Sky Loaf Limited v I&M Bank Limited & another (Civil Suit E006 of 2023) [2024] KEHC 4502 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4502 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E006 OF 2023

JRA WANANDA, J

APRIL 12, 2024

BETWEEN

SKY LOAF LIMITED ..... PLAINTIFF

AND

I&M BANK LIMITED ..... 1ST DEFENDANT

WESTMINSTER AUCTIONEERS ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff-Applicant filed this suit on 10/05/2023. 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 10/05/2023. Prayer 3 of the Application had made reference to seeking a "mareva injunction" but vide the orders made on 28/11/2023, the Plaintiff deleted such reference by amending the same. The prayers now read as follows:

    i. [.....] Spent

    ii. [.....] Spent

    iii. That an order of injunction do issue pending valuation and determination of the market value of the demised property and fixing of a reserve price based on the valuation obtained herein restraining the Defendants, its agents and/or assigns or any of them from advertising for sale, disposing of, selling or otherwise interfering with Plaintiff's property known as Eldoret Municipality/Block 12/79 approximately measuring 0.185 Ha pending and determination of this Application and the suit

    iv. That the Court be pleased to to make an order of inhibition inhibiting the registration of any dealing in respect of the Plaintiff's leasehold property known as Eldoret Municipality/Block 12/79 pending the hearing and final determination of the suit.

v. That the OCS Eldoret Police Station to supervise the enforcement and compliance of the orders issued herein

vi. Costs of the Application be provided for.

vii. Such further or other orders be made as the Court may deem fit and expedient.

2. The Application is filed through Messrs Angu Kitigin & Co. Advocates and is expressed to be brought under Article 159 of *the Constitution* of Kenya, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Section 90, 91 & 92 of the *Land Act*, Order 40 Rules 1, 2, 3, & 4, Order 51 Rule 1 of the Civil Procedure Rules 2010 "and all other enabling provisions of the law". The Application is then premised on the grounds stated on the face thereon and on the Supporting Affidavit sworn by one Licon Cool who described himself as a Director of the Plaintiff.

3. In the Affidavit, the deponent stated that in the year 2020, the Plaintiff took a loan facility with the 1st Defendant for a first amount of Kshs 23,000,000/- and additional 6,000,000/-, that the Plaintiff deals in processing bread and confectionaries on wholesale and retail, that the Plaintiff engaged the 1st Defendant in negotiation for the loan to be restructured to a daily deposit of Kshs 10,000/- awaiting full operations in the market, that one of his employees received communication on or about 29/04/2023 for a notice of redemption to advertise the property on 15/05/2023 for a public auction by the 2nd Defendant, that the communication was received via Whatsap from the 2nd Defendant, that the employee was not on duty due to her annual leave and had travelled upcountry until 9/05/2023 when she presented the message, that the auction was to be on 30/05/2023, that normal business activities were suspended due to COVID-19, that business has now resumed and the Plaintiff is hopeful of clearing the loan, that he had approached the 1st Defendant for restructuring of the loan since the Plaintiff's sister business, Village Mark Supermarket closed, that the loan had been taken to expand had closed business.

4. He deponed further that although the Defendant served the notification for redemption notice, the Plaintiff has never been served with the 3 months' notice as by law provided hence the right of sale has not accrued, that the sale value quoted by the Defendant of Kshs 39,654,856.94 in its letter dated 27/04/2023 is inordinately low and if the property is sold as scheduled, the Plaintiff shall suffer irreparably, and that the Plaintiff is yet to agree with the Defendants on a common valuer. After reiterating and repeating the matters already stated, he deponed that it was prudent for the Defendant's management to have called for a meeting with the Plaintiff to reach a mutual undertaking than to send auctioneers, that the process of advertising the property for auction is premature and will cripple the Plaintiff's efforts to settle the loan, and that the Plaintiff is only asking for a few months.

Replying Affidavit

5. In opposing the Application, the 1st Defendant on 12/07/2023 filed a Replying Affidavit sworn by one Jeremiah Washiali who described himself as an Assistant Manager, Debt Recovery Department. The Affidavit is filed through Messrs G&A Advocates.

6. In the Affidavit, the deponent stated that vide a Fixed and Floating Debenture dated 27/04/2020, the 1st Defendant extended to the Plaintiff a loan facility of Kshs 29,000,000/- which was secured vide a Legal Charge over the property, that as at 29/07/2021, the Plaintiff had defaulted in repayment of the loan and had an outstanding balance of Kshs 28,338,921.11 prompting the Respondent to issue the Plaintiff with a 90 days' statutory notice pursuant to Section 90(2) of the *Land Act* upon which the Plaintiff approached the 1st Defendant for yet another facility to the tune of Kshs 6,500,000/- but which did not materialize, that as at 5/05/2022, the outstanding debt stood at Kshs 31,996,044/-

prompting the 1st Defendant to issue it with a 40 days' statutory notice pursuant to Section 96(3) of the *Land Act*, that the 1st Defendant then commissioned the valuation of the property wherein its open market value was placed at Kshs 14,000,000/-, that the said notices bore no fruit and as a consequence, the 1st Defendant instructed the 2nd Defendant to issue the Plaintiff with a 45 days' redemption notice pursuant to Rule 15(d) of the Auctioneers Rules, that the notice required the Plaintiff to clear the outstanding balance of Kshs 34,438,172.10 as at 8/08/2022 or risk the property being sold by public auction, that the 2nd Defendant also issued the Plaintiff with a Notification of Sale indicating its intention to dispose of the property at the expiry of the 45 days redemption period, that the property was then advertised for sale on 22/11/2022 vide the Newspaper dated 31/10/2022, that the Plaintiff then filed a suit, namely, Eldoret CMCC No. E863 of 2022, wherein the 1st Defendant was barred from disposing the property pending the determination of the suit, that however the suit was vide the Ruling delivered on 25/04/2023 struck out for want of pecuniary jurisdiction effectively lifting the orders, that the 1st Defendant then instructed the 2nd Defendant to issue the Plaintiff with a notice informing it that the 1st Defendant shall advertise the property for sale on 15/05/2023 in an auction to be held on 30/05/2023, that it is at this point that the Plaintiff instituted this suit.

7. He deponed further that the Plaintiff is undeserving of the orders sought as it has not met the threshold for grant of interim injunctions as laid out in the case of Giella & Cassman Brown, that the Applicant has not established a prima facie case with a probability of success, that the Application and the suit are fatally defective for violating Order 2 Rule 16 of the Civil Procedure Rules for want of execution by the Plaintiff's Advocates, that the Supporting Affidavit and Verifying Affidavit also violate Section 5 of the *Oaths and Statutory Declarations Act* and Rule 7 of the Oaths and Declarations Rules as the Affidavit is neither dated or signed, and that there is therefore no proper suit before this Court. He added that no basis has been laid for grant of the orders sought, that the Plaintiff has not established irreparable loss since the Plaintiff offered the property as security to secure financial obligations and it knew or ought to have known that in the event of default, the same would be sold off as a commercial commodity as elucidated in Clause 9.1.2 (a) of the Fixed and Floating Debenture and Clause 8.1 (e) of the Charge, that the Plaintiff has also not established irreparable loss since the value of the property has been ascertained and as such an award of damages would be sufficient compensation, that the balance of convenience also lies in not granting the orders since, among others, and grant of injunction will risk the loan outstripping the value of the property thus leaving the Defendant exposed to no chances of recovery.

Hearing of the application

8. 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 27/11/2023 while the Defendants had filed theirs earlier on 9/09/2023. However, due to the amendment of the Application as referred to above, with leave of the Court, the 1st Defendant filed Supplementary Submissions on 9/01/2024.

Plaintiff's Submissions

9. Counsel for the Plaintiff cited the case of Suleiman vs Amboseli Resort Limited [2004] 2 KLR 589 and submitted that the Court, should always opt for the lower rather than the higher risk of injustice, that non-granting of the orders will occasion hardship to the Plaintiff since its business will be closed and create adverse effects, that in determining the prayers, the Court will consider if the property is sold and the interest transferred to third parties, the same will become unavailable by the time the trial is concluded, whether the Applicant has an arguable case, whether refusal to grant the prayers will render the suit nugatory and the prejudice that may be occasioned to the parties. He submitted that the said

principles are similar to those set out in the case of Giella v Cassman Brown (supra). He also cited Order 40 Rule 7 as read with Section 3A and 63(e of the *Civil Procedure Act*.

10. Counsel contended further that the Plaintiff has established a prima facie case since it has not refused to remit the monthly repayments but only sought a restructuring and that the property is being used as a residential homestead. He cited the case of Dr. Simon Waiharo Chege vs Paramount Bank of Kenya Ltd, Nairobi (Milimani) HCCC No. 360 of 2001. On what amounts to prima facie case, he cited the case of Mrao vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125. He averred further that the Court will not venture into considering the merits of the case when considering whether or not a prima facie case has been established and submitted that the Plaintiff has demonstrated that it has rights over the confectionary equipment/assets which are likely to be violated by the Defendants' intended exercise its statutory power of sale.

11. On whether the suit will be rendered nugatory if the orders are not granted, Counsel submitted that the Plaintiff's moving to Court is to protect the auction of the property without due notice and that the sale will force the Plaintiff to suffer huge debts and claims from other players, that the Plaintiff and the concerned family will suffer irreparable damage and the suit will be rendered nugatory because the substratum of the dispute will be lost and the same will force the Plaintiff to close the business. On whether the Plaintiff can be compensated by damages, he submitted that the property is a residential homestead and the Plaintiff cannot be compensated by an award of damages. On the term "irreparable injury", he cited the case of Pius Kipchichir Kogo versus Frank Kimeli Tenai [2018] eKLR and submitted that the sale is likely to proceed without notification and the quoted value is lower than the current market rates, that the property is where the factory rests. He also cited the case of Mobil Kitale Service Station vs Mobil Oil Kenya Ltd & Another [2004] eKLR, the case of Keshavji Jethabalal & Brothers Limited vs Saleh Abdulla [1959] EA 260 and also the case of Onyango Oloo vs Attorney General [1986-1989] EA 456.

Respondent's Submissions

12. On his part, Counsel for the 1st Defendant reiterated that there is no proper suit before the Court because all the pleadings filed by the Plaintiff are unsigned and undated. He submitted extensively on this issue and cited several provisions of the law and authorities.

13. Counsel also submitted extensively on the issue of "mareva injunction" but as already stated, the Plaintiff subsequently deleted any such reference by amendment on the ground that the term "mareva" was inadvertently included. In view thereof, submissions on this issue is therefore no longer relevant herein.

14. On the prayer for issuance of an order of inhibition, Counsel submitted that such is governed by Section 68 of the *Land Registration Act*. He cited the case of Geno Shar Shamo & Another vs Ganza Limited & 3 Others [2019] eKLR cited in the case of Dorcas Muthoni & 2 Others v Michael Ireri Ngari [2016] eKLR and submitted that the law governing granting of an inhibition order is similar to the law governing prohibitory/interlocutory injunctions. He also cited the case of Jane Njeri James v Kenya Commercial Bank Limited & Another [2021] eKLR. Counsel submitted further that the Application does not establish a prima facie case with a probability of success. He cited the case of Mrao Ltd vFirst American Bank (supra) and also the case of Bank of Africa Limited v John Ndungu Gachara [2022] eKLR. He argued further that the Plaintiff faults the 1st Defendant for failing to serve a 3 months' statutory notice of default yet the requisite notices were served upon the Plaintiff through its known postal address number 372-30100 Eldoret that was indicated in both the Debenture and the Charge and the Certificates of Postage exhibited, and that such service was sanctioned by Clause 24

of the Debenture and Clause 38 of the Charge. He cited the case of Khan & Another v Habib Bank AG Zurich & Another [2022] eKLR.

15. It was Counsel's further averment that although the Plaintiff faults the 1st Defendant for not engaging the Plaintiff to obtain a common valuer to prepare a valuation Report for the property, under Section 97(2) of the *Land Act*, the sole duty placed on a Chargee is to carry out a valuation, that the provision does not provide for reference to or in conjunction with the Chargor. He cited the case of Stephen Kibowen v Agricultural Finnace Corporation [2015] eKLR and submitted that the 1st Defendant fulfilled that duty. Regarding "irreparable injury", Counsel cited the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR and submitted that a valuation was done before issuing the 45 days' redemption notice was served and which put its open market value at Kshs 40,000,000/-, insurance value at Kshs 14,000,000/- and Forced Value at Kshs 30,000,000/-, that this demonstrates that the loss, if any is occasioned, is quantifiable and can be adequately compensated by way of damages. He cited the case of Isaac Kiprono Songok v Samuel Kiptingei & Another [2021] eKLR and submitted that the 1st Defendant is a reputable financial institution that is more than capable of settling the damages, that the Plaintiff was well aware of the effect of offering the property as security, that once land is offered as collateral it becomes a commodity of sale. He cited the case of Geoffrey Joram Akindo v Barclays Bank of Kenya Limited [2020] eKLR. On balance of convenience, Counsel cited the case of Stek Cosmetics Limited v Family Bank Limited & Another [2020] eKLR and submitted that the forced value is Kshs 30,000,000/- while the serviced loan amount is Kshs 39,654.856.94, that therefore, the 1st Defendant is at risk of not recovering the amounts since the same has outstripped the forced value and that therefore the balance of convenience lies in favour of not granting the orders. In conclusion, Counsel submitted that the Plaintiff has confirmed categorically that it is in default and posed the question; why should the Court aid an indolent defaulter to avoid its financial responsibilities? He cited the case of Hellen Karinthoni Njau v Remu DTM Limited [2017] eKLR.

16. As aforesaid, pursuant to the amendment of the Application, the 1st Defendant, with leave of the Court, filed Supplementary Submissions. However, upon perusal, it is clear that the same does not introduce any fresh averments. I will not therefore belabour recounting the same.

Determination

17. Before I delve further into this matter, regarding the argument by Counsel for the 1st Defendant that both the Plaint and the Application are undated and unsigned and that the Supporting Affidavit is not commissioned, I clarify that the copies in the Court file are all dated and signed and the Supporting Affidavit is also duly commissioned. I therefore presume that the copies served upon the 1st Defendant may have been raw copies prematurely or inadvertently served. Counsel's argument on this point therefore falls by the wayside.

18. In view thereof, 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 Respondent from exercising its statutory power of sale pending hearing and determination of the suit"

19. 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.

20. 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.

21. 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."

22. 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."

23. 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."

24. In this case, from the very beginning, the Plaintiff was very candid that it does not deny owing the 1st Defendant nor that the Plaintiff is in default insofar as repayment of the loan is concerned. What the Plaintiff is asking for is time to put its house in order. The Plaintiff states that it did approach the 1st Defendant for restructuring of the loan but that instead, the 1st Defendant instructed Auctioneers to sell the property. I must commend the Plaintiff for its forthrightness which is very rare with defaulters who seek the Court's protection when they find themselves faced with the auctioneer's hammer. Whether or not this honesty and forthrightness will be of any assistance to the Plaintiff will become apparent hereinbelow.

25. The Plaintiff has however also pegged its 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;

26. 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".

27. It is 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.

28. In this case, the Plaintiff rushed to Court when it was served with the 2nd Respondents-Auctioneers 45 days' notification of sale referred to in (c) above and dated 27/04/2023. What must therefore be established is whether, before the 45 days' redemption notice referred to in (c) above was served, the 90 days' statutory notice and the 40 days' notice of intention to sell as referred to in (a) and (b) above, respectively, had been served.

29. In response, the 1st Defendant has exhibited copies of both the 90 days' statutory notice and the 40 days' notice of intention to sell, together with respective Certificates of Postage. I also note that the address used to post the notices is the same one indicated in the Debenture and Charge the subject hereof, namely, "P.O. Box 372-30100 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."

30. In this case, despite being granted the opportunity to file a Further Affidavit to perhaps rebut or contradict the allegations of service of the statutory notice, the Plaintiff chose not to take advantage of such opportunity. In the circumstances, the allegation of service upon the Plaintiff remains uncontroverted and I uphold it.

31. I must point out that the requirement for service of the said notices 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 connection thereto, I note that this suit having been filed in May 2023 and the Court having issued interim orders of preservation of the status quo, even assuming that the Plaintiff never received the statutory notice, to date the Plaintiff has had almost 1 year to put its house in order but has still not made any repayments.

32. Service having therefore been demonstrated, it cannot be in dispute that the 1st Defendant was entitled to exercise its power of sale since both parties agree that there was default in repayment of the loan by the Plaintiff.

33. The Plaintiff has also alleged that the 1st Defendant has undervalued the property. He wants the parties to conduct a common valuation. In my view, this argument is a misconception of the law since Section 97(2) of the *Land Act* only requires the Respondent to procure a Valuation Report prior to the sale. Although under Section 97 a Chargee who exercises a power to sell the charged property owes a duty of care to the Chargor to obtain the best price reasonably obtainable, it has not been demonstrated that there is any provision or practice requiring the Chargor and the Chargee to conduct a joint or common valuation. In any event, 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 the need for a joint valuation.

34. In the circumstances, I find that the Plaintiff has failed to demonstrate the existence of a prima facie case. The evidence presented flatly falls short of the threshold required to establish the existence of a prima facie case. Granting an injunction will be tantamount to rewriting the parties' express contract yet it is a settled principle of law that parties to a contract are bound by the terms and conditions thereof. This principle was reiterated in the Court of Appeal case of National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR, where it was stated as follows:

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

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

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). ..... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration ....."

36. Nevertheless, suffice to mention that even on these other two limbs, I still rule against the Plaintiff. It has been argued that the Plaintiff will be greatly prejudiced by the auction and stands to suffer irreparably since the suit property is residential home and also houses the Plaintiff's factory. However, Courts have on numerous occasions expressed their position over such arguments. For instance, 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".

37. I am also guided by the holding of 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 where he 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."

38. In the instant suit, the trial Court will be entitled to order the Defendants to compensate the Plaintiff should the latter prove its claims and succeed before it. In my view, the 1st Defendant, one of the largest banks in Kenya, is capable of compensating the Plaintiff for any eventual loss or injury, if any.

39. On the balance of convenience, it is also the position that the fact that a property is residential or for business purposes in nature or has a sentimental value does not stop it from being auctioned as long as the requisite procedures have been followed. When charging such property, the borrower is fully aware of the consequences of default. In the circumstances, I find that the balance of convenience, too, tilts towards allowing the Defendants to proceed with recovery. On this point, I find company in the holding of F. Ochieng J (as he then was) in the case of Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR in which he stated the following:

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

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

Final Orders

41. In the premises, the Plaintiff's Application dated 10/05/2023 filed is hereby dismissed with costs to the 1st Defendant.

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

WANANDA J.R. ANURO

JUDGE

Eldoret High Court Civil Case No. E006 of 2023