Kombo v Rafiki Micro-Finance Bank Limited & another (Civil Appeal 90 of 2023) [2024] KEHC 155 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 155 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 90 OF 2023

JRA WANANDA, J

JANUARY 19, 2024

BETWEEN

KASIM SHABAN KOMBO ..... APPELLANT

AND

RAFIKI MICRO-FINANCE BANK LIMITED ..... 1ST RESPONDENT

DENIS KIRUI T/A SADDABRIA AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. This Appeal is against the Ruling delivered on 26/04/2023 in Eldoret Chief Magistrate's Court Civil Suit No. E265A of 2022. By the said Ruling, the Magistrate's Court declined to grant an interlocutory injunction to restrain the 1st Respondent from exercising its statutory power of sale by auctioning the Appellant's property known as Pioneer/Ngeria Block 1 (EATEC)/973 (hereinafter referred as "the suit property").

2. Now before the Court for determination is the Appellant's Application brought by way of the Notice of Motion dated 25/05/2023. The same seeks the following orders:

    a. [.....] Spent

    b. Thatan interlocutory injunction do issue restraining the Respondents jointly and severally from selling, transferring and/or in whatever way alienating the land parcel known as Pioneer/ Ngeria Block 1 (EATEC)/973.

    c. That the costs of this Application be provided for

3. The Application is filed through Messrs Wambua Kigamwa & Co. Advocates and is stated to be brought under Order 42 Rule 6(6) of the Civil Procedure Rules 2010. The grounds of the Application are as set out on the face thereon and it is supported by the Affidavit sworn by the Appellant, Kasim Shaban Kombo.

4. In the Affidavit, the Appellant deponed that he impleaded the Respondents before the Magistrate's Court challenging the intended exercise of the 1st Respondent's statutory power of sale over the suit property on the grounds that the 1st Respondent failed to serve a valid notice under Section 90(1) of the *Land Act*, 2012, and also failed to serve compliant notices in tandem with Section 90(2)(a) of the *Land Act* to indicate the nature and extent of default, if any. The Appellant deponed further that the 1st Respondent also failed to serve notices as required under Section 90(2)(b) of the Act indicating the amounts, if any, that must be paid to rectify the default and the time, being not less than 3 months, by the end of which the payment in default must have been completed. He added that the 1st Respondent also failed to comply with Section 90(2)(d) of the Act which obligates it to inform the Appellant of the consequences that, if the default is not rectified within the time specified in the notice, it will proceed to exercise, and that further, the 1st Respondent intends to sell the suit property and complete a contract of sale thereof without compliance with Section 96(2) of the *Land Act* requiring service of a 40 days' notice in the prescribed form.

5. He also contended that the service of a redemption notice simultaneously with a notification of sale is not only in breach of the law but amounts to a clog on his right of redemption provided under Section 89 of the Act. It was also the Appellant's averment that the mandatory notice of variation of interest rate(s) has not been served as required under Section 84 of the Act yet the 1st Respondent persists in charging varied interest rates, and also that the 1st Respondent has withheld a sum of Kshs 800,000/- of the loan amount without any cause which it ought to have been disbursed to the Appellant.

6. The Appellant deponed further that simultaneously with the Plaint, he also filed before the Magistrate's Court an Application seeking an interlocutory injunction restraining the Respondents from selling, transferring or alienating the suit property, that interim orders of injunction were issued and the same subsequently replaced with a consent order that the status quo be maintained pending determination of the Application, that however on 26/04/2023 the Court delivered its Ruling dismissing the Application, that the Respondents are now likely to sell, transfer or alienate the suit property, that aggrieved by the Ruling he has preferred this Appeal which raises substantial issues and has a probability of success, that unless the injunction is issued, he stands to suffer irreparable loss for which damages shall not atone as the Respondents have breached the law with extreme impunity, that this Appeal will be rendered nugatory, a mere academic exercise and a waste of precious judicial time should the Respondents proceed to sell, transfer or alienate the suit property, and that should the Court be in doubt, it should assume the lesser risk by ordering maintenance of the status quo.

1st Respondents' Replying Affidavit

7. The 1st Respondent opposed the Application vide the Replying Affidavit filed by one Daniel Ogola who described himself as an Assistant Manager-Debt Recovery Unit of the 1st Respondent. He deponed that by an agreement contained in the letter of offer dated 9/07/2019 the 1st Respondent advanced a loan facility to the Appellant to the tune of Kshs 8,100,000/-, that the facility was secured by a first legal charge over the suit property, that upon a further application by the Appellant, the 1st Respondent advanced a further loan to the Appellant for the sum of Kshs 1,200,000/- which facility was also secured by the suit property, that the Appellant was expected to comply with the terms and conditions of payment as contained in both the letter of offer and the instruments of legal charge and further legal charge, and that, the Appellant in breach of the letter of offer, failed to observe his legal obligations and made sporadic payments resulting in the loan falling in default.

8. He deponed further that on 8/11/2019, the 1st Respondent sent a demand notice requesting the Appellant to regularize the loan facility which was in default of Kshs 313, 119.95, that the letter

elicited no response from the Appellant prompting the issuance a 90-days statutory notice requiring the Appellant to pay the defaulted loan arrears of Kshs 7,901,998.11 pursuant to regularizing his outstanding loan facility which stood at Kshs 13,959,104.80 as at 29/01/2021 when the 90 days' statutory notice was sent, that upon lapse of the 90-days' notice, the 1st Respondent issued the 40-days statutory notice wherein the Appellant was required to settle the outstanding loan amount being the sum of Kshs 14,824,841. 35 as at 2/11/2021, that the Appellant failed to comply with the statutory notices issued as depicted above and continues to remain in default of payment of the loan.

9. The deponent averred further that that on account of the default, the 1st Respondent instructed the 2nd Respondent to take the requisite steps and proceed to sell the property by way of a public auction, that on 4/02/2022, the 2nd Respondent issued the 45-days redemption notice together with the notification of sale to the Appellant, by the said notice the Appellant was required to pay the sum of Kshs 15,664,257.50 to redeem the property from sale by the public auction scheduled for 19/04/2022, the 2nd Respondent advertised the public auction in the Nation newspaper of 30/03/2022, and that the 1st Respondent also conducted a valuation of the suit property to ascertain its market and forced sale value prior to conduct of the auction. He added that despite the above notices the Appellant continues to be in default and has failed to service the loan nor to offer any plausible explanations to the bank in regard to the default.

10. The deponent averred further that contrary to the Appellant's allegations, the 1st Respondent complied with the provisions of the Act on the issuance of notices as depicted above, that the provisions of Section 89 of the provide for the equity of redemption but do not in any way provide that issuance of both notices amounts to a clog of the right of redemption, that notwithstanding, the Appellant had up to 60 days from the date of receiving the 45 days' redemption notice on 10/02/2022 to the date of auction that was scheduled for 19/04/2022 to make good of his outstanding arrears and redeem his property, there was no variation of interest rate as alleged, what was applied was the additional penalty interest rate on account of default as provided for in the letter of offer and the statutory notices, therefore, the 1st Respondent adhered to provisions of Section 84, the Appellant applied for a loan of Kshs 1,200,000/- and this was the amount disbursed and remitted to his account and that no amount was withheld as alleged.

11. It was also the deponent's contention that it is well established in law that a borrower who puts up a property as security in a commercial transaction such as to obtain a facility from a bank, ought to know that in the event of default, the property can be sold to recover the amount due, that the Appellant failed to satisfy the requirements for the granting of orders restraining the 1st Respondent from exercising its statutory power of sale hence the dismissal of his application, that the grounds raised in the present Application are similar to the issues pending in the main suit, that this Court risks giving a contrasting decision to the trial Court which is yet to pronounce itself, the appeal is frivolous as the loan is in arrears and the same continues to accrue interest causing hardship to the 1st Respondent, that the accounts rendered by the 1st Respondent are true, accurate and in conformity with both the law and the contracts binding on both parties, and that the Appellant has come to Court with unclean hands harbouring the intention of delaying and/or refusing to pay the arrears and is therefore not deserving of any equitable orders. In conclusion, he deponed that the 1st Respondent will suffer substantial loss and prejudice if the orders sought are allowed as the outstanding debt continues to accrue interest.

Appellant's Supplementary Affidavit

12. The Appellant then swore the Supplementary Affidavit filed on 10/08/2023. He deponed that it is not in dispute that the 1st Respondent is the proprietor of two charges entered on the register of the suit property, that however the charges were for the sums of Kshs 8,100,000/- and Kshs 2,000,000/-

and not Kshs 1,200,000/- as indicated by the 1st Respondent, that vide the letter dated 15/02/2020 the 1st Respondent was to advance to him a further sum of Kshs 2,000,000/- but only disbursed Kshs 1,200,000/-, that through the same letter the 1st Respondent agreed to consolidate and restructure the 2 loans to a repayment period of 120 months, being 10 years, on 13/06/2022 after filing of the suit, the 1st Respondent disbursed the sum of Kshs 827,341.75 to him in a bid to rectify the deficit in disbursement and defeat the cause, that the 1st Respondent confirms that it did send a redemption notice simultaneously with a notification of sale, that redemption, as contemplated under Section 89 of the *Land Act* is no longer an equity but a right and that sending the redemption notice simultaneously with a notification of sale amounts to a clog on that right.

Hearing of the Application

13. Pursuant to directions given, the Application was canvassed by way of written submissions. The Appellant filed his Submissions on 10/08/2023 while the 1st Respondent filed on 6/11/2023.

Appellant's Submissions

14. Counsel for the Appellant submitted that the law governing the grant of injunction pending Appeal is provided under Order 42 Rule 6(6) of the Civil Procedure Rules. On the guiding principles in exercising this power, he cited the case of Patricia Njeri & 3 Others vs National Museum of Kenya [2004] eKLR. Counsel then recited the factual matters already set out in the Affidavits. On the requirements for the grant of interlocutory injunctions, he cited the case of Giella vs Cassman Brown (1973) EA 358 cited with approval in Nguruman Limited versus Jan Boden Nielsen & 2 Others (2014) eKLR.

15. Counsel submitted further that the Appeal is not frivolous and raises arguable issues as can be discerned from the grounds of Appeal enumerated in the Memorandum of Appeal. He recited the grounds already set out hereinabove and added that in a bid to defeat the suit before the trial Court the 1st Respondent proceeded to disburse the balance of the loan, that it is unconscionable for the 1st Respondent to purport to realize a loan that it had yet to fully disburse as the same would amount to benefit from its breach, the loan was to help the Appellant advance his business and complete the development project on the suit property, that had the 1st Respondent disbursed the loan in full as per the letter of offer, the Appellant would have advanced his business more. He cited the case of Surya Holdings Limited & 4 Others v ICICI Bank Limited & Another [2015] eKLR and submitted that there was no variation of the terms of the letter of offer in as far as the sums to be disbursed are concerned, the only variation was in the period of repayment of the loan and the fact of consolidation of the two loans, that the 1st Respondent's action of disbursing the balance of to the Appellant's account after filing of the suit speaks volumes about its knowledge of its obligations under the loan agreement and its breach thereof. He also cited the case of Mea Limited v Echuka Farm Limited & 2 Others [2007] eKLR and also Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 Others [2008] eKLR.

1st Respondent's Submissions

16. On his part, on the principles governing the granting of an order of injunction pending Appeal, Counsel for the 1st Respondent cited the case of Raphael Mulinge Muthusi & 2 Others v Mary Ndila Nyolo [2022] eKLR. He submitted that it is not disputed that the loan advanced to the Respondent is in arrears, that the Appellant's contention is that the 1st Respondent did not issue him with the requisite notices prior to advertising the suit property for sale. According to Counsel, due process was properly followed and all notices were issued, the notices were sent to the Appellant's postal address which he provided to the 1st Respondent at the time of creation of the charge, each of the notices was

accompanied by a certificate of postage, the Appellant has not denied receipt of the notices but only alleges that the same were not valid or did not comply with the provisions of Section 90(1) and (2) (a) and (b), it is however clear that the notices complied with the law as they indicated the nature and extent of the Appellant's default, the amount the Appellant was required to pay to rectify the default, the time within which payment needed to be made and the consequences of failing to pay.

17. Counsel submitted further that the claim by the Appellant that the 1st Respondent did not issue notice of variation of interest rates is unfounded as the 1st Respondent did not vary interest rates as alleged, the interest rates charged on the loan are as per the Letters of Offer, the Appellant has only made allegations which are not supported by evidence as he has not stated what the interest rates changed to, that in any case, a dispute as to the amount due on a loan or the interest chargeable is not a ground for restraining a chargee from exercising its statutory power of sale. He cited the case of Jim Kennedy Kiriro Njeru vs Equity Bank (K) Limited [2019] eKLR and also Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (supra) and submitted that the Appellant has not repaid the loan and is therefore undeserving of the orders he seeks,

18. On the claim that the 1st Respondent failed to disburse the sum of Kshs 800,000/- out of the loan amount, Counsel submitted that the allegation is controverted by the loan Application Form, the letter by the Appellant dated 12/09/2019 and the letter of offer dated 12/09/2019, that it is evident from the said documents that the Appellant made an Application for a further loan of Kshs 1,200,000/- and duly executed the letter of offer dated 12/09/2019, the loan amount was disbursed to the Applicant prior to perfection of a further charge upon the undertaking by the Appellant to continue to perfect the charge after disbursement, it is clear from the bank statements that no loan amount was disbursed to the Appellant in the year 2020, and that the loan disbursed to the Appellant was in September 2019 and was pursuant to a the letter of offer dated 12/09/2019.

19. According to Counsel therefore, the Application has failed to establish a prima facie case with a probability of success, the Appellant is therefore undeserving of the orders sought, he does not have an arguable appeal, the Appeal will not therefore be rendered nugatory if the Application is not allowed, that in contrast, allowing the Application will cause hardship to the 1st Respondent which is not receiving payment for the loan and which is not being serviced. Counsel contended further that the Appellant is in breach of the terms and conditions of the letter of offer and cannot seek an injunction to defeat the contractual rights of the 1st Respondent. He cited the case of Algahussein Establishment v Eton College [1991] 1ALL ER 267 quoted in Imperial Health Sciences Kenya Limited v Wiseway Freighters Limited [2018] eKLR. He added that the Appellant has not come to Court with clean hands and cited the case of Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015] eKLR. He also submitted that the Appellant has not demonstrated in what way he stands to suffer loss that cannot be compensated by an award of damages and cited the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2001] eKLR, the case of Stek Cosmetics Limited v Family Bank Limited & Another [2020] eKLR and also Stanbic Bank & Another v Martin Tumaini Ngala [2018] eKLR.

Analysis and Determination

20. Upon considering the pleadings and the submissions presented, I find the following to be the one broad issue that arises for determination herein:

> " Whether, pending hearing and determination of this Appeal, a temporary injunction should be granted restraining the Respondent from selling the suit property by public Auction."

21. Generally, the law governing the grant or refusal of temporary, interim or interlocutory injunctions is set out under Order 40(1)(a) and (b) of the Civil Procedure Rules 2010 which provides as follows:

> " Where in any suit it is proved by affidavit or otherwise—
>
> (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or .....;
>
> (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit;
>
> the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

22. Specifically, this Court's power to grant an injunction pending Appeal is provided under Order 42 Rule 6(6) of the Civil Procedure Rules in the following terms:

> " Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

23. The conditions for consideration in applications for injunctions were settled in the celebrated case of Giella v Cassman Brown & Company Limited (1973) E A 358, where the Court expressed itself in the following terms:

> " Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

24. The above test was also considered in the case of American Cyanamid Co. v Ethicon Limited (1975) AC 135 where its elements were broken down as follows:

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

25. It is also settled that in applications for interim injunctions, the Court should avoid making final determinations on matters of fact on the basis of the conflicting Affidavit evidence. In connection

thereto, in Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1, the Court of Appeal guided as follows:

> "...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."

26. The first task is therefore to determine whether the Appellant has established a prima facie case. Although as aforesaid, I should not delve deeply into determining substantive matters, to make a determination whether a prima facie case has been established, I must to some safe extent examine the facts deponed in the rival Affidavits and apply them to the law.

27. As to what amounts to a prima facie case, the Court of Appeal, in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 held as follows:

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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."

28. In this case, it is evident from the record that pursuant to the letter of offer dated 9/07/2019 the Appellant obtained a loan of Kshs 8,100,000/- from the 1st Respondent payable within a maximum period of 60 months at the interest rate of 23% per annum. It is also not in contention that this loan was secured by a legal charge over the suit property and the amount secured was Kshs 8,500,000/-. It is also evident that it was a term of the loan contract that in the event of default, additional interest would be charged at a rate of 1.5% per month over and above the rate stated above.

29. It is also not in dispute that pursuant to a subsequent second letter of offer dated 12/09/2019 the Appellant obtained a further loan. According to the Appellant, this further loan was to be for a sum of Kshs 2,000,000/- but that only a sum of Kshs 1,200,000/- was disbursed to him. However, according to the 1st Respondent and which position seems also apparent from the letter of offer, the correct amount of this further loan was Kshs 1,200,000/- and the same was disbursed in full. The parties however agree that whichever the further loan amount was, the same was also secured by the same property. From the letter of offer for this further loan, it is expressly stated the same was in addition to the initial loan of Kshs 8,100,000/- and that the initial loan would continue as per its previous terms and that the same was payable over a period of 6 months in equal monthly instalments of Kshs 213,629/- at the interest rate of 23% per annum. This second letter of offer also provides that the existing legal charge and the further charge would secure an aggregate amount of Kshs 9,300,000/-. As applied to the initial loan, the letter of offer for this further loan also provides that, in the event of default, an additional interest would be charged at a rate of 1.5% per month over and above the rate stated above

30. Save for slight discrepancies in interpretations by the partiers, the loan contract is therefore not denied. The Appellant also does not deny that the loan account is in default insofar as repayment of the loan instalment arrears is concerned.

31. The default not having been denied, save for other grounds that may be established, the 1st Respondent would ordinarily be entitled to exercise its statutory power of sale. However, before doing so, the law requires the 1st Respondent to issue notices to the Appellant as follows:

    a. 90 days' statutory notice of default, pursuant to Section 90(1) and (2) of the *Land Act*, 2012.

    b. 40 days' notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012.

c. 45 days' redemption notice pursuant to Rule 15(d) of the Auctioneers' Rules, 1997.

d. 14 days' notification of sale, pursuant to Rule 25(e) of the Auctioneers' Rules, 1997.

32. A chargee intending to exercise its statutory power of sale bears the burden of proving that the said notices have been served upon the chargor. On this point, the Court of Appeal, in the case of Nyagilo Ochieng & Another v Kenya Commercial Bank Limited [1996] eKLR held as follows:

> " ..... Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya."

33. In this case, the 1st Respondent has exhibited copies of documents to its Replying Affidavit, including certificates of posting, indicating that indeed the notices were all served upon the Appellant. My understanding of the Appellant's case is that he does not seriously deny that such service was effected but rather, argues that the notices, as drawn, were insufficient and not compliant insofar as they allegedly did not contain all the matters required by law to be included therein. Specifically, the Appellant alleges that the notices do not indicate the nature and extent of default, do not indicate the amounts that must be paid to rectify the default and also do not indicate the time by the end of which the payment in default must have been completed, and do not also inform the Appellant of the consequences of not rectifying the default.

34. I have perused the copies of the notices exhibited and although the final verdict will have to await the final outcome of the suit before the trial Court, despite some slight but, in my view, negligible contradictions or mix-up in the demand letters and notices on the amounts disbursed and on other items, the notices appear on the face thereof to be substantially compliant. I cannot at this stage discern any substantial or material deficiency that would, per se, warrant or justify a Court of law to issue a temporary or interlocutory injunction stopping the 1st Respondent from exercising its statutory power of sale.

35. The Appellant also complains that contrary to the law, the Respondents served the 45 days' redemption notice pursuant to Rule 15(d) of the Auctioneers' Rules simultaneously and concurrently with the 14 days' notification of sale pursuant to Rule 25(e) of the Auctioneers' Rules. According to the Appellant, this simultaneous and concurrent service is unprocedural since it amounts to a clog on the right of redemption provided under Section 89 of the *Land Act*. A similar argument came up before Ombwayo J in the case of Simon Kipkoech Kwambai v Sidian Bank Limited & another [2018] eKLR and the Judge ruled as follows:

> " The plaintiff main argument is that there is no valid redemption notice and notification for sale in respect of the subject land. It is the plaintiff's contention that the redemption notice was served concurrently with the notification of sale and that this was unprocedural.
>
> Rule 15 of the Auctioneers Rules provides that a notification of sale must be served prior to a sale of immovable property. The notification of sale must give 45 days upon which to redeem the property.
>
> This court is of the considered, view that the two notices can be issued concurrently. The notice to sell is in a prescribed form and should be issued by the chargee. The chargee should not proceed and complete any contract of sale of charged land until at least forty (40) days

have lapsed from the date of service of the notice to sell. Under Rule 15 of the Auctioneers Rules, the auctioneer is required to give a notification of sale of 45 days before the sale.

The 40 days given in section 96(2) is to pre-empt the entering into contract of sale in respect of the charged land but does not mean that the auctioneer has to wait for the lapse of 40 days in order to issue the notification of sale. It is my considered view that the notification of sale under the Auctioneers Rules can be issued concurrently with the notice to sell under section 96(2) of the *Land Act*.

It is trite law and principle of statutory interpretation that when two competing acts construed to further the purposes behind them produce a conflict, the court may resolve the conflict by taking into consideration as to which Act represents the "superior purpose" in addition to other relevant factors. In applying a principle construction in addition to other relevant factors, this court finds that the two notices are separate and distinct and provided for under different legislation and therefore, can be issued concurrently.

36. Needless to state, the above holding of Ombwayo J is not binding on this Court, being a decision of a Court of equal status. It cannot however be said not to be based on sound logic. On the contrary, I find it to be quite well reasoned. In view thereof, it cannot therefore be declared outrightly that the Respondents' act of simultaneously or concurrently serving the said respective notices is contrary to the law or was unprocedural or amounted to a clog on the Appellant's right of redemption. Although a final verdict on this issue will have to await conclusion of the case before the trial Court, and which I would not wish to pre-judge herein, I do not think that the concurrent or simultaneous service of the two notices to be a sufficient ground for issuing an interlocutory injunction at this stage.

37. As aforesaid, the Appellant has also alleged the two charges lodged as security were for the sums of Kshs 8,100,000/- and Kshs 2,000,000/-, and not Kshs 1,200,000/- as indicated by the 1st Respondent, that the 1st Respondent was to advance to him a further sum of Kshs 2,000,000/- but only disbursed Kshs 1,200,000/-, that the 1st Respondent also agreed to consolidate and restructure the 2 loans to a repayment period of 120 months, being 10 years, that after filing of the suit the subject of this Appeal, in a bid to rectify the deficit in disbursement and to defeat the suit, the 1st Respondent disbursed the sum of Kshs 827,341.75 to the Appellant. According to the Appellant therefore, the 1st Respondent withheld a sum of Kshs 800,000/- of the loan amount without any cause. He submitted that it is unconscionable for the 1st Respondent to purport to realize a loan that it had yet to fully disburse as the same would amount to benefit from its breach. He also submitted that the loan was to help the Appellant to advance his business and complete the development project on the suit property. It was therefore the Appellant's position that had the 1st Respondent disbursed the loan in full as per the letter of offer, the Appellant would have advanced his business more.

38. To his credit, the Appellant has exhibited a copy of a letter of offer dated 15/02/2020 which indicates that indeed the 1st Respondent accepted the Appellant's application for consolidation and restructuring of the two loans. The effect of the restructuring is indicated in the letter to be that the loan would now be payable within a period of 120 months. What however the Appellant has not sufficiently explained is what effect or consequences, if any, this restructuring and consolidation had on the fact that the loan was in arrears.

39. I am also unable to determine the aggregate amount that was secured by the Charge since the only page of the Charge exhibited indicates the sum secured as Kshs 8,100,000/-. There is also no material presented to assist the Court establish whether the Further Charge was ever registered and if so, the amount secured. I may however state that the documents exhibited give the indication that the initial loan was for the sum of Kshs 8,100,000/- and the further loan was for Kshs 2,100,000/-. Under these

circumstances, and since it is the Appellant who has made contrary allegations, under the rules of burden of proof, it is him who is presumed to have failed to prove the allegations. I so hold.

40. Regarding the allegation that in a bid to rectify the deficit in disbursement and to defeat the suit, the 1st Respondent on 13/06/2022 disbursed the sum of Kshs 827,341.75 to the Appellant, the Appellant has exhibited an extract of a bank statement and also extract from a text message received through his phone. However, I observe that the bank statement so exhibited describes the disbursement of Kshs 827,341.75 as "interest reversal-induplum adjustment", and not as a loan disbursement as alleged by the Appellant.

41. On its part, and in response, the 1st Respondent has dismissed the claim that it failed to disburse the sum of Kshs 800,000/- out of the loan amount. According to the 1st Respondent, the claim is easily controverted by the contents of the Loan Application Form and the letters of offer which reveal that the Appellant applied for a further loan of Kshs 1,200,000/-, that the loan amount was disbursed to the Applicant prior to perfection of a further charge upon an undertaking by the Appellant to continue to perfect the charge after disbursement. According to the 1st Respondent therefore, it is clear from the bank statements annexed that no loan amount was disbursed to the Appellant in the year 2020, and that the loan disbursed to the Appellant was in September 2019 pursuant to the letter of offer dated 12/09/2019.

42. Under these circumstances, I am unable at this stage to conclusively make a determination on these conflicting matters of fact. However, since as aforesaid, the bank statements relied upon by the Appellant describe the disbursement as "interest reversal-induplum adjustment", I would be prepared to hold that the Appellant has not demonstrated, at least at this stage, that the payment was a loan disbursement made. I cannot therefore conclude that the payment amounted to an admission of fault on the part of the 1st Respondent.

43. The biggest undoing in the Appellant's case is the fact it is not contested that the loan account is in colossal arrears. According to the 1st Respondent, as per the 45-days Redemption Notice dated 4/02/2022, the amount in arrears, as at that date, was Kshs 15,664,257.50. I also note from the bank statements annexed that the last time that the Appellant made any payment on the loan account was on 12/03/2020. I may have given the Appellant the benefit of doubt had he demonstrated that he has made some effort in servicing the loan. Despite existence of any dispute, a borrower should continue repaying at least the principal amount of the loan facility pending the determination of the dispute. In cases like this, evidence that the borrower continues with repayment of the loan facility or at least the principal amount or proof of his willingness to do so is paramount (see decision of Nyakundi J in the case of Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited [2019] eKLR)

44. As already held, on the question of whether or not the further amount disbursed was Kshs 2,000,000/- or Kshs 1,200,000/-. I find that the same is a matter under contest and is a question of fact as is also the issue of when the same was disbursed. The true position on those issues shall be established at the full trial of the case. However, no matter the outcome, it does not change the reality that the loan account is seriously in arrears and that that the Appellant has neglected servicing the loan. Insofar as the Appellant has stopped making payments, he is in clear breach of the loan contract voluntarily entered into by himself and there would therefore no justification for this Court to "protect" him from the consequences of such breach.

45. On the of alleged variation of interest rate, the Appellant argues that the mandatory notice of variation of interest rate(s) has not been served as required under Section 84 of the *Land Act* while the 1st Respondent persists in charging varied interest rates. The 1st Respondent, on its part, contends that this claim is unfounded and denies that the 1st Respondent varied interest rates as alleged. According

to the 1st Respondent, the interest rates charged on the loan is as per the Letters of Offer. On my part, I find that the Appellant has only made allegations without presenting any evidence in support of the allegation. I agree with the Counsel for the 1st Respondent's submission that the 1st Respondent has not stated what the interest rates changed to. There does not seem to have any attempt made to adduce any evidence on this allegation. Determination thereof will therefore have to await the outcome of the suit. For now however, I find that the Appellant has not established that the interest rate was varied.

46. Further, in any case, it is now generally accepted that as long as it is established that a loan account is still in arrears despite a dispute on the rate of interest employed, a dispute as to the amount due on the loan or on such interest rate would not, per se, amount to a justifiable ground for restraining a chargee from exercising its statutory power of sale. This was made clear by Kwach JJA in the Court of Appeal case of Mrao Ltd v First American Bank of Kenya Ltd (supra) in the following terms:

> "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."

47. Further, in the case of Priscillah Krobought Grant v Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R) (unreported), the Court stated as follows:

> "Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another v Shah Depar Devji [1965] E. A. 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd v Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A."

48. Having agonized over the issue, in the circumstances set out, I find that the Appellant has not sufficiently demonstrated the existence of a prima facie case. Granting the injunction in the absence of a prima facie case would be tantamount to rewriting the parties' express contract. It is a settled principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite contracts. In connection thereto, in the case of National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A. 503, [2011] eKLR, the Court of Appeal stated as follows:

> "A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

49. I therefore find that the evidence presented before this Court falls short of the threshold required to establish the existence of a prima facie case. My conclusion is therefore that no prima facie has been established.

50. Having found that no prima facie case has been established, it is no longer necessary to consider the second and third limbs of the rule in Giella vs Cassman Brown. For this position, I refer to the case of In Nguruman Limited v Jane Bonde Nielsen and 2 Others, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, where the Court of Appeal reiterated as follows:

> "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 prima facie case is not established, then irreparable injury and balance of convenience need no consideration ....."

51. Nevertheless, suffice to mention that even on these other two limbs, I would still rule against the Appellant. He has argued that he will be greatly prejudiced by the auction and stands to suffer irreparably. However, Courts have on numerous occasions expressed the position that once property is offered as security it becomes a commodity for sale. For instance, in the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Ltd [2001] KLR 458, Ringera, J (as he then was) correctly stated as follows:

> "Is the applicant's probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. So although Mr Wandaba's eloquence nearly induced in me tears of sympathy for the applicant, I am on a rational consideration of the matter impelled to conclude that the applicant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award. The application fails on this ground too."

52. In the instant suit, the trial Court will be entitled to order the Respondents to compensate the Appellant should the latter prove his claims and succeed before it. In my view, it has not been demonstrated or even alleged that the 1st Respondent, a large financial institution in Kenya, is incapable of compensating the Appellant for any eventual loss or injury, if any.

53. On the balance of convenience, as aforesaid, when charging the suit property, the Appellant was fully aware of the consequences of default. In the circumstances, I find that the balance of convenience, too, tilts towards allowing the 1st Respondent to proceed with enforcing the default clause in the loan contract. On this, I find company in the holding of F. Ochieng J (as he then was) in the case of Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR in which he stated the following:

> "In my considered view if the 1st and 2nd defendants were restrained from selling off the suit property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st and 2nd defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property were sold, the plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd defendants would be able to compensate the plaintiff. In contrast, the stoppage of the intended sale by the chargor would result in the continued growth of debt, thus exposing them to potentially substantial

irrecoverable losses. I therefore find that provided the chargee complies with all other legal requirements, he should be permitted to realise the security."

54. For the above reasons, I find that the Appellant has not satisfied the principles guiding the grant of interlocutory injunctions. The Application therefore fails.

Final Orders

55. In the premises, I rule as follows:

    i. The Appellant's Notice of Motion dated 25/05/2023 is hereby dismissed

    ii. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JANUARY 2024

.....

WANANDA J.R. ANURO

JUDGE