of Muranga University to a stakeholders forum at the University where they were informed of a MOU between the bank , the University and the County Government in respect to a One Billion Shillings hostel project. In the said project, the bank would provide financing to investors to the tune of 90% with a grace period of 18 months for loan repayment. The University was to collect rent from the hostels and remit on behalf of the investors to the bank and more importantly allocate students to the hostels and ensure there was growth in student numbers at the University year on year.

36. That it is Plaintiffs' case that they relied on the banks and university's representations on the terms of the MOU and approached the bank for the loan facilities aforesaid to construct the hostels. That the terms of the indicative term sheet carried identical terms as expressed in the MOU to wit the loan would be for a term of 120 months inclusive of a 18 month moratorium in interests from the principal. The letter of offer dated the 22/9/14 offering the Plaintiffs Kshs 17 million contained the same terms as stated in the MOU. Such terms included the 120 months repayment with a 18 month moratorium interalia. That with the finances in place the construction of the hostels started in earnest and in 2015 upon application, they were advanced 6.7 million SME loan to complete the project.

37. The Plaintiffs decry the failure of the 2nd Defendant to allocate the students as represented leading to their inability to repay the loan after which the Bank issued statutory notices to exercise their power of sale to recover the loan.

38. It is the Plaintiffs' case that they are not in default of their loan obligations to warrant the sale of the securities. They term the banks issuance of notices as unlawful and a threat to exert pressure on them to pay amounts that are not due or owing under the agreement between the parties. That the bank is guilty of breach of contract and fetter of their equity of redemption.

39. In rebuttal the 1st Defendant through its witness demonstrated that the 1st plaintiff is in default of its loan repayments and that it is within its right to exercise its statutory power of sale as per the charge and the loan agreements between the parties. It denied any breach on its part nor any attempts to shackle the borrower's equity of redemption. It denied any tripartite agreement between the Plaintiffs and the Defendants nor that it misrepresented any facts to the Plaintiffs in respect to construction of hostels for the university.

40. The 2nd Defendant on the other hand sought to demonstrate to the Court that it did not enter into any agreement with the Plaintiffs to allocate or secure the allocation of students to their hostels, collect rent and remit to the bank. That it did not grant any indemnity whatsoever to the Plaintiffs against their obligations with their lender. Through its two witnesses the 2nd Defendant was clear that the deficit in hostel accommodation in the University was bridged through private accommodation provided by private hostel owners. That through the University policy in place the University has accredited a number of hostels to provide accommodation to the students entirely on the student choice and desire. The University does not allocate any students to the hostels and infact the hostel owners are given the opportunity to engage and market themselves to the students in the campus during admission and registration. That students pay their rent directly to the hostel owners and not through the University.

41. I have perused and examined the writeup and the so-called investor briefings in respect to the collaboration between the University, the County Government and the 1st Defendant's bank. The contents of the initiative were widely carried and lauded as the innovation of the day in financing of University accommodation by interalia the Daily Nation (date is not legible), University of Sunderland University Times paper, Higher Education facilities management Association of Southern Africa and the 2nd Defendants website. In addition, I have seen the page that detailed the responsibilities of the three parties to wit; the County Government was to provide standard approved building plans and waive fees associated with construction. The University on the other hand was to collect rent from the hostels and remit the same to the collection accounts at the bank, increase the student numbers to 5000 by September 2015 and ensure steady growth of student numbers year on year upto 10,000 in the next 10 years. The bank on the other hand was to provide 90% of the financing to the investors with a grace period of 18 months for a period of 10 years.

42. That notwithstanding the Plaintiffs did not produce before the Court any signed Memorandum of Understanding or agreement between the County Government, the University and the bank.

43. It was reported in the Daily Nation (undated) that the County Government had signed an agreement with the 1st Defendant to construct hostels at Muranga University. It would appear that the initial plan was to built the hostels on land provided by the University. The agreement referred to above was not tabled before the Court. It is in doubt if it exists. The 2nd Defendant was not mentioned in the alleged agreement either. To the contrary, in the case at hand, the Plaintiffs constructed the hostels on their land through a loan they procured voluntarily from their lenders secured by their lands through a charge document duly signed between the 1st Defendant and the Plaintiffs.

44. The Plaintiffs have argued that the terms contained in the investor briefing materials are similar to the terms of the letters of offer and the charge which they relied as representations to their detriment. Further that the purpose of the loan was expressed as for the construction hostels for Muranga University. At the trial the Plaintiffs witness confirmed to the Court that they did not sign any agreement with the University for the provision of the student hostels. She categorically stated that they proceeded to construct the hostels but did not countercheck or ensure that indeed there was a back- end contract for the uptake of the hostel space by the University. The argument of the Plaintiffs as averred in their pleadings that they were misled or misrepresented by the bank and the 2nd Defendant is unfounded and not supported by the evidence of the Plaintiffs.

45. Moreover, at the end of the marketing information of the booklet there is, in small print, a statement that says terms and conditions apply. My understanding of this statement is that the marketing information supplied to the investors were subject to General and special arrangements, provisions, requirements, rules, specifications, and standards that form an integral part of an agreement or contract between the parties. In this case there appears to have been no agreement between the Parties. At the very least, the Plaintiffs did not provide any. The claim of misrepresentation is therefore unfounded.

46. Section 107 of the Evidence Act provides that whoever desires a Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

47. In the absence of any agreement between the three parties, it is the conclusion of the Court that the only contracts in place are those between the Plaintiffs and the 1st Defendant for which the 2nd Defendant was not a party.

48. In conclusion therefore the Court holds that there was no contract between the Plaintiffs and the 2nd Defendant.

49. That being the case, the Court will now turn to the issue as to whether the Plaintiffs are entitled to a mandatory injunction compelling the 2nd Defendant to allocate students to the hostels, collect rent and remit the same to the 1st Defendant until the outstanding loan is cleared.

50. A mandatory injunction like all other injunctions are equitable remedies. A mandatory injunction should be granted only in the clearest of cases where the guilty party has undertaken a blatantly illegal course of action which needs a remedy by the court. The legal jurisprudence of rights in law presupposes the existence of an obligation so that if obligated then the right in that respect is created. It is borne from the evidence of PW1 that they did not enter into any agreement with the 2nd Defendant to supply students to their hostel. The prayer for a mandatory injunction therefore remains unfounded.

51. Having determined that there was no contract between the Plaintiffs and the 2nd Defendant, the Court declines to issue these orders.

52. I shall now examine the relationship between the borrower, the guarantors and the lender vis a vis the Plaintiffs' prayer for a permanent injunction restraining the 1st Defendant from interfering with the ownership occupation use and quiet possession of the suit lands.

53. The principles of granting injunctions are now settled. In the *locus classicus* case of the conditions of granting interlocutory injunction as set out in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that 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, and thirdly, if the Court is in doubt, it will decide

an application on a balance of convenience.

54. The Court of Appeal in **Mrao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 eK.L.R**)defined a prima facie case in the following terms;

> "A prima facie case in a civil application include 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".

55. As to whether the Plaintiffs have shown a prima facie case with a probability of success, it is not in dispute that the Plaintiffs and the 1st Defendant entered into certain loan facility agreements as alluded to in the preceding paras in this judgment. The Plaintiffs have argued that they do not owe any monies to the 1st Defendant and have urged this Court to injunct the 1st Defendant from interfering with its suit lands. It is on record that the parties executed the letters of offer and the charge documents detailing their obligations and duties. In the charge document at para 9 what constitutes default is clearly spelt out. One of the clauses at 9.1 states as follows;

> "if the chargor and or borrower fails to pay when demanded any sum due and owing to the bank under this charge or fails to comply with any term and condition of any facility from the bank or fails to perform or discharge any term agreement obligation or liability of the chargor and or borrower to the bank under this charge or in any other security created by the chargor and or the borrower in favour of the bank contained or implied or under any loan agreement facility or letter or other agreement;"

56. The 1st Defendant detailed the events of default in its defence as well as in its evidence at the trial. That the default was in the sum of Kshs 29.1 million for 284 days as at 6/9/2016. In addition, the 1st Defendant enumerated incidents of admission of default by the Plaintiffs in a meeting held between the parties on the 28/12/15 when the Plaintiffs promised to regularize their accounts. The Plaintiffs' witness admitted in evidence that they owe the bank monies and are willing to repay.

57. I have examined the bank statements presented by the 1st Defendant's witness which clearly demonstrate that the Plaintiffs are in default of their repayment of the loan with the bank.

58. The procedure for exercising the statutory power of sale is to be found under Section 90(1) – (3) of the Land Act states as follows; -

> "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.
>
> (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
>
> (a) the nature and extent of the default by the chargor;
>
> (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
>
> (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
>
> (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
>
> (e) the right of the chargor in respect of certain remedies to apply to the Court for relief against those remedies.
>
> (3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may —
>
> (a) sue the chargor for any money due and owing under the charge;
>
> (b) appoint a receiver of the income of the charged land;
>
> (c) lease the charged land, or if the charge is of a lease, sublease the land;
>
> (d) enter into possession of the charged land; or
>
> (e) sell the charged land;

58. Section 96 of the said Act provides as follows;

Chargee's power of sale

> (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.
>
> (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

59. Halsbury's Laws of England, Vol 32(4th edition) paragraph 725 states as follows;

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

59. In the case of **HCCC No. 3125 of 1995 John P.O Mutere & Another vs Kenya Commercial Bank Ltd** it was held that;

> "Once a power of sale has arisen a mortgagee has the right to exercise it. The Court has no power to prevent the exercise of that power if it is being properly exercised. It is a power parliament has granted a mortgagee and Courts cannot and ought not to interfere if it is being exercised."

60. In this case it is clear that upon default, the Plaintiffs approached the 1st Defendant requesting to be allowed to clear the arrears as at 10/1/2016 which never materialized prompting the bank to issue statutory notices in accordance with the provisions of Section 90 of the Land Act for recovery of the monies. The Plaintiffs have not challenged or rebutted these notices save to state that the monies are not due as per the loan agreement. This position is not true given the admission of indebtedness in evidence as well as the outstanding loan arears as per the loan statements adduced in evidence.

61. In respect to whether or not the bank is in breach of the loan agreement, there was no evidence tendered by the Plaintiffs in support of this averment. Indeed, it is the finding of the Court that the 1st plaintiff is in breach of its loan agreements with the 1st Defendant. The argument of the Plaintiffs that the 1st Defendant has fettered its equity of redemption is not supported. As alluded in the previous paras in this judgment, the 1st Defendant tendered in evidence the statutory notices as follows; on the 1/2/16 the bank issued a 90-day statutory notice notifying the Plaintiffs of the outstanding amounts giving them 3 months to pay the amount in full together with interest. The amount outstanding as per the said notice stood at Kshs 25.1 Million. On the 5/5/16 the bank issued a 40 days redemption notice to the Plaintiffs in accordance with section 96(2) of the Land Act. It would appear that the two notices did not elicit any response from the Plaintiffs and on expiry, the Auctioneer namely Keysian Auctioneers issued the auction notice giving the Plaintiffs 45 days to pay in default the suit lands were to be sold by public auction on the 26/8/2016.

62. The Plaintiffs' argument that the loan is not due is not supported by any cogent evidence. In the course of the hearing the Court issued a temporary injunction stopping the bank from auctioning the Plaintiffs suit lands however the Plaintiffs failed to pay the outstanding loans. The interim injunction expired.

63. It is the bank's position that they are entitled to exercise their statutory power of sale having given the Plaintiffs the opportunity to make good their accounts and exercise their equity of redemption to redeem their suit lands in vain.

64. From the forgoing it is clear to the Court that the Plaintiffs have not established a prima facie case. The prayer fails on this limb.

65. Moving to the second limb which is whether the Plaintiffs will suffer irreparable harm in the event that the injunction is declined, I am guided by the case of **Kitur Vs Standard Chartered Bank & 2 others (2002) EKLR** where the Court stated as follows;

> "it must be noted that when a chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a charge, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale with the prior concurrence and consent of the chargor. How then can he having defaulted to repay loan arrears prompting a charge to exercise its statutory power of sale claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits."

66. The import of the above decision is that once a party offers land or such assets as security, it is deemed that he has accepted the consequence that the said assets may be sold in an event of default. It is trite that once land is offered as security for the performance of a loan it becomes commercialized that is to say a good that can be sold in the market at the right price at the behest of the lender.

67. The Court finds that the Plaintiffs will not suffer any irreparable loss in the event the injunction is declined.

68. As the Court is not in doubt, the third limb is declined. The reason being that I do not see any hardship that the Plaintiffs are bound to suffer. The debt is due and owing and they remain in default contrary to their obligations in the loan agreement and the charge.

69. For avoidance of doubt the bank retains its right to exercise its statutory power of sale as provided by law.

70. Finally, in respect to whether or not there was breach and by whom, I have already held that there is no contract between the Plaintiffs and the 2nd Defendant and therefore there cannot be any breach. Further that the contract between the Plaintiffs and the 1st Defendant has been breached by the Plaintiffs on account of default in repayment of the loan facility. The Plaintiffs therefore are not entitled to any damages for breach.

71. In the end the plaintiffs have failed to prove their case and the suit is hereby dismissed.

72. The costs of the suit shall be payable by the Plaintiffs in favour of the Defendants.

73. It is so ordered.

DATED, DELIVERED AND SIGNED VIA EMAIL THIS 7TH DAY OF MAY 2020.

J G KEMEI

JUDGE

ORDERS

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this Judgment has been delivered to the parties by electronic mail/video conferencing. In this case the parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

J.G. KEMEI

JUDGE