Kanyua & another v I&M Bank Limited; Antique Auctioneers (Interested Party) (Civil Suit E008 of 2024) [2025] KEHC 4802 (KLR) (23 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E008 OF 2024

DKN MAGARE, J

APRIL 23, 2025

BETWEEN

HENRY MAINA KANYUA .... 1ST APPLICANT

FAULU FLOUR MILLS LIMITED .... 2ND APPLICANT

AND

I&M BANK LIMITED .... RESPONDENT

AND

ANTIQUE AUCTIONEERS .... INTERESTED PARTY

RULING

1. The matter tests the age-old tradition of the sanctity of agreements entered into between parties. The orders sought in the main suit are germane to the determination of the application herein. The Applicant sought the following in the plaint:

    a. The statutory notice issued in the suit properties LR No. Gatarakwa /Gatarakwa block 2-2676, while Gatarakwa /Gatarakwa block 2-2678 dated 4.3.2022 be set aside(sic)

    b. A permanent injunction to restrain the defendants either by themselves, their agents, employees and/or servants from offering for sale, selling, transferring or howsoever disposing of a parcel of land known as LR No. Gatarakwa /Gatarakwa block 2-2676, while Gatarakwa / Gatarakwa block 2-2678 is within Nyeri county and a further order directing the amount due to the first defendant be paid by equal monthly instalments as stated (sic) in the loan agreement until full payment.

2. Though mentioned as land reference, the said parcels are parcels registered under Cap 300, and therefore are land parcels. The Applicant filed the plaint together with a truncated application dated

23.08.2024. It is not indicated whether it is a notice of motion or chamber summons. However, it is in the form and style of notices of motion. The Applicant sought the following orders:

a. Spent

b. spent

c. ..... to issue a temporary order of injunction restraining the defendant, acting on its own, or through agents (read interested party), or other representatives, from selling and/or disposing of the suit properties LR No. Gatarakwa /Gatarakwa block 2-2676 Gatarakwa and /or Gatarakwa block 2-2678, as it proposed through auction, pending hearing and determination of this suit and the suit finally.

d. In the alternative, ... there be an order maintaining status quo in respect of the suit properties, LR No. Gatarakwa /Gatarakwa block 2-2676 Gatarakwa and /or Gatarakwa block 2-2678 pending hearing of this suit.

e. NA

3. The grounds were that the Applicant approached the magistrate's court in MCC E065 of 2022 but withdrew the suit as the same exceeded the pecuniary jurisdiction of that court. The defendant advertised the property for sale on the basis of previously issued statutory notices.

4. The Applicant stated that they had advanced the amounts but suffered the effects of COVID-19, occasioning a decline in operations. They have sought advice from the interest advisory centre on the applicable interest. The applicants were thus apprehensive that the suit property would be disposed of. They prayed for the court to balance between property rights and interest of parties.

5. The application was supported by the annexed affidavit of the first applicant, who stated that he was a director of the second applicant. He stated that he was the registered owner of land parcel numbers Gatarakwa/Gatarakwa Block 2-2676 Gatarakwa and/or Gatarakwa Block 2-2678, as per the attached search. The search shows that the property measures 1.10 hectares and 3.55 hectares, respectively. They also attached a statutory demand dated 4.3.2022. The notices explained the effect of Section 90(3) and 96(1) of the *Land Act*. It also had a warning in terms of section 56(2) for rectification of default. The arrears were indicated to be a sum of Ksh. 37,299,590.58.

6. The notice equally notified that the loan was secured through a charge dated 3.11.2020.

7. A notice under Section 96(3)(b) of the *Land Act* was issued on 21.6.2022. It indicated that as at 20.6.2022, a sum of Ksh. 43,533,422.82 was due and owing. The applicant enclosed demand notices dated 10.11.2021 and 22.12.2021, indicating default. The notices were duly received by the Applicants, as addressees.

8. They were requested to restructure and be patient as they set up their new factory in the Eastern Bypass. The request for restructuring was declined in May 2022. A request for interest recalculation was made on 20.8.2024, three days before filing of the suit.

9. The respondent filed grounds of opposition dated 7.10.2024 and a replying affidavit dated 11.11.2024. They stated that the 2nd Applicant sought credit facilities from the Respondent for Ksh. 49,978,133 for working capital. The said facilities were secured vide a first charge on land parcel No. Gatarakwa/ Gatarakwa block 2-2676 Gatarakwa and /or Gatarakwa block 2-2678 . The security was furnished by the first Plaintiff.

10. They stated that the applicants have not cleared their indebtedness to the Respondent as admitted by the Applicants. They also produced documents showing that demand notices and statutory demands were issued. They stated that they served a notification of sale dated 10.8.2024 to realize the property. It was their case that the Applicants filed suits at last minute to frustrate the sale. They stated that there were 2 suits to frustrate the sale, that is MCC E065 of 2022 and MCC Misc. No. E001 of 2021. The later was seeking transfer of the former suit.

11. It was the respondent's case that once property is offered for sale, it is a commodity that can be sold, and only damages can lie. They stated that the respondents were not bound to restructure the loan. They cautioned that the court is being invited to rewrite the contract between the parties.

12. The Interested Party relied on the grounds. In view of the decision regarding interested parties in Methodist Church in Kenya v Fugicha & 3 others (Petition 16 of 2016) [2019] KESC 59 (KLR) (23 January 2019) (Judgment), it is unnecessary to go into the contents therein. The Supreme Court stated as hereunder:

    (53) What should we make of a cross-petition fashioned as such" Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

    > "Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal.
    >
    > Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
    >
    > Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court" [emphasis supplied].

    (54) In like terms we thus observed in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 (paragraph 24):

    > "A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

Submissions

13. The Applicants filed submissions in court dated 28.02. 2025. They submitted that the suit emanated from statutory notices and gazette adverts made by the defendant to exercise statutory sale. The applicant conceded and submitted that the total facilities sourced from the institution amounted to Kshs.49,900,000/-, but the current outstanding amount against the 2nd Applicant was disputed.

14. The Applicants submitted that a sum of Kshs.20,000,000/= was paid by a guarantor, Global Communities Kenya, which payment was not reflected against the 2nd Plaintiff's loan account. Thus, the reducing balance as submitted against the loan is not accurate. The Applicants submitted that they sought the interest recalculation by the Interest Rates Advisory Centre.

15. In their bid the Applicants sought to rely on the case of Mrao Ltd vs First American Bank of Kenya Limited & 2 others [2003] on a prima facie case. They submitted that a prima facie case had been established. They relied on a myriad of authorities, that is, the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR, Airland Tours & travel Limited vs National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002; Nairobi High Court Civil Case No. 517 of 2014 Lucy Nungari Ngigi & 4 others vs National Bank of Kenya Limited & Another eKLR.

16. The Respondent filed submissions opposing the impugned application through Grounds of Opposition dated 7.10.2024 and a Replying Affidavit sworn by Enock Kimutai Rono dated 11.11.2024. They submitted that the 1st Respondent granted the 2nd Applicant facilities for KES.49,978,133/- to finance takeover facilities and working capital requirements and secured by way of charging land parcel No. Nyeri/ Gatarakwa/Block2/2678 and Gatarakwa/Gatarakwa/Block2/2676 and a fixed and floating debenture of KES.50,000,000/- over all assets of the borrower furnished by the Plaintiff/Applicant.

17. They submitted that it is undisputed that the Applicants persistently defaulted on the loan. By 31.10.2024, the loan outstanding was at KES. 59,055,880.17/=. The Respondents submitted that they complied with all statutory notices and thus embarked on exercising their statutory power of sale over the charged properties.

18. The Respondents relied on the authority of Giella vs Cassman Brown & Co. Ltd [1973] EA 358 on principles of granting interlocutory injunctions. On prima-facie case the Respondents relied on the authority of Mrao Ltd vs First American Bank of Kenya Limited & 2 others [2003].

19. The Respondents submitted that they did not impose excessive penalties on the Applicants unilaterally. They submitted that they served the statutory notices which has not been controverted and the same was served upon them through post and personal service.

20. The Respondents submitted that Section 96 of the *Land Act* No. 6 of 2012 was invoked over Gatarakwa/Gatarakwa/Block2/2678 and Gatarakwa/Gatarakwa/ Block2 /2676, which duly had their statutory notices after default of payment as evidenced by the annexures. They submitted that a chargee shall not be restrained from exercising his rights unless it can be shown that the amount is in dispute.

21. The Respondent cited Halsbury's Laws of England Vol.32 (4th Edition) paragraph 725 which was adopted in the Mrao case (supra) but submitted that that in itself is not enough and reliance was on the court of Appeal case of Priscillah Krobought Grant vs Kenya Commercial Finance Co. Ltd and 2 others Civil Application No, Nai 227 of 1995(108/95) (UR).

22. The Respondents submitted that the Applicants had a loan of KES. 59,059,880.17 as at 31/10/2014 and that the 2nd Plaintiff has since diverted its business proceeds elsewhere and the same remains at 48

months in default. They submitted that the applicants have not denied defaulting or breach of contract and thus the 1st Respondent ought to exercise its statutory rights.

23. The Respondents submitted that the 1st Applicant willingly offered Gatarakwa/Gatarakwa/Block2/2678 and Gatarakwa/Gatarakwa/ Block2/ 2676 as security and as per Section 99(4) of the *Land Act*, and thus should the properties be sold and if found to be irregular will have a remedy in damages. The Respondent relied on the case of Simon Njoroge Mburu vs Consolidated Bank of Kenya eKLR, which upheld Section 99(4) of the *Land Act*. Further reliance was put on Bii vs Kenya Commercial Bank Limited (2001) KLR 458; Sammy Japheth Kavuku vs Equity Bank Limited & another [2014] eKLR; Mrao Ltd vs First American Bank of Kenya Limited & 2 others [2003].

24. On interest charged, the Respondents submitted that clause 2(e) on the bank's rate was conclusive, thus IRAC's involvement is strange, tantamount to inviting the court to rewrite the contract and relied on the case of National Bank of Kenya vs Pipeplastic (K) Ltd & another (2001) eKLR and James Muchemi vs Agricultural Finance Corporation in NRB HCC No. 1265 of 2001.

25. The Respondents submitted that the Applicants were in abuse of court processes as they had been, at the 11th hour, subjected to litigation aimed at challenging the realization process, to wit Nyeri CMCC ELC Case No. E065 of 2022 Henry Maina Kanyua & Faulu Flour Mills Limited vs I&M Bank Limited & Antique auctions that sought injunction orders which have since lapsed and the discharge of the orders therein in Nyeri CMCC ELC Case No. E065 of 2022. The Applicants have replicated the same orders sought in multiple courts in an attempt to frustrate the Respondents. They relied on the case of NRB High Court Misc. Appl. No. 241 of 2019 Nyandoro & Co Advocates vs National Water Conservation & Pipeline Corporation.

26. On a balance of convenience, the Respondents submitted that they would suffer a disadvantage more than the Applicants and that the balance tilts in favour of the 1st Respondent. The Respondents further submitted that the Applicants' conduct by persisting in default does not show them as doing equity. They relied on the authority of Kyangavo vs Kenya Commercial Bank Ltd & another [2004] eKLR.

Analysis

27. The court is lost as to why a party like an auctioneer is sued as an interested party. Given the status, the court cannot address any wrongs attributed to the interested party. Luckily, none are set out in the plaint or application. Only one issue comes out for determination in this application, that is:

    a. Whether the prayer for interlocutory injunction or status quo is merited.

28. The caution that this court must bear in mind is that the factual findings may not be made at an interlocutory stage. The court in deciding on an injunction of this nature is well guided by the decision in the locus classicus case of Giella –vs- Cassman Brown & Co. Ltd (1973) EA, 358, 360, which sets out principles for grant of injunction. The former Eastern Africa Court of Appeal stated as follows, through the wisdom of Spry VP, as he then was: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

29. In order to succeed the court must as a corollary, establish a prima facie case capable of succeeding, and damages will not be adequate compensation. It is only when the court is in doubt that the balance of convenience is considered. This means that the three tests are sequential.

30. The Court of Appeal succinctly dealt with this postulation in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR. The Court stated that:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> (a) establish his case only at a prima facie level,
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> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
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> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

31. The Applicant has wholly eschewed the central issue in this matter; that is, whether there was breach from either side. The debt is not disputed to be due, except the statement that the interest advisory centre was asked to recalculate the interest. There are no particulars of breach attributed to the Respondent.

32. The question then is whether the Applicants have established a prima facie case. The test of what constitutes a prima facie case was well enunciated in the case of Mrao Ltd v First American Bank of Kenya Ltd& 2 others[2003] eKLR, where the Court of Appeal noted that: -

> 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

33. The question of debt is central to the exercise of a statutory power of sale. There is no dispute on that end. There is no dispute as to the nature of interests applied. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the Court of Appeal stated as doth:

> "The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each

party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible"

34. Though this is not an action for debt recovery, it is an action for statutory debt recovery. There ought to be evidence that the indebtedness is fully settled or at least the undisputed amounts are paid. The questions raised, even if they were true, do not amount to a prima facie case. In Village Auto Bazaar Ltd v African Banking Corporation (Civil Suit E392 of 2018) [2024] KEHC 9928 (KLR) (Commercial and Tax) (31 July 2024) (Ruling), A Mabeya J, stated as doth, regarding a dispute as to the amount due:

> In Bharmal Kanji Shah and Another vs. Shah Depar Devji [1965 EA), it was held that: -"The court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage."
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> 33. In Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725, it is stated: -"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 into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."
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> 34. Further, in Palmy Company Limited vs. Consolidated Bank of Kenya Limited [2014] eKLR, it was held that: -"Unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction against a chargee who is exercising the statutory power of sale of the charged property..."
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> 35. From the foregoing, it is crystal clear that a dispute on accounts alone, that is, the correct amount due cannot and should not be a basis for granting an injunction. This extends to disputes on the interest charged, unless of course an applicant demonstrates that the loan has been fully paid and the amount being demanded is but the overcharge of interest. That the amount being demanded is not due.

35. In agreeing with the holding above, I add that, if there is a demonstration that the Applicants have paid the contractual amount, save for the disputed interest, they will not be in default, then a prima facie case could be established. That is to say, a customer who is paying consistently the contractual amount, but for some illegal demonstrable interest, he is purported to be in default when that is not factual, will earn an injunction. This case is different. Though the applicant blames COVID-19, it is not lost that the loan was taken in November 2020 after the onset of COVID-19. The pandemic is thus a lame excuse that does not fit into the whole gamut of reasons for issuance of injunction.

36. The next question relates to issuance of notices. Section 90 of the *Land Act* provides as follows:

> 90.(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be. (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters;
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> (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 two months 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;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may-

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to (i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

37. On the other hand, Section 96 of the *Land Act* provides as follows:

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

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

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on-

(a) the Commission, if the charged land is public land;

(b) the holder of the land out which the lease has been granted, if the charged land is a lease;

(c) a spouse of the chargor who had given the consent;

(e) any lessee and sublessee of the charged land or of any buildings on the charged land;

(f) any person who is a co-owner with the chargor;

(g) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;

(h) any guarantor of the money advanced under the charge;

(i) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

(j) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

38. Insofar as the pleadings are concerned, there is no challenge to the notices under the foregoing sections. The applicants have not laid, on a prima facie basis, the raison d'être for questioning the notices issued on 4.03.2022.

39. Further, Rule 15 of the Auctioneers Rules provide as follows:

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.

40. Notification of sale was also issued on 29.7.2024. There was a redemption notice issued on 22.08.2022 and duly received. This was issued together with a notification of sale. A last notification of sale was issued on 10.08.2024, after withdrawal of the suit challenging the earlier notices. There is no challenge to the latter notification of sale. There was sufficient time to rectify the default. The period of rectification ought to be not less than 2 months. In this case, a 90-days notice was given. The auctioneer was under a duty to issue a redemption notice. The notices were issued.

41. All factors considered, I do not find any prima facie case to established. In line with the decision in Nguruman Limited v Jan Bonde Nielsen (supra), it is unnecessary to go to the other two aspects.

42. In any case, the property once offered became a chose in action. It can be sold, and any loss can be ascertained. There is no allegation that the valuation was improper. The loss is thus ascertainable. There was no complaint by the chargor that he was not served. The disputes as to the amount are between the Respondent and the 2nd Applicant.

43. The issuance of these notices is a legal requirement. Once issued under the charger, then the same triggers other legal processes. As held in East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & another [2017] eKLR, without the notices the entire process cannot be undertaken. The court posited;

> 45. The statutory notices stipulated under the *Land Act* are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices. The Statutory notice in the present case in my humble view was not in accordance with section 90(2) of the *Land Act* and therefore the acts of the defendant in seeking to exercise its chargee's statutory power of sale are unlawful.
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> 46. Secondly, section 96 of the *land Act* is explicit to the effect that after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96(2) of the *Land Act*, before the chargee can sell the charged property. The notice under section 96(2) of the *Land Act* is mandatory, and is quite different from the Redemption Notice issued under rule 15 of the *Auctioneers Act* as herein explained.
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> Section 96(2) of the *Land Act* which provides as follows:-
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> > "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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell".

44. Conversely, when valid notices are issued, the court cannot gratuitously issue an injunction out of goodwill, fiat, conjecture, or surmise. The balance of convenience tilts in favour of the 1st Respondent. As the court of appeal held in Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others [2018] eKLR, banks don't have their own money. They must safeguard those. The court of appeal stated as doth: -

> A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.

45. I am inclined to agree with the Hon. Kwach, JA (as he then was) in the case of Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125, when he had this to say:

> " I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf."

46. Before departing, I need to address the question of multiple suits. I have perused the pleadings herein and noted that the first suit was withdrawn while the miscellaneous application for transfer of a suit filed in the wrong jurisdiction cannot be said to be an abuse of the court process.

47. The application lacks merit and is accordingly dismissed. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

48. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

49. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

50. The Respondent is entitled to the application's costs. It is not necessary to indicate costs at this stage. The application's costs shall be taxed at the conclusion of this case.

Determination

51. The upshot of the foregoing is that I make the following orders: -

    a. The application dated 23.08.2024 lacks merit and is accordingly dismissed with costs.

    b. The matter shall be fixed for mention for pre-trial directions.

    c. For avoidance of doubt, the interim orders hitherto issued are vacated.

d. Ruling and proceedings will be supplied to the parties on payment. The same be posited on CTS forthwith.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF APRIL, 2025.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Plaintiff/Applicant present

Mr. Mahinda for the Defendant and Interested Party

Court Assistant – Michael