



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC CAUSE NO. 154 OF 2019**

**AZIM TAIBJEE**

**MADHAV BHALLA.....PLAINTIFFS**

**-VERSUS-**

**HARISH KUMAR BHAGWANDAS KANABAR.....1<sup>ST</sup> DEFENDANT**

**NCBA BANK KENYA PLC.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiffs/Applicants have filed and/or lodged a Notice of Motion Application dated the 21<sup>st</sup> of September 2020, in respect of which the Plaintiffs/Applicants have sought the following reliefs;

i. ....(spent

ii. *An Interlocutory Injunction do issue to restrain NCBA Bank Kenya Plc and/or the 2<sup>nd</sup> Defendant and/or any other third parties by themselves and/or their servants, agents, employees, howsoever from selling or offering for sale whether by public auction or private treaty auctioning, transferring, charging, leasing, pledging or in any other way alienating or in any other manner whatsoever and howsoever interfering with the ownership, possession and/or title thereof and/or dealing with or transacting with the property the subject matter of this suit, otherwise known as Townhouse Number 12, Highgroove Village on L.R. NO. 29998 and/or in any other manner whatsoever from dealing with and/or interfering, remaining on and/or continuing occupation of same pending Interpartes hearing of this Application*

iii. *An Interlocutory injunction do issue to restrain NCBA Bank Kenya Plc and/or the 2<sup>nd</sup> Defendant and/or any other third parties by themselves and/or their servants, agents, employees, howsoever from selling or offering for sale whether by public auction or private treaty auctioning, transferring, charging, leasing, pledging or in any other way alienating or in any other manner whatsoever and howsoever interfering with the ownership, possession and/or title thereof and/or dealing with or transacting with the property the subject matter of this suit, otherwise known as Townhouse Number 12, Highgroove Village on L.R. NO. 29998 and/or in any other manner whatsoever from dealing with and/or interfering, remaining on and/or continuing occupation of same, pending the hearing of this suit*

iv. *An order directing the Chief Land Registrar to ensure that no other transactions are effected or any dealings is initiated, registered or noted, that in any way form or shape, derogate from or subtract or extinguish or in any other manner whatsoever diminishes or prejudices the title in the said suit property herein above described, pending the hearing and determination of this Application and the suit*

v. *Cost of this Application be provided for.*

2. The subject Application is premised on the various grounds which have been enumerated at the foot thereof and same is further supported by two affidavits sworn by the Plaintiffs/Applicants, respectively. For clarity, the lead supporting Affidavit has been sworn by the 2<sup>nd</sup> Plaintiff/Applicant and same is sworn on the 21<sup>st</sup> of September 2020, to which the deponent has attached two annexures, namely MB001 and MB002, respectively.

3. On the other hand, the 2<sup>nd</sup> supporting Affidavit has been sworn by the first Plaintiff/Applicant and same is sworn on the same date, namely the 21<sup>st</sup> of September 2020, and the said Affidavit adopts and otherwise reiterates the contents of the supporting Affidavit sworn by the 2<sup>nd</sup>

Plaintiff/Applicant herein, which I have alluded to in the preceding paragraph.

4. Upon service of the subject Application, the 2<sup>nd</sup> Defendant/Respondent filed a Replying Affidavit by one Stephen Atenya, which was sworn on the 17<sup>th</sup> of December 2020, to which the deponent attached various annexures, pertinent of which are the charge registered against the suit property at the instance and request of the 1<sup>st</sup> Defendant/Respondent.

5. Besides, the Replying Affidavit on the part of the 2<sup>nd</sup> Defendant/Respondent has also annexed copies of the primary notices issued pursuant to **Section 90(1) of the Land Act**, the secondary notice issued pursuant to **Section 96(1) and (2) of the Land Act 2012**, as well as a copy of the Notification of sale, the latter issued by the 2<sup>nd</sup> Defendant/Respondent's nominated auctioneer.

6. On the other hand, the 1<sup>st</sup> Defendant/Respondent herein though served with the subject Application, has neither filed a Replying Affidavit nor Grounds of Opposition. Consequently, the subject Application has not been opposed by the 1<sup>st</sup> Defendant/Respondent.

### **DEPOSITIONS BY THE PARTIES**

#### **The Plaintiffs'/Applicants Case.**

7. The Plaintiff/Applicants have deposed to two Affidavits, both which are sworn on the same date, namely the 21<sup>st</sup> of September 2020.

8. Pursuant to the said Affidavits, it is the Plaintiff/Applicants' case that same entered into and executed a sale agreement between themselves( Plaintiffs/Applicants) and the 1<sup>st</sup> Defendant/Respondent, which was executed on the 14<sup>th</sup> of July 2016.

9. According to the Plaintiffs/Applicants, the sale agreement was in respect of L.R. NO 29998, (herein after referred to the suit property).

10. It is the Plaintiffs/Applicants' further averment that the purchase price over and in respect of the suit property was agreed upon in the sum of Kshs. 128,000,000 only, out of which the sum of Kshs. 100,000,000 was paid to the 1<sup>st</sup> Defendant/Respondent by way of set-off and/or exchange of some other properties, details of which were captured in Clause 2 of the said agreement for sale.

11. On the other hand, the Plaintiffs/Applicants further aver that the balance of Kshs. 28,000,000 Only, was agreed to be paid to and/or deposited in an account in the name of the 1<sup>st</sup> Defendant/Respondent, albeit operated with the 2<sup>nd</sup> Defendant/Respondent.

12. Further, the Plaintiff/Applicants aver that pursuant to and in line with the clause of the sale agreement, same proceeded to and deposited the sum of Kshs. 28,000,000 Only, in the said 1<sup>st</sup> Defendant/Respondent's account, though operated by the 2<sup>nd</sup> Defendant and that at the time of deposit of the said monies, the Plaintiff/Applicants availed instructions to the 2<sup>nd</sup> Defendant/Respondents, on how the said Deposit was to be utilized or otherwise appropriated.

13. The Plaintiff/Applicants further contend that despite the explicit instructions, which were given to the 2<sup>nd</sup> Defendant/Respondent, pertaining to the utilization and appropriation of the deposits, the 2<sup>nd</sup> Defendant/Respondents unlawfully allowed the 1<sup>st</sup> Defendant/Respondent to withdraw the deposit for own personal use.

14. In this regard, the Plaintiff/Applicants have averred that by allowing the 1<sup>st</sup> Defendant/Respondent to withdraw the deposits paid to the 2<sup>nd</sup> Defendant/Respondent, same breached the express instructions which essentially were to the effect that the said monies were to be applied against the outstanding debt towards discharging the suit property, which was then charged in favor of the said 2<sup>nd</sup> Defendant/Respondent.

15. Besides, the Plaintiff/Applicants have averred that despite their effort to liquidate the debt which was owing on behalf of the 1<sup>st</sup> Defendant/Respondent, the 2<sup>nd</sup> Defendant/Respondent is now keen to alienate, sell or otherwise dispose of the suit property in exercise of her statutory power of sale, which exercise is contended shall prejudice the Interests of the Plaintiffs/Respondents.

16. In the premises, the Plaintiffs/Applicants have averred that the intended disposal and/or alienation of the suit property by the 2<sup>nd</sup> Defendant/Respondent shall deprive the Applicants of their lawful rights to the suit property.

17. On the basis of the foregoing deposition, the Plaintiff/Applicants have thus sought for the Reliefs contained at the foot of the Notice of Motion Application dated the **21<sup>st</sup> of September 2020**.

#### **1<sup>st</sup> Defendant/Respondent's Case.**

18. As pointed out elsewhere herein before, the 1<sup>st</sup> Defendant/Respondent did not file any response to the subject Application. Essentially, the 1<sup>st</sup> Defendant/Respondent appears to concede the Application made by the Plaintiffs/Applicants.

#### **2<sup>nd</sup> Defendant/Respondent's Case.**

19. Upon being served with the Notice of Motion Application herein, the 2<sup>nd</sup> Defendant/Respondent filed an elaborate Replying Affidavit,

sworn by one Stephen Atenya on 17<sup>th</sup> of December 2020.

20. Vide the Replying Affidavit, the 2<sup>nd</sup> Defendant/Respondent has contended that the suit property herein was charged to and/or in favor of the 2<sup>nd</sup> Defendant/Respondent as a security against a bank facility amounting to USD 1,025,000 OnlyDwhich monies were accessed and appropriated by the 1<sup>st</sup> Defendant/Respondent.

21. It was further stated in the said Replying Affidavit that despite the disbursement of and appropriation of the monies by the 1<sup>st</sup> Respondent, same failed and/or defaulted in the repayment of the facility in question.

22. Arising from and as a result of the failure by the 1<sup>st</sup> Defendant/Respondent to repay the monies, the 2<sup>nd</sup> Defendant/Respondent was obliged to and indeed issued and served the requisite statutory notices, in exercise of her statutory power of sale.

23. It was the further Deposition on behalf of the 2<sup>nd</sup> Defendant/Respondent that despite the issuance and service of the statutory notices, the 1<sup>st</sup> Defendant/Respondent failed and/or neglected to repay the monies which were then due and outstanding at the foot of the banking facility.

24. In the premises, the 2<sup>nd</sup> Defendant further avers that she was obliged to instruct and/or retain a nominated Auctioneer, who proceeded to and indeed issued the statutory notice of sale, thus proceeding to actualize the 2<sup>nd</sup> Defendant/Respondent's instructions, in line with Rights conferred vide the Charge Instrument.

25. Owing to the foregoing, the 2<sup>nd</sup> Defendant has thus averred that her right to sell and/or dispose of the suit property has accrued and/or otherwise matured.

26. Finally, the 2<sup>nd</sup> Defendant/Respondent has also averred that at the time of the purported sale between the Plaintiffs/Applicants and the 1<sup>st</sup> Defendant/Respondent, the suit property was lawfully charged to and/or in favor of the 2<sup>nd</sup> Defendant/Respondent and thus the 1<sup>st</sup> Defendant/Respondent was not seized of any capacity to sell and/or dispose of the suit property. In any event, the 2<sup>nd</sup> Defendant/Respondent further avers that no legal rights, interests and/or title passed to and/or in favor of the Plaintiffs/Applicants whatsoever.

27. In view of the foregoing, the 2<sup>nd</sup> Defendant/Respondent has sought for orders that the subject Application be Dismissed.

#### **SUBMISSIONS BY THE PARTIES**

28. The subject Application came up on the 3<sup>rd</sup> of May 2021, on which date the parties agreed that the Application be canvassed and disposed of by way of written submissions.

29. Pursuant to the directions issued on the 3<sup>rd</sup> of May 2021, the Plaintiffs/Applicants proceeded to file their written submissions on 15<sup>th</sup> of May 2021, whereas the 2<sup>nd</sup> Defendant/Respondent filed their written submissions on the 8<sup>th</sup> of June 2021.

30. On the other hand, the 1<sup>st</sup> Defendant/Respondent herein did not file any written submissions. However, Counsel Ms. Gichuki, who held brief for Mr. Kyallo for the 1<sup>st</sup> Defendant, intimated to the Honourable Court that same would be associating with the submissions of the Plaintiffs/Applicants.

#### **ISSUES FOR DETERMINATION**

31. Having reviewed and evaluated the Notice of Motion Application dated 21<sup>st</sup> of September 2020, the Supporting Affidavits thereto as well as the written submissions filed on behalf of the Plaintiffs/Applicants, on one hand, and the Replying Affidavit sworn on 17<sup>th</sup> of December 2020, on behalf of 2<sup>nd</sup> Defendant/Respondents as well as written submissions dated 8<sup>th</sup> of June 2020, I am of the humble view that the following issues do suffice for determination;

*i. Whether the Plaintiffs/Applicants have established a prima facie case with overwhelming chances of success.*

*ii. Whether the Plaintiffs/Applicants are disposed to suffer irreparable loss, if the orders sought are not granted.*

*iii. In whose favor does the Balance of Convenience tilt.*

#### **ANALYSIS AND DETERMINATION**

##### **ISSUE NUMBER ONE**

##### **Whether the Plaintiffs/Applicants have established a prima facie case with overwhelming chances of success.**

32. The starting point to unlocking the subject issue, that is whether the Plaintiffs/Applicants have established a prima facie case with overwhelming chances of success, is to understand and/or appreciate the meaning and tenor of the term prima facie case.

33. As pertains to the meaning of what constitutes a prima facie case, it is sufficient to refer to and apply the holding of the Honorable Court of Appeal in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR**;

*“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

34. Perhaps just to reinforce the position underscored in the preceding paragraph, the Honorable Court of Appeal returned to the definition of what is a prima facie case in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014] Eklr**, where the Honorable Court observed as hereunder;

*“Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the **American Cyanamid Co. Ethicon Ltd [1975] AC 396** is a case in point. The meaning of “prima facie case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in **Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332**.*

35. Armed with the definition of what constitutes a prima facie case from the foregoing decisions (supra), I must now venture to determine, whether the totality of evidence before the court by the Plaintiffs/Applicants have met and/or established the existence of a prima facie case.

36. According to the Plaintiffs/Applicants, same entered into and executed a sale agreement with the 1<sup>st</sup> Defendant/Respondent, over and in respect of the suit property, whereupon the 1<sup>st</sup> Defendant/Respondent covenanted to sell to and transfer in favor of the Plaintiffs/Applicants the suit property.

37. It was further contended by the Plaintiffs/Applicants that pursuant to and in line with the sale agreement, the sum of Kshs. 100,000,000 Only, was paid by way of set-off and/or exchange of some other properties with the 1<sup>st</sup> Defendant/Respondent, a fact which the 1<sup>st</sup> Respondent acknowledged.

38. It was further the contention by the Plaintiffs/Applicants that the balance of the purchase price amounting to Kshs. 28,000,000 Only, was agreed to be deposited in the 1<sup>st</sup> Defendant/Respondent’s account operated at the 2<sup>nd</sup> Defendant/Respondent Bank, albeit on instructions that same was to be applied against the debt which was due on account of the 1<sup>st</sup> Defendant/Respondent to the 2<sup>nd</sup> Defendant/Respondent.

39. It is apparent that at the time of entering into and/or executing the sale agreement between the Plaintiff / Applicants and the 1<sup>st</sup> Defendant/Respondent, it was well known to the Plaintiffs/Applicants, that the suit property was indeed charged to the 2<sup>nd</sup> Defendant/Respondent.

40. Even though the Plaintiffs/Applicants have not conceded to the fact that the suit property was so charged, it is evident that the monies which were deposited in the account of the 1<sup>st</sup> Defendant/Respondent, albeit operated at the 2<sup>nd</sup> Defendant/Respondent’s Bank, was said to be meant and/or to be applied towards offsetting the debt which was due and owing at the foot of the charge.

41. However, it is not clear whether prior to or before making the deposit of the sum of Kshs. 28,000,000 Only, into the account of the 1<sup>st</sup> Respondent, towards offsetting the 1<sup>st</sup> Respondent’s liability, the exact amount of the loan due had been established, authenticated and/or confirmed whatsoever.

42. Be that as it may, it is conceded by the Plaintiffs/Applicants that the sum of Kshs. 28,000,000 Only, which allegedly was meant to offset the debt due at the foot of the charge, was withdrawn and utilized by the 1<sup>st</sup> Defendant for personal use. In this regard, even assuming that the debt due on account of the charge was Kshs. 28,000,000 Only, (which was not the case), it is common ground that the money did not settle the debt due to the 2<sup>nd</sup> Respondent or at all.

43. It is also common ground that the suit property herein remained lawfully charged to and/or in favor of the 2<sup>nd</sup> Defendant/Respondent and therefore the 2<sup>nd</sup> Defendant/Respondent, held superior rights to the suit property and in the event of default, to liquidate the charged debt, same were enjoined by law to sell and/or dispose of the suit property in exercise of her statutory powers of sale.

44. Suffice it to say, that at the time the 1<sup>st</sup> Defendant/Respondent was attempting to sell the suit property to the Plaintiffs/Applicants, same was incapacitated by the existing charge. In this regard, the 1<sup>st</sup> Defendant/Respondent had no legal rights to convey in favor of the Plaintiffs/Applicants, subject to the Equity of Redemption.

45. Worse still, the transaction between the 1<sup>st</sup> Respondent and the Plaintiffs/Applicants did not materialize and in this regard the Plaintiffs/Applicants did not accrue the title over and in respect of the suit property. For clarity, it is worthy to note that one of the prayers sought by the Applicants both in the original and amended plaint, the latter amended on the 17<sup>th</sup> of August 2020, is for Specific performance.

46. Simply put, the Plaintiffs/Applicants herein did not earn title to the suit property and in this regard, the Plaintiffs/Applicants therefore have no legitimate claim of ownership to the suit property.

47. In my humble view, in the absence of title or any legitimate rights to the suit property, the Plaintiffs/Applicants, cannot approach the

Honorable Court with a view to attracting and/or procuring any orders, let alone orders for temporary injunction, against the 2<sup>nd</sup> Defendant /Respondent.

48. On the other hand, I am afraid that the Plaintiffs/Applicants herein also do not appear to have any locus standi to maintain a suit pertaining to and/or against the alienation and/or disposal of the suit property by the 2<sup>nd</sup> Defendant/Respondent.

49. To the contrary, the Plaintiffs/Applicants claims and remedies appear to exist as against the 1<sup>st</sup> Defendant/Respondent for breach of contract and no wonder, the Plaintiffs/Applicants have impleaded a claim for Refund of the sum of Kshs. 128,000,000 Only, plus Damages for Breach of Contract as against the 1<sup>st</sup> Respondent vide the amended plaint.

50. Notwithstanding the foregoing, it is also common knowledge that once a property is charged to a Bank to secure banking facility, in the manner in which the suit property was charged, the Banking institution, the 2<sup>nd</sup> Defendant/Respondent, would be entitled to dispose of the charged property in the event of default, subject only to compliance with the statutory conditions, which include the following;

- i. Issuance of and service of the primary statutory notice under Section 90 of the Land Act 2012.
- ii. Issuance and service of the secondary statutory notice under Section 96(1) and (2) of the Land Act.
- iii. Conducting statutory evaluation pursuant to Section 97 of Land Act 2012.
- iv. Issuance and service of the statutory notification of sale by a duly licensed nominated auctioneer.
- v. Advertisement in one of the local dailies in accordance with Rule 15 of the Auctioneers Rules 1997.

51. In respect of the subject matter, the 2<sup>nd</sup> Defendant/Respondent has availed evidence that same has complied with all the statutory requirements and indeed service of the requisite statutory notices, have not been opposed by the 1<sup>st</sup> Defendant/Respondent.

52. In my humble view, the 2<sup>nd</sup> Defendant/Respondent, has met the requisite threshold to warrant the exercise of the requisite statutory power of sale that inhere in her by virtue of the existing statutory charge, which has not been discharged on account of default by the 1<sup>st</sup> Defendant/Respondent.

53. It must similarly be observed, that the 1<sup>st</sup> Defendant / Respondent has not challenged the Exercise of the statutory powers of sale. By implication, the 1<sup>st</sup> Defendant/Respondent has acquiesced to the sale and/or disposal of the suit property and that is why same has not filed any suit and/or counterclaim whatsoever.

54. Perhaps, before I depart from the issue of a prima facie case, a question thus arise as to whether the Plaintiffs/Applicants who were not parties to the charged instrument in favor of the 2<sup>nd</sup> Defendant/Respondent, can seek to accrue any rights and/or legitimate obligations arising therefrom.

55. In my humble view, the Doctrine of privity of contract, does not allow a party who was not anticipated by such a contract to commence and/or implead a suit, that seeks to enforce the rights and/or obligations of the parties thereto. This was stated by the Honorable Court in the case of **Savings & Loans (K) Limited vs Kanyenje Karangaita Gakombe & Another [2015] eKLR;**

*“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principle thus:*

*“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”*

*In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), KENYA NATIONAL CAPITAL CORPORATION LTD V ALBERT MARIO CORDEIRO & ANOTHER (supra) and WILLIAM MUTHEE MUTHAMI V BANK OF BARODA, (supra).*

*Thus in AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), quoting with approval from Halsbury’s Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:*

*“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”*

*Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in SHANKLIN PIER V DETEL PRODUCTS LTD [1951] 2 KB 854, for example, the plaintiff owned a*

pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In *DARLINGTON BOUROUGH COUNCIL V WITSHIRE NORTHERN LTD* [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:

*“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”*

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties) Act, 2001 have respectively been enacted.”

56. I have evaluated the Plaintiffs/Applicants claim and/or case as against the 2<sup>nd</sup> Defendant/Respondent and I must say, I am unable to discern any reasonable cause of action. For clarity, I am in doubt about the Existence of a Prima Facie case.

57. Consequently, I conclude that the Plaintiffs/Applicants have not established any prima facie case, with any realistic chance of success as against the 2<sup>nd</sup> Defendant/Respondent.

## **ISSUE NUMBER 2**

### **Whether the Plaintiffs/Applicants are disposed to suffer irreparable loss, if the orders sought are not granted.**

58. The Plaintiffs/Applicants have also contended that same are disposed to suffer Irreparable loss, if the suit property were to be alienated and/or disposed of by way of sale and/or auction, in the manner envisaged by the 2<sup>nd</sup> Defendant/Respondent.

59. To fortify the Plaintiffs/Applicants claim that irreparable loss will arise and/or ensue, the Applicants have alluded to the Decision in the case of **Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority & 4 others [2019] eKLR** and particularly the aspect of Justice Ouko JA where he Judge observed as follows;

*“In Kenya, the attachment to land is passionate, emotional and almost fanatical. Nations, neighbors, siblings, spouses and even strangers, fight over land. In some instances, the disputes degenerate into bloodshed and death. This court in **Gitamaiyu Trading Co. Ltd vs Kiambaa Company Ltd & 11 others, Civil Appeal 24 of 2013**, explained why land is such an important asset thusland no doubt is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities. It is for this reason that most constitutions guarantee the right to property.”*

60. True, the observation by Hon. Justice Ouko JA,[ as he then was], represents and reflects the sentimental attachment that persons and/or people have to land.

61. Besides, it is also true that land is the most important factor of production, and that above all, despite the increase in population, the mother earth, does not increase and/or expand to be able accommodate the growth in population. In this regard, the pressure being exerted on Land is truly enormous.

62. But I must point out that the foregoing observations, which bear sentimental and emotional attachment to land, do not hold sway in respect of the subject matter. In the instant case, the suit property was charged to the 2<sup>nd</sup> Defendant/Respondent, and on the basis of such charge, the emotional and sentimental attachment if any, took a backseat. For the avoidance of Doubt, the subject parcel of land became a commodity for sale, with a Market and forced sale Value.

63. Perhaps I may have digressed into an issue that is not for deliberation here, and I need to return to the mainstream issue. The critical question though, is whether the Plaintiffs/Applicants will suffer Irreparable loss.

64. In my humble view, the Plaintiffs/Applicants not being the lawful and registered owners of the suit property, and the transaction between same and 1<sup>st</sup> Respondent not having materialized, any rights if any, remained Remote.

65. In the premises and in the absence of any legal rights to vindicate, the Plaintiffs/Applicants would lose nothing in respect of the suit property, because they own nothing as pertains to same. I have pointed out that their claim lies elsewhere and perhaps in line with the Remedies stipulated in the sale agreement dated 16<sup>th</sup> July 2016.

66. To fortify what irreparable loss entails, I beg to adopt and reiterate the holding in the Decision in **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Honorable Court observed as follows;

*“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”*

67. In my humble view, the Plaintiffs/Applicants herein would not suffer any irreparable loss. If anything, the loss that the Plaintiffs/Applicants would suffer is measurable in monetary terms and same shall entail Recovery of the purchase price paid to and/or in favor of the 1<sup>st</sup> Defendant/Respondent, special damages, if any, incurred in the perfection of the agreement as well as proven damages for breach of contract.

68. Suffice it to say, that such Damages, may not ensue as against the 2<sup>ND</sup> Defendant/Respondent. Nevertheless, the success or otherwise, of such a claim shall however, have to await a plenary hearing.

### **ISSUE NUMBER THREE**

#### **In whose favor does the Balance of Convenience tilt.**

69. On the issue of balance of convenience, I must say that the loan balance due and owing in favor of the 1<sup>st</sup> Defendant/Respondent, shall continue to accumulate interest and penalties. In this regard, there is a likelihood that the ultimate balance ,may far outstrip the value of the suit property.

70. Pursuant to the Ruling of this Honorable Court,(*differently constituted*), it was found and/or established that the total debt which was outstanding as the 3<sup>rd</sup> of May 2021, was Kshs. 132,000,000 and same continues to rise.

71. There being no evidence that the debt is being liquidated and given that the monies which were supposed to liquidate a portion thereof, was withdrawn and utilized by the 1<sup>st</sup> Defendant/ Respondent, the balance of convenience tilts in favor of the 2<sup>nd</sup> Defendant/Respondent.

72. If anything, the exercise of the 2<sup>nd</sup> Respondent’s power of sale, which has accrued, has not been challenged by the chargor and /or such other Guarantor, if any.

73. In a nutshell, it is my humble finding, that even if I were to come to the third condition, for purposes of making a determination, I would still have been constrained to hold against the Plaintiffs/Applicants.

### **FINAL DISPOSITION**

74. I have endeavored to address the issues enumerated herein before and in respect of each of the foregoing issues, the Plaintiffs/Applicants have failed to meet the established threshold to warrant the grant of the Orders sought.

75. Consequently, the Notice of Motion Application by the Plaintiffs/Applicants is ripe for Dismissal and same is hereby **Dismissed**.

76. As to costs, I find and hold that the 2<sup>nd</sup> Defendant/Respondent is entitled to same. In the premises, costs are awarded to and/or in favor of the 2<sup>nd</sup> Defendant/Respondent only.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June Nafula            Court Assistant**