



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 332 OF 2017

ROBERT MUTHAMA KIAMBA.....1ST PLAINTIFF

MERCY NUNDU MUMO.....2ND PLAINTIFF

VERSUS

FRANCIS MUTUKU.....1ST DEFENDANT

ANDREW KIMILU.....2ND DEFENDANT

MARY MWOLOLO.....3RD DEFENDANT

TIMOTHY SIREL.....4TH DEFENDANT

SHEDRACK MWAU.....5TH DEFENDANT

BENSLEY MATHUKU.....6TH DEFENDANT

CAROLINE MUNANE.....7TH DEFENDANT

BERNARD MUSAU.....8TH DEFENDANT

JANET KITUNGA.....9TH DEFENDANT

GIDEON MWANGO.....10TH DEFENDANT

MAKUENI COUNTY ASSEMBLY.....11TH DEFENDANT

THE CLERK OF THE COUNTY ASSEMBLY OF MAKUENI...12TH DEFENDANT

RULING

1) Before me are two applications, the first one being the notice of motion dated 5th September, 2017 and filed in court on the 6th September, 2017 by the first and second applicants for orders that:-

1. The 1st – 10th respondents be and are hereby restrained by themselves, their officers, employees, agents, servants and/or any other person whomsoever from in any way disposing off, alienating, selling, or in any way interfering with the Applicant's ownership and possession of the suit property known as Land Reference Number Makueni/Kako/1203, 1204, 1200,1197, 1201, 1199, 1194, 1202, 1205, 1206, 1195 and 1198 situate in the Kako area of Wote Township in Makueni County pending the hearing and determination of this application inter partes.

2. The 11th respondent be and is hereby restrained by itself, its officers, employees, agents, servants and/or any other person whomsoever from in any way disposing off, auctioning, selling, commencing the sale of or otherwise initiating the realization of the suit property known as Land Reference Number Makueni/Kako/1203, 1204, 1200, 1197, 1201, 1199, 1194, 1202, 1205, 1206, 1195 and 1198 situate in the Kako area of Wote Township in Makueni County pending the hearing and determination of this application inter partes.

3. The 1st -10th respondents be and are hereby restrained by themselves, their officers, employees, agents, servants and /or any other person whomsoever from in any way disposing off, alienating, selling, or in any way interfering with the applicant's ownership and possession of the suit property known as Land Reference Number Makueni/Kako/1203, 1204, 1200, 1197, 1201, 1199, 1194, 1202, 1205, 1206, 1195 and 1198 situate in the Kako area of Wote Township in Makueni County pending the hearing and determination of this suit.

4. The 11th respondent be and is hereby restrained by itself, its officers employees, agents, servants and/or any other person whomsoever from in any way disposing off, auctioning, selling, commencing the sale of or otherwise initiating the realization of the suit property known as Land Reference Number Makueni/Kako/1203, 1204, 1200, 1197, 1201, 1199, 1194, 1202, 1205, 1206, 1195 and 1198 situate in the Kako area of Wote Township in Makueni County pending the hearing and determination of this suit.

5. The applicants be and are hereby allowed to rent or the houses erected on Makueni/Kako/1203, 1204, 1200, 1199,1194, 1202, 1205, 1206, 1195 and 1198 , the subject of the agreements for Saleso as to generate rental income without interference from the respondents.

6. A mandatory injunction be issued compelling the 11th respondent to discharge the suit properties.

2) The second application is dated 20th September, 2017 and was filed in court by the first to tenth defendant for orders;

a) Spent

b) An injunction be issued restraining the 11th defendant through the 12th defendant by themselves, agent, servants, employees or otherwise howsoever from demanding, restraining and/or withholding their emoluments and/or benefits, pending the hearing and determination of this application.

c) An injunction be issued restraining the 11th defendant through the 12th defendant by themselves, agents, servants, employees or otherwise howsoever form demanding, restraining and/or withholding their emolument and/or benefits, pending the hearing and determination of this suit.

d) The 11th defendant through the 12th defendant to process and 'clear' the 1st to 10th defendants to facilitate the processing of the 1st to 10th defendant/applicants' terminal benefits, and/or emoluments.

e) A temporary injunction be issued restraining the 11th defendants by themselves, agents, servants, employees or otherwise howsoever from entering, occupying, destroying, erecting structures, selling, transferring , alienating, or in any way dealing with or interfering with their properties erected on all that property identified as MAKUENI/KAKO/928, within Makueni County, pending the hearing of this application.

f) An injunction be issued restraining the 11th defendants by themselves, agents, servants, employees or otherwise howsoever from entering, occupying , destroying, erecting structures, selling, transferring, alienating or in any way dealing with or interfering with their properties erected on all that property identified as MAKUENI/KAKO/928, within Makueni County, pending the hearing of this suit.

g) The costs of this application be provided for.

3) Both applications are predicated on the grounds on their face.

4) Further, the application by the first and the second applicants is supported by the supporting affidavit of Robert Muthama Kiamba sworn on the 5th September, 2017.

5) The application is opposed by the first to tenth respondents vide their replying affidavit sworn on the 20th September, 2017 by the first defendant/respondent and filed in court on the 22nd September, 2017.

6) On the 7th November, 2017 the eleventh and twelve defendants/respondents filed their replying affidavit to applicant's notice of motion application. The replying affidavit by the two respondents was sworn on the 8th November, 2017 by Edward Libendi, the clerk of the County Assembly of Makueni.

7) On the 7th November, 2017, the court directed that the two applications be disposed off by way of written submissions.

8) The applicants, the first to tenth respondents and the eleventh to twelve respondents filed their submissions on 22nd November, 2017, 27th November, 2017 and 13th December, 2017 respectively.

9) With regard to the first application, the applicants' counsel framed two issues for determination namely,

1) Whether the applicants have satisfied the criteria for grant of an injunction.

2) Whether the applicants have established a clear case to warrant the granting of the mandatory orders sought?

10) On the first issue, the applicants' counsel relies on the case of *Dorris Kanini Ndunda Vs Family Bank Limited (2013) eKLR* where the High Court relied on the holding of the Court of Appeal in *Mbuthia Vs Jimba Credit Corporation & Another [1988] KLR*.

11) In the latter case, the Court of Appeal stated as follows regarding the way to deal with application for interlocutory injunction,

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions...”

12) The counsel correctly submitted that the principles for consideration in an application for grant of interim orders were well settled in the case of *Giella Vs Cassman Brown & Co. Ltd [1973] EA 358*. Those principles are :-

- a) Prima facie case with probability of success,
- b) The applicant must show irreparable injury which would not adequately be compensated in damages,
- c) If the court is in doubt, it will decide on a balance of convenience.

13) In summary, the applicants' counsel submitted that the applicants have fulfilled the first two principles. Regarding the principle of balance of convenience, the counsel added that there was no doubt as to the first two principles and as such the court need not delve into it. The counsel urged the court to find the balance of convenience tilts in favour of the applicants should it deem it necessary to delve into the third principle.

14) On the issue of whether or not the applicants have established a clear case to warrant the grant of the mandatory orders sought, the counsel submitted that a charge was registered on each of the properties in favour of the eleventh respondent to secure monies advanced to the first to the tenth respondents separately for the purchase of some properties. The counsel went on to submit that due to the breach of agreement by the first to tenth respondents who have failed to pay the balance of the purchase price, the applicants wrote to the eleventh respondent requiring it to forthwith discharge the property which it has not done. The counsel added that this causes a huge risk to the applicants since the eleventh respondent may at any time realize the said properties yet the balance of purchase price remains to be paid to the applicants.

15) The counsel cited the principles for granting mandatory injunction as propounded in Halsbury's Law of England, Volume 24, paragraph 948 which reads;

“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application”

16) The counsel further cited the case of *Africa Safari Club Ltd Vs Commissioner of Police and 6 others [2013] eKLR*, where the Court relied on the finding of the Court of Appeal in the case of *East African Fine Spinners Ltd(In Receivership) & 3 others Vs Bedi Investments Ltd in Civil Appl. Nai 72 of 1994 (UR)* where Gicheru, JA (as he then was), cited Megarry, J(as he then was) in *Shepherd Homes Ltd Vs Sandahm [1971] 1ch. 34*, stating in part:

“ , it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course , the defendant has rushed on with his work in order to defeat the plaintiff’s attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff’s promptitude is a badge of the seriousness of his complaint”

17) The counsel added that from the authorities that he had cited, a mandatory injunction can only be issued in clear cases and submitted that it was malicious on the part of the respondents to charge the suit properties and yet fail to disburse the balance of the purchase price.

18) The counsel ended by submitting that the respondents have not given any sufficient reasons why the court should not grant the orders sought.

19) The submissions by the first to the tenth respondents' counsel were that they essentially do not deny the allegations leveled against them by the applicants. They pointed out as laid out in their notice against co-defendants dated 20th September, 2017 the whole transaction was frustrated by the acts of the eleventh respondent which was the financier of the transaction and which unilaterally declined to settle the 20% balance of the purchase price despite signing agreements to that effect. The counsel cited the case of *Hassan Zubeidi Vs Patrick Mwangangi Kibaya & Another [2014] eKLR* where Hon. F Gikonyo, J quoted with approval the case of *Alghussein Establishment Vs Eton*

College (1991),1 All ER page 267 with regard to the conduct of the respondents as follows:-

“The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach....”

20) The counsel went on to submit that in the aforementioned case, Justice F. Gikonyo stated that;

“ The legal position is that a party should never be allowed to take advantage of his wrongs/omissions at the expense of the other party”

21) The counsel further cited the case Hanigton Matingi Janji Vs Katana Pekeshe and 7 others [2013] eKLR where A.O Angote ,J found as follows:-

“The above provision recognized the equitable doctrine of part performance which permitted the party who had performed the act of part performance, to bring an action under an unwritten agreement”

“This provision however restricted the equitable doctrine of part performance to two possible acts, to wit. Taking or possession of the property or any part thereof; or being already in possession continues in possession in part performance of the contract and if a party has done some other act in furtherance of the contract”

22) The counsel submitted that it would be similarly and equally wrong , illegal and irregular for the eleventh and the twelfth respondents to purport to change the roles after the first to tenth respondents have already relied on that promise to their disadvantage and disenfranchisement. The counsel added that if the mortgage loan repayment period should be retained at 20 years with an interest rate of 3 % and that monthly installments payable should be retained as they were prior to the issuance of the demand letters.

23) The counsel concluded by submitting that the eleventh and the twelfth respondents should not be allowed to profit and benefit from their own breach taking into consideration that the first to tenth respondents have already partly performed their part of the contract as provided under section 3(3) of the Law of Contract Act. He urged the court to grant the prayers sought on the face of the motion application dated 20th September, 2017 and order the eleventh and twelfth respondents to clear the first to tenth respondents in order to enable them access their terminal benefits as well as to order the eleventh and twelfth respondents to abide by the terms of the mortgage agreements entered into with the first to tenth respondents.

24) The submissions by the counsel for the eleventh and twelfth respondents were that based on the prayers sought, the three principles set out in the Giella case must be satisfied.

25) Regarding the first principle, the counsel submitted that there is no contractual relation between the eleventh respondent and the plaintiffs and therefore the balance of convenience does not arise. The counsel went on to submit that since the properties have thus far been transferred to the first to tenth respondents who subsequently charged the same to the eleventh respondent, the applicants’ allegations are inadmissible to vary the contract and create new obligations. The counsel cited the case of Ethics and Ant-Corruption Commission and 3 others Vs African Safari Club Limited and 2 others [2013] eKLR where Lady Justice Kasango while dealing with similar issue stated thus;

[33.] On a prima facie basis I find that Zum Zum has not established a prima facie case with a probability of success. The sequence of events show that the alleged agreement dated 2nd June, 2010 cannot override the subsequent transaction that is the transfer in favour of Altam and the charge in favour of KCB. The law is certainly not in favour of Zum Zum. Section 107 of the Evidence Act Cap 80 provides as follows-

“ Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that facts exist”

26) The counsel pointed out that since the properties are currently registered in the names of the first to tenth respondents, the applicants have no locus standi in complaining about the propriety of recovery. The counsel cited section 40 of the Land Registration Act 2012 which provides thus;

A transfer shall not be expressed to take effect on the happening of any event or on the fulfillment of any condition or at any future time.

27) He also cited sections 44 of the Land Act, 2012 and 24 of the Land Registration Act. The counsel went on to submit that the eleventh respondent rights as the registered chargee over the property ranks superior over the plaintiffs’ claim and cited the case of Continental Developers Ltd Vs Sauti Housing Co-operative Society [1988] eKLR where E. Githinji J, (as he then was) while dealing with a similar issue where a vendor sought to execute a decree for the balance of the purchase while a bank claimed its rights of statutory power of sale ruled thus;

“In the circumstances of this case it is just that the attached charged property be sold by public auction subject to the charge. Consequently, I allow the application with costs to the extent that and I order that;

1. the attached property be sold by public auction subject to the charge by Co-operative Bank by Watts Enterprises subject to a reserve price of shs. 140,000,000

2. the whole of the proceeds of sale be paid into court and distributed as follows:

a) First, to the auctioneer for the expenses of the sale and auctioneers charges which shall be assessed by court if not agreed

b) Second, to co-operative Bank for the amount secured by the charge – that is to say

i. The principal sum of shs. 34.6 million plus interest as agreed in the charge and any other bank charges related to the charge.

ii. The interest on the amount secured by the charge to be calculated on the principal a sum of shs. 34.6 million and not on the consolidated charge,

iii. The amount secured by the charge to be determined by the court if not agreed.

c) Thirdly – to the plaintiff for the decretal sum plus interest and costs to date.

d) Fourthly- Balance, if any to the defendant (J.D) [See page 21 of the 11 and 12 defendants bundle of authorities].”

28) The counsel surmised that it cannot be said that the applicants have established a prima facie case with probability of success.

29) On the issue of whether irreparable harm would be occasioned on the applicants if the orders sought are not granted, the counsel submitted that it would be important to address what is meant by irreparable harm under the parameters of *Giella Vs Cassman*. He pointed out judicial consideration was given to this issue by the Court of Appeal in *Nguruman Ltd Vs Ian Bonde Nielsen & 2 others [2014] eKLR* where Ouko, Kiiage and M’Inoti JJA stated thus;

“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 facie, 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 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.”

30) The counsel was of the view that there is no risk of irreparable harm being suffered by the applicants if the application is not allowed.

31) On whether the balance of convenience tilts in favour of granting the prayers sought, the counsel submitted that more reasons exists to dismiss the application in that the balance of convenience tilts in favour of doing so since the eleventh respondent disbursed 80% of the facilities to the first to tenth respondents which they have utilized and have fallen in arrears as per annexure”EL-6” of the eleventh and twelfth respondents’ replying affidavit. The counsel cited the case of *Peter Kamau Kiriba Vs City Council of Nairobi & 3 others [2015] eKLR* where the court while dismissing an application for injunction noted that where a valid chargee exists and the chargor is in arrears, it would be prejudicial to a chargee to grant a temporary injunction hence a balance of convenience tilts in favour of a chargor in a such a case.

32) Regarding the issue of whether a mandatory injunction should be granted compelling the eleventh respondent to discharge the suit properties, the counsel cited the case of *Robai Kadil Agifa and Another Vs Kenya Power & Lighting Company Ltd [2015] eKLR* where the Court of Appeal stated thus:-

“ the considerations for granting interlocutory mandatory injunctions were well stated in the case of *Kenya breweries Ltd & another Vs Washington O. Okeyo [2002] eKlr* where the Court of Appeal said:-

The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edition paragraph 948 which read:-

“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstance, it will not normally be granted. However, if the case is clear and once which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff... a mandatory injunction will be granted on an interlocutory application”

33) The counsel submitted that the Court of Appeal quoted with approval an English decision in the case of *Locabail International Finance Ltd Vs Agroexport and others (1986) 1 All ER 901* where it stated;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was

directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”

34) The counsel also cited the case of *Nation Media Group & 2 others Vs John Harun Mwau [2014] eKLR* where the Court of Appeal said

“ it is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances.... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.

35) The counsel submitted that the applicants’ prayer for a mandatory injunction is not merited since it would leave the eleventh respondent with no security for the facilities advanced to the first to tenth respondents who are in arrears.

36) As for the first to tenth respondents application, the counsel for the eleventh and twelfth respondents submitted that the issues that fall for determination are:-

(a) whether the 11 respondent should be restrained from withholding the 1st to 10th respondents emoluments and for it to process the same

(b) whether a temporary injunction should be granted stopping the 11th respondent from recovering the suit properties

37) With regard to the first issue, the counsel cited section 13 of the Pensions Act which provides as follows:-

A pension, gratuity or other allowance granted under this Act shall not be assignable or transferable except for the purposes of satisfying

a) A debt due to the Government; or

b)

38) He went on to submit that the eleventh respondent is entitled to withhold emoluments of the first to tenth respondents as long as the mortgage facilities remain in arrears.

39) Regarding the issue of whether a temporary injunction should be granted to stop the eleventh respondent from recovering suit properties, the counsel cited *Giella Vs Cassman Brown* and submitted that the first to tenth respondents cannot be said to have established a prima facie case with probability of success when they are still indebted to the eleventh respondent. The counsel further cited the case of *Benjamin Kaburi Kamuruci Vs Stanbic Bank [2014] eKLR* where Gikonyo, J stated thus;

*“I have noted that the plaintiff is in default of payment and he has admitted this. Even if he is disputing the varied interest rate, he has not paid in court the sum he admits. He confessed that he has paid only about or slightly over Kshs. 4,000,000. Even if we go by the principle sum of Kshs. 7,400,000, without any interest, a balance of Kshs. 3,400,000 would still be outstanding. Although I sympathize with what happened to the plaintiff when he lost his job, but he is clearly in default and may not excite the tenderness of equity. The Court of Appeal in *Francis J.K Ichatha Vs. Housing Finance Company of Kenya, Civil Application No. 108 of 2015* held: “A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity”.*

40) In addition the counsel for the 11th and the 12th respondents cited the case of *Cieni Plains Company Ltd & 2 others Vs Ecobank Kenya Ltd[2017] eKLR* where Onguto, J while dismissing an application for injunctive relief for reasons that there were no effort at repayment by the charge stated thus;

*“I also hasten to add that the Court of Appeal in *Mrao* also did make it clear that when it comes to injunctions sought to restrain mortgagees and chargees from realizing their security additional care and consideration of the circumstances of the transaction is very relevant with the focus being on whether the payment of the debt is being made and further that a dispute as to the amounts due was not good enough reason to halt the realization process even if the dispute had been occasioned by alleged illegal and contested interest..”*

41) The counsel was of the view that the 1st and 10th respondents’ application has no merit and it should be dismissed with costs.

42) I have read the two applications as well as the their supporting affidavits and the replying affidavits. I have also read the submissions that were filed by the counsel on record. The grant of the orders sought in the two applications hinge upon the principles set out in the celebrated case of *Giella Vs Cassman Brown and Company Ltd[1973] EA*. Those principles are:

a) A prima facie case with probability of success.

b) 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.

c) If the court is in doubt it will decide on a balance of convenience.

43) With regard to the application by the plaintiffs/applicants, the agreement for sale of the suit premises was between the plaintiffs/applicants and the first to tenth defendants/respondents.

44) There is no mention of the eleventh (11th) defendant respondent anywhere in the entire agreement. Further, there was no agreement between the applicants and the eleventh respondent for the benefit of the first to tenth respondents. The applicants' counsel's submissions were that there was understanding that each of the first to the tenth respondents would obtain financing through mortgage facility from the eleventh respondent. However, there was no evidence to show that those provisions were complied with. The agreements have clear and express provisions of how the eleventh respondent would have been incorporated into the agreement yet for reasons known to the applicants, they decided to deal with the matter casually. It is clear to me that there arises the issue of privity of contract between the applicants and the eleventh respondents. Prima facie there is no privity of contract between the aforementioned parties and as such, it is clear that the applicants have not satisfied the first principle in *Giella Vs Cassman Brown's* case.

45) Having so held with regard to the first principle, I need not delve into the other two principles. I am guided on this issue by the case of ***Kenya Commercial Finance Co. Ltd Afrala Education Society(2001) 1 EA 86*** where the Court of Appeal held as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first is satisfied ...”

I however wish to point out that it is not in dispute that the applicants have already received 80% of the purchase price. Further, in their submissions, the applicants have stated that they have been receiving rental income from the suit premises during the pendency of this suit. Any loss that they are likely to suffer is quantifiable and can be compensated by an award of damages.

46) With regard to the issue of whether or not the applicants have established a clear case to warrant the grant of the mandatory order sought in prayer 8, I hold that they have not shown any to warrant the grant of the order. In other words they have not established an unusually strong and clear case.

47) As for the application by the first to tenth respondents, there is no doubt that they are indebted to the eleventh respondent. It is not in dispute that the suit properties were charged in favour of the eleventh respondent. Whereas that might constitute sufficient security, I am in agreement with Gikonyo J who in the case ***Benjamin Kamuruci Kaburi Vs Stanbic Bank [2014] eKLR*** stated thus;

“ I have noted that the plaintiff is in default of payment and he has admitted this. Even if he is disputing the varied interest rate, he has not paid in court the sums he admits. He confessed that he only paid about on slightly over Kshs. 4,000,000. Even if we go by the principal sum of Kshs, 7,400,000 without any interest, a balance of Kshs. 3,400,000 would still be outstanding. Although I sympathise with what happened to the plaintiff when he lost his job, but he is clearly in default and may not excite tenderness of equity”

48) It is clear to me that in the first application, the first to the tenth respondents have not disputed the fact that they are in default of the facilities advanced to them by the eleventh respondent. As such, I am in agreement with the counsel for the eleventh respondent that the first to the tenth respondents cannot be said to have established a prima facie case with probability of success.

49) From the foregoing, I hold that the application by the applicants and the one by the first to the tenth respondents/applicants against the eleventh respondents have no merits. Both must fail. In the circumstances, the plaintiffs/applicants' application is hereby dismissed with costs to the respondents. Equally, the application by the first to the tenth respondents is dismissed with costs to eleventh respondent.

Signed, dated and delivered at Makuani this 6th day of July, 2018.

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

1) Mr. Muumbi for the 1st & 2nd plaintiff/applicant

2) Mr. Hassan holding brief for Mr. Omari for the 1st to 10th defendants and Mr. Mulondo for the 11th and 12th Defendants/Respondents

3) Mr. Kwemboi Court Assistant

MBOGO C.G , JUDGE

6/7/2018