



**Mahadi & 3 others v Premier Bank Kenya Limited (Previously Trading
as First Community Bank Limited) (Commercial Case E556 of 2023)
[2024] KEHC 2432 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E556 OF 2023
MN MWANGI, J
MARCH 1, 2024**

BETWEEN

**IBRAHIM HUSSEIN MAHADI 1ST PLAINTIFF
MAHADI ENERGY LIMITED 2ND PLAINTIFF
MAHADI OIL (K) LIMITED 3RD PLAINTIFF
MAHADI CONTAINER DEPOT LIMITED 4TH PLAINTIFF**

AND

**PREMIER BANK KENYA LIMITED (PREVIOUSLY TRADING AS FIRST
COMMUNITY BANK LIMITED) DEFENDANT**

RULING

1. The plaintiffs filed a Notice of Motion application dated 10th November, 2023 under the provisions of Order 40 Rules 1 & 2, Order 20 Rules 1, 2, 3 & 4 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3, 3A & 63 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Sections 80, 90, 96 & 97 of the *Land Act*, 2012 and all enabling provisions of the law. The applicants seek the following orders -
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. A temporary injunction be and is hereby issued restraining the defendant by itself, agents, servants, employees or otherwise howsoever from advertising for sale, selling, disposing, alienating and/or in any manner whatsoever dealing with the plaintiffs' properties known as



Nairobi Juja Road Pangani L.r No. 209/2389/95, Eastleigh L.r No. 25764, Nairobi South C Mtelo Rd. L.r. No. 209/5082 and Port Reitz-mombasa L.R NOs. 2428/VI/MN, IOI7/VI/MN & 4689/VI/MN, pending the hearing and determination of this suit;

- v. The Honourable Court be pleased to suspend, stay and/or vacate the auction scheduled for 14th and 15th December, 2023 (now spent) and any further implementation of the defendant's 90 days' Statutory Notices dated 25th April, 2023 and issued to the plaintiff on 4th May, 2023 together with the 40 days' Statutory Notices dated 8th August, 2023 and served upon the plaintiffs on or about 18th August, 2023, pending the hearing and determination of this suit;
 - vi. An order requiring the defendant to supply the plaintiff with detailed updated statements of accounts showing the current position of the plaintiffs' bank accounts with the defendant; and
 - vii. Costs of this application be in favour of the plaintiffs.
2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn on 10th November, 2023 and 8th December, 2023 by Ibrahim Hussein Mahadi, the 1st plaintiff, and the Chairman and Managing Director of the 2nd, 3rd & 4th plaintiffs. In opposition thereto, the defendant filed a replying affidavit sworn on 30th November, 2023 by Claris Ajwang Ogombo, a Legal Manager at the defendant bank.
 3. The instant application was canvassed by way of written submissions which were highlighted on 20th December, 2023. The plaintiffs' submissions were filed on 13th December, 2023 by the law firm of Prof. Albert Mumma & Company Advocates, whereas the defendant's submissions were filed by the law firm of Igeria & Ngugi Advocates on 13th December, 2023.
 4. Mr. Agwara, learned Counsel for the plaintiffs relied on the case of Mrao Ltd v First American Bank of Kenya & 2 others [2003] KLR 125, where the Court of Appeal defined what constitutes a prima facie case and submitted that this matter is premised on the duly executed letters of offer dated 24th September, 2020 and the Settlement Agreement dated 30th September, 2020, which led to the retirement of the plaintiffs' previous facilities and conversion of the same into letters of credit facilities advanced to the 2nd, 3rd & 4th plaintiffs in favour of Wilben Trade LLC totaling to USD 15 Million. He further submitted that by virtue of condition 5.2 of the letters of offer dated 24th September, 2020, the plaintiffs' initial financial facility of Kshs. 671 Million was redeemed, settled, and/or fully retired at Kshs. 950 Million vide a Deed of Settlement dated 30th September, 2020 between the 1st & 2nd plaintiffs and the defendant.
 5. Counsel stated that as a result of the foregoing, the defendant received a total of USD 15 Million part of which was used to settle the plaintiffs' previous liabilities with the defendant, and that for the remainder, the defendant had refused to render an account to show it was utilized. Counsel for the plaintiffs referred to clause 2 of the letter of offer dated 24th September, 2020 and argued that the letters of credit facilities were not secured and the properties which had been used to secure the plaintiffs' initial financial facility were not amended to secure the said letters of credit. It was alleged that the defendant did not seek their consent as provided for under clauses 4.9 & 4.14 of the letter of offer. He contended that clause 3.1 to 3.9 of the said letter of offer set out the credit facilities and the respective securities, and contends that the properties used to secure the plaintiffs' initial financial facility were not among them.
 6. It was stated by Counsel that clause 5.3 (i) of the deed of settlement dated 30th September, 2020 provided that none of the existing security documents would be discharged or released unless and until all payments of the settlement amount and credit facilities had been paid in full. Further, clause 5(iii)



on the other hand granted the defendant the right to amend, vary, increase and/or modify the existing security documents in order to secure the credit facilities but the defendant did not do any of the above or register any new security to secure the credit facilities. Mr. Agwara contended that in view of the above, the defendant had no right to issue statutory notices contemplated under Sections 90 and 96 of the Land Act and/or exercise its statutory power of sale over the suit properties. In addition, the defendant did not comply with the provisions of Section 79(3) of the Land Act before charging the suit properties, thus it has no right to dispose of the same. Counsel maintained that the statutory notices issued by the defendant herein are not only unlawful but also a nullity ab initio.

7. Mr. Agwara cited the provisions of Section 84(2), (3), (4) & (5) of the Land Act and asserted that the securities used to secure the initial financial facility advanced to the plaintiffs cannot be termed as continuing securities since for them to be so, the terms of the said securities and/or the amounts therein ought to be reviewed or increased through a memorandum registered and attached to the charge, which is not the case herein. He stated that in view of the foregoing and the provisions of Section 79(6) & (9) of the Land Act, the defendant is holding an informal charge over the existing facilities which can only be enforced by a Court order. To this end, Counsel relied on the cases of Charles G. Munge v Development Bank of Kenya Limited [2007] eKLR and Stephen K. Melly & 2 others v Eco Bank Kenya Limited & another [2016] eKLR.
8. Counsel referred to the case of John Mwenja Ngumba & another vs National Industrial Credit (NIC) Limited & another [2014] eKLR and contended that the defendant's intention to sell the suit properties at a gross undervalue of approximately 75% below their actual market value is unlawful and contrary to the express provisions of Sections 97 & 98 of the Land Act. He asserted that from the foregoing, and in view of the fact that it is not clear whether or not the plaintiffs defaulted in their loan repayment obligations, the plaintiffs have demonstrated a prima facie case with high chances of success.
9. On the issue of whether the plaintiffs will suffer irreparable harm that cannot be compensated by an award of damages, Mr. Agwara submitted that the plaintiff stands to suffer irreparable loss in the event the instant application is disallowed. In addition, the main property comprising the container handling depot is located a few metres away from the Port of Mombasa thus it is very ideal for providing container handling services, being the only business carried out by the 2nd plaintiff. He stated that if the defendant proceeds with the intended sale of the suit properties, the 2nd plaintiff is at the risk of being wound up during the pendency of this suit. Counsel cited the case of Manasseh Denga v Ecobank Kenya Limited [2015] eKLR and argued that having demonstrated that the defendant engaged in illegalities by failure to comply with the relevant provisions of the Land Act and the terms of the letters of offer, the plaintiffs stand to suffer irreparable harm should they be deprived of their property through an illegal process.
10. Mr. Agwara relied on the case of Jan Bolden Nielsen v Herman Philips Steyn A.K.A Hermanus Philips Steyn & 2 others [2012] eKLR and stated that the balance of convenience tilts in favour of the plaintiffs in view of the above submissions and the injustices meted out on them by the defendant. He urged this Court to consider the lower risk of injustice in the circumstances of this case, which would be to allow the application herein.
11. Mr. Njoroge, learned Counsel for the defendant cited the case of Mrao Ltd v First American Bank of Kenya & 2 others (supra) and submitted that the defendant advanced a loan facility to the plaintiffs sometime in the year 2013 but the plaintiffs persistently defaulted in their repayment obligations of the said loan, prompting the defendant to exercise its statutory power of sale over the charged properties used to secure the loan facility. Counsel agreed that the aforementioned facility was thereafter settled through the execution of a settlement agreement between the parties dated 30th September, 2020, where it was agreed that the loan facility shall be settled at an agreed sum of Kshs.1,000,000,000/



- =. Counsel argued that the issues raised with regard to the said facility are *res judicata* since before execution of the said Settlement Agreement, the plaintiffs had moved the Court in Nairobi High Court Civil Suit No. 117 of 2017 - Ibrahim Hussein Mahadi & others v First Community Bank Ltd & others, to stop the defendant from exercising its statutory power of sale over the suit properties. The suit was however compromised and/or finalized vide a consent recorded by the parties herein, who are the same as the parties in the other case.
12. Mr. Njoroge stated that the subject matter in this suit are the letters of credit advanced in favour of the plaintiffs in the sum of USD. 15,000,000/=. That these letters were advanced to the plaintiffs via a letter of offer, but the plaintiffs defaulted in their repayment obligation of the said letters of credit. Mr. Njoroge contended that as a result of the said default, the parties herein engaged in continuous negotiations which culminated in a mediation session conducted by Mr. Mohamud Salat and Dr. Osman, where it was agreed that parties would execute a Settlement Agreement.
 13. The said agreement was then prepared by the defendant's Counsel and forwarded to the plaintiffs who have not executed it to date, but instead they have made further promises to pay without making good the said promise. Counsel stated that the letters of credit were secured by the suit properties among other securities, and that the provision to vary/amend the securities was not mandatory since clause c of the settlement agreement dated 30th September, 2020 reads that, the defendant may amend/vary the securities.
 14. Mr. Njoroge submitted that by executing the letter of offer that lists the existing securities held by the defendant as assets that secured the USD 15,000,000/= loan advanced to the plaintiffs, they consented to securing the said USD 15,000,000/= with the existing securities held by the defendant. He further submitted that the Valuation Report relied on by the plaintiffs was prepared based on a proposed LPG facility which is still in the proposal phase. He opined that valuations premised on possible future events cannot be applied as valid valuations. He asserted that the defendant has done its due diligence and availed recent Valuation Reports of the suit properties. He referred to the case of *Wilstone Mdindi v Kenya Women Microfinance Civil Appeal E022 of 2021* and stated that by willingly charging matrimonial properties, the plaintiffs lifted the protection veil and converted the said properties into a trading commodity.
 15. Counsel for the defendant contended that the plaintiffs have failed to prove that they have a *prima facie* case with a probability of success. In addition, from the pleadings filed it is evident that the plaintiffs expressly admitted the debt owed to the defendant. He stated that the plaintiffs have also admitted receipt of all the statutory notices in their affidavit in support of the instant application. Counsel further stated that the plaintiffs have not demonstrated to this Court the harm they will suffer in the event the instant application is disallowed that cannot be compensated by an award of damages. He stated that to the contrary, any loss to be suffered by the plaintiffs is financial in nature which is easily calculable hence it cannot be classified as irreparable loss. He cited the cases of *Amina Karama v Njagi Gachagua & 3 others [2020] eKLR* and *Joseph Kipkorir Cheruiyot & another v Equity Bank (K) Limited & another [2017] eKLR* and asserted that the defendant is a financial institution, hence it will be in a position to compensate the plaintiffs, in the event that they are successful in this suit.
 16. Counsel referred to the case of *National Bank of Kenya Ltd v Isaac A Ogettah [1999] eKLR* and submitted that the balance of convenience tilts in favour of the defendant since loan facilities are obtained from bank deposits from the public and as such, the money belongs to the public and not the bank, and failure to repay the sums advanced to the plaintiffs by the defendant will occasion a loss to the public.



Analysis And Determination.

17. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit by the defendant together with the written submissions by Counsel for the parties. The issue that arises for determination is whether the plaintiffs have satisfied the requisite conditions to warrant being granted an interlocutory injunction against the defendant.
18. In the affidavit filed by the plaintiffs sworn by Ibrahim Hussein Mahadi, he deposed that vide a letter of offer dated 24th September, 2020, the defendant advanced to the 2nd, 3rd & 4th plaintiffs three letters of credit facilities in favour of Wilben Trade LLC., for a total transaction value of USD 15,000,000/= for purposes of settling previous facilities of Kshs.671,000,000/= advanced by the defendant to the 1st, 2nd & 3rd plaintiffs and two other related sister companies, thereby settling the said facilities together with profit and cost at an agreed sum of Kshs.1,000,000,000/= vide a Deed of Settlement dated 30th September, 2020.
19. He averred that the letters of credit were to run for an initial period of two years and were to terminate in November 2022, by which period the facility would either have been fully refinanced by another party with the 2nd plaintiff's proposed Liquefied Petroleum Gas (LPG) project at its property in Mombasa, or they would be settled on maturity and the defendant's exposure converted to a Diminishing Musharakah facility that would run for 8 years. He further averred that the letters of credit were unsecured save that the defendant continued holding onto the previous securities initially given by the 1st and 2nd plaintiffs as security for the now settled and retired facility.
20. Mr. Mahadi stated that sometime in September 2021, the plaintiffs procured a tripartite financing from Alberta and P & T Management Corporation for the settlement of the aforesaid letters of credit to fully retire the facility but the transaction collapsed on account of the defendant. Subsequently, vide a letter dated 30th November, 2022 the defendant advised the plaintiffs that since they failed to externalize the existing loan facility with an initial investment of USD 15,000,000/= they were obligated to pay the defendant the sum of USD 18,000,000/=, failure to which it would proceed and file a recovery claim for the said amount.
21. He averred that the plaintiffs requested for their account statement to reconcile how the facility of USD 15,000,000/= had grown to USD 18,000,000/= but the same was never provided by the defendant. Instead, on 25th April, 2023 it served the plaintiff with a 90 days' statutory notice of sale for the suit properties which comprised securities initially issued to the defendant for the previous settled facility on account of loan arrears amounting to Kshs. 2,293,464,826.96. Thereafter, on 8th August, 2023 the defendant issued the plaintiffs with a 40 days' statutory notice pursuant to Sections 90 and 96 of the [Land Act](#).
22. That on 6th October, 2023 the defendant through Phillips International Auctioneers served the plaintiff with a 45 days' redemption notice, wherein the defendant scheduled the suit properties for sale by way of public auction on 14th & 15th December, 2023 at a value way below their current market value contrary to the express provisions of Sections 97 & 98 of the [Land Act](#) No.6 of 2012. Mr. Mahadi contended that the plaintiffs are making good progress towards settling the outstanding letters of credit and are confident that the same would be cleared soon
23. He asserted that the suit properties comprise inter alia the 1st plaintiff's residential home located in South C Nairobi, and the Container Handling Depot which is the heart and soul of the 2nd plaintiff



- and the 1st plaintiff's only source of livelihood. Mr. Mahadi contended that the defendant's actions will subject the plaintiffs to the loss of their valuable properties and their only means of livelihood.
24. In response thereto, Miss. Claris Ajwang Ogombo, the deponent of the defendant's replying affidavit averred that it advanced financing to the plaintiffs in the form of an overdraft and further letters of credit in favour of M/s Wilben Trade LLC, by way of letters of offer dated 24th September, 2020 which strictly specified that the said financial facilities advanced to the plaintiffs would be secured by the suit properties which had already been secured by the defendant in respect of an earlier facility save for Nairobi South C Mtelo RD. L.R. No. 209/5082 and Port Reitz-Mombasa L.R No. 10I7/VI/MN.
 25. She referred to clause c of the Settlement Agreement dated 30th September, 2020 which provides that the letters of credit facilities shall be secured by among others, the existing securities issued by the plaintiffs as may be amended, modified or restated by the parties. Further, clause 3.3 provided that the settlement amount shall be Kshs.1,000,000,000/= representing the full settlement of outstanding payments by the plaintiffs and their associated companies to the defendant under the existing facilities, but did not include the letters of credit facilities and such other new debts that may be advanced by the defendant to the plaintiffs from the date of settlement of the existing facilities.
 26. She averred that clause 5.3 provided that none of the existing security documents relating to the existing facilities would be discharged or released until and unless all payments of the settlement amount and letters of credit facilities had been unconditionally and irrevocably paid in full.
 27. Miss. Ogombo contended that in view of the foregoing, the defendant had no legal or contractual requirement to register new or further charges over the stated assets as claimed by the plaintiffs. She referred to the plaintiffs' Advocates letter dated 15th December, 2022 and stated that there was no wrongdoing or breach of operations by the defendant to warrant the collapse of the payments being made to the defendant.
 28. Furthermore, that the contents of the plaintiffs' Advocates letter dated 16th August, 2023 reveal that there is no dispute as to the outstanding amounts and the fact that they had secured a significant discount of the debt to a negotiated sum of Kshs.2,000,000,000/= subject to the execution of a Settlement Agreement which the 1st plaintiff refused to execute, hence leading to the advertising of the secured assets for sale by public auction.
 29. She further stated that the Valuation Reports relied on by the plaintiffs are fictitious, illogical and simply produced to distort the value of the securities and make it impossible for the defendant to exercise its statutory power of sale. In addition, the plaintiffs had since been supplied with their bank account statements, which is buttressed by the fact that the plaintiffs undertook to execute a Settlement Agreement to settle the sum of Kshs.2,000,000,000/= since no entity can simply admit liability of such a significant debt and undertake to execute a Settlement Agreement, while at the same time dispute the amounts owed.
 30. Miss. Ogombo asserted that the defendant has served the plaintiffs with all the requisite statutory notices as provided for by law.
 31. In a rejoinder, Mr. Mahadi stated that by virtue of the defendant's failure to exercise its contractual right to vary and/or amend the security documents it had in its possession or perfect the securities before drawdown, the suit properties herein are not legally charged as they were redeemed by the settlement of the plaintiffs' initial facility of Kshs.671,000,000/=. He contended that in that case, the purported statutory notices issued by the defendant are unlawful in view of the fact that the suit properties were never issued as collateral nor perfected as security in the first place.



32. He further stated that the plaintiff's Valuer only conducted a market survey, using co-relatable comparable of the suit properties, so as to demonstrate to this Court the true market value of the suit properties herein at the current market rate. He averred that the defendant did not seek spousal consent before charging Nairobi Juja Road L.R. Nos. 25764, 209/5082 and 209/2389/95, Nairobi South C. L.R. Nos. 209/5061 and Title No. Nairobi/Block 103/434 for the initial loan facility of Kshs. 671,000,000/= despite the fact that they are matrimonial properties owned by the 1st plaintiff and his wives.

33. Mr. Mahadi asserted that the defendant's Valuation Reports are irregularly skewed to allow the defendant to unjustly dispose of the suit properties, they are professionally unsound and the values therein do not represent the actual current values for the subject properties.

Whether the plaintiff has met the requisite conditions to warrant being granted an interlocutory injunction against the defendant.

34. The instant application has been filed pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states as hereunder -

“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 orders.”

35. The test for granting of an interlocutory injunction was considered by the Court in the case of *American Cyanamid Co. v Ethicom Limited* [1975] AER 504, where the following three elements were noted to be of great importance:

- i. There must be a serious/fair issue to be tried;
- ii. Damages are not an adequate remedy, and
- iii. The balance of convenience lies in favour of granting or refusing the application.

36. On the question of whether the plaintiffs have demonstrated a prima facie case with high chances of success, this Court is bound by the Court of Appeal holding in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where the Court stated thus -

“So what is a prima facie case” I would say that in civil cases 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability



of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

37. It is not disputed that the defendant had advanced the 2nd & 3rd plaintiffs a loan facility of Kshs. 671,000,000/= sometime in the year 2013. The loan facility was secured by among others, the suit properties in issue. The 2nd & 3rd plaintiffs defaulted in their loan repayment obligations of the aforesaid facility prompting the defendant to initiate the process leading to the exercise of its statutory power of sale over the suit properties. The parties herein however got into a compromise to retire and or settle the aforementioned loan facility in terms of the letters of offer dated 24th September, 2020 which converted the said facility into letters of credit advanced to the 2nd, 3rd & 4th plaintiffs in favour of Wilben Trade LLC totaling USD 15 Million, and a Settlement Agreement dated 30th September, 2020 where it was agreed that the 2nd plaintiff and its associated companies would pay the defendant Kshs.1,000,000,000/= as full settlement of outstanding payments by the 2nd plaintiff and its associated companies under the existing facilities. The said amount was however not to include the letters of credit facilities.
38. The plaintiffs averred that the letters of offer and the Settlement Agreement were not secured, thus the defendant has no legal right to purport to exercise its statutory power of sale over the suit properties in a bid to recover the amounts under the letters of credit and Settlement Agreement. On perusal of the letters of offer dated 24th September, 2020, it is however evident that security for the facility is provided for under clause 4. It states that prior to drawdown, the customer (in this case being the plaintiffs) procures that the defendant receives the documents specified thereunder as a continuing security for all monies, obligations and liabilities incurred by the plaintiffs to the defendant. A perusal of the documents listed thereunder shows that all the suit properties save for Nairobi South C Mtelo RD L.R. No. 209/5082 and Port Reitz-Mombasa L.R Nos. 2428/VI/MN and 10I7/VI/MN were offered as continuing securities for the letters of credit by the plaintiffs to the defendant.
39. A reading of the Settlement Agreement dated 30th September, 2020 on the other hand reveals that it provided for security under clause 5 which provides that the initial credit facilities advanced to the 2nd plaintiff and its associated companies were secured by all the suit properties save for Nairobi South C Mtelo RD. L.R. No. 209/5082 and Port Reitz-Mombasa L.R No. 1017/VI/MN. In as much as I agree with Counsel for the plaintiffs that clause 5(3)(iii) of the Deed of Settlement dated 30th September, 2020 granted the defendant the right to amend, vary, increase, modify or restate such existing security documents in order to secure the letters of credit facilities to the defendant's satisfaction, it is my considered view that this does not mean that amendment and/or variation of the security documents had to be done before the security could take effect. Instead, it means that if at all the defendant was of the view that there was need for variation and/or amendment, it was at liberty to do so.
40. The above is buttressed by the provisions of clause 5.5 of the Deed of Settlement dated 30th September, 2020 which provides that as of the date of the deed, each continuing finance document shall remain in force and effect, and/further obligations secured by each continuing finance document extend to any new obligations assumed by the 2nd plaintiff subject to clause 8. In light of the foregoing provisions of the Deed of Settlement, this Court finds that it is incorrect for the plaintiffs to conclude that the letters of credit were unsecured. In submitting that the securities used to secure the initial financial facility advanced to the plaintiffs cannot be termed as continuing securities since for it to be so, the terms of the said security and/or the amounts therein ought to be reviewed or increased through a memorandum registered and attached to the charge, which is not the case herein.
41. Mr. Agwara cited the provisions of Section 84 (2), (3), (4), & (5) of the Land Act which state as follows: -
 1.



2. The amount secured by a charge may be reduced or increased by a memorandum which shall-
 - a. comply with subsection (5); and
 - b. be signed-
 - i. in the case of a memorandum of reduction by the chargee; or
 - ii. by the chargor; and
 - c. state that the principal funds intended to be secured by the charge are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.
 3. The term of a charge may be reduced, extended or renewed by a memorandum which-
 - a. complies with subsection (5);
 - b. is signed by the chargor and the chargee; and
 - c. states that the term of the charge has been reduced, extended or renewed, as the case may be, to the date or in the manner specified in the memorandum.
 3. The covenants, conditions and powers expressed or implied in a charge are varied in the manner specified in the memorandum.
 4. A memorandum for the purposes of subsections (2), (3) and (4) shall-
 - a. be endorsed on the register or annexed to the charge instrument; and
 - b. upon endorsement or being annexed to the charge instrument, vary the charge in accordance with the terms of the memorandum”.
42. I agree with Counsel for the defendant that by executing the letters of offer dated 24th September, 2020 and the Deed of Settlement dated 30th September, 2020, which documents were annexed to the charge instruments in respect to the suit properties, the parties herein were fully compliant with the provisions of Section 84 of the *Land Act* reproduced at paragraph 41 of this ruling. In the end, this Court finds that the letters of credit facilities advanced to the plaintiff in favour of Wilben Trade LLC via the letters of offer dated 24th September, 2020 and the deed of settlement dated 30th September, 2020 were secured by continuing securities comprising charges registered over all the suit properties save for Nairobi South C Mtelo RD L.R. No. 209/5082 and Port Reitz-Mombasa L.R No. 1017/VI/MN.
43. The plaintiffs’ Counsel contended that it is not clear whether or not the plaintiffs defaulted in their loan repayment obligations. It is noteworthy that at paragraph 23 of their affidavit in support of the application herein, the plaintiffs averred that they are making good progress towards settling the outstanding letters of credit and are confident that the same will be cleared soon enough. In addition, upon perusal of the plaintiffs’ letter dated 15th December, 2022 it is clear that as at the date of the said letter, the plaintiffs were still indebted to the defendant. In view of the foregoing, there is no doubt in my mind that by the time the defendant initiated the process that leads to its exercise of its statutory power of sale, the plaintiffs had defaulted in their repayment obligations hence the financial facilities advanced to them by the defendant were in arrears.
44. It is not disputed that the defendant issued the plaintiff with a 90 days’ statutory notice of sale dated 25th April, 2023 for the suit properties, and a 40 days’ statutory notice dated 8th August, 2023 pursuant



to the provisions of Sections 90 and 96 of the *Land Act*. Subsequently, on 6th October, 2023 the defendant through Phillips International Auctioneers served the plaintiff with a 45 days' redemption notice, wherein the defendant scheduled the suit properties for sale by way of public auction on 14th & 15th December, 2023 (now past). This means that the defendant has since been served with all the requisite statutory notices.

45. Notably, the plaintiffs do not dispute that the defendant has carried out valuations on the suit properties, instead they averred that the suit properties have been grossly undervalued thus they are at the risk of being sold at a value which is way below their current market value. A challenge on the valuation carried out on the suit properties by the defendant in a situation where the Court has already found that indeed there is a debt that is due and owing from the plaintiffs to the defendant is not sufficient reason to warrant this Court to grant the plaintiffs an interlocutory injunction. This is because upon determination of this suit, if the Court finds that the suit properties were sold at a value below their current market or forced value, the plaintiffs can always be compensated by an award of damages equivalent to the market value of the suit properties at the time of valuation.
46. Having considered the circumstances of the application as a whole, this Court finds that the plaintiffs have not demonstrated that they have a prima facie case with high chances of success.
47. As to whether the plaintiff stands to suffer irreparable damage that cannot be adequately compensated by an award of damages in the event the instant application is disallowed, I am of the considered view that this is not the case since the properties in issue are parcels of land whose value can be ascertained through valuation. For this reason, this Court holds that the plaintiffs do not stand to suffer any harm and/or damage that cannot be compensated by an award of damages in the event that this suit is determined in their favour.
48. The balance of convenience tilts in favour of the defendant since the plaintiffs have not established a prima facie case against the defendant with high chances of success, and in the event the plaintiffs are successful in their suit against the defendant, they can always be compensated by an award of damages since the value of properties that form the subject of this application are ascertainable.
49. In addition, I agree with Counsel for the defendant that loan facilities are obtained from bank deposits from the public, as such, the money belongs to the public and not to the bank. As a result, failure to repay the sums advanced to the plaintiffs will occasion a loss to the public whose rights this Court should endeavor to protect.
50. As for the prayer for the defendant to be ordered to render detailed accounts to the plaintiff, the defendant averred that the same had been done.
51. The application dated 10th November, 2023 is found to be without merits. It is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kimathi h/b for Mr. Agwara for the plaintiff/applicant



Mr. Mumu h/b for Mr. Njoroge for the defendant/respondent

Ms B. Wokabi - Court Assistant.

