Aggarwal v NCBA Bank Kenya PLC & another (Civil Suit E017 of 2023) [2024] KEHC 3419 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3419 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E017 OF 2023

JRA WANANDA, J

APRIL 12, 2024

BETWEEN

AMIT AGGARWAL ..... PLAINTIFF

AND

NCBA BANK KENYA PLC ..... 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The Plaintiff-Applicant filed this suit on 26/09/2023. Together with the Plaint and the other usual Pleadings accompanying it, the Plaintiff also filed the Notice of Motion the subject of this Ruling, dated 26/09/2023. The prayers sought in the Application are as follows:

   a. [.....] Spent

   b. [.....] Spent

   c. There be temporary orders of injunction restraining the Defendants/Respondents by themselves, their agents, servants, employees, and/or otherwise howsoever from advertising for sale, selling, disposing of, auctioning, transferring or in any other manner interfering with the Plaintiff/Applicant's possession of land parcel known as Eldoret Municipality/Block 6/6 pending the hearing and determination of this suit.

   d. That the Court be pleased to issue an order that the 1st Defendant/Respondent does provide account and/or complete statements of account for the loan/escrow account pending the hearing and determination of the Application and thereafter the suit.

   e. That the costs be provided for.

2. The Application is filed through Messrs Nyairo & Co. Advocates and is expressed to be brought under Section 90(1), 96(1)(2)(3) and 97 of the *Land Act*, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Order 20 Rule 1, Order 40 Rule 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules "and "all other enabling provisions of the law". The Application is then premised on the grounds stated on the face thereof and on the Supporting Affidavit sworn by the Plaintiff, Amit Aggarwal who also described himself as one of the Directors of Messrs Turbo Highway Eldoret Limited (hereinafter referred to as "the company").

3. In the Affidavit, the Plaintiff stated that in or about the year 2015, the 1st Defendant instituted Nairobi High Court Winding Up Cause No. 37 of 2015 against the company (Turbo Highway Eldoret Limited) in which, as aforesaid, the Plaintiff is a Director together with one Kamla Devi Aggarwal (deceased), his mother, that in the Winding-Up Cause, the 1st Defendant sought to wind-up the said company claiming that it was indebted to the 1st Defendant on account of unsecured credit facilities advanced to it by the 1st Defendant, that the claim was disputed by the company so far as the amount demanded was concerned, that in a bid to resolve the issue and considering that the company was not liquid owing to financial challenges that it was facing, the 1st Defendant, on one part, the said Kamla Devi Aggarwal, Panna Dilip Chauhan, the company and the Plaintiff, on the other, entered into a Settlement Agreement in 2016 in which the Plaintiff, as one of the guarantors, together with the said Kamla Devi Aggarwal and Panna Dilip Chauhan undertook to pay the 1st Defendant an agreed sum of Kshs 115,000,000/- in full and final settlement of the claim, that out of good faith and as a gesture of commitment to settle the agreed amount, the Plaintiff voluntarily offered his said property, Eldoret Municipality/Block 6/6 (hereinafter referred to as "the property") as security and agreed to charge it for payment of the said sum of Kshs 115,000,000/- despite the fact that the credit facility advanced to the company was unsecured.

4. The Plaintiff deponed further that pursuant to the Settlement Agreement, a Charge between the 1st Defendant and the Plaintiff was registered against the title to the said property which property is registered in the Plaintiff's sole name, that it was further agreed that that an escrow account be opened in the names of Messrs Nyairo & Co. Advocates and Messrs Hamilton Harrison & Mathews Advocates, the Advocates for the respective parties, to facilitate deposits therein in settlement of the agreed sum, that the other guarantors and the Plaintiff have since then been making payments towards settlement of the said sum which they deposited into the escrow account, that this is in spite of the financial constraints that the other guarantors and the Plaintiff have been facing as a result of the COVID 19 pandemic and after the effects of the 2017 and 2022 elections and paid an amount of excess of Kshs 87,000,000/-, that subsequently, the Plaintiff offered two properties to the 1st Defendant whose value was commensurate to the debt outstanding which was now below Kshs 30,000,000/- for disposal, in full and final settlement of the matter, that on 19/09/2022, following the commitment on the Plaintiff's part, the 1st Defendant's Advocates in the said Winding-Up Cause indicated to the Court that the parties had resolved the dispute and on account of that he sought to withdraw the Winding-Up Petition, and that the Court then marked the Cause as withdrawn with no order on costs and closed the case.

5. The Plaintiff contended further that however, to the Plaintiff's surprise and shock, the 2nd Defendant acting on the instructions of the 1st Defendant, issued the Notification of Sale dated 7/09/2023 of the suit property directed at the directors of the company (Turbo Highway Eldoret Ltd) in purported recovery of the amount of Kshs 195,023,495/- in respect of Account No. 6824090014 and USD 24,378.74 in respect of Account No. 6924090035, that at no time did the 1st Defendant issue a statutory notice of 2 months as provided under Section 90 of the *Land Act* (No. 6 of 2012) notifying him of the extent of the debt before issuing the Notification of Sale, that as such the Plaintiff is unable

to tell on what basis the sale is being called for given that the Settlement Agreement entered into was for a sum of Kshs 115,000,000/- which has substantially been paid leaving a balance of less than Kshs 30,000,000/- which sum was then secured by the Charge for a property whose value is over Kshs 250,000,000/-, that he stands to suffer irreparable loss as a guarantor and owner of the property if the same is sold yet the amount sought in the Notification of Sale is erroneous, inaccurate and is disputed, that the Settlement Agreement and the Charge are for a specific amount, that the claim has not factored the amount paid into the escrow account of Kshs 87,250,000/-, and that he is not aware of any valuation that has been done for the property and it is his fear that the property shall be sold at a throw away price.

Replying Affidavit

6. In opposing the Application, the 1st Defendant on 6/11/2023 filed the Replying Affidavit sworn by one Kenneth Mawira who described himself as the Senior Legal Counsel at the 1st Defendant. The Affidavit is filed through Messrs Nyaanga & Mugisha Advocates.

7. In the lengthy Affidavit, the deponent stated that the grounds cited by the Plaintiff constitute blatant lies and a gross distortion of dealings between the parties and intended to delay the realization of the bank's securities, that the Plaintiff is also guilty of material non-disclosure, that in April 2012, the 1st Defendant granted the company several letters of credit facilities to allow importation of fertilizers under collateral management agreement, that thereafter, the company sought and was granted enhancement of these facilities to facilitate huge importation of the fertilizer and chemicals in view of anticipated high demand and low global prices, that the credit facilities were enhanced and/or restructured severally through various successive letters of offer signed by the 1st Defendant and the company (Turbo Highway Eldoret Ltd) between 2/04/2012 and 21/08/2014 and whereof the Plaintiff took successive further letters of credit in US Dollars denominations and which were guaranteed by the Plaintiff and the said Kamla Devi Aggarwal.

8. He deponed further that that it was it was the parties' agreement that the 1st Defendant shall impose standard interest for overdrawn balances for facilities in Kenya Shillings denomination at 38.5% p.a but which was reviewed to 19% p.a with effect from 24/09/2014 through a letter jointly signed by the parties on 22/10/2014, that in the letters of offer, the parties agreed that the 1st Defendant would levy additional interest at the rate of 15% p.a. for the facilities in Kenya Shillings denominations and 2% p.a for facilities in USD denominations where the amount drawn by the company is in excess of the facilities committed in the offer letters, that over and above the foregoing standard and additional interest, the 1st Defendant was also at liberty to charge default interest rate of 15% p.a for the facilities in Kenya denominated accounts and 2% p.a for facilities in USD denominated accounts in case the company defaults in repaying any other facilities, that in 2014, the company started defaulting in repaying the credit facilities and as at 23/03/2015, the total outstanding loan amount in Kenyan currency accounts were Kshs 212,310,271.90 and the USD denominated accounts was USD 105,600, that further, the 1st Defendant later learnt that the company was multi-banked by Kenya Commercial Bank and Bank of Africa Limited and the latter held a debenture over the company's assets which the 1st Defendant was not aware of while extending the credit facilities, and that however, to avert any acrimonious recovery between the 1st Defendant and Bank of Africa Limited, a private treaty for sale of fertilizers to MEA Limited was signed as an optimal exit strategy and the proceeds thereof were utilized to cover the outstanding loan but it was insufficient.

9. He further stated that as at 1/09/2015 the company was indebted to the 1st Defendant to a tune of Kshs 218,520,999.63 in current account No. 6824090014 and Kshs 73,370.40 and USD 13,933.63 in credit card accounts No. 4025370000016170 and 4890000010002918, respectively, that the outstanding

amounts in the current account was attracting interest at the rate of 3.5% p.a,, that given the above non-performance of the accounts, the 1st Defendant had no option but to initiate recovery process by filing for winding/insolvency proceedings against the company, namely, Eldoret High Court Winding-Up Cause No. 37 of 2015 which was filed on 26/09/2015, that however following negotiations between the parties, the guarantors proposed to pay Kshs 115,000,000/- from the sale of 4 separate properties, a proposal which the 1st Defendant accepted and in April 2016, a Settlement Agreement was signed by the 1st Defendant, on one part, and the company, Amit Kumar Aggarwal, Kamla Devi Aggarwal, and Panna Dilip Chauhan as guarantors, on the other part and that, that in the Agreement, it was agreed that the guarantors including the Plaintiff, should pay to the 1st Defendant the sum of Kshs 115,000,000/- on or before 31/10/2016,

10. It was contended further that in the Agreement, the Plaintiff offered to charge to the 1st Defendant the suit property as security, that proceeds of the sale would then be deposited in an escrow account to be opened in the joint names of the respective Advocates for the parties, that the guarantors agreed that upon entering Sale Agreements for the properties, they would immediately notify the 1st Defendant and the deposit for the sale would be utilized towards repaying the loan and the balance of the purchase price would be paid to the 1st Defendant on completion, that if the guarantors fail to pay the sum of Kshs 115,000,000/- on or before 31/10/2016, the full amount of the loan outstanding together with interest and costs would immediately become due for payment and the 1st Defendant shall be at liberty to realise the charged property to recover the balance, that if the amount of Kshs 115,000,000/- was paid on or before 31/10/2016, the company and the guarantors would be discharged of all liabilities and the Winding-Up case, Eldoret Insolvency Cause No. 37 of 2015 would be withdrawn but the other creditors would be at liberty to prosecute the winding up Cause.

11. The deponent added that following conclusion of the Agreement, a Charge over the suit property dated 30/03/2017 was registered in favour of the 1st Defendant, that in total violation of the terms of the Agreement, especially the requirement to pay Kshs 115,000,000/- on or before 31/10/2016, the guarantors, including the Plaintiff, did not pay, that however, through various correspondence, the Plaintiff requested for extension of time and the 1st Defendant was gracious enough to extend the deadline to 31/03/2017, that despite the extension of time, the Plaintiff failed to honour his obligation, that as a consequence of default, the 1st Defendant was constrained to exercise its statutory power of sale over the property, that however, prior to doing so, the 1st Defendant issued several demand letters, requests and reminders to the company and the Plaintiff calling upon them to regularize the account but despite making promises and undertaking to pay, the Plaintiff still failed to do so, that given this situation, the 1st Defendant had no choice but to invoke the default clause No. 5 of the Agreement, that through a letter dated 11/10/2019, the 1st Defendant issued a demand notice under Section 56 of the *Land Registration Act*, 2012, and asked the Plaintiff to pay within 3 months, that on 22/09/2022, the 1st Defendant issued the 90 days' statutory notice pursuant to Section 90(1)(2) and (3) of the *Land Act*, that the same was served through Registered Post and the Plaintiff was advised of the consequences of failing to comply, including that if upon expiry of the 3 months period the amounts would not have been paid, the 1st Defendant would exercise its statutory power of sale, that the Plaintiff and the company still did not pay and the 1st Defendant was then forced to proceed with the recovery process.

12. He deponed further that the 1st Defendant thus issued the 40 days' notice dated 22/02/2023 pursuant to Section 96(2) and (3) of the *Land Act* which was delivered to the Plaintiff by a Process Server, that upon receipt of the notice, through his Advocates, the Plaintiff wrote and requested for accommodation on basis that he intended to sell the suit property via private treaty, that on 31/05/2023, the 1st Defendant gave the Plaintiff final accommodation on the conditions stated, that however, the Plaintiff did not respond and the offer was withdrawn through the letter dated

5/09/2023, that given the foregoing, the 1st Defendant was then constrained to instruct the 2nd Defendant-Auctioneers to issue the Notification of Sale and 45 days' Redemption Notice and thereafter arrange for sale of the property which notices the Auctioneer issued, both dated 7/09/2023, and that contrary to the Plaintiff's allegation that the charged property is valued at over Kshs 250,000/-, the 1st Defendant carried out its own valuation and established that the market value is Kshs 150,000,000/- while the forced value is Kshs 112,500,000/-.

13. The deponent stated further that from the foregoing, it is clear that being the principal borrower, a guarantor and Chargor, the Plaintiff was all along aware of the unpaid loan arrears, that he was also served with all the relevant statutory notices which the Plaintiff has not refuted receipt thereof and there is no justification for him to file the instant Application a few days to the advertisement of sale, that the Plaintiff has not demonstrated any wrongdoing on the part of the 1st Defendant, that an injunction ought not to issue if there is default in repaying the facility and proper notices have been served, that the 1st Defendant should be allowed to exercise its statutory power of sale, that the loan stood at Kshs 195,023,495 and USD 24,378.74 as at 6/10/2023 and which continues to attract interest, that the proceedings in Eldoret Winding Up Cause No. 37 of 2015 are separate and distinct from the present suit and the continued existence of the said suit did not bar the 1st Defendant from pursuing recovery action.

14. According to the deponent, all the money that was received from the guarantors and the company was utilized to reduce the debt as per the exhibited Statement of Account for the escrow account, that contrary to the Plaintiff's allegations, it is not true that the Plaintiff offered other properties towards settlement of Kshs 30,000,000/-, that the Plaintiff only indicated that he was willing to offer some properties but the 1st Defendant declined and asked the Plaintiff to execute a Power of Attorney granting the 1st Defendant rights to market and sell the properties but the Plaintiff did not revert on the proposal.

15. He further averred that the Certificates of postage exhibited clearly show that the postal address provided by the Plaintiff in the Charge instrument is similar to those stated in the Certificates of postage, that it is therefore absurd for the Plaintiff to claim that he did not receive the statutory notices which were served through both the registered post and physical delivery yet he has produced the Notification of Sale and Redemption Notice which were served through the same postal address, that there is no dispute as to the Plaintiff's indebtness to the 1st Defendant and the Plaintiff has not demonstrated full repayment of the loan, that the Application does not raise any issues for trial and this suit is an afterthought intended to delay realization of the security, and that the Plaintiff has failed to show that he has a prima facie case with a probability of success.

Plaintiff's Supplementary Affidavit

16. With leave of the Court, the Plaintiff swore the Supplementary Affidavit filed on 17/11/2023 in which he deponed that portions of the Replying Affidavit are extraneous, diversionary and not relevant as they relate to transactions between the 1st Defendant and the company (Turbo Highway Eldoret Ltd), that the issue of material non-disclose does not arise, that it is conceded by the 1st Defendant that it exercised its legally available options against the company by filing Nairobi High Court Winding Up Petition No. 37 of 2015 which could only be withdrawn if the sum of Kshs 115,000,000/- was paid, that despite economic challenges, an amount of Kshs 87,000,000/- was paid and two properties offered whose value was commensurate to the debt outstanding which was now Kshs 30,000,000/- in full and final settlement, that it is on the strength of the payment that the 1st Defendant withdrew the Winding-Up Cause, that if at all the 1st Defendant had any other claim against the company then the claim is separate from the Charge and which was specifically for Kshs 115,000,000/-, that the 1st Defendant

is out to unjustly enrich itself by shifting positions, that on one hand it withdrew the Winding-Up Cause on the strength of the payment and on the other hand it turns around to claim close to Kshs 200,000,000/- after receiving what was due.

17. The Plaintiff reiterated that he has not been served with any statutory notice as alleged, that paragraph 29 and annextures "KM 16" and "KM 17" ought to be struck out as they relate to "without prejudice" communication which cannot be relied on to the 1st Defendant's advantage, that the allegations that the suit property is worth Kshs 150,000,000/- is doubtful and unrealistic as property value is known to naturally appreciate, and that it is surprising how a valuation done on the 1st Defendant's instructions in 2017 before the property was charged revealed that the market value of the property, as at 2017, was Kshs 164,000,000/- while the forced value was Kshs 123,000,000/-.

Hearing of the application

18. It was then agreed, and I directed, that the Application be canvassed of by way of written submissions. Pursuant thereto, the Plaintiff filed its Submissions on 5/10/2023 while the Defendants filed theirs on 24/11/2023.

19. However, since as aforesaid, the Defendants filed their Replying Affidavit on 6/11/2023, out of time and after the Plaintiff had already filed its Submissions, the Plaintiff on 17/11/2023 filed Further Submissions. Although the same was clearly filed without leave of the Court, I will nevertheless admit it since it is the Defendant's delay that has given rise to it.

Plaintiff's Submissions

20. Counsel for the Plaintiff submitted that the conditions to be satisfied while considering an application for temporary injunction were laid out in the renowned case of Giella v Cassman Brown (supra).

21. On the first limb, she submitted that the Plaintiff has made out a prima facie case for the reason that the Plaintiff disputes the amount claimed in the Notification of Sale, that according to the Settlement Agreement which led to the Charge, the Plaintiff was to pay Kshs 115,000,000/- which payment he has made religiously despite the financial hardship he was facing, that there is therefore need for an order for accounts to be made, that the Plaintiff was not served with the 3 months statutory notice and the 40 days statutory notice, that the Defendant has not conducted a forced valuation, that in the absence of a proper valuation, the interest of justice demands that the property be preserved by way of injunctive orders. She cited the case of Olympics Sports House Limited vs School Equipment Centre Limited [2021] eKLR in which she submitted, the case of Mrao vs First American Bank (K) Ltd was quoted.

22. On the second limb, she submitted that the Plaintiff stands to suffer irreparable damage that cannot be compensated by damages in light of the Defendant's illegal action not to follow due procedure by not issuing the mandatory statutory notices, that the Plaintiff's right to property hangs in the balance as the property risks being disposed of or transferred to third parties, that the Plaintiff has complied with the terms of the Settlement Agreement and it would be unconscionable for the Defendant to sell the property at a throw away price yet the debt is disputed, that if the intended auction materializes then it will be on the basis of the highest bidder and not necessarily based on the current market value, as such the Plaintiff is bound to suffer loss that cannot be monetarily compensated as the property is located in a prime location and the Plaintiff may not get the amount of acreage in the same location at the price it was acquired.

23. On the third limb, Counsel submitted that the "balance of convenience" tilts in favour of the Plaintiff as the registered owner and having made every effort over settlement of the amount agreed upon.

24. In the end, she also cited the case of Rafique Ebrahim versus William Ochanda t/a Ochanda & Co. Advocates [2013] eKLR and also the case of Humphrey Wainaina Mungah versus Housing Finance Finance Limited [2009] eKLR.

Defendant's Submissions

25. On his part, Counsel for the Defendants submitted that contrary to the Settlement Agreement, the Plaintiff, the guarantors and the company failed to clear Kshs 115,000,000/- as agreed, that as a result, the 1st Defendant issued demand letters and invoked the relevant clause of the Agreement, that despite the demands, no payment was made and the 1st Defendant had no other recourse than to realize the charged property. According to Counsel, no injunction orders should be granted because the Plaintiff has not met the threshold for grant of interlocutory injunctions. He too cited the case of Giella v Cassman Brown (supra) and also the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR as cited in the case of Kigio Group Company Limited v Housing Finance Company Limited & Another [2021].

26. On whether the Plaintiff has established a prima facie case, Counsel submitted that none has been established. He again cited the case of Mrao v First American (supra) and submitted that the Plaintiff does not deny being indebted to the 1st Defendant, that the Plaintiff has not disputed that he did not clear the entire Kshs 115,000,000/- within the period agreed and that as such, the entire sum became due and payable, that the amount payable according to the Settlement Agreement is the outstanding loan plus interest and costs. He submitted that a party who executes a contract is bound by its terms as stated in the case of Joel Phenehas Nyaga & Joseph Nyaga Nzau (suing as the Chairperson and Treasurer of Kemagui Electrification Self Help Group) vs Aloysius Nyaga Kanyua & Julia Gicuku Nyaga [2020] eKLR and also the case of Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017] eKLR.

27. Counsel submitted further that it is a principle of law that a dispute as to the outstanding amount or interest or reconciliation of loan accounts cannot be a ground for granting interim injunctions. He cited the case of Priscilla Krobought Grant vs. Kenya Commercial Bank Finance Co. Ltd and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 cited in the case of Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited [2019] eKLR. According to Counsel, the current outstanding amount due and payable is Kshs 195,023,495.44 and USD 24,378.74 and not Kshs 30,000,000/-. He also reiterated that all the statutory notices were served and cited the case of David Limo Bundotich v Housing Finance Company of Kenya Limited [2022] eKLR. On service by Registered Post, he cited Section 3(5) of the *Interpretation and General Provisions Act*. Counsel also cited the case of Nest Manor Residence & Suites Ltd & Another vs African Banking Corporation Limited & Another [2021] eKLR on the issue of shifting of the burden of proof once evidence of service of the notices has been shown. Finally, in arguing that a prima facie case has not been established, Counsel cited the case of Ronald Ratemo Moturi & Another vs Credit Bank Limited & Another [2021] eKLR.

28. On the issue of valuation of the charged property, Counsel submitted that the same was done and cited the case of Othaya Villas Ltd v Victoria Commercial Bank Ltd & 2 Others [2020] eKLR. He reiterated that the Report dated 1/02/2023 placed the market value at Kshs 150,000,000/- and forced value at Kshs 112,500,000/- and submitted that contrary to the argument that the property is valued at more than Kshs 250,000,000/-, the Plaintiff has not produced a valuation Report of his own to support his claim. He cited the case of Stek Cosmetics Limited v Family Bank Limited & Another [2020] eKLR.

29. Regarding "irreparable harm", Counsel submitted that it is the 1st Defendant who is at risk of not recovering the amounts advanced if injunctive orders are issued, that when the Plaintiff offered the

property as security, he was well aware that the same would become the bank's commodity for sale in case of default in repaying the loan and as such, he cannot frustrate the bank's exercise of statutory power of sale. He cited the case of Andrew Mwanjohi v Equity Building Society & 7 Others [2006] eKLR and also the case of Ronald Ratemo & Another vs Credit Bank Limited & Another (supra). He added that the 1st Defendant is a financial institution capable of compensating the Plaintiff were the suit to eventually succeed, and that therefore, there is no irreparable injury to be suffered by the Plaintiff.

30. Regarding "balance of convenience", Counsel submitted that the same tilts in favour of rejecting the Application. He cited the case of Stek Cosmetics (supra) and submitted that injunction is an equitable relief granted to a deserving party, that in this case, the Plaintiff borrowed the loan through his company, utilized it, and made profits but defaulted and now wants to frustrate the sale of the charged property he offered as security. He cited the case of Kyangavo v Kenya Commercial Bank Ltd & Another [2004] eKLR, the case of Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR and also the case of Groffin Africa Fund LLC & Another v Namisi Limited t/a Nobilia East Africa & 2 Others [2019] eKLR which cited the case of National Bank of Kenya Limited vs Shimmers Plaza Limited [2009] eKLR.

Plaintiff's Further Submissions

31. Counsel submitted that that the Charge was only for Kshs 115,000,000/-, that whereas the 1st Defendant has tried to tie the Charge to the Settlement Agreement, the two are separate and distinct, that there are specific properties listed thereunder and the Charged property is not one of those listed in the Settlement Agreement, that the property was only offered as a sign of good faith towards settling the amount due, that an amount in excess of Kshs 87,000,000/- was paid and two properties offered for sale, that it was on the strength of the payment on account of the Settlement Agreement that the 1st Defendant withdrew the Winding-Up Cause that it was thus expected that the 1st Defendant would execute a discharge of charge however the 1st Defendant opted to purport to auction the property for an amount that was not subject to the Charge. On the submission that the 1st Defendant has wrongly relied on "without prejudice" letters, Counsel cited the case of Millicent Wambui v National Botanica Gardening Limited [2013] eKLR. The rest of the matters submitted upon are basically a repetition of the same matters already recounted.

Determination

32. Upon considering the pleadings, response thereto and the respective submissions filed, I find the following to be the one broad issue that arises for determination:

> " Whether an interim injunction should issue to bar the 1st Defendant from exercising its statutory power of sale pending hearing and determination of the suit"

33. Determination on whether to grant interim injunctions is governed by Order 40 Rule 1 of the Civil Procedure Rules 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 orders.

34. The principles that guide a Court in dealing with applications for injunctions were well settled in the celebrated case of Giella –vs-Cassman Brown and company Limited Civil appeal No.51 of 1972 where it was held as follows:

i. The Applicant must establish a prima facie case with a probability of success.

ii. Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.

iii. Applicant has to demonstrate that balance of convenience tilts in its favour.

35. Further, in Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

> "These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

36. It is also settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact made 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."

37. Before I venture into determination of this matter, I may mention that it cannot be a point of debate that a person who receives a loan from a lender and who voluntarily and lawfully gives out his property as collateral or security for the loan is presumed to be fully aware that in the event of default in repayment of the loan within the terms and timelines agreed, the lender is at liberty to sell off the

property to recover the money lent out. On this point, Pall J in Muhani & Another vs. National Bank of Kenya Ltd [1990] KLR 73 held as follows;

> " The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties ..... The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale".

38. Further, in the case of Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation), HCCC No. 82 of 2006), Warsame J (as he then was) observed as follows:

> " ..... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".

39. Similarly, Ringera J, in the case of Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540, also held as follows:

> " Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them."

40. Back to this instant case, the first limb that I have to therefore determine is whether the Plaintiff has established a prima facie case. What constitutes a "prima facie"case was discussed in the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, where the Court of Appeal held as follows:

> " It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two ... In civil cases a prima facie case 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 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."

41. In this case, it is clear that previously, between the year 2012 and 2014, the parties (Plaintiff, through his company) had a cordial credit facility and/or loan advancement relationship. The advances, short

term in nature, were unsecured. Things however seem to have taken a negative turn sometime in the year 2014 when the company started experiencing financial difficulties and defaulted in repayments. The 1st Defendant then in 2015, filed Winding-Up proceedings against the company. Fortunately, after negotiations, the parties in a bid to resolve the dispute, entered into the Settlement Agreement in April 2016. The exact date of the Agreement is not however disclosed but the parties agree that the Agreement is genuine and valid.

42. In the Agreement, it was appreciated that the Plaintiff was indebted to the 1st Defendant at much higher sums but it was however agreed that the Plaintiff would in full and final settlement pay the lesser amount of Kshs 115,000,000/-. The concession was on the condition that the Plaintiff would pay the said amount on or before 31/10/2016, that the Plaintiff would charge to the 1st Defendant the property described as Eldoret Municipality/Block 6/5 (not Eldoret Municipality/Block 6/6 that was eventually charged) as security for payment of the said amount. The Agreement was also guaranteed by the Plaintiff and two others. Further, it was a term of the Agreement that the guarantors would sell about 11 separate properties and deposit the proceeds thereof in an escrow bank account to be opened in the respective names of the parties' Advocates. It was then agreed that if the guarantors pay the sum of Kshs 115,000,000/- by 31/10/2016, then the 1st Defendant would discharge the company (Turbo Highway Eldoret Ltd) and the guarantors and will withdraw the Winding-Up Cause. It was also a term of the Agreement, under Clause 5 thereof, that if the guarantors fail to pay the said sum of Kshs 115,000,000/- by 31/10/2016, the full amount of the debt then outstanding together with interest and costs will immediately fall due for payment and the 1st Defendant would then be at liberty to realize the charged property to recover the balance then due.

43. Subsequently, sometime in September 2022, the 1st Defendant withdrew the Winding-Up Cause. Since according to the Agreement, the Winding-Up Cause was to be withdrawn upon full settlement of the sum of Kshs 115,000,000/-, it is not clear whether the withdrawal of the Winding-Up Cause in September 2022 was indeed made upon payment of such full sum. I do not however think so since the Plaintiff's own case is that to date, it has only paid a sum of about Kshs 87,000,000/- in part-payment of the said sum of Kshs 115,000,000/-.

44. The Plaintiff claims that in addition to payment of the said part-settlement of Kshs 87,000,000/- or thereabouts, he also offered to the 1st Defendant two properties whose value was commensurate to the balance outstanding which was now below Kshs 30,000,000/- in final settlement. In response however, the 1st Defendant has strenuously disputed this allegation and averred that the offer remained just, that an offer, since the 1st Defendant never accepted it and the same was therefore never actualized. I tend to agree with the 1st Defendant on this issue since no evidence suggesting formalization of the offer into an agreement was produced by the Plaintiff.

45. The presumption is therefore that, contrary to what was contemplated or envisaged in the Agreement, the 1st Defendant withdrew the Winding-Up Cause even before full settlement of the agreed amount of Kshs 115,000,000/- and perhaps therefore, prematurely. I would not however go to the extent of equating such premature withdrawal of the Winding-Up Cause to waiver or abandonment by the 1st Defendant of the balance outstanding. This is because nothing has been placed before me to indicate any intention of that nature. In the circumstances, since the Plaintiff concedes that he only paid an amount of about Kshs 87,000,000/-, it follows that the Plaintiff was still indebted to the 1st Defendant.

46. In view thereof, and although the final and conclusive findings shall be made after full trial, I am prepared at this stage to hold that since the deadline of 31/10/2016 had long passed and full payment had not been made, the 1st Defendant was indeed entitled to invoke Clause 5 of the Agreement and demand, as it did, payment of the balance of the debt then outstanding, together with interest and

costs. However, whether the 1st Defendant could make such recovery under the Charge instrument is a question that I shall revisit hereinbelow.

47. As aforesaid, I notice that in the Agreement, under Clause 2, the property stated as the one to be charged was Eldoret Municipality/Block 6/5 which is different from the one that was in fact charged, namely, Eldoret Municipality/Block 6/6. Neither of the parties addressed this apparent discrepancy and it is not clear whether this discrepancy was intended or whether it was a simple typographical error. Be that as it may, the position is that the parties agree that they did subsequently execute the Charge dated 30/03/2017 over the property Eldoret Municipality/Block 6/6 to secure the said sum of Kshs 115,000,000/-.

48. Although at its Recital C, the Charge provides that "the total moneys for which this Charge constitutes a security shall be the aggregate of the Principal Sum together with interest from the time of the Principal Sum becoming payable until payment thereof and other charges costs and monies payable by the Chargor pursuant to the provisions of this Charge", the Charge only specifies the amount of Kshs 115,000,000/-. Secondly, the Charge does not appear, on its own, to specify any rate of interest to be so applied.

49. Although it is therefore not in doubt that upon default, the earlier entire balance, including interest, reverted in full and became immediately due and payable to the 1st Defendant, the question is whether the 1st Defendant could rely on the Charge to realize even the interest portion over and above the principal sum of Kshs 115,000,000/- when the Charge does not by itself specify any rate of interest. In other words, did the Charge really secure any amount above Kshs 115,000,000/-?

50. According to the 1st Defendant, the Charge instrument should be read together with Clause 5 of the Settlement Agreement and be interpreted to mean that even the interest was secured under the Charge and could therefore be recovered under the Charge. On his part, the Plaintiff strongly digresses and holds the position that the Charge and the Settlement Agreement are distinct and separate and must therefore be read independently. In light of these conflicting and directly opposite positions, and considering that a huge component of the alleged balance consists of accrued interest, my view is that a firm conclusion on whether these further amounts can be recovered under the Charge can only be made after full trial, and not at this interlocutory stage.

51. The Plaintiff has also pegged his case on the submission that it was never served with the 90 days' statutory notice which is mandatory before a Chargee can exercise its statutory power of sale. In regard to the notice, Section 90 of the *Land Act*, 2012 provides as follows:

> 1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
>
> 2. .....
>
> 3. If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may —
>
> (a) sue the chargor for any money due and owing under the charge;
>
> (b) appoint a receiver of the income of the charged land;
>
> (c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

52. It is therefore true that before the 1st Defendant can exercise its statutory power of sale, the law requires it to issues notices to the Plaintiff 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.

53. In this case, the Plaintiff moved to Court when it was served with the Auctioneers 40 days' notice of sale referred to in (b) above. What must therefore be established is whether, before that 40 days' notice of sale was served, the 90 days' statutory notice referred to in (a) above, had been served.

54. In response, the 1st Defendant has exhibited copies of the 90 days' statutory notice and the 45 days' redemption notice, together with respective Certificates of Postage and also an Affidavit of Service confirming personal service. I also note that the address used to post the notices is the same one indicated in the Charge the subject hereof, namely, "P.O. Box 712-30100 Eldoret". In Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR the Court of Appeal when dealing with the issue of service of such notices made the following observation:

> " ..... 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."

55. In this case, despite filing a Further Affidavit, apart from merely proclaiming that he was not served, the Plaintiff did not in any way challenge the said documents evidencing service of the notices. In the circumstances, the documents remain uncontroverted and I uphold them as confirming proper service upon the Plaintiff.

56. In any case, I must point out that the requirement for service of a statutory notice was never meant to enable borrowers escape from their obligations but was only meant to enable borrowers have sufficient time within which to redeem their charged properties (equity of redemption). In the circumstances therefore, even where it is shown that the notice has not been received but it is demonstrated that the Chargee has subsequently become aware of it and the redemption timings are still within the periods stipulated in law, the Chargee will still not necessarily be barred from exercising his statutory power of sale.

57. The Plaintiff has also alleged that the 1st Defendant has undervalued the property and the Plaintiff is therefore apprehensive that the 1st Defendant likely to auction the property at a throw away price. It is indeed true that under Section 97 of the *Land Act*, a Chargee who exercises the power to sell a charged property owes a duty of care to the Chargor to obtain the best price reasonably obtainable. However, in this case, the Plaintiff has not provided his own independent Valuation Report to contradict the one produced by the 1st Defendant and to therefore lay a basis for doubting the valuation. In the circumstances, I find that the allegation of undervaluation has not been established. I am also alive to the fact that in regard to auctions, considering the circumstances of such sale, the valuation relied on is the "forced value", and not the "market value" hence the sometimes appearance of an undervaluation.

58. From the foregoing, it is clear that out of the grounds relied upon by the Plaintiff, I have only upheld the one challenging the 1st Defendant's right to invoke the Charge instrument to recover amounts over and above the principal sum of Kshs 115,000,000/-. The question is therefore whether this finding alone is sufficient to support a conclusion that the Plaintiff has established a prima facie case. My finding is that it does. This is because the principal sum being Kshs 115,000,000/- and there being indication that an amount of Kshs 87,000,000/- has been paid so far, it means that the balance of the principal sum is about 28,000,000/-. Considering therefore that the 1st Defendant is demanding sums approaching Kshs 200,000,000/-, it means that a huge bulk of the demand comprises only of interest accrued on the principal sum. If this is so, then my view is that a prima facie case has been established as to whether this huge interest can be recovered under the Charge when the Charge only expressly secured an amount of Kshs 115,000,000/-. My view is that the amount over and above the principal sum is just too enormous to be ignored.

59. Regarding the limb of "irreparable loss", in light of my finding that the biggest chunk of the amount claimed as being the basis for proceeding with the auction is purely accrued interest on the principal sum, I agree with the Plaintiff's that he stands to suffer loss that cannot be sufficiently compensated by damages if the property is disposed of and transferred to a third party before the validity of levying such huge interest is determined. Flowing from the above, I also find that the Plaintiff is likely to suffer irreparably should the auction proceed before the very serious question of whether the Charge instrument really secured any amount over and above the principal sum of Kshs 115,000,000/- is determined. Further, according to the 1st Defendant, the market value of the property is about Kshs 250,000,000/- while according to the 1st Defendant's valuation Report, the market value is about Kshs 150,000,000/-. Either way, these huge amounts confirm the high value of the property and which also supports preserving the subject matter while awaiting the full trial.

60. It is true that generally, a dispute only on the amount of interest levied would not necessarily be sufficient to form the foundation for grant of an interim injunction to bar a Chargee from proceeding with recovery. However, in this case, the amount of interest alone is so substantial that I am prepared to term the case as being an exception to the general principle.

61. On "balance of convenience", my finding is that it tilts towards granting an order of injunction in view of the substantial questions of law identified above regarding whether the Charge instrument secured any amounts beyond the principal sum of Kshs 115,000,000/-, including the huge interest demanded over and above the principal sum.

62. For the above reasons, and although clearly the Plaintiff is still indebted to the 1st Defendant, I find that the Plaintiff has met the threshold or satisfied the principles required to grant an interlocutory injunction and which I so grant.

63. Regarding the prayer that the Court do issue an order that the 1st Defendant provides an account and/or statements of account for the loan/escrow account, the 1st Defendant has already attached the relevant bank statements to its Replying Affidavit and I therefore believe that prayer has been addressed and is no longer necessary.

Final Orders

64. The upshot of my findings above is that the Plaintiff's Notice of Motion dated 26/09/2023 partially succeeds and I order as follows:

    i. Pending the hearing and determination of this suit, an order of injunction is hereby issued restraining the Defendants/Respondents by themselves, their agents, servants, employees,

and/or otherwise howsoever from advertising for sale, selling, disposing of, auctioning, transferring or in any other manner interfering with the Plaintiff/Applicant's possession of the parcel of land known as Eldoret Municipality/Block 6/6.

ii. Since I have dismissed all, but one, of the grounds raised by the Plaintiff in support of the Application, I do not make any order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF APRIL 2024

.....

WANANDA J.R. ANURO

JUDGE