



**Sarovima Sevens Stars Resort Lodge Ltd v Yetu Sacco Limited & another
(Civil Suit E008 of 2023) [2024] KEHC 53 (KLR) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 53 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT E008 OF 2023
EM MURIITHI, J
JANUARY 11, 2024**

BETWEEN

SAROVIMA SEVENS STARS RESORT LODGE LTD PLAINTIFF

AND

YETU SACCO LIMITED 1ST DEFENDANT

VIEWLINE AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiff filed a suit by a Complaint dated 22/9/2023 filed on 25/9/2023 pleading a chargor/chargee relationship between the Plaintiff and the 1st Defendant and alleging on the part of the 1st Defendant unlawful and irregular failure to “adhere to established legal procedures” while attempting to realise the security, and consequently sought a declaration of unenforceability of the contract between the parties and injunctive relief against the 1st Defendant chargee, the auctioneer 2nd Defendant and their servants as follows:
 - “4. The Plaintiff avers that the 1st defendant advanced to it various financial facilities in the following manner.
 - a) October 2020 - Ksh 15,000,000=
 - b) June 2021 - Ksh 12,000,000=
 - c) November 2021 - Ksh 9,000,000=
 - d) December 2021 - Ksh 4,800,000=
5. The Plaintiff states that the said amounts were to be secured by charges registered in favour of the 1st defendant against LR No. Kiamuri 'A' 589 registered in the name of the Plaintiff.



6. The Plaintiff avers that it has been servicing the loan amounts as they fall due in accordance with the terms and conditions of the contract.
7. The Plaintiff however states that the 1st defendant has continued to impose previously undisclosed penalties and interest to the loan amount thereby altering the nature of the contract.
8. The Plaintiff further states that the 1st defendant has instructed the 2nd defendant to advertise the security for sale through a public auction on 26/9/2023 without issuing the Plaintiff an opportunity to redeem the said security.
9. It is the Plaintiffs statement that the 1st defendant registered the charges in a manner that is not reflective of the contracts entered into by the parties thereby altering the nature of the contract.
10. The Plaintiff avers that the intended sale by public auction is unlawful and irregular for failure to adhere to the established legal procedures.
11. The Plaintiff states that besides Meru H.C.C.C. No E004 of 2023 which the Plaintiff has withdrawn, there is no other suit between the parties herewith over the same subject matter.
12. The cause of action arose within the jurisdiction of this court.

Reasons Wherefore the Plaintiff prays for judgment against the defendants jointly and severally for:-

- a) A declaration that the variation and/or alteration of the terms of contract between the Plaintiff and the 1st defendant renders the contract unenforceable.
- b) An order of permanent injunction do issue restraining the defendants whether by themselves or through their officials, agents, servants, employees, assigns or anyone else acting at their behest from proceeding with the sale by public auction or private treaty of LR No. Kiamuri 'A'/589.
- c) costs of the suit.
- d) Any other or such better orders which the honorable court may deem fit to grant in the circumstances.

Dated at Meru this 22nd day of September 2023.

[Signed]

For M/S Basilio Gitonga, Muriithi & Associates

Advocates for the Plaintiff.”

2. Contemporaneously with the Plaint, by Notice of Motion dated 22/9/2023, the Applicant sought interim relief pending the hearing and determination of the suit as follows:
 - “1. That this application be certified urgent.
 2. That pending the interparties hearing of this application an order of temporary injunction do issue restraining the defendants whether by themselves or through their employees, officials, agents, servants, assigns or anybody else acting at their behest from proceeding with the intended sale by public auction of LR No. Kiamuri 'A'/589 scheduled for 26/09/2023.
 3. That pending the hearing and determination of this application and the main suit an order of temporary injunction do issue restraining the defendants whether by themselves



or through their employees, officials, agents, servants, assigns or anybody else acting at their behest from proceeding with the intended sale by public auction of LR No. Kiamuri 'A'/589.

4. That costs of this application be provided for.
 5. That the court do make any other or such better orders which it may deem fit to grant in the circumstances.”
3. The application was based on grounds set out in the application as follows:
- “1. That the 1st defendant has on four (4) occasions advanced varied amounts of money to the Plaintiff to be secured by four (4) charges against LR No. Kiamuri 'A'/589.
 2. That the Plaintiff has been servicing the said loan facilities as envisaged in the contract.
 3. That the defendants have caused the security offered to be advertised for sale by public auction on 26/09/2023.
 4. That the 1st defendant has not issued the requisite notices upon the Plaintiff to accord it an opportunity to redeem the security.
 5. That the Plaintiff has come to the realization that the amounts of loan secured by the property as reflected in the loan agreements differ significantly with the records held by the ministry of lands on registration of the charge.
 6. That this irregularity manifesting affects the terms of the contract.
 7. That further the 1st defendant has imposed undisclosed interests and penalties on the loan facility rendering it difficult to reconcile the accounts.
 8. That the suit property is comprised of a fully functional hotel business complete with all the modern amenities.
 9. That the intended sale of the property will result in immense loss and damage to the Plaintiff.
 10. That the plaintiff claim has a high chances of success.
 11. That the balance of convenience shifts towards preserving the property to allow the plaintiff ventilate it's claim.”
4. The application was supported by an affidavit of Robert Kiogora Arimi, one of the directors of the Plaintiff deponing to facts relied on in terms similar to the grounds of the application, as follows:
- “1. That I am one of the directors of the Plaintiff sufficiently versed with all the issues stated herein.
 2. That I have the authority of the other directors to swear this affidavit.
 3. That the 1st defendant, on Four (4) occasions, advanced varied amounts of money to the Plaintiff as a loan facility against LR.No. Kamuri'A'/589. (Attached hereto and respectively marked "RKA1, RKA2, RKA3 and RKA4" are copies of loan agreements dated 05/10/2020, 26/05/2021 16/10/2021 and 23/12/2021.
 4. That as can be deduced from the loan agreements the amounts advanced were 15,000,000/=, 12,000,000/=, 9,000,000/= and 4,800,000/= (Attached herein and marked" RKA5 and, RKA6" are copies of the statement).
 5. That we have been servicing the loan amount as per the terms of the contract



6. That however the 1st defendant has levied fines, interests and penalties that are not in tandem with the terms of the contract.
 7. That we believe that this is directly attributable to the irregularities committed by the 1st defendant whether deliberately or by mistaken.
 8. That whereas annexure "RKA5" reflects that the amount requested and advanced as Kenya Shillings Twelve Million (Ksh12,000,000/=), the certificate of official search attached hereto and marked "RKA 7" shows the amount secured by the further charge as Kenya Shillings Fifteen Million (Ksh 15,000,000/=).
 9. That further whereas annexure "RKA6" reflects the amount requested and advanced Kenya Shillings Nine Million (Ksh 9,000,000/=), the certificate official search reflects the sum of Kenya Shillings Ten Million (Ksh.10,000,000/=) .
 10. That lastly sum of Kenya Shillings Four Million Eight Hundred Thousand (Ksh 4,800,000/=) requested and advanced on 23/12/2021 seems not to have been secured through the registration of a further charge.
 11. That in essence there is evidence of irregularities that require an explanation from the 1st defendant.
 12. That despite the existence of the deliberate errors demonstrated above the 1st defendant has proceeded to advertise the suit property for sale with the intended public auction scheduled for 26/09/2023. (attached hereto and marked 'RKA 8' is a copy of the newspaper advert).
 13. That the defendants have not issued the Plaintiff with the requisite statutory notices prior to proceeding with the sale.
 14. That we are advised by our advocates on record that the errors of omission and commission committed by the 1st defendant regarding the registration of the separate charges are of a grave nature as to vitiate the contract and hence the need to have the intended sale suspended to enable the parties ventilate the issues in dispute.
 15. That we are further advised by our advocates that we have a strong case with a probability success."
5. The Defendants field a defence dated 5/0/2023 denying the allegations of the Plaintiff and put the Plaintiff to strict proof. The 1st Defendant further opposed the application and filed a Replying affidavit sworn on 18/10/2023 by Diana Kawaira, the Credit Recovery manager of the 1st Defendant deponing principally 3-21 thereof facts to support its contention that the defendants "have fully complied with all the legal requirements in the quest to exercise the 1st Respondent's Statutory Power of Sale," as follows:
- “ 3. That from the onset, it is noteworthy that the Applicant herein approached this Honorable Court through HCCC E004 of 2023, which suit was held to be fatally defective and for the reasons appurtenant thereto, the Applicant made a decision to discontinue the same. (Annexed and marked DK 1 a and b is a copy of the Ruling and Notice of Discontinuance of Suit).
 4. That raising the same issues herein gravely prejudices the 1st Applicant seeing as it continues to suffer immense loss. These issues would have been substantively determined in the earlier suit, had the Applicant been proper



before this Honorable Court. Unfortunately, that did not happen and the Respondents cannot be held at bay by mundane and obvious mistakes of the Applicant.

5. That the Supporting Affidavit sworn by the Plaintiff/Applicant is full of falsehoods and distortion of facts purposely intended to mislead this Honourable Court and the same ought to be rejected.
6. That between the year 2020 and 2021, the Applicant on several occasions sought financial facility from the 1st Respondent for the purposes of setting facility on the subject Suitland herein.
7. That at all material times, various Letters of Offer were issued (05/10/2020; 16/10/2021; 23/12/2021) were issued by the 1st to 2nd Respondent and duly accepted by the latter (annexed and marked 'DK2' is a bundle of the aforesaid Letters of Offer).
8. That at all stages the subject facilities were secured by way of Charge, Further Charge and Second Further Charge over the Suitland in favour of the 1st Respondent (annexed and marked 'DK3' is a bundle of the aforesaid Charges dated 16/10/2020; 26/05/2021; 11/06/2021 and 23/12/2021).
9. That equally each Director of the Applicant executed Personal Guarantee and Indemnity in favour of the 1st Respondent for the facilities extended thereof (annexed and marked 'DK4' is a bundle of the aforesaid Guarantees and Indemnity at various stages of the facility herein).
10. That the 1st Respondent cumulatively extended a facility of Kenya Shillings Forty Million Eight Hundred Thousand (40.8 M) to the Applicant. This is conceded by the Applicant at Par 4 of the Complaint and Statement of one Robert Kiogora Arimi who appears on the List of Witnesses dated 22nd September 2023.
11. That contrary to terms of the contract of monthly repayments of the subject facility herein, the Applicant defaulted and the numerous attempts by the 1st Respondents (informally) to have regularization fell on deaf ears and the empty promises did not yield any results. -
12. That taking into account that the informal engagements did not yield any result and the facility was in default for a period of over 30 days, the 1st Respondent initiated the process to exercise its Statutory Power of Sale by issuing a 3 months Statutory Notice to the Applicant (annexed and marked 'DK5' is copy of the aforesaid 3 months' statutory Notice dated 20/05/2022 and its certificate of postage).
13. That the Applicant did not bother to regularize the outstanding arrears of Kenya Shillings 1,397,387/- as at 12/05/2022.
14. -That following the failure by the Applicant to regularize the arrears within the 3 months and upon the expiry of the requisite notice, the 1st Respondent issued a 40 Days' Notice of Intention to sell dated 15/09/2022 calling for redemption of the charged property by payment of Kenya Shillings



40,876,277/- (annexed and marked 'DK6' is a copy of the aforesaid Notice of Intention to sell and its certificate of postage).

15. That the 40 Days of Intention to sell was as well ignored and lapsed without any whatsoever by the Applicant to regularize the subject facility and thus the 1st Respondent had no other alternative other than instructing the 1st Respondent to proceed with public auction in full compliance with the attendant legal requirements in all the steps (annexed and marked 'DK7' is a copy of the instructions by the 1st to 2nd Respondent).
16. That pursuant to the aforesaid instructions, the 2nd Respondent issued upon the Applicant 45 Days' Redemption Notice together with the Notification of Sale (annexed and marked 'DK8' is a copy of the aforesaid Redemption Notice, Notification of Sale and their Certificate of Postage / service).
17. That before the intended public auction that was slated for 18/04/2023, the Applicant herein filed the aforementioned suit and Application seeking to stop the auction, which auction was temporarily halted, the 1st Respondent had commissioned a Pre-Auction Valuation Report, which itemized that the Market Value of the Property at Kshs.41,000,000/= and the Forced Sale Value at Kshs.30,750,000/= (annexed and marked 'DK9' is a copy of the pre-auction valuation Report dated 31.01.2023).
18. That the Applicant outstanding loan was 41,887,581.60/- as at 24/04/2023 (annexed and marked 'DKIO' is a copy of the Applicant's Loan Statement as at 24/04/2023).
19. That all manner of allegations put forth in terms of illegalities on part of the Respondents have no iota of evidence and are merely wishful thinking. The Applicant executed each and every document as demonstrated above and the loan was advanced to him pursuant to the terms so accepted.
20. That at all material times, the Respondents have fully complied and confined the quest to exercise power of sale within the legally allowed parameters. The same cannot be said of the Applicants who have failed to utilize the safeties envisaged in the process leading to the exercise of the Statutory Power of Sale. They continued to ignore all notices and at no given point did they render an explanation and/ or seek any restructure. They callously persisted in their default.
21. That at no material time has Applicant engaged the 1st Respondent in addressing the irregular 'repayments of the facility herein and the default thereof."

6. No supplementary affidavits were filed by either party.

Submissions

7. The Counsel for the parties thereafter filed submissions on their respective contentions. For the Applicant, it was urged that the contract of borrowing was not enforceable for failure principally



to register one of the charges and the statutory notice had not been shown to have been sent to the borrower Plaintiff, as follows:

“The applicable law

Your Lordship, the Plaintiff has invoked the provision of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and Section 63(e) of the *Civil Procedure Act*. The yardstick to be satisfied by an applicant seeking orders of temporary injunction was laid down in the oft-cited decision of *Giella v Cassman Brown & Co. Ltd* to the effect that:-

“The conditions for the grant of an inter/ocutory injunction are 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 will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience’.

(a) Prima facie case

Your Lordship, the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2013] KLR 123 qualified the term prima facie case as follows:-

“A prima facie case in a civil application includes but not confined to 8 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”.

In the instant case, the Plaintiff has pointed out the discrepancies relating to the Charges.

This is reflected in paragraphs 8, 9 and 10 of the Plaintiff’s supporting affidavit sworn on 22/09/2023.

Summarily, the amounts reflected in the charge Instruments executed by the parties do not correspond with the amounts entered during the registration of the first three (3) charges. Further, the final charge was not registered at all as is required by law.

Unfortunately, the Defendants did not deem it necessary to respond to this issue which in all probability forms the backbone of the Plaintiff’s suit.

Regarding service of statutory notices, the 1st Defendant has provided what it deems evidence of proper service.

However, the same suffer the following inadequacies.



- Whereas the three (3) months statutory notice dated 20105/2022 and notice of intention to sell dated 15/09/2022 are purported to have been dispatched to P.O. BOX 440-60602 Nkubu, the postage receipts do not support that position.
- There is a distinct difference between the postal codes in the two situations with the notices bearing postal code 60602 and the postage receipts bearing postal code 60202.
- The postage receipt is not reflective of the postage address number 440.
- The foregoing should be considered against the fact that the postal address appearing in all the letters of offer provided by the 1st Defendant and collectively marked as 'DK 2' is p.a. BOX 395-60202 Nkubu.
- Whereas the 45 days redemption notice and notification of sale were allegedly served upon a manager at the Plaintiff's business premises, there is no indication that such manager had the requisite authority to accept such service or that he appended his signature on either of the notices.
- Whereas it is alleged that both notices were also dispatched to P.O. BOX BOX 395 - 60202 Nkubu, the postage receipt does not support that assertion and the name of the recipient is not legible.

Your Lordship, owing to the foregoing, it is our submission that the twin issues of the legality of the charges and the issue of service of the statutory notices raise substantive issues that require to be addressed at trial.

We on this account rely on the decision in *Julius Ochudho & 31 Others v. Kisony Welfare Group Ltd & 8 others* [2021] eKLR where the court stated:-

“To the extent that the Plaintiffs have challenged service of the notice to sell on them, they have demonstrated a prima facie case with probability of success.”

8. The Plaintiff submitted that as a going concern loss of the business would be immense and the fact that the Plaintiff can be compensated by an award of damages is not sufficient reason to deny the plaintiff an interlocutory injunction citing *Kanorero River Farm Ltd & 3 Others v. National bank of Kenya* (2002) 2 KLR 207 that:

“I would for those reasons alone accede to the plaintiffs prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages”.

9. The Plaintiff urged that the balance of convenience tilts in favour of granting the orders to avert dire consequences relying on statement in *Films Rover International v. Cannon Film Sales Ltd* (1986) ALL ER 772 in considering whether to grant interlocutory injunctions that “A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong.”



10. In the Defendants' submissions, it was emphasized that the 1st Defendant's statutory power of sale had crystallized and opportunity given to the Plaintiff to regularize its accounts, as set out in paragraphs 7-11 of the Submissions:

“7. Section 90 (1) of the Land Act, provides that once the default in any obligation by a chargor for a period for more than a Month, the Chargee is required to call for regularization by issuing a 3 months statutory notice itemizing issuing set out in section 90 (2) thereof including setting out the nature and extent of default by the chargor; specifying the amount payable within the three months; indicate that in the event of non-regularization within the specified period would invite the chargee to invoke any of the remedies available to the chargee and advise the chargor of its right to seek Court's intervention.

8. The 1st Respondent herein issued a 3 months statutory notice dated 20/05/2021 to the Applicant to address (p.a. BOX 440-60202 NKUBU) address used in Further Charge dated 11/06/2021 (see page 27, 52 & 109 of the Replying Affidavit) and Second Further Charge dated 23/10/2021 (see page 82 & 119 of the Replying Affidavit) herein. The aforesaid statutory Notice is set out in paragraph 11 of the Replying Affidavit and appears at page 131 to 133 of thereof.

9. The aforesaid 3 months statutory Notice was posted via registered mail and its certificate of postage is annexed in the Replying Affidavit herein and the effective date of service can be invoked from Clause 38 of the Charge instruments in place.

10. Further the Notice was specific that the arrears outstanding as at 12/05/2021 was Kenya Shillings 1, 397, 387/- and was to be settled within 3 months.

11. As set out in the Replying Affidavit, the 3 months' Notice was ignored and a 40 Days' Notice of Intention to sell was issued in accordance with section 96 (1) of the Land Act. It is set out in paragraph 14 of the Replying Affidavit and appears at page 134 to 136 thereof.”

11. The Respondent further submitted that it duly complied with the 45 day redemption notice under Rule 15 (d) of the Auctioneers Rules 1997, as well as with the provision of section 97 (2) of the Land Act that “a chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer” and citing F. Gikonyo J in Studertek Powers (EA) Ltd. & Anor. v. Housing Finance Company Ltd [2020] eKLR and Kasango J. in Zum Zum Investment Limited v. Habib Bank Limited [2014] eKLR urged that it was for the Plaintiff to demonstrate, which it had not done, that the presale valuation report that the defendant sought to rely on did not give the best price obtainable at the material time.

12. On the issue of prima facie case, it was submitted that the Plaintiff could not demonstrate a prima facie case as the debt and default were not contested and the suit property as a charged property was a commodity for sale, whose value had been outstripped by the outstanding amount on the loan, as follows:

“29. In the instant matter, the Applicant sought financial accommodation to the tune of Kenya Shillings 40,800,000/- (an issue that is not contested). By own



admission, the Applicant is in default and has not put forth any proposal to address the shortcomings.

30. Further, the outstanding amount has outstripped the market value of the suit land. Having admitted that it is in default the Applicant cannot sustain prima facie case at the moment (see paragraph 49 of the Court's Ruling in the case of Yusuf Abdi Co. Ltd v Family Bank Kenya Ltd [2015] eKLR).
31. It is trite law that charge properties are commodities of sale whose commercial value can be ascertained and it is astonishing that the Applicant is seeking to stay levying of interest over a facility that it is in default and without offering any basis and/or justification for the same. Your Lordship, the Applicant is inviting the Court to re-write the contract between the parties herein which is legally untenable.
32. Justice Lenaola (as he then was) in the case of Jopa Villas LLC vs Overseas Private Investment & 2 Others [2009] eKLR in part stated that;

“...I am clear in mind that the Applicant is running away from obligations lawfully imposed and with its full knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover its monies lawfully advanced. That is a tradition that I cannot depart from and as was advised in *Aiman vs Muchoki* (1984) KLR 353. Our courts must uphold the sanctity of lawful commercial transactions.” (Emphasis ours).
33. The *Land Act*, 2012 is very express that in case of default by a borrower, a lender is allowed to enforce his rights, albeit through the legally laid down procedure. Justice Ringera (as he then was) explained in the case of *Morris and Co. Ltd v Kenya Commercial Bank Ltd and others* [2003] 2 EA 605 (CCK) that:

‘Where a party has a statutory right of action, the court will not usually prevent that right from being exercised except that the court may interfere where there was no basis on which the right could be exercised or it was being exercised oppressively.’”

13. Ruling was reserved.

Issue for determination

14. As accepted by both parties' submissions, the application for interlocutory injunction is governed by the principles of interlocutory injunction set out in *Giella v. Cassman Brown* (1973) EA 358, and the question before the court is whether a prima facie case has been established; whether damages are adequate compensation in the circumstances of this case, and where, in case of doubt, the balance of convenience lies on the issue of grant of temporary prohibitive injunction.



Determination

Prima facie case

15. The court has considered the question of registration of the charges subject of this suit. The Court confirmed from the copies of charges filed that a charge was registered for three advances of loan amounts. No charge was exhibited on the admitted loan of 4,800,000/- but a personal guarantee and indemnity thereon by all the directors of the Plaintiff is adduced by the 1st Defendant.
16. The Plaintiff admits that it was advanced a total sum of Ksh.40,800,000/-. The various Charges executed by the Plaintiff and the 1st Defendant are exhibited in the Replying Affidavit.
17. The Plaintiff's argument on the registration of the charges is based on perceived differences in the amounts of the charges and amounts registered on the land register against the title. It is urged that –

“Summarily, the amounts reflected in the charge Instruments executed by the parties do not correspond with the amounts entered during the registration of the first three (3) charges. Further, the final charge was not registered at all as is required by law.

Unfortunately, the Defendants did not deem it necessary to respond to this issue which in all probability forms the backbone of the Plaintiff's suit.”

18. A Charge on property is for purposes of enforcement of the rights and obligations therein created by registration. Charges as with other dispositions in land are required to be registered by section 43 (2) of the [Land Registration Act](#) as follows:

“43. Instruments of dispositions

1. Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.
2. No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.
3. The provisions of subsection (2), shall not apply to any disposition that is exempt from registration.
4. This section shall not apply to or affect the operation of any contract for a disposition under this Act.

[Act No. 28 of 2016, s. 17.]”

19. A Charge is perfected or completed by registration, in terms of Section 56 of the [Land Registration Act](#), which provides specifically for registration of charges, in material parts, as follows:

“56. Form and effect of Charges



1. A proprietor may by an instrument, in the prescribed form, charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money's worth, or the fulfillment of a condition and, unless the chargee's remedies have been by instrument, expressly excluded, the instrument shall, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, the persons attesting the affixation of the common seal.
 2. A date for the repayment of the money secured by a charge may be specified in the charge instrument, and if no such date is specified or repayment is not demanded by the charge on the date specified, the money shall be deemed to be repayable three months after the service of a demand, a written, by the chargee.
 3. The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.
 4. The Registrar shall not register a charge, unless a land rent clearance certificate, certifying that no rent is owing in respect of the land, and the consent to charge has been presented, or unless the land is freehold.
 5. A charge shall have effect as a security only and shall not operate as a transfer."
20. The Court has noted the copy of Certificate of Official Search dated 6/1/2023 (six months and three months, respectively, after the statutory notice and notice of intention to sell the suit property) and copy of and title deed at pp.157 -161 of the Replying Affidavit, the register of the suit parcel of land shows only the following (3) encumbrances are registered:
1. 19.10.2020 - Charge In Favour Yetu Sacco Limited For A Sum Of Ksh.15,000,000/- Rights Under Sec. 82 & 83 Reserved.
 2. 11.6.2021 - Further Charge By Yetu Savings & Credit Cooperative Society Limited For Ksh.15,000,000/- Rights Under Sec. 82 And 83 Reserved.
 3. 28.10.2021 - 2nd Further Charge By Yetu Savings & Credit Cooperative Society Limited For Ksh.10,000,000/- Rights Under Sec. 82 And 83 Reserved.
21. From the exhibits in the Relying Affidavit, the charges are as follows: Charge of 16/10/2020 at pp.24-50 of the Replying Affidavit for Ksh.15,000,000/- is correctly registered on 19/10/2020. Further charge of 11/6/2021 pp.51-80 of the Replying Affidavit for Ksh.15,000,000/- is correctly registered as encumbrance for the same amount on 11/6/2021. Charge of 23/10/2021 at pp 81-110 of the Replying Affidavit for Ksh.10,000,000/- is registered on 28/10/2021 for the same amount. The charges are signed by the Plaintiff through its directors.
22. It is clear that the complaint of irregularities as to differences between amounts in loan agreements and the entries on the green card register of the suit land is not well founded. Indeed, the Plaintiff



points out that the amounts advanced to it on two occasions of them, respectively for 12,000,000/- and 9,000,000/-, are different from the amounts noted in the register as shown in the Certificate of Official Search RKA7. The two relevant letters of offer RKA2 and RKA3 referred to as loan agreements are letters of offer before the formal charges. The letters of offer and the Charges are signed by the plaintiff's directors and the representatives of the 1st Defendant.

23. The court has carefully considered the two documents and noted that although Reference on the Letters give the figure of the loan facility offered respectively as 12,000,000/- and 9,000,000/- the substantive Clause 7 (c) of the Letters of Offer on Securities and Undertaking in the body of the letter of offer which is signed by the Plaintiff's directors indicates the further charges respectively of 15,000,000/- and 10,000,000/- are to be registered in favor of the 1st Defendant. There is, therefore, no difference between the amounts to be secured by the further charges as indicated in the letters of offer and the respective charges as registered on the land register. And the Plaintiff has signed both the letters of offer and the respective Charges, and the court cannot be asked to rewrite the contract of the parties.
24. There does not appear to have been concluded a charge for the sum of Ksh.4,800,000/- and it is secured by the personal guarantee and indemnity of all the directors of the Plaintiff dated 17/12/2021. It was incumbent on the Plaintiff by reason of the burden of proof under sections 107, 108 and 109 of the [Evidence Act](#) to demonstrate the existence of the unregistered charge.

Debt is admitted

25. The Plaintiff accepts the debt by borrowing the monies in the sums of Ksh.15,000,000/-, 12,000,000/- , 9,000,000/- and 4,800,000/- relying on what it calls at paragraphs 3 of the Supporting Affidavit as "loan agreements", alleges to have been servicing the loan amounts as per terms of the contract but claims at paragraph 6 of the affidavit that "the 1st Defendant has levied fines, interests and penalties that are not in tandem with the terms of the contract." The Plaintiff does not refer to the Charges which are duly signed by its directors and no evidence is offered that there are any fines, interests and penalties that are not authorised by the charges.
26. For whatever reason or purpose, the letters of offer executed by the Plaintiff and the 1st Defendant forming what the Plaintiff calls the loan agreement on the facilities for 12,000,000/- and 9,000,000/- stipulated that further charges in the sums of respectively 15,000,000/- and 10,000,000/- would be registered. No claim is made by the Plaintiff that it did not execute the Charges subject of this suit, with the usual elaborate certificates that the instrument is signed before an advocate and the effects of sections 82 and 83 of the [Land Act](#) explained. There is similarly no claim that while the amounts of ksh.12,000,000/- and 9,000,000/- as sought to be demonstrated by statements of Account RKA5 and RKA6 of the Supporting Affidavit, the lender used the higher sums of 15,000,000/- and 10,000,000/- to compute interest and other levies. It is only said that the charges in question secured as registered the amounts of 15,000,000/- and 10,000,000/- respectively while the loan amounts were Ksh.12,000,000/- and 9,000,000/- respectively. The court does see any prejudice as the computations on loan accounts as shown on the statements of accounts was based on the actual amounts advanced to the Plaintiff.
27. The Court does not find merit in the complaint that charges were registered for amounts not advanced under the loan agreements. All the three charges securing the sums of 15,000,000/-, 15,000,000/- and 10,000,000/- were respectively registered on 19/10/2020, 11/6/2021 and 28/10/2021 as agreed between the parties in the respective Letters of Offer. The Plaintiff did not attach the charge for Ksh. 4,800,000/- which it contended was not registered. There is exhibited at pp.111-120 and pp.121-130 of the Replying affidavit personal guarantee and indemnity respectively dated 23/11/2020



and 17/12/2021 in the names of the directors of the plaintiff as further security for the loans of 15,000,000/- and 4,800,000/-.

28. Moreover, it is accepted that a mere dispute on accounts cannot found a case for halting the exercise of the chargee's power of sale where the debt and default is admitted. There is no dispute that an amount of Ksh.40,800,000/- was advanced to the Plaintiff and there was default in payment. See Halsbury's Laws of England Vol. 32 4th Edition that:

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

Statutory notices

29. I have perused the letter of Statutory Notice DK5 and Chargee's Notice of Intention to sell DK6 and their respective certificates of postage together with 45-day redemption notice and notification of sale by the 2nd Auctioneers under the Auctioneers Rules and accompanying affidavit of service sworn on 7/2/2023 attached to the Replying Affidavit of the 1st Defendant's Credit Recovery manager.
30. The Statutory Notice under section 90 (1) and (2) of the Land Act by letter dated 20/4/2022 was addressed to the Plaintiff through its address 440-60602 Nkubu given in the charge document dated 23rd October 2021 (the code of the postal office is given in the charge documents variously as 60200, 60602 and 60202) and sent according to the certificate of postage dated 24/4/2022 to a destination indicated as Nkubu [60202]. The certificates of postage being a document of the Postal Service must be taken to give the correct official postal code, and not the 1st Defendant's rendition of the code, and this court accepts on a balance of probabilities that the statutory notice was sent to the plaintiff address 440 at Nkubu, whose official code is taken as 60202 as given by the Post Service and as given in the Charge dated 20/4/2022.
31. The Plaintiff was similarly properly given the necessary statutory notice and the chargee's notice of intention to sell under section 96 of the Land Act shown to have been sent to the same address destination NKUBU 60202.
32. The 45-day Redemption Notice by the 2nd Defendant Auctioneer was addressed to the Plaintiff at P.O. Box 395-60202 Nkubu, and shown by certificate of postage to have been sent to a destination at NKUBU [60202]. This notice was also served personally on the Plaintiff's manager by process server Isaac Gitonga Ringera of 7/2/2023. Needless to say, service on the Plaintiff company may be served by analogy in terms of section 131 of the Land Act, as follows:

“ 131. Service of notices

- (1) A notice which may be given under this Part may be served on a person—
- (a) by delivering it to the person personally;
 - (b) by sending it by registered post to the person's last known address;
 - (c) if the whereabouts of the person or the address cannot, after reasonable inquiry, be ascertained, by



leaving it with the occupier of the land concerned or, if there is no occupier, by affixing it upon some prominent part of the land;

- (d) if the person is a body corporate, society or other association of persons, by serving it personally on a secretary, director or other officer thereof or on a person concerned or acting in the management thereof, or by leaving it or sending it by registered post addressed to the body corporate, society, or, if there is no registered office, at any place where it carries on business, or, if there is none, by leaving it with the occupier of the land concerned, or, if there is no occupier, by affixing it upon some prominent part of the land; or
- (e) the Commission may in addition to serving notice by paragraphs (c) and (d), place an advertisement in two newspapers with a national circulation.

33. The court does not find merit in the Plaintiff's complaint of lack of service of the statutory notices herein.

Adequacy of damages

34. The same suit parcel of land was mortgaged or charged by the Plaintiff to secure multiple advances of loans of various amounts making a total acknowledged loan amount of Kenya Shillings Forty Million Eight Hundred Thousand (Ksh.40,800,000/-). How can such a parcel of land deliberately offered to secure these multiple loans be, in the minds of the borrower and the lender, anything other than an item for sale in the event of default of repayment of the loans? If there be any losses arising from the sale of the parcel of land offered as such security, say in sale at an under value or in the computation of monies due under the loan account, the same must be deemed to be remediable by an award of damages.

35. As urged by the 1st Defendant herein, the suit land is, as a charged property, a commodity for sale. The borrower treated the parcel of land as a security for the various loans that it obtained from the 1st Defendant, as an equivalent to the monies advanced as loan thereon on four occasions, and it must be taken to have contemplated its sale in the event of default.

36. in *Kihara v Barclays Bank (K) Ltd* (2001) 2 EA 420, the Court rendered thus:-

“The mere fact that a borrower has a claim in damages against a lender which is equal to or in excess of the debt due does not at law entitle it to resist the lender's attempt to exercise its statutory power of sale when this has properly arisen...As the Plaintiff had put up the property as security for the loan with full knowledge that should he default it would be sold, he had converted it into a commodity for sale and there was no commodity for sale the loss of which could not be adequately compensated in damages.”

37. This court in *Stephen Michuki Kiunga v National Bank of Kenya Ltd* [2018] eKLR observed thus:-

“Suffice it to state the his having offered the suit property as a security for the loans, the applicant must be deemed, as in *Isaac O. Litali v. Ambrose W. Shubai & 2 Ors*, to have been ready for the eventuality that befalls it upon default of loan repayments and the Bank is



entitled to realize its security in those circumstances, to give effect to certainty of commercial lending transactions.”

38. However, in the circumstances where there is a prima facie case on the issue whether circumstances have arisen to support the exercise of a power of sale, a chargor must be protected from the loss of property subject of the charge. Indeed, inherent in the mortgage arrangement is the term that so long as the chargor continues to pay the amounts due under the mortgage or charge, the chargee cannot seek to sell the property to recover his monies. This is the effect of the provisions of section 80 of the *Land Act* that charge of land is a security only and section 89 of the Act underpinning the equity of redemption. There must be a default, lawful demand and notice before the power to sell may crystallize.
39. In this case, the argument on alleged discrepancy in the registration of the charges and non-registration of one charge proffered as raising a prima facie case within the meaning of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others*, supra, of “a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter” fails because it has been shown that the Plaintiff executed each of the three registered charges and its directors executed personal guarantee and indemnity to secure the fourth loan. In addition, the complaint of want of service of statutory notices has been shown to be without merit.
40. In this context, this Court finds that the sale of the suit property is a loss which is contemplated under the charges and consequently, an award of damages is adequate remedy.

Balance of convenience

41. In this regard, I respectfully accept the guidance of the Court of Appeal decision cited by the Plaintiff in *Charter House Investments Ltd v Simon K. Sang and Others*, Civil Appeal No. 315 of 2004, [2010] eKLR held:

“The superior court correctly applied the case of *Giella vs Cassman Brown* [1973] E. A. 358 when it declined to grant the injunction sought. Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the *Giella* case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”
42. I consider that a Chargee whose right has crystalized is, of course, entitled to seek to realise the security. However, a Chargor who can show a prima facie case that the charge upon which the power of sale is sought to be exercised is invalid or that due statutory notice, and therefore opportunity to exercise the equity of redemption, has not been given, is entitled to protection of the substratum of the dispute pending full hearing and determination.
43. Being satisfied that the Plaintiff has not demonstrated a prima facie case for the grant of the reliefs sought herein and that damages would be an adequate remedy, in the event the court eventually adjudicates the matter in favour of the Plaintiff, the Court does not find any occasion for consideration of the balance of convenience test of *Giella v. Casman Brown*, save to observe that where, as here, the



value of the loan amounts is almost outstripping the market value of the charge property, the balance of convenience may tilt towards the exercise of the power of sale to realise the security and allow the lender to recover his money and reduce the exposure of the borrower by way of excess monies that may he may be called upon to pay under the personal guarantee and indemnity.

Conclusion

44. The court finds that the Plaintiff has not demonstrated a prima facie case for the grant of the relief sought on the grounds of alleged discrepancy between the amounts secured on the charges as registered and the amounts in loan agreement as executed between the parties and alleged absence of service of statutory notices. The Court does not find a prima facie case based on a claim in the Plaint that “the variation and/or alteration of the terms of contract between the Plaintiff and the 1st defendant renders the contract unenforceable” because the various charges are all shown to be executed by the Plaintiff’s directors and registered in the register of the suit property in accordance with the law.
45. The Court further considers that damages are an adequate remedy in the circumstances of this case of multiple charges on the suit property, clearly presenting the land security as a commodity for sale.
46. The Court is mindful of the history of this case where upon filing what the court found in a ruling delivered on 30/8/2023 (exhibit “DK1a” of the Replying Affidavit) to be incomplete and incompetent application in Meru HCCC NO. E004 of 2023, the Plaintiff withdrew that suit and filed this suit. Although, permitted under Order 25 Rule 1 of the Civil Procedure Rules, such a withdrawal and re-institution of a suit and the resultant delay in the fair hearing of the dispute in the circumstances of commercial transactions of this nature have an effect outside the individual causes of the parties before the court in the impact on the image of the Court as an effective and efficient arbiter.
47. In addition, there is a spectre of abuse of process of court by the Plaintiff in withdrawing the previous suit and filing this present suit after the court has partially considered the previous suit and after hearing the parties reduced the issue between the parties to one of pre-sale valuation of the suit property and directed an independent valuation under the auspices of the Chairman of the Valuers Registration Board as shown in Ruling of 30/8/2023 in the previous suit between the same parties.
48. The Plaintiff will be mulcted in costs.

Orders

49. Accordingly, for the reasons set out above, the Court makes the following orders:
 1. The Plaintiff’s application for injunction herein dated 22/9/2023 is dismissed.
 2. The Plaintiff shall pay costs of this application to the Defendants.

Order accordingly.

DATED AND DELIVERED ON THIS 11TH DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Basilio Gitonga, Muriithi & Associates Advocates for the Plaintiff Applicant.

M/S Wambugu & Muriuki Advocates for the Defendants Respondent.

