



**Panal Freighters Limited v Diamond Trust Bank Limited (Commercial Case 29 of 2022) [2023] KEHC 20 (KLR) (6 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 20 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE 29 OF 2022  
OA SEWE, J  
JANUARY 6, 2023**

**BETWEEN**

**PANAL FREIGHTERS LIMITED ..... PLAINTIFF**

**AND**

**DIAMOND TRUST BANK LIMITED ..... DEFENDANT**

**RULING**

1. Before the Court for determination is the plaintiff's Notice of Motion dated May 5, 2022. The said application was filed pursuant to Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya; Sections 90, 96, 97, 98, 103, 104, 105 and 106 of the *Land Act*, 2012, as well as Order 40 Rules 1, 2, 3 and 4 of the *Civil Procedure Rules, 2010*, for the following orders:
  - (a) Spent
  - (b) That pending the hearing and determination of this application the Court be pleased to issue an order of temporary injunction restraining the defendant, its agents, in particular Dalali Traders Auctioneers, its employees, servants or assignees or any other person acting for them from auctioning, alienating, selling or in any way dealing with the plaintiff's property known as LR No Mombasa/block Xvi/1048 Majengo Mombasa Island by public auction.
  - (c) That pending the hearing and determination of this application the Court be pleased to issue an order of permanent injunction restraining the defendant, its agents in particular Dalali Traders Auctioneers, its employees, servants or assignees or any other person acting for them from auctioning, alienating, selling or in any way dealing with the plaintiff's property known as LR No Mombasa/block Xvi/1048 Majengo Mombasa Island by public auction.
  - (d) That this suit be consolidated with Mombasa High Court Civil Suit No 59 of 2020: Panal Freighters Ltd, Ahmed Mwinyi Shimbwa, Whiterose Properties Ltd and Jamil & Karim



Properties Ltd v Diamond Trust Bank Limited which is related to this case as far as the legal charges are concerned.

- (e) A declaration that the said process of auctioning and selling the 1st plaintiff's property by the defendant in exercise of their statutory power of sale was premature and irregular.
  - (f) That the plaintiff be given time by the defendant to regularize the payment of the loan.
  - (g) Any other order the Court deems necessary in the circumstances of this case.
  - (h) That the costs of the application be provided for.
2. The application was premised on the grounds that the plaintiff applied for a loan facility from the defendant (hereinafter, 'the Bank') in respect of which it offered its property, known as LR No Mombasa/block Xvi/1048 Majengo Mombasa Island(the suit property) as security vide a Charge dated March 16, 2010 and several Further Charges which were registered against the suit property and other properties belonging to the plaintiff. Some of those Further Charges relate to properties which are the subject of Mombasa Civil Suit No 59 of 2020. It was, thus, the contention of the plaintiff that, although it had been diligently making payments towards repayment of the loan facility, it encountered financial constraints in 2019 which occasioned delays in repayments, for which it now seeks relieve.
  3. It was further the assertion of the plaintiff that it approached the defendant and negotiated for a restructure of the loan in the following terms:
    - (a) The plaintiff was to make efforts towards payment of the outstanding loan facility by ensuring that all the payments made to the plaintiff by its creditors were channeled directly to the Bank.
    - (b) The plaintiff would sell one of its properties by way of private treaty and the monies realized used towards servicing the loan.
    - (c) The defendant would restructure the facilities advanced to the plaintiff due to the economic hardships suffered by the plaintiff as a result of the Corona virus pandemic.
  4. Thus, the plaintiff averred that, while it was busy sourcing for a buyer for one of its properties, the defendant proceeded to advertise the suit property for sale by public auction that was to take place on May 10, 2022; and that this was done behind its back. In effect, the plaintiff averred that it was never served with any of the requisite statutory notices as envisaged by Sections 90 and 96(2) of the Land Act. It further complained that the defendant did not comply with Section 97 of the Land Act which requires that a current valuation of the property be obtained before sale. Accordingly, the plaintiff prayed for the Court's intervention to forestall what it referred to as a sale tainted with illegalities.
  5. The foregoing grounds were expounded on by the plaintiff in its Supporting Affidavit sworn by one of its directors, Ahmed Mwinyi Shimbwa. In addition, the plaintiff annexed a copy of the advertisement for the sale of the suit property, placed in one of the daily newspapers by the defendant's agent, Dalali Traders Auctioneer to demonstrate that the intended sale was premature.
  6. In response to the application, the defendant relied on the affidavit sworn on May 17, 2021 by its Debt Recovery Officer, Mr Joram Kilwanda. He confirmed that the plaintiff obtained banking facilities from the defendant for which it offered the suit property, among others, as security; and that, in breach of the express terms of the facilities, the plaintiff failed and/or neglected to repay the loans. Mr Kilwanda further confirmed that, following the plaintiff's breach, the Bank took steps towards realizing its securities by issuing the requisite statutory notices before instructing Dalali Traders Auctioneers to proceed and sell the suit property by public auction upon serving the plaintiff with a Notification of Sale.



7. Thus, it was the assertion of the defendant that the plaintiff was served with all the notices as by law required, copies of which were annexed to the Replying Affidavit as Annexures 'JK 6' to 'JK 11'. At paragraph 24 of the Replying Affidavit, the respondent deposed that the plaintiff had, on numerous occasions, been granted more time to enable it regularize its accounts and meet its obligations to the Bank, but had utterly neglected to do so, such that, by July 5, 2021, its amalgamated loan portfolio stood at Kshs 751,830,636.02. Thus, the defendant averred that its statutory power of sale had crystalized and therefore that the instant application is nothing but an abuse of the court process and should therefore be dismissed with costs.
8. Pursuant to the directions given herein on May 18, 2022, the application dated May 5, 2022 was canvassed by way of written submissions. Accordingly, Mr Mkan for the plaintiff relied on his written submissions filed on July 6, 2022. He thereby proposed the following issues for determination:
  - (a) Whether the plaintiff has a prima facie case and whether it stands to suffer irreparable harm for which an award of damages will not be commensurate recompense.
  - (b) Whether the necessary statutory notices were issued before the intended sale.
9. Mr Mkan submitted that the plaintiff has placed before the Court sufficient evidence to prove an infringement of its rights by the defendant. In particular, he pointed out that the plaintiff had raised issue with the failure by the defendant to serve it with statutory notices as provided for in Sections 90(1) and 96(1) of the *Land Act*. He pointed out that in the defendant's own Annexure 'JK 7', it is indicated that the notices were marked 'RTS' meaning they were returned to the sender; thus confirming that service of the notices was never effected on the plaintiff. In support of his arguments, Mr Mkan relied on *Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*, *Nyagilo Ochieng & Another v Fanuel B Ochieng & 2 Others [1996] eKLR*, *Delphis Bank Limited v Praful Natwarlal Shavdia & 2 Others [2005] eKLR*.
10. Further to the foregoing, Mr Mkan submitted that it was mandatory for the defendant to ensure that a notification of sale pursuant to Rule 15 of the *Auctioneers Rules, 1997*, was issued by Dalali Traders before the suit property was advertised for sale. He relied on *Rose Chepkirui v Jared Mokua Nyariki & 2 Others [2015] eKLR* and *Albert Mario Cordeiro v Visbram Shamji [2015] eKLR* in urging the Court to find that, since no acknowledgement of receipt is evident in the document purported to be the Notification for Sale issued by Dalali Traders (marked Annexure 'JK 11' to the defendant's Replying Affidavit), the intended auction is illegal.
11. Lastly, Mr Mkan submitted that it was obligatory for the defendant to undertake a valuation of the suit property before advertising it for sale, as required by Section 97(2) of the *Land Act*. He added that this requirement is not just cosmetic, but is intended to ensure a chargor receives fair value for the charged property. He cited *Koileken Ole Kipolonka Orumoi v Mellech Engineering Construction Ltd & 2 Others [2018] eKLR* in support of this assertion, and urged the Court to find that the intended sale was premature.
12. On behalf of the defendant, Mr Kisinga relied on his written submissions dated June 10, 2022. He reiterated the facts from the defendant's standpoint, as adverted to in the Replying Affidavit sworn by Mr Joram Kilwanda. He therefore urged the Court to find that, on account of the plaintiff's default in repaying the loan even after restructure, the defendant's statutory power of sale had ripened as of September 28, 2020 when it issued the Section 90 notice to the plaintiff (marked Annexure 'JK 6' to the Supporting Affidavit). He added that the defendant has availed credible proof that all the other requisite notices were issued as well and therefore that the proposed sale would have been proper in



- every sense. He referred to Clause 25(o) of the Charge to shore up his argument that it matters not that the notices were returned to sender; so long as they were directed to the correct address.
13. Mr Kisinga then made reference to the cases of *Giella v Cassman Brown [1973] EA 358*, *Mrao Limited v First American Bank of Kenya Limited & 2 Others (supra)* and [\*Nguruman Limited v Jan Bonde Nielsen & 2 Others \[2014\] eKLR\*](#) in support of his argument that the plaintiff has utterly failed to demonstrate a prima facie case. Counsel added, on the authority of [\*Housing Finance Company of Kenya v Ngege Kitson Mondo \[2006\] eKLR\*](#), that once the power of sale has arisen the Court has no power to prevent it if it is being exercised properly. He further urged the Court to note the express admission by the plaintiff that it is in default and impute therefrom that the plaintiff did not approach the Court with clean hands. Accordingly, Mr Kisinga relied on [\*HCCC No 414 of 2004: Francis JK Ichatba v Housing Finance Company of Kenya\*](#) for the proposition that a plaintiff should not be granted an injunction if he does not have clean hands; and that a plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the defendant of a debt which he expressly undertook to pay.
  14. In response to the plaintiff's assertion that Section 97 of the [\*Land Act\*](#), as to valuation of the suit property, was not complied with, Mr Kisinga submitted that a dispute as to the value of the charged property cannot form the basis of a grant of an injunction as a chargee has recourse under Section 97 of the [\*Land Act\*](#), including the right to have the sale nullified. To buttress this argument, Mr Kisinga relied on [\*Kisumu ELC No 280 of 2015: Al-Hyder Trading Co Ltd v Diamond Trust Bank Kenya Limited & Another\*](#). He added that, in any case, the intended sale never took place. Thus, Mr Kisinga urged the Court to find that the plaintiff has not made out a prima facie case to warrant the grant of a temporary injunction.
  15. On whether the plaintiff stands to suffer irreparable loss, Mr Kisinga took the posturing that, once property is given to a bank as security, the same becomes a commodity that can be subjected to sale; and therefore the value is ascertainable and if wrongfully sold, such loss is remediable by way of damages. He relied on the provisions of Section 99(4) of the [\*Land Act\*](#) and the cases of [\*Andrew Muriuki Wanjohi v Equity Building Society & Another \[2006\] eKLR\*](#) and [\*Andrew Ouko v Kenya Commercial Bank & 3 Others \[2005\] eKLR\*](#) to buttress his argument that the suit property has a known value which the plaintiff can seek compensation in damages for. He added that the defendant is a financially stable bank and is therefore capable of meeting an award in damages.
  16. On the balance of convenience, Mr Kisinga posited that the same is in favour of the defendant, granted that the plaintiff has been in default since 2019. He pointed out that the outstanding amount continues to accumulate interest at contractual rates and was apprehensive that the total amount due will soon surpass the value of the suit property and thus permanently hinder the defendant from fully recovering the debt owed to it. In the circumstances, Mr Kisinga urged for the dismissal of the plaintiff's application dated May 5, 2022.
  17. I have given careful consideration to the application and perused the affidavits filed by the parties. I have likewise considered the submissions made by learned counsel; including the authorities they relied on. The agreed facts are that the plaintiff is the registered proprietor of the suit property, LR No Mombasa/block Xvi/1048 Majengo Mombasa Island; and that, sometime in the year 2017, the plaintiff approached the defendant for a loan facility for which he offered its title for the aforementioned property as security. It is common ground that the application was favourably considered and a Letter of Offer issued by the defendant dated October 27, 2017. The plaintiff was agreeable to the terms set out in the offer letter and thus was accorded banking facilities to the tune of Kshs 320,229,000/=, including an Overdraft Facility of USD 250,000.



18. There is further no dispute that, in addition to a First Legal Charge over the suit property, the defendant asked for and the plaintiff furnished the defendant with joint, several and personal guarantees by its directors, namely, Ahmed Mwinyi and Zahra Said Amin. It is also plain from the material placed before the Court that as from 2019, the plaintiff fell in arrears and did not repay the loan as agreed. Indeed, the plaintiff conceded, at paragraph 3 of its Supporting Affidavit that:

' The plaintiff has been diligently making payments towards repayment of the loan facility however sometime in 2019, due to financial constraints, he delayed to make payments to the defendant.'

19. It is likewise apparent from the averments in the affidavits filed by the parties that efforts were made to re-negotiate and restructure the loans to enable payment by the plaintiff, but even these efforts did not substantively lift the plaintiff from the mire in which it found itself. Hence, by a letter dated July 5, 2021, annexed to the defendant's Replying Affidavit as Annexure 'JK 14' the plaintiff expressly admitted its indebtedness to the defendant, explained the reasons for that situation and asked the defendant for outright waiver of the entire amount outstanding on all the facilities granted it by the defendant. Needless to mention that the request for waiver was declined by the Bank, and it was thereupon that the Bank commenced the process of exercising its statutory power of sale; a process that precipitated the filing of this suit as well as the instant application.

20. I need to point out at this stage that by the time the plaintiff filed this suit, it had already filed Mombasa High Court Civil Case No E009 of 2020: Panal Enterprises Ltd & 3 Others v Diamond Trust Bank Limited, (wrongly cited in the instant application as HCCC No 59 of 2020) in which the defendant had similarly commenced the process of realizing its statutory power of sale against the plaintiff. That other suit is however in respect other properties belonging to the plaintiff and its directors. The plaintiff obtained similar interim orders in that suit, hence the prayer, per paragraph [4] of the application dated May 5, 2022 that:

That this suit be consolidated with Mombasa High Court Civil Suit No 59 of 2020: Panal Freighters Ltd, Ahmed Mwinyi Shimbwa, Whiterose Properties Ltd and Jamil & Karim Properties Ltd v Diamond Trust Bank Limited which is related to this case as far as the legal charges are concerned.

21. In an apparent obfuscation of matters, the plaintiff proceeded to file a subsequent application under a Certificate of Urgency dated June 9, 2022, seeking that an order be issued in line with prayer No 4 in the plaintiff's Notice of Motion dated May 4, 2022 for the consolidation of the instant matter with Mombasa High Court Civil Suit No 59 of 2020: Panal Freighters Ltd, Ahmed Mwinyi Shimbwa, Whiterose Properties Ltd and Jamil & Karim Properties Ltd v Diamond Trust Bank Limited; and that upon consolidation the parties be at liberty to amend their pleadings respectively. The second application having been allowed on June 21, 2022, it would follow that the plaintiff's Prayer No, 4 is spent.

22. It is noteworthy too that, although Prayer 2 of the application is spent, Prayer 3 appears to be somewhat similar to it in terms, because it essentially seeks an interlocutory relief pending the hearing and determination of the application, save that the prayer is not for a temporary injunction but a permanent one; which of course cannot be issued at his interlocutory stage. In the same vein, the plaintiff's prayer for a declaration, per prayer 5 of its application, that the process of auctioning and selling the its property by the defendant in exercise of its statutory power of sale was premature and irregular, cannot be granted at this stage. That said, the valid prayers in the application dated May 5, 2022 are Prayers [6], [7] and [8], namely:

(a) That the plaintiff be given time by the defendant to regularize the payment of the loan;



- (b) Any other order the Court deems necessary in the circumstances of this case; and
- (c) That the costs of the application be provided for.
23. Since no objection was taken to Prayer 3, and given the tenor and effect of the submissions made herein, I will proceed on the basis that what was sought by the plaintiff vide Prayer 3 is a temporary injunction pending the hearing and determination of the suit. Indeed, by Article 159(2)(d) of the Constitution, the Court is charged with the mandate of administering justice without undue regard to procedural technicalities. Accordingly, the main issue for determination is whether the plaintiff has made out a good case for the issuance of a temporary injunction pending the hearing and determination of their suit.
24. One of the enabling provisions cited by the applicants is Order 40 Rule 1 of the Civil Procedure Rules. It provides that:
- ' Where in any suit it is proved by affidavit or otherwise 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 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.'
25. Since the relief is discretionary, principles have been developed to guide the courts in the exercise of such discretion. Hence, in *Giella vs Cassman Brown & Co Ltd* (supra), it was held that:
- ' The conditions for the grant of an interlocutory injunction are well settled in East Africa. 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.'
26. Accordingly, the first question to pose is whether the plaintiff has established a prima facie case. In *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 a prima facie case was defined thus:
- ' A prima facie case in a civil application includes but not confined to a genuine and arguable 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 apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'
27. It is trite that, in considering whether or not a prima facie case has been made out, the Court need not go into an exhaustive evaluation of the merits of the Plaintiff's case. This caution was aptly expressed by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR thus:
- 'In considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise



as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'

28. The contention of the plaintiff was that it was not served with the requisite statutory notices under Sections 90 and 96 of the Land Act. They also contended that Section 97 of the Land Act, which requires that a current valuation of the charged property be obtained prior to sale, was not complied with. Moreover, it was the contention of the plaintiff that no notification of sale was issued by the Dalali Traders prior to advertising the suit property for sale. It is therefore crucial to ascertain whether these allegations have been proved, albeit on a prima facie basis.

**On Whether the Plaintiff was served with the requisite Statutory Notices under Sections 90 and 96 of the Land Act:**

29. Section 90 of the Land Act provides as follows in part:

- (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 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.

30. The defendant countered the plaintiff's averments by producing the document marked Annexure 'JK 6' to its Replying Affidavit in support of its assertion that Section 90 of the Land Act was duly complied with. The said document is indeed a statutory notice to remedy default, and is in accord with the stricture of Section 90 of the Land Act. It is dated 28th September 2020. It is explicit as to the nature and extent of the default by the chargors; and the amount that needed to be paid by the plaintiff to rectify the default. More importantly, the notice is specific as to the three months' period within which the plaintiff was to pay the arrears to rectify its default, failing which the defendant would be at liberty to proceed and exercise its right to sell the charged property; among other options.
31. On the face of it, it is indicated that an advance copy of the notice was sent via email; and that a hard copy was dispatched by registered post to the plaintiff. It also shows that the copies were duly served on the directors separately and individually. In addition, the defendant annexed three Track Summaries Postal Corporation of Kenya (marked Annexure 'JK 7' to the Replying Affidavit), indicating how the three notices to the plaintiff, and its two directors, Ahmed Mwinyi and Zahra Said Amin were handled between September 30, 2020 and January 8, 2021. Those documents appear show that Section 90 of the Land Act was duly complied with.
32. The defendant further availed documentation to prove that it, likewise, complied with Section 96 of the Land Act, which states thus:
- (1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.
  - (2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.
33. The applicable notice was exhibited as Annexure 'JK 8' to the defendant's Replying Affidavit. It is dated January 15, 2021 and states that it was issued in respect of the 40 days following the expiry of the three months' notice given earlier. It also shows that it was issued pursuant to Section 96(2) of the Land Act; that an advance copy of it had been sent to the plaintiff via email, and that a hard copy was sent by registered post to the plaintiffs' address. Similarly, the defendant relied on the Track Summaries marked Annexure 'JK 9' to its Replying Affidavit to prove service, not only on the plaintiff but also its two directors. Hence, the defendant sufficiently demonstrated, on a prima facie basis, that it served the Section 96 Notice as required.
34. In the light of the foregoing, the burden of proof shifted to the chargors, to demonstrate that they did not and could not have received the said notices. In *Nyagilo Ochieng & Another vs Phaniel B Ochieng & 2 Others [1996] eKLR*, the Court of Appeal pronounced itself on this point thus:

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.



35. And, Section 3(5) of the *Interpretation and General Provisions Act*, provides that:

' Where any written law authorizes or requires a document to be served by post, whether the expression 'serve' or 'give' or 'send' or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post.'

36. It matters not, in my considered view, that the postal articles were eventually returned to sender. It remains the duty of the plaintiff to demonstrate at the hearing why that was the case. In arriving at this conclusion, I have taken into account the decision of the Court of Appeal in *Delphis Bank Limited v Praful Natwarlal Shavdia & 2 Others* (supra) in which it was held that the plaintiff was not served since the mail was returned unclaimed with the remarks 'RTS' and therefore that the plaintiff had established a prima facie case. In my considered view the facts of that case are distinguishable in that the Court of Appeal noted that it was a matter of common knowledge between the parties that the 2nd respondent was not in Kenya at the material time; and that he lived overseas. The Court also noted that attempts to serve him through his agent had been declined; and that the appellant did not attempt to serve the 2nd respondent by any other legally recognized mode of service.
37. As to whether or not the plaintiff was served with the Redemption Notice for purposes of Rule 15 of the Auctioneers Rules, the defendant relied on the documents at pages 132 to 136 (marked Annexure 'JK 10' and 'JK 11' to the Replying Affidavit. They show that the defendant's instructions to Dalali Traders were explicit: to issue 45 days Redemption Notice before advertising the property for sale; and that the Notice, in the form of Annexure 'JK 11' was indeed issued. That notice appears to be valid in all respects; and, Annexure 'JK 13' shows that sufficient lead time was given prior to the advertisement of the suit property for sale. Clearly therefore, there is prima facie proof that that the defendant complied with the requirements of the law and served the requisite Statutory Notices on the plaintiff as well as its directors/guarantors.

**On Whether there was failure by the Defendant to comply with Section 97 of the *Land Act*:**

38. Before exercising the statutory power of sale, a chargee is under obligation to obtain a current valuation of the charged property. In this regard Section 97 of the *Land Act* provides 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 court, owes a duty of care 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.
  - (3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-
    - (a) There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and
    - (b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by



the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).

39. Hence, while the provision imposes a duty on the chargee to ensure the best interest of the chargor while exercising its statutory power of sale, that duty is limited to ensuring the best sale price is obtained by undertaking a forced sale valuation before sale. Although there is no indication that valuation was done, that omission of itself, cannot form the basis for issuing a temporary injunction. I agree with Mr Kisinga that, in any event, the defendant will be required to undertake a valuation before proceeding with the process of selling the suit property.
40. As to whether the balance of convenience is in favour of the Plaintiff, courts have opted for the path that leads to the lower rather than the higher risk of injustice, in line with the case of *Suleiman vs Amboseli Resort Ltd (2004) 2 KLR 589* in which Hon Ojwang AgJ (as he then was) quoted the following words of Justice Hoffmann in the English case of *Films Rover International vs Cannon Film Sales Ltd (1986) 3 All ER 772*:
- ' The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' .
41. As matters stand, the plaintiff owes the defendant a large amount of money, not only in this suit, but also in respect of Mombasa High Court Commercial Case No E009 of 2020. The outstanding sums keep on accruing interest and penalties. There is no sign of good will on the part of the plaintiff. It appears that no effort has been made by it towards reducing the debt since 2020 when it obtained interim reprieve from the Court. In the circumstances, the path leading to the lower risk of injustice would be to dismiss the plaintiff's application and thereby unfetter the defendant's statutory power of sale.
42. In the result, I find no merit in the plaintiff's Notice of Motion dated May 5, 2022. The same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 6TH DAY OF JANUARY 2023.**

**OLGA SEWE**

**JUDGE**

