**Chemeli v KCB Bank Kenya Limited (Civil Suit E009 of 2023)**
**[2024] KEHC 14800 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14800 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL SUIT E009 OF 2023**

**JRA WANANDA, J**

**OCTOBER 4, 2024**

**BETWEEN**

**CHESANG ARON CHEMELI ..... PLAINTIFF**

**AND**

**KCB BANK KENYA LIMITED ..... DEFENDANT**

**RULING**

1. The Application before Court is the Plaintiffs' Notice of Motion dated 15/06/2023 filed through Messrs Tororei & Co. Advocates. It seeks orders as follows:

    i. Spent

    ii. Spent

    iii. That a temporary injunction be issued restraining the Defendant/Respondent either by themselves or agents/servants from offering for sale, transferring, alienating, or otherwise in any manner interfering with land parcel number Uasin-Gishu/ Ainabkoi East/17 pending the hearing and determination of this suit or until further orders.

    iv. That cost be in the cause.

2. The grounds of the Application are as set out on the face thereof and the same is supported by the Affidavit sworn by the Plaintiff.

3. In the Affidavit, the Plaintiff deponed that he is the registered owner of the property known as land parcel number Uasin-Gishu/ Ainabkoi East/17 (hereinafter referred to as the "suit property") which he Charged in favour of the Defendant vide the Charge for Kshs 7,000,000/- registered on 10/09/2013 and the Further Charge for Kshs 3,000,000/- registered on 10/02/2015, and that the same were to facilitate a bank guarantee/overdraft facility issued by the Defendant to Baraka Travel Services Limited (hereinafter referred to as "the Borrower") in the sum of Kshs 10,000,000/-. He deponed further

that he later learnt from his son that by an advertisement appearing in the Daily Nation newspaper of 12/05/2023, the Defendant had offered the suit property for sale by way of public auction to be conducted on 29/06/2023, that he has never been served with any correspondence to the effect that there was default by the Borrower that would have therefore triggered the realization of the bank guarantee, and that he has never been served with any default notice, statutory notice or any other notices as required by the law. He deponed further that the Charge is, in any event, unlawful and incapable of anchoring the exercise of the statutory power of sale for the reason that the overdraft/bank guarantee facility secured by the Charge lapsed more than 10 years ago, that the same has been renewed by the Defendant without his consent, and that such renewal without his consent voids the Charge and renders it illegal, null and void. He also deponed that there is a danger that unless restraining orders are issued forthwith, the property shall be auctioned thus rendering the instant Application and the suit nugatory, and that he has a prima facie case with chances of success.

**Replying Affidavit**

4. In opposing the Application, the Defendant, through the firm of Messrs Kibichy & Co. Advocates, on 1/11/2023, filed the Replying Affidavit sworn by one Jackson Muriithi, who described himself as a Credit Administrator with the Defendant. He deponed that in the year 2013, the Defendant advanced a loan of Kshs 7,000,000/- and a further advance of Kshs 3,000,000/- to the Borrower, that both Charges were registered against the title for the suit property, that additionally, the Borrower was advanced further loans of Kshs 6,555,000/- and USD 60,000/- through an offer letter dated 11/06/2019 and that upon the Borrower's request for a restructure of the loan, the Defendant granted a 3-month moratorium on the principal sum and interest through the letter dated 06/06/2020. He deponed further that the Plaintiff agreed to guarantee the entire outstanding loan and executed the guarantor's form, that however, the Borrower continued to default on the loan and the Defendant was forced to issue a 60-day Statutory Notice on 25/01/2022 as per provisions of Section 90(3) of the *Land Act* which the Borrower and/or the Plaintiff failed to heed, and that the subsequent 40 days statutory demand notice pursuant to Section 96(2)(3) of the *Land Act* was issued on 22/02/2023 to which again the Plaintiff ignored. He stated that as a result of the loan remaining unpaid, the Defendant instructed Auctioneers on 06/04/2023 to issue and serve a 45-days Redemption Notice upon the Plaintiff which the Auctioneers issued on 12/04/2023 notifying the Plaintiff that the total sum guaranteed and then outstanding totalled to Kshs. 19,501/597/-, and that the Auctioneers also placed an advertisement in the Daily Nation of 12/05/2023 giving notification of sale of the property by public auction scheduled for 29/06/2023. According to him therefore, the Plaintiff was served with all statutory notices and was well aware that the amount he had guaranteed was in default.

5. He reiterated that the first advance was taken in the year 2013 with further advances in 2015 and 2019, that the Plaintiff executed all security documents before an Advocate, that the Plaintiff has on several occasions approached the Defendant to explain his financial constraints in settling the loan and negotiations have taken place but that the Plaintiff has failed to honour his obligations. He deponed further that the Plaintiff is not entitled to the orders sought as the Borrower is in clear breach of the contract entered into and has not taken any steps to remedy the situation and continues to be in default, and that the Application is an attempt to delay justice and obstruct the Defendant from exercising its statutory power of sale.

**Plaintiffs' Further Affidavit**

6. The Plaintiff then filed a Further Affidavit on 02/02/2024. He deponed that he did not consent to any Further Charge and that he was a stranger to the same. He disowned the signatures thereon and termed them as forgery since, according to him, they did not belong to him or his wife and that his

late wife had been ailing having suffered a heart attack in 2012 and therefore could not have travelled to Mombasa to execute the consent at page 23 of the Charge or the spousal consent, and that due to his late wife's ill-health, she could not write and only used her fingerprints in place of a signature. He denied knowledge of any Further Charge or the Application for restructuring of the loan made in 2020 and deponed further that pursuant to clause 7 of the Charge instrument, whenever the Plaintiffs were called upon to pay any sums demanded in the statutory notices and the same was complied with, the Defendant was enjoined to commence the issuance of the relevant notices afresh. He also reiterated his denial of being served with any notices. He then raised a new issue, that before the suit property is sold by way of auction, the Defendant has an obligation to conduct a forced sale valuation before offering the same for sale pursuant to Section 97(2) of the *Land Act* as read with clause 9 of the Charge instrument and which was never done.

**Hearing of the Application**

7. It was then agreed that the Application be canvassed by way of written Submissions. Pursuant thereto, the Plaintiff filed his Submissions on 2/02/2024 whereas the Defendant filed on 21/02/2024.

**Plaintiffs' Submissions**

8. Regarding the conditions to be satisfied for a temporary injunction to be issued, Counsel cited the locus classicus case of Giella v Cassman Brown Ltd [19731 EA 358. On whether the first condition of a "prima facie" case has been established, he cited the case of Nawaz Manii & 4 others vs Vandeep Sagoo & 8 others (2017) eKLR and submitted that the intended exercise of the statutory power of sale is unlawful due to the Defendant's failure to serve the relevant notices upon the Plaintiff, that the Defendant issued instructions to an Auctioneer to advertise the suit property for sale and the same was scheduled for sale by way of public auction scheduled on 29/06/2023 without conducting a forced sale valuation as required under Section 97 of the *Land Act*, that a serious doubt has arisen on the validity of the Charge for want of spousal consent since the one exhibited by the Defendant shows that it was purportedly executed in Mombasa yet the Plaintiff is categorical that his wife was elderly and that at no time did she travel to Mombasa, that therefore, the spousal consent that anchors the Charge is a forgery and cannot therefore support any statutory power of sale. He also contended that the Plaintiff did not execute a Further Charge which he has now learnt was denominated in US dollars, that the Plaintiff is elderly and was therefore taken advantage of by the Defendants, and that the foregoing are weighty issues that require interrogation by the Court during trial.

9. Counsel recognized that the Defendant anchors the sale on the Charge registered on 10/09/2021 to the tune of Kshs 7,000,000/- pursuant to which the Borrower was to make repayments by way of monthly instalments but reiterated that no statutory notices were served upon the Plaintiff as required under Section 90 as read with Section 96 of the *Land Act*. According to him therefore, in moving to foreclose, the Plaintiffs is not only in breach of contract and statute but was also unconstitutional as the Defendant was attempting to sell the property without due process and that this was an infringement on the constitutional rights of the Plaintiff to own property in accordance to Article 24. He reiterated that once the Borrower complied with any statutory notice earlier issued, the Defendant was enjoined to restart the issuance of the notices afresh which however the Defendant never did.

10. He also reiterated that the Defendant failed to conduct a forced sale valuation prior to sale by public auction advertised on 12/05/2023 and scheduled for 29/05/2023 as required under Section 97(2) of the *Land Act*. He cited the case of Stephen Kibowen v Agricultural Finance Corporation [2015] eKLR and also the case of Palmy Company Limited v Consolidated Bank [2014] eKLR. He appreciated that the provisions of the *Land Act* being procedural and that Courts give due regard to substantive justice over procedural technicalities as stipulated under Article 159 of *the Constitution* but that the breach

herein is so grave as it goes to the root of the process of foreclosure, that the procedural disobedience cannot be forgiven as to do so would amount to re-writing the contract between the parties and would also place the Court in the place of the Legislature as it will have amended the law which is not within its jurisdiction and that it would lead to an unjust enrichment as the Defendant will be allowed to benefit from a contract which it has breached. He cited the case of National Bank of Kenya Ltd v Pipelastic Samkolit (K) Ltd & Another [2001] eKLR and termed the above matters as raising arguable points.

11. Regarding the condition of whether the Plaintiff will suffer "irreparable harm", Counsel submitted that no amount of damages will be equivalent to the loss the Plaintiffs will suffer should the property be sold in the circumstances. He cited the case of Panari Enterprises Ltd vs Lijoodi & Mothers (2014) eKLR. He also submitted that should the Court be inclined to find that indeed damages is an adequate remedy for the harm that the Plaintiff would be occasioned, then the Court should be guided by the case of Lucy Njoki Waithaka vs ICDC Nairobi HCCC No. 321 of 2001 where the Court stated that it is not a laid down rule that where damages may be an appropriate remedy, temporary injunction orders should never be issued since, if that were the case, it would not only be unjust but would also be seen to be unjust.

12. Regarding the third condition, "balance of convenience", Counsel cited the case of Nawaz Manii & 4 others vs Vandeep Sagoo & 8 others (supra) and submitted that the same is in favour of the Plaintiff as opposed to the Defendants since the Defendants failed to follow the correct procedure in exercising their statutory power of sale, that the Defendant has not demonstrated any prejudice to them in the event the orders are granted. He also cited the case of Nyando Enterprises Limited v Barclays Bank of Kenya Limited [2018] eKLR and the case of Showind Industries Ltd v Guardian Bank Ltd & Another [2002] eKLR.

**Defendant's Submissions**

13. On his part, Counsel for the Respondent observed that the Plaintiff admits that the Borrower took the loan facilities from the Defendant in the year 2013 and 2015 whereupon the suit property was used as security and a Charge registered over the property. He also pointed out that the Plaintiff confirms that indeed he guaranteed a loan advance of Kshs 3,000,000/- to the Borrower. He then reiterated matters already addressed in the Defendant's Replying Affidavit, including the default by the Borrower in repayment and insisted that all the relevant notices were served upon the Plaintiff. He cited the case of Nyando Enterprises Limited v Barclays Bank (supra) on the quote that where there is no dispute that the Borrower is in default, then the Defendant's right to sell the mortgaged property is presumed to have crystallized. He also cited the case of Executive Curtains and Furnishings Limited v Family Finance Building Society [2007] eKLR.

14. According to Counsel, the Plaintiff has not met the threshold for the granting of injunction orders as outlined in the case of Giella Cassman Brown (supra). Regarding the first conditions of whether a "prima facie" case has been established, he cited the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR and submitted that none of the Plaintiff's rights has been infringed to warrant a rebuttal, that it is the Plaintiff who is in default of servicing the loan, that the Defendant was ceased of options save for the option of exercising its statutory power of sale and acted rightfully and procedurally by issuing the Plaintiff with the requisite statutory notices which the Plaintiff chose not to honour. He submitted that in the circumstances, granting the Plaintiff the injunction will be prejudicial and unjust to the Defendant, that the Plaintiffs act of running to Court knowing very well that he and the Borrower had defaulted in repayment and in honouring the notices is purely authored to frustrate and oppress the Defendant. He also cited the case of Ochola Kamili Holdings Limited v Guardian Bank Limited [2018] eKLR.

15. Regarding the second condition, namely, whether the Plaintiff will suffer "irreparable harm", Counsel submitted that the Plaintiff has not demonstrated such kind of damage, that in any event, the injury that may be suffered by the Plaintiff can adequately be compensated by way of damages, that it is the Defendant that stands to suffer irreparable injury as the loan will remain in arrears since the Plaintiff, being "a man of straw", will not be able to repay the outstanding amounts together with the accruing interest and penalties, that this is demonstrated by the Plaintiff's inability to remedy the wrong despite being given sufficient time to do so and even being given a loan structure. He again cited the case of Executive Curtains Limited v Family Finnace (supra), the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others which, he submitted, was cited in the case of Bonface Renja Erambo v Kenya Commercial Bank Limited [2020] eKLR.

16. He then submitted that the Plaintiff having failed to establish the first two conditions, the Court need not take into consideration the third condition of "balance of convenience".

**Determination**

17. It is evident that the broad issue arising for determination in this matter is "whether the Defendant correctly exercised its statutory power of sale insofar as service of the requisite notices and conducting of a valuation before sale are concerned, and therefore whether a temporary injunction should be issued".

18. 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.

19. 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.

20. 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."

21. 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."

22. 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 thereof 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".

23. 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".

24. 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."

25. 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."

26. In this case, I agree that before a Chargee can exercise its statutory power of sale, the law requires it to issue notices to the Chargor 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.

27. In regard to (a) above, Section 90 aforesaid 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;

28. Section 96(1) then provides that:

> " Where a chargor is in default of the obligations under a Charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a Chargee may exercise the power to sell the Charged land."

29. In this case, the parties are in agreement that the Plaintiff is the registered owner of the suit property, and that a Charge in favour of the Defendant was registered against the property on 10/09/2013 to secure a sum of Kshs 7,000,000/- being the proceeds of a loan advanced by the Defendant to the Borrower (Baraka Travel Services Limited). Neither of the parties has exhibited a copy of the said Charge but there is no dispute that indeed it exists. In any event, the Defendant has exhibited a copy of a Certificate of Search dated 15/06/2023 confirming the same.

30. From the said Certificate of Official Search exhibited, it is also indicated that on 10/02/2015, a Deed of Variation of the above Charge was registered against the property and on the same date, a Further Charge was registered in favour of the Plaintiff securing a further sum of Kshs 3,000,000/-. Again, neither of the parties has exhibited a copy of the said Deed of Variation. The Further Charge has however been exhibited by the Defendant although I notice that pages 17-20 thereof are "missing" thereon. The Plaintiff has denied the authenticity of his alleged own signature appended on the Further Charge instrument as the Chargor and has also denied that his wife signed the spousal consent included in the instrument. Since the issued raised is one of forgery, a substantive matter, I am not able to determine on Affidavit of service. I however wonder how the Plaintiff would all along not be aware of the Further Charge registered against his property was back on 10/02/2015, 8 years before the Plaintiff filed this suit. For this reason, I take this denial with "a pinch of salt" and much scepticism.

31. On whether the Borrower has defaulted in its repayments and that the loan is therefore in arrears, this has not been seriously challenged. The Defendant has exhibited the letter dated 5/06/2020 indicating that upon the Borrower's request, the bank agreed to and did restructure the loan in terms that the bank placed a moratorium on repayments for a period of 3 months. The letter also indicates that at that date, the amount in arrears was Kshs 6,758,711.22. The contents of this letter have not been controverted and I also note that it bears the signatures of persons whom I presume are the directors of the Borrower indicating their acceptance of the terms and conditions of the restructure. There is no material before this Court indicating that the said arrears were settled in full. For this reason, although the bank has not exhibited copies of statements of account, I find that the fact that the Borrower defaulted with the result that the account is in arrears has been sufficiently demonstrated.

32. Regarding service of the 90-days' statutory notice, 40-days' notice of intention to sell and the 45-days Redemption Notice, there is no dispute that no copy of the 60-days' statutory notice required under Section 90(3) of the *Land Act* has been attached. The only reference to the statutory notice is in the

40-days' notice of intention to sell dated 22/02/2023 issued under Section 96(2)(3) of the Act and in which it is stated as follows:

> "Whereas you were issued with a Statutory Notice dated 25th January, 2022 wherein the Chargee required you to settle the outstanding arrears of ..... KES. 6,796,080.00 and ..... USD 81,445.98 as at 25th January, 2022 three (3) months from the date of service thereof, failing which the Chargee shall exercise its statutory remedy of sale under Section 90(3)(e) of the *Land Act* No. 6 of 2012, Laws of Kenya."

33. Inasmuch as the said 40-days' notice of intention to sell refers to an alleged 90-days earlier statutory notice dated 25/01/2022 issued, strangely, no copy of such alleged statutory notice has been exhibited and no explanation has been offered regarding this conspicuous omission despite the Plaintiff having insisted that none was issued by the bank. In this state of affairs, it is difficult to understand how the Defendant would expect the Court to rule in its favour.

34. Further, I note from the Charge instrument that the postal address cited for the Plaintiff is "P.O. Box 131 Ainabkoi". While this address correctly appears in both the exhibited 40-days' notice of intention to sell and the 45-days Redemption Notice alongside the addresses of the Borrower and a director thereof, the exhibited certificates of postage tell a different story. First, there is even no certificate of postage exhibited for the 40-days' notice of intention to sell dated 22/02/2023. Secondly, the exhibited certificate of postage for the 45-days Redemption Notice dated 12/04/2023 indicates that the address used to post the notice was an address under "Nairobi GPO [00100]". Considering, as aforesaid, that the Plaintiff's address as stated in the Charge instrument is "P.O. Box 131 Ainabkoi", again, I wonder how the Defendant expects the Court to treat this as proper service upon the Plaintiff. The Defendant seems to equate service upon the Borrower and the directors of the Borrower to service upon the Plaintiff as the Chargor. If this is so, then clearly, it is misplaced reasoning and cannot be accepted by a Court of law.

35. On this issue of proof of service of the notices, in the case of Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR, the Court of Appeal 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."

36. As already stated, at this stage, the Court is not determining the main suit and the only role it serves at this juncture is to determine whether the Plaintiff has established a prima facie case so as to qualify for the temporary orders of injunction sought. From what I have stated above, the ground that stands out is the fact that the notices, if at all, were not properly served as required by law. The service of the notices is not merely a technicality, it is a substantive requirement anchored on statutory provisions of the law. It follows that failure to abide by the requirements tentatively would affect the validity of the entire process of exercise of the chargee's statutory power of sale. Whereas the statutory power of sale may have lawfully accrued, in exercising the same, the Defendant is required to follow the procedures set out in law. In view of the foregoing, I am satisfied that the Plaintiff has raised justifiable doubts over service of the notices.

37. Further, the Plaintiff also raised the issue that before the suit property is sold by way of auction, the Defendant has an obligation to first conduct a forced sale valuation. This averment is correct and is pursuant to Section 97(2) of the *Land Act* as read with clause 9 of the Charge instrument. Although as aforesaid, the Plaintiff never raised this issue in his initial Supporting Affidavit and only brought it up

in his Further Affidavit after the Defendant had already filed its Replying Affidavit, the Defendant had the choice of seeking that the new issue be disregarded or in the alternative, the Defendant be granted leave to respond to the issue. The Defendant however never sought any of these available options and also never responded to the issue, not even in its Submissions. For this reason, I have no reason to refuse to also consider the issue of the absence of the valuation.

38. Indeed, Section 97(1) and (2) of the *Land Act* provide as follows:

> "(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale".
>
> (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

39. Rule 11(b)(x) of the *Auctioneers Act* then provides that the content of a warrant or instruction to an Auctioneer to conduct the sale by public auction shall contain:

> "the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed date."

40. In regard to the above, in the case of Patrick Kangethe Edward v Co-operative Bank of Kenya Limited & Another [2016] eKLR, the Court held that:

> "Section 97(1) *Land Act* now places a duty of care on a charge while exercising its powers of sale. That duty to this court includes the duty to ensure that the best achievable price is realized and further that the chargor whose land is to be sold is not exposed to unnecessary and avoidable expense and costs."

41. In this case, the sale by public auction was advertised on 12/05/2023 and the same was scheduled for 29/05/2023, only about 1½ months away. Despite this, no sale valuation, whether conducted within 12 months of the auction date scheduled or otherwise, was produced by the Defendant to demonstrate that it had complied with Section 97 of the *Land Act* and Rule 11(b)(x) of the Auctioneers' Rules.

42. For the above reasons, I find and hold that the Plaintiff has satisfactorily established a prima facie case worthy of a consideration at trial.

43. Regarding "irreparable harm", I agree with the Plaintiff's Counsel that no amount of damages will be equivalent to the loss the Plaintiffs will suffer should the property be sold in the flawed circumstances described above. In any case, there is no principle in law that where an award of damages is found to be an adequate remedy, temporary injunction orders should never be issued. Each case must be decided on the basis of its own peculiar and unique circumstances. In this case, I find that the injury risked is actual, substantial and demonstrable, and that damages cannot adequately make up for the harm that shall be suffered by the Plaintiff (see the case of Nguruman Limited (supra)).

44. On "balance of convenience", it clearly tilts in favour of the Plaintiff since there is evidence to suggest that the Defendant may have failed to follow the correct procedure in exercising its statutory power of sale. Further, the Defendant has not demonstrated any prejudice that may be caused to it if the orders are granted and which it cannot recover from.

**Final Orders**

45. In light of the above, I hereby order as follows:

    i. The Plaintiff's Notice of Motion dated 15/06/2023 succeeds to the extent that a temporary injunction is hereby issued barring the Plaintiff, as Chargee herein, from exercising its statutory power to sell the property known as Uasin Gishu/Ainabkoi East/17 registered in the name of the Plaintiff, as Chargor, pending the hearing and determination of this suit.

    ii. Costs shall abide the hearing and determination of the main suit

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024**

**.....**

**WANANDA J. ANURO**

**JUDGE**

Delivered in the presence of:

Tororei for Plaintiff

Ms Matendechere for Defendant

Court Assistant: Brian Kimathi