



REPUBLIC OF KENYA



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Ndovu Estates Limited & another v Bank of Baroda (Kenya) Ltd (Commercial Case E005 of 2023) [2024] KEHC 12715 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
COMMERCIAL CASE E005 OF 2023
E OMINDE, J
OCTOBER 23, 2024**

BETWEEN

NDOVU ESTATES LIMITED 1ST PLAINTIFF

LAXMIDEVI BACHULAL VYAS 2ND PLAINTIFF

AND

BANK OF BARODA (KENYA) LTD DEFENDANT

RULING

1. There are two Application pending before this court. The first Application is a Notice of Motion filed by the Plaintiffs/Applicants dated 16/11/2023. The second Application is a Notice of Motion filed by the Defendant/Respondent dated 27/05/2024.

Consolidation of the Applications

2. The Court on 19th June 2024 gave directions that the two Applications be consolidated and further, that one ruling would be delivered with respect to both.

The Application dated 16th November 2023

3. The Application dated 16/11/2023 seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. That the defendant, by itself, its agents and/or servants be restrained from appointing a receiver/manager over the Plaintiff's properties namely Eldoret Municipality Block 7/51 and 7/52 pending the hearing of this suit.



- iv. That the costs of this Application be provided for.
4. The orders sought under prayer iii) of the Application dated 16th November 2023 were subsequently amended to include another Land Parcel Number Eldoret Municipality Block 6/140 in light of an Application filed under a Certificate of Urgency on 17th November 2023.
 5. The Application is premised on the grounds set out on the face of it and the facts deposed in the Supporting Affidavit Rajesh B Vyas who states in the said affidavit that he is the Director of the 1st Plaintiff Company and has its authority and the authority of his Co-plaintiff to swear the affidavit on their behalf.
 6. In the said Affidavit, the deponent deposes that by various letters of offer, culminating with the one dated 28/02/2022, the defendant offered to extend banking facilities to the 1st plaintiff on the terms contained in the letter. He annexed a copy of the same as RV1
 7. That consequently, charges were created over the plaintiff's land parcels known as Eldoret Municipality Block 6/140, 7/51 and 7/52. He annexed copies of the charge documents as RV/2.
 8. That the facilities were extended to the Applicant to facilitate its wheat growing on its 50 acres in Narok area and other neighbouring leased farms and more particularly on the plaintiff's Land Parcel Numbers CISMARA/[OLOLUNGA/11919](#), 12164 and 12189. He annexed copies of the Titles as R/V3
 9. That the Applicant took out a Crop Insurance cover with APA Insurance Limited and to further secure the defendant's interest as a chargee, as additional collateral, a specific lien clause was factored in the insurance documents. He annexed a copy of the relevant document as RV/4
 10. The Applicant deposed that following a season of crop failure, the 1st Plaintiff filed Milimani HCCC No. 438 of 2011 against APA Insurance Limited for a claim of Kshs. 120,291,170.20 in a bid to enforce its rights under the insurance policy.
 11. That judgment was delivered in favour of the plaintiff in the sum of Ks. 90,000,000/-. He annexed a copy of the judgement as RV/5. That however, the defendants in the suit being aggrieved filed an application for stay of execution which order was granted on the condition that the sum of Kshs. 90,000,000/- is deposited in an escrow account in the joint names of the concerned advocates.
 12. The total amount of Ks. 90,000,000/- was deposited in NCBA Bank on 9th November 2023. The Applicant deposes that the defendant has a lien over the said sum of money as well as any other funds that will accrue as interest and may be further awarded in the appeal which to date has accrued in excess of Kshs. 1.2 billion. He annexed the relevant document as R/V6
 13. The deponent deposed that arising from problems related to crop failure the 1st Plaintiff was unable to consistently to meet its loan obligations to the defendant.
 14. That following serious distress and to avoid the exercise of the defendant's statutory power of sale, the plaintiffs sold land parcel Nos. LR 8342/1 and Eldoret/municipality 7/53 for Ks. 250,000,000/- and Kshs. 147,500,000/- respectively and the remitted the proceeds of the two sales to the defendant. He annexed as RV/7 a copy of the Sale Agreement and Bank Statements.
 15. That on 07th November 2023 the Applicant received a letter by Registered Post from Sheth & Wathigo Advocates that issued a Thirty (30) day Notice to regularise the bank account by payment of the sum of Kshs. 372,216,879.72, failing which the defendant bank would appoint a receiver/manager for the Applicant's estates. He annexed a copy of the letter as R/V8



16. That upon inquiry, he established that the letter was received late due to a go-slow strike by postal workers protesting unpaid salaries. It is the Applicant's contention that the notice is incompetent and unenforceable for the following reasons;
 - a. It expressly offends the provisions of section 90 (3) of the Lands Act (2012) as it does not give a ninety (90) days period but gives a shorter period of thirty days.
 - b. It offends the provisions of section 90(2) (e) as it does not indicate on its face that the chargor has a right to challenge the notice by seeking court orders, which is a mandatory requirement.
17. He urged that as he has demonstrated, the 1st Plaintiff/Applicant has not been delinquent in the operation of the account and has, when necessary, sold substantial properties and remitted funds to the loan account and that further, the arrears is Kshs. 70 million and not the full loan balance of Ks. 372,2116,879.72.
18. It is the deponent's contention therefore that unless the injunction that the Applicant's seek in granted, the exercise of the chargee's right to appoint a receiver/manager will adversely impact the plaintiff and the plaintiff's employees who depend on the plaintiff's business for their livelihood as well as other service providers and stakeholders.
19. That additionally, the Plaintiff has other financial commitments on bank loans that are dispensed through its account which will be adversely affected if the threatened notice is effected and he annexed as RV/9 copies of the bank documents as well as an arrangement with the KRA on repayment of its tax obligations which will be impossible to fulfil if the notice is effected. He annexed as RV/10 a copy of the agreement with KRA
20. That the 1st Plaintiff is a multi-generational business that has been painstakingly nurtured over the decades and will face imminent collapse if the receiver manager is appointed considering the history and notoriety of receiverships in the Kenyan landscape.
21. That the financial constraints faced by the 1st Plaintiff are not of its own making but are attributable to the crop failures which he had insured against and that they have been fighting gallantly for the enforcement of the judgment of Kshs. 90,000,000/- through the courts and have kept the defendant well appraised of the progress.

The Defendant's Response

22. In response to the Application dated 16th November 2023, the Defendant/Respondent filed a Replying Affidavit dated 11th April 2024 sworn by Alfred Arunga, a Legal officer of the Respondent who deposed that he has the authority of the Defendant's Board of Director's to swear the Affidavit on its behalf
23. In the said Affidavit, he confirmed that a loan facility was for Kshs. 379,021,286.97/- and an overdraft facility of Kshs. 21,750,607/- was advanced to the plaintiffs at their request to the Bank vide the letter of offer annexed by the plaintiff to their Application as annexure R/V3
24. The deponent deposes that the loan facility was charged to the property referred to as Eldoret Municipality Block 61/40, 7/51 & 7/52 and, CISMARA/[olulunga/11919](#), 12149 & 12189 in favour of the defendant vide the charges dated 13th May 2020, 18th May /2020 and 20th December 2021. He annexed as AM1 copies of the said charges
25. The deponent stated that at all times, the 1st Plaintiff was the principal borrower and the registered owner of CISMARA/[olulunga/11919](#), 12149 & 12189 and guaranteed by the 2nd Plaintiff as the



registered owner of Eldoret Municipality/block 7/51 7/52 and one Bachulal Narbheram Vyas being the registered owner of Eldoret Municipality Block 6/140.

26. That consequently, the loan facility of Kshs. 379,021,286.97 was disbursed to loan account no. 95880600000889 and the overdraft facility of Kshs. 21,750,607/- was disbursed to account no. 95880400000039.
27. He deposed that the Plaintiffs made part payments in servicing the loan but along the way abdicated their responsibilities under this charge. That the plaintiffs do not deny that as a result of the default, there was accrual of interest at the rate of 12.32% on the loan account together with interest 3% per annum on overdue or excess amount until payment in full whereas the overdraft facility accrued interest at 12.82% per annum together with interest of 3% per annum on overdue or excess amounts.
28. That as at 2nd September 2022, the plaintiffs were in arrears at the sum of Ks. 53, 471,286.97 on the loan account and Ks. 1, 750, 607/- on the overdraft facility, thus totalling Ks. 55,2221, 893/-
29. He deposed further that light of the default by the plaintiff, the defendant through the firm of Ondatei Mogaka & Associates Advocates on various days and in compliance with Section 90 of the Land Act 2012, issued the 90-day statutory notice to both the borrower and guarantors. He annexed as AM3 a) b) and c) Copies of the Statutory Notices and certificates of postage
30. That the Notice failed to elicit any response whatsoever from the plaintiff and/or the guarantors and the so through the same firm of Advocates, the defendant proceeded to further issue a 40-day statutory notice to all parties and this too failed to elicit any response. He annexed as AM4 a) and b) copies of the Statutory Notices and certificates of postage
31. That in light of the non-action by the plaintiff and his guarantors to the Statutory Notices issued, the defendant then exercised its legal right to appoint a receiver manager over the charged parcels of land as envisaged under the charge documents and Section 92(1) and (2) of the Land Act 2012. He annexed as AM5 a) and b) a copy of the Notice dated 17th October 2023 and certificate of postage
32. The deponent therefore disputed the allegations by the plaintiffs that it was not in compliance with Sections 90 and 92 of the Land Act 2012, adding that the postal addresses for service of the Statutory Notices were provided by the plaintiffs during the execution of the charge documents who have not adduced any evidence rebutting the stated position and who also have admitted that there are outstanding arrears to in the loan accounts as can be seen from their statements of accounts
33. The deponent terms the allegation of crop failure as far-fetched and further deposes that the same was never brought to the attention of the defendant with a request for the restructuring of the loan facility.
34. That additionally, the plaintiffs' claim that they took out crop insurance cover and are currently in court over the judgment in Milimani HCCC No. 438 of 2011 was never brought to the attention of the defendant and neither did the plaintiff attempt to negotiate a restructure of the loan on the aforesaid grounds or at all. The deponent states that they are also not a party to or privy to the said Insurance Policy
35. The deponent deposes that the appointment of the receiver manager was done as provided under Section 92(2) of the Land Act which prescribes an operating period of thirty (30) days and this requirement was duly complied with.
36. The deponent swore that the plaintiffs have not met the requirements for



the grant of equitable orders of injunction sought as they have not established a prima facie case or demonstrated that they will suffer irreparable damage if the orders sought are not granted.

37. That this being a commercial and private contract between the plaintiffs, the independence of the contract cannot be upset by the court. Further, that the orders sought being equitable in nature cannot issue to the Plaintiffs who have come to court with grubby hands as they are hopelessly in arrears the last payment having been made almost three years ago. The deponent urged the court to dismiss the Application with costs.

The Application dated 27th May 2023

38. The second Notice of Motion Application dated 27th May 2023 filed by the Defendant seeking the following orders;
- i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That pending the hearing and determination of the instant suit, this honourable court be pleased to issue orders that the monthly rental Income obtained from the plaintiff's property known as Eldoret Municipality Block 7/51 and 7/52 be deposited in a joint interest earning account in the name of advocates for both parties.
 - v. That costs be in the cause hearing
39. The Application is premised on the grounds on the face of it and the contents of the supporting affidavit sworn by Alfred Arunga, the Legal Officer of the Defendant sworn on even date.
40. In the said Affidavit, he deposes that in light of the orders of injunction granted in favour of the plaintiff vide their application dated 16th November 2023, the plaintiffs are currently enjoying interim restraining orders against the defendant to whom they are truly indebted the plaintiffs themselves having so admitted this fact in their application dated 16th November 2023.
41. That this state of affairs is detrimental to the defendant who continues to incur substantial economic losses due to the plaintiffs' indebtedness and that the said debt continues to accrue as a result of the plaintiffs' failure to service the loan the subject matter of the orders of injunction issued vide the application dated 16th November 2023 and this is despite the fact that the plaintiffs make a good income from the parcels of land known as Eldoret Municipality Block 7/51 AND 7/52 which form part of the suit properties in the Application dated 16th November 2023.
42. The deponent therefore prays that in the interest of prudence, the Court orders that the rent collected from the suit parcels of land be deposited in a joint interest earning account in the name of the Advocates for both parties pending the hearing and determination of both the instant Application and the instant suit.

The Plaintiff Response

43. In response to the Application dated 27th May 2024, the Plaintiff/Applicant filed a replying affidavit dated 13th June 2024 sworn by Rajesh B Vyas. In the said Affidavit, the deponent notes that the Defendant had initially threatened to exercise its power of appointment of a receiver but the court issued orders restraining the defendant from proceeding with the said appointment.



44. The prayer sought in the current Application is strange and misplaced since it is not a remedy contained in law that can be exercised by a chargee upon default by a chargor. That the holistic purpose of the restraining orders issued by the honourable court on 17th November 2023 was to prevent the Defendant/Applicant from exercising its remedies as a chargee.
45. The deponent stated that given these circumstances, the Defendant/Applicant can now not approach this honourable court with different prayers with the hope of obtaining a different and favourable outcome over the same subject matter and urged the court to dismiss the Application for lack of merit.

Hearing of the Applications

46. The Court directed that the applications be canvassed by way of written submissions. The parties subsequently filed their respective written submissions on the Applications.
47. The Plaintiff/Applicant' Counsel filed two sets of submissions in support of the Application dated 16th November 2023. The first set of submissions was filed on 12th January 2024 and the second set was filed on 28th June 2024. Additionally, he filed submissions dated 04th July 2024 in opposition to the Application dated 27th May 2024.
48. The Defendant, Counsel filed submissions dated 09th April 2024 in opposition to the Application dated 16th November 2023 and a further set of submissions dated 25th June 2024 in support of the Application dated 27th May 2024.

Plaintiff/Applicants Submissions to the Application dated 16/11/2023

49. Counsel submitted that the Thirty (30) day notice for appointment of a receiver dated 17th October 2023 and served on 7th November 2023 ought to have been preceded by a Ninety (90) days' notice. Counsel submitted that the Ninety (90) days' notice was never issued and that they never received any such Notice.
50. He cited the case of Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260 where the Court of Appeal held that the burden of showing that the statutory notice has been served is on the chargee. That further, once the chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that such a notice was in fact served.
51. Counsel urged that in this instance, the Defendant has the burden of showing that it served the Applicants with the notice under section 90 of the *Land Act*, and that the same was duly received by the Applicant. To further buttress his submission, Counsel cited the case of Moses Kibiego Yator v Eco Bank Kenya Limited NKU E& L No. 426 of 2013 [2014] eKLR
52. Further, Counsel submitted that due to the fact that the Notice dated 17th October 2023 was served on the 7th November 2023, then the said Notice was not in compliance with the law and more specifically the provisions of Section 90(2) (e) and (3) of the *Land Act* 2012 for reasons that it sought to be affected outside of the thirty (30) day Statutory period hence rendering it the said notice defective, null and void ab initio as it offends the said provisions of the Act
53. That the inadequate postage period and/or failure by the Defendant to issue a ninety (90) day notice, in compliance with the provisions of Section 90 of the *Land Act* 2012 rendered the Notice dated 17th October 2023 defective, null and void ab initio.
54. Counsel still relying on the case of Moses Kibiego Yator v Eco Bank Kenya Limited NKU E& L No. 426 of 2013 [2014] eKLR submitted that the Applicants were not aware of the ninety (90) day



- notices allegedly issued. That further, certificates of postage were not conclusive proof and did not demonstrate that the Applicants in fact collected the notice and signed for it as proof of receipt.
55. Counsel submitted that this is due to the fact that prior to collecting any item from the Post office, the receiver firstly receives a notification either by phone call or electronic message informing them that they are required to collect the item within a specified number of days. During collection the receiver presents identification documents required and thereafter proceeds to sign to prove that the intended receiver collected the item. Since the Respondent did not prove the above, then the purported service was manifestly erroneous.
56. Counsel further submitted that the said notice offends the provisions of Section 90(2) (e) of the [Land Act](#) 2012 since it does not state that the chargor has the right to challenge the notice by seeking court orders.
57. Counsel submitted that in light of the provisions of Section 90 and 92 of the [Land Act](#) 2012, the law requires that a ninety (90) day notice must first be issued, followed by an additional thirty (30) day notice, it follows that cumulatively a total of one hundred and twenty (120) days must be issued to the chargor then remedy its breach. Counsel relied on the case of *Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others* [2020] eKLR.
58. Counsel further relied on the case of *David Githome Kuhiguka vs Equity Bank Limited* [2013] eKLR and also *Manasseh Denga vs Eco Bank Ltd & Another* [2015] eKLR, and *Florence Njeri Karanja vs Molyn Credit Limited* [2014] eKLR amongst several other cases in support of these submissions.
59. Counsel in his submissions reiterated the Applicant's deposition that submitted that if the Respondent/Defendant is not restrained from appointing a receiver/manager, the Applicant will be substantially and irreversibly prejudiced since its business has been natured over decades and will face imminent collapse if a receiver/manager is appointed.
60. That further, that the plaintiff has shown diligence in making attempts to clear the facility, by selling properties and surrendering the funds to the Respondent. The inability to clear the facility at once is due to financial constraints faced by the plaintiff as a result of crop failure against which he had taken out an insurance cover and that the Respondent has a lien over the said Kshs. 90,000,000/- plus interest the subject matter of the said cover as already herein above explained which monies have been deposited in an escrow account.

Submissions on the Application dated 27th May 2024

61. In opposition to the Application dated 27th May 2024, counsel filed submissions dated 04th July 2024. Counsel submitted that the prayer sought is not a remedy available under the [Land Act](#), 2012, that a chargee can use, and it is not supported by any relevant Kenyan statute and case law.
62. That further, Section 90 of the [Land Act](#), 2012 outlines the remedies available to a chargee in case of default by the charger as follows;
- 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 or sublease the charged land, or take possession of it.
 - d. Sell the charged land.



63. That there is no provision under the *Land Act*, 2012 that allows a chargee to seek an order for monthly rental income from the charged property to be deposited in a joint interest-earning account. Counsel cited the case of *Gill v. Lewis* [1956] WLR 555, where the Court of Appeal held that the remedies available to a chargee must be those expressly provided by the statute or contract and that courts should not innovate or create new remedies outside the statutory framework.
64. Additionally, he cited the case of *Commercial Bank of Africa Ltd v. Isaac Kamau Ndirangu* [1992] eKLR, where the High Court of Kenya emphasized the principle that remedies available to a chargee must be consistent with the provisions of the statute governing charges.
65. Counsel reiterated that the statutory remedies available to the chargee, as outlined in the *Land Act*, 2012, are comprehensive and adequate to protect the chargee's interests. That further, the holistic purpose of the restraining orders issued by the court on 17th November 2023 was to prevent the Defendant from exercising any of its remedies as a chargee.
66. That the Defendant cannot approach this court with different prayers with the hope of obtaining a favourable outcome. He cited the case of *Republic v. High Court of Kenya, ex parte Kamau* [2015] eKLR, where it was established that parties are bound by the orders of the court and cannot seek different prayers in subsequent Applications that contradict or undermine those orders. This rule prevents litigants from manipulating legal procedures to achieve results that would otherwise be unjust or contrary to earlier court decisions.
67. Counsel urged that the principle of consistency in court orders is another cornerstone of Kenyan jurisprudence. He cited the case of *Republic v. High Court of Kenya, ex parte Oginga* [2010] eKLR in support of this submission.
68. Lastly, Counsel submitted that based on the principles established in the precedents, the Applicant should be precluded from approaching this honourable court with prayers that seek relief inconsistent with the restraining orders issued on 17/11/2023. He urged the court to dismiss the Application with costs.

The respondent's Submissions to the Application dated 16/11/2023

69. Learned counsel for the Respondent filed submissions dated 9th April 2024 in opposition to the Application dated 16th November 2023. He urged that in the only issue for the determination of the Court is whether the plaintiffs are entitled to the prayer of injunction pending the determination of the suit based on the principles laid out in the case of *Giella V Cassman Brown Limited* 1973 EA 358 as follows;
 - a. The applicant must establish a prima facie case with a high probability of success
 - b. The applicant must demonstrate that he will suffer irreparable harm that cannot be adequately compensated by way of damages
 - c. The applicant must demonstrate that absent the injunction, the balance of convenience tilts in his favour.

Whether the applicant has established a Prima Facie Case with a probability of success

70. Counsel relying on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125 where the Court determined what a prima facie case is submitted that the plaintiffs have not demonstrated that they have a prima facie case with a probability of success.



71. In support of this submission, Counsel submits that there is no contention that this suit emanates from a commercial contract which the plaintiffs and the defendant are privy to specifically, a commercial contract which arises from the letters of offers and charge documents executed by the said parties. That having executed the said letters of offer and charge documents the plaintiffs were bound by the terms therein.
72. Counsel urged that contracts are made by the parties themselves and courts do not come in to construe these contracts and arbitrate any disputes concerning or touching upon them and cannot make those contracts for the parties.
73. Counsel further submitted that freedom of contract is a general principle in Contract Law and it is to the effect that the law does not restrict the terms on which the parties may contract and it will not merely give relief because the terms of the contract were harsh or unfair to one party.
74. That the above being the case, Counsel submits that it therefore, behoves parties to a contract, prior to execution of the same, to read it comprehensively and understand the terms and obligations thereto and consequences of non-adherence to the same not as mere words but as enforceable contracts.
75. Counsel submitted that based on the statements of accounts of the plaintiffs' loan account number 95880600000889 and 95880400000039 annexed to the supporting affidavit, it is clearly evident that whereas it was incumbent on the plaintiffs to service the loan accounts on a monthly basis, the plaintiff abdicated his duties for more than a year whereof he incurred penalties and interest.
76. Counsel submitted further that in light of the plaintiff's default, the defendant had a right under the letter of offer, charge and further charge to realize its monies and as such demanded for immediate settlement of the same which it did vide the Statutory Notices that it issued to the plaintiff on various dates. It is therefore their submission that the plaintiff has come to court with unclean hands and is seeking the court's protection of their own wrong as they are the authors of their own predicament. Counsel relied on the case of *Maithya v Housing Finance Co. Kenya & Anor* in this regard.
77. Counsel therefore submits that the plaintiffs have not in any way demonstrated that they have a prima-facie case with high probability of success. That moreover, pursuant to Section 92 (1) & (2) of the [Land Act](#) 2012 and as per the charge documents, upon failure by the plaintiffs to service the loan accounts, the defendant exercised his legal right in appointing a receiver manager through a letter dated the 17th October 2023 which was merely a notice of its intention to appoint a receiver manager.
78. On the claim that the notice of appointment of Receiver Manager was not in accordance to Section 90 of the [Land Act](#) 2012, counsel submitted that the notice of appointment of a receiver manager is guided by Section 92 of the [Land Act](#) 2012 and from the aforesaid provision, it is abundantly clear that the operating period of the notice of appointment of a receiver manager is thirty (30) days and not ninety (90) days as alluded to by the plaintiffs.
79. Additionally, counsel submitted that the requirement that the defendant indicate that in the said notice, that the chargor has a right to challenge the notice by seeking court orders, is not necessary under this notice as the said requirement is preserved for statutory notices under Section 90 of the [Land Act](#) 2012.

Whether the Applicant has demonstrated that he will suffer irreparable harm that cannot be adequately compensated by way of damages

80. Counsel in this regard urged that the plaintiffs, having appended their signatures on the charge documents and letters of offer; were well aware of the dire consequences in the event of default. Further,



- that no document has been tendered to support his claims that if the appointment of the receiver manager was to proceed its business operations and personnel will be negatively affected to the extent alleged in their supporting affidavit.
81. He submitted that the value of the property is ascertainable and any loss suffered by the Plaintiffs upon the appointment of a receiver manager, is remediable by an award of damages. He cited the case of *Kismani Holdings Limited & Another vs Fidelity Bank Limited (2013) eKLR* in support of the submission
 82. Further it was his contention that in exercising its power of appointing a receiver manager, the defendant must be bound by the provisions of the *Land Act 2012* and specifically section 92 (8) thereof. That this section ascribes the duties of the Receiver Manager who would act as an agent of the chargor and as such, the plaintiffs, being chargors shall be in full participation of all the rent collected.
 83. Counsel submitted that the defendant is a giant Financial Institution that has resources and assets capable of paying such damages that the Court may award should the instant suit be found against it and in favour of the Applicants and in this regard, he relied on the case of *Kitur & Another vs Standard Chartered Bank & 2 Others (2021) eKLR*.
 84. It is therefore the Respondent's case that the balance of convenience tilts in favour of the Respondents in light of the fact that the loan accounts stated herein to date, continue to incur interest and penalties for non-payment and if an injunction is granted restraining the defendant from exercising its statutory right, the amount in the said account will continue to increase to the extent that by determination of this suit, the property offered as security will not adequately recover the unpaid amount especially in the event that the case is determined as against the plaintiff. He cited the case of *Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 Others (2006) eKLR* in support of this submission
 85. Counsel concluded by submitting that the court exercises its discretionary powers and finds that the Applicants have not met the required threshold to warrant grant of temporary injunctive relief and disallow the instant Application which is brought in bad faith and is unmerited.

The Respondent's Submission to the Application dated 27th May 2024

86. Counsel urged that their response to the orders sought in their application seeking that the monthly rent obtained from plaintiff's properties known as Eldoret Municipality Block 7/51 7/52 be deposited in a joint interest earning account in the names of the Advocates for the parties is in the affirmative based on their submissions as summarised above and more specifically that no prima facie case has been established by the plaintiffs.
87. That they failed to satisfy the 3 main requisite for grant of temporary injunctive orders, more specifically, that the plaintiffs failed to establish a prima facie case with a probability of success warranting a grant of injunctive orders against the defendant. Counsel reproduced the sequence of events as laid out in the Supporting Affidavit of the Application, as to how the debt was accrued and urged that it is clear that there is no dispute of the plaintiffs being indebted to the defendant herein. Further, counsel reiterated that the necessary statutory notices were adequately issued.
88. That because the Respondents adequately demonstrated that the requisite Statutory Notices were issued, it is evident that there no dispute of the Plaintiffs being indebted to the Defendant herein and in addition it is also not in dispute that the Plaintiffs are entitled to seek protection and redress from the Court where they feel that their rights have been or are likely to be infringed.
89. That however, both litigants in the suit are entitled to protection under the law from infringement of their rights and therefore the trial court is called upon to balance the rights of both parties in the



pendency of the suit without one gaining an undue advantage over the other. Counsel cited the case of *Keary Developments Limited vs Tarmac Construction Limited & Another* [1995] 3 ALL ER 534 and the case of *Bakari Ali Ogada & 245 Others v Unilever Kenya Limited* [2008] eKLR in support of this submission.

90. Counsel further submitted that the loan sums continue to incur interest and penalties for non-payment. That if an injunction is granted restraining the defendant from exercising its statutory right and the orders sought, the amount in the said account will continue to increase to the extent that by determination of this suit, the property offered as security will not adequately recover the unpaid amount.
91. Counsel urged the court to exercise its discretionary powers and find that the Applicants have met the required threshold to warrant grant of the orders sought and that no prejudice will be occasioned to the Plaintiff if this Application is allowed for reasons that if the Plaintiff's suit is successful, the proceeds collected will be reimbursed to the. Counsel urged that the Court in exercise of this discretion be guided by the case of *Onyango V Ombito & 2 others* (Environment & Land Case No. 62 of 2019 (2024) KEELC 4168 (KLR))

Analysis & Determination

92. Having considered the pleadings in the Consolidated Applications, the Submissions made by Counsel with respect to each as herein above summarised, it is my considered opinion that the issues that arise for determination from the are as follows;
 - i. Whether the Plaintiff has sufficiently demonstrated that it warrants the orders for a temporary injunction
 - ii. Whether the orders for the deposit of the monthly rental income obtained from ELDORET MUNICIPALITY BLOCK 7/51 & 7/52 as sought by the Defendant are merited

Whether the Plaintiff has sufficiently demonstrated that it warrants the orders for a temporary injunction

93. Injunctions generally are governed by the provisions of Order 40 of the Civil Procedure Rules. Rule 1 thereof 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.

Order 40 Rule 2;

Injunction to restrain breach of contract or other injury.



1. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

94. As I have already indicated above, the case of *Giella vs Cassman Brown*

(1973) E A 358 set out the following conditions which an Applicant is required to demonstrate for the grant of a temporary injunction:

“First an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an Application on the balance of convenience.”

Prima Facie Case

95. In the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, the court described prima facie case as below;

“in civil case, 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

96. Sections 90 and 92 of the *Land Act* 2012 are the relevant statutory provisions to the issues raised in this application and they provide as hereunder in so far as the said sections are relevant to the matter at hand; Section 90.

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 in 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. The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - (a) the nature and extent of the default by the chargor;
 - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to



rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part;

and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may

(a)

(b) appoint a receiver of the income of the charged land;

Section 92.

(1) It shall be an implied condition in every charge that the chargee shall have the power to appoint a receiver of the income of the charged land.

(2) Before appointing a receiver under this section, the chargee shall serve a notice in the prescribed form on the chargor and shall not proceed with the appointment until a period of thirty days, from the date of the service of that notice, has elapsed.

97. It is the Applicant's contention the Respondent did not issue them with the ninety (90) days and then a sixty (60) days as required by the law as herein above cited before proceeding to appoint a receiver manager because they did not receive any.

98. The respondents in their Replying Affidavit deposed that the said Notices were indeed issued. They annexed the relevant notices as well as evidence of postage as the Court as already summarised above.

99. The issue of service of Statutory Notices was very well articulated by the Court of Appeal in *Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others* [1995-1998] 2 EA 260 as follows:

The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements.... That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. It must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting.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....”

100. I have perused the Certificate of Postage of the Statutory Notices as annexed to the Replying Affidavit whose contents I have already clearly summarised above and I am very well satisfied that the Respondent did in fact properly discharge the burden that the *Land Act* 2012 has placed upon him by virtue of Section 90 (2) b) and c) and as buttressed and clarified by the authority herein above cited and the Applicant's contention to the contrary has no basis at all and is accordingly dismissed.



101. With regard to the notice on the appointment of a receiver, the Applicants while admitting that the same dated 17th October 2023 was served upon them, contend that the same is not within the thirty (30) days as per the provisions of Section 92(2) of the *Land Registration Act* 2012 for reasons that the Applicants received the notice on 7th November 2023.
102. While noting that the assertion by the Applicant that the notice was received on 7th November 2023 has not been denied, contradicted and/or controverted by the Defendants, the Court notes that the Defendants in their Replying Affidavit contend that the notice was served upon the Applicants through their given address and annexed AM5 (b) as proof of the fact of service.
103. I have perused the said annexure. The same is a photocopied document with the name Rajesh Vyas written thereon as well as the address of the Applicants. Apart from having the "POSTA" indent embossed on the said document, it does not indicate the date and time it was posted, where it was posted from, by whom and the amount that was paid for it.
104. It also does not indicate the nature of the item posted. In actual fact it is totally at variance with the rest of the Certificates of Posting annexed by the Respondents themselves as proof of postage of the notices issued under Section 90 (2) (b and (c) of the *Land Act* 2012. It also does not at all compare with the Certificates of Posting that the Court would ordinarily take cognisance of as being such by virtue of their usage in the normal course of doing business with the Post Office.
105. In light of the above, the Court on a balance of probabilities finds in favour of the Applicants that the notice dated 17th October 2023 was not served upon the Plaintiffs within the period of time prescribed by the *Land Act* 2012 to warrant the exercise of the charges right to appoint a receiver as provided under Section 90(3) and Section 92.
106. Further to the above finding it is the Applicant's further contention that the said Notice does also not also comply with the provisions of Section 90(2)(e) and of the Act.
107. The Statute at Section 90(2) (e) provides for the requirement that a chargor be informed of the right in respect of certain remedies to apply to the court for relief against those remedies. This is a mandatory requirement for reasons that the operative word under the section is shall. Subsequently the right of the chargee to appoint a receiver manager is provided for under Section 90(3) of the Act and thereafter the appointment of a receiver is provided for under Section 92.
108. In light of the fact that the requirement that a charger be informed of their right to approach the court is within the same section of the Act that provides for a chargor's remedy to appoint a receiver, I am of the considered opinion that this then is a requirement that must be met in the notice to the chargor by the chargee of the chargee's intention to appoint a receiver.
109. In this regard then, I agree with the Applicant and I now hereby do find that the thirty-day notice ought to have complied with this provision as a mandatory requirement and that the noncompliance with the same as is apparent on the face of the said Notice renders it defective both in form and in substance.
110. Given my above findings, it is my finding that the Applicant has sufficiently established a prima facie case as described in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, by demonstrating to the satisfaction of the Court that they do have a right which right has apparently been infringed by the Respondent to warrant for an explanation or rebuttal from the latter.
111. In this regard, I find that the Applicant has established a prima facie case as set out in the case of *Giella vs Cassman Brown* (1973) E A 358 and that the Application by the Applicants also meets the



requirements for grant of a temporary injunction as set out in Order 40 Rule 2 of the Civil Procedure Rules upon which the Application is premised.

Irreparable Injury

112. In the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others Civil Appeal Number 77 Of 2012* the Court of Appeal observed that it is established that the three conditions and stages set out in the case of *Giella v Cassman Brown* 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*.
113. The Court held that 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.
114. In the instant case, the Applicant's allege irreparable harm for the reasons already herein above summarised and the Respondents maintain that the reasons given by the applicants have not sufficiently demonstrated irreparable harm because whatever harm they may suffer is quantifiable and also they knowingly and intentionally offered the suit properties as security and can now not turn around and claim that they are of sentimental value. That the Respondent is a reputable Bank with vast assets and is able to satisfy any decree of the Court in the event that the Court finds in favour of the Applicant.
115. Whereas the Court notes the decision of the Court of Appeal in the case of *Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR* where the Court held that
- “... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
116. Whereas the above holding is relevant, in this case the Respondents save to state that the Applicants failed to provide specifics did not controvert the Applicant's deposition that there are many persons that have been employed in the suit premises who earn their livelihoods and those of their families from the said employment.
117. That these people stand to lose their means of livelihood if the injunction is not granted. Whereas I agree with the Respondents that the apprehended injury is quantifiable in this dispute, there are on the suit property third parties consisting of employees and their families whose livelihoods are likely to be adversely affected if an order of injunction is not granted and I hereby so find. In this regard, I am satisfied that the Applicants have sufficiently demonstrated irreparable injury.

Balance of Convenience

118. Balance of convenience was defined in the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR* as:
- ‘The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show



that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

119. In this case, the Applicant has demonstrated that they have an arrangement with KRA as well as other creditors apart from the Respondents through the Bank Accounts for which the Respondents seek to appoint a receiver and if the injunction is not granted, their businesses stand to be inconvenienced.
120. That in any event, the Respondents already have a lien over the APA Insurance claim where a total sum of Ks. 90,000,000/- together with interest is already held in an escrow account since November 2023. The Court notes that save to state that the matter of the lien was never brought to their attention, and that in light of the judgement in Milimani HCCC No. 438 of 2011 the Applicant never sought to restructure the loan, they did not categorically deny that such a lien exists.
121. The Respondents on the other hand state that the suit properties may depreciate to a level where the Respondent may not be able to recover the sums of money advanced to the Applicants. I have considered both arguments and in light of the submissions under this head as herein summarised coupled with my findings on a prima facie case and balance of convenience, I find that the balance of convenience, tilts in favour of the Applicant.
122. On the Respondent's Application dated 27th May 2024, it is my considered opinion that in essence, this Application is seeking to interfere with the interim orders that were granted on 17th November 2023.
123. But that aside, Section 89 (2) of the Land Act 2012 clearly states as follows;

Upon commencement of this Act, a chargee shall not be entitled to enter into possession of the charged land or a charged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the charge, other than in accordance with the provisions of this Act.

123. Given the above provision of Section 89, it is important that the Court sets out the remedies that are available to a chargee under Section 90 (3) and (4) to fully appreciate the import of the prayer sought by the Respondent in their Application dated 25th May 2024 and they are as follows;

Remedies of a chargee

90. (3) If the chargor does not comply within two months 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;
- (4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may
- (a) appoint a receiver of the income of the charged land;
 - (b) apply to the court for an order to—



- (i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;
- (ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

124. Based on the above legal provisions it is abundantly clear that income derived from the land and which includes rent from properties erected upon the suit land et al, can only be divested from the chargor to a chargee as provided under Section 90(4) (a) and that can only be once a receiver has been appointed and is in place to collect that income on behalf of the chargee and not before. Gin this case, the Respondent opted to exercise his right to appoint a receiver and can now not turn around and seek to collect rent contrary to the provisions of the law.
125. For reasons that the orders of injunction are in place and the Respondent having not moved the Court under Order 40 Rule 7 of the Civil Procedure Rules 2010 to have the same discharged, I find this Application not only to be misconceived but also bad in law.
126. The upshot is that I find that the Application dated 27th May 2024 lacks merit and the same is dismissed in its entirety with costs to the Applicants. On the other hand I find merit in the Application dated 16th November 2023 and I allow the same as follows;
- i. That an order of injunction be and is hereby issued restraining the defendant, by itself, its agents and/or servants from appointing a receiver/manager over the Plaintiff's properties namely Eldoret Municipality Block7/51 Eldoret Municipality Block7/52 And Eldoret Municipality Block6/140 pending the hearing and determination of this suit.
 - ii. That the Respondents are to bear the costs of the Application.

READ DATED AND SIGNED AT ELDORET ON 23RD OCTOBER 2024

E. OMINDE

JUDGE

