



REPUBLIC OF KENYA



KENYA LAW
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**Bii & another v Family Bank Limited & another (Civil Suit
E003 of 2022) [2023] KEHC 901 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL SUIT E003 OF 2022
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

PETER KIMUTAI BII 1ST PLAINTIFF

JOHANNES HENRY KIBIY MENJO 2ND PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

RAZORS SHARPAUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 7th November, 2022, the 1st Plaintiff pleaded that he is the registered proprietor of parcel of land known as Kajiado/Kaputiei North/50051 whereas the 2nd Plaintiff is the registered proprietor of parcel of land known as Kapsabet Township/338, Kapsabet Municipality/332 and Nandi/Kamobo/5169.
2. The Plaintiffs/Applicants deposed that Capitek Agencies Limited (principal debtor), was granted a credit facility of Kshs.22,300,000/= by the 1st Defendant which was to repaid in (84) months. Further that the said facility was secured by the 1st and 2nd Plaintiff's/Applicants parcels of land known as Kajiado/Kaputiei North/50051, Kapsabet Township/338, Kapsabet Municipality/332 and Nandi/Kamobo/5169 (herein after referred to as the suit properties).
3. The Plaintiffs/Applicants further deposed that the Defendants intend to exercise the chargee's statutory power of sale over the suit properties on the 11th of November, 2022. According to the Plaintiffs the intended exercise of the chargee's statutory power of sale is unlawful and irregular for reasons that the charge failed to issue and serve valid notices as per the requirements under Section 90 (1) of the *Land Act*, 2012 in respect to each of the charged facilities.



4. Further that the chargee has failed to issue and serve notices in accordance with Section 90 (2) (a) of the [Land Act](#), clearly indicating the nature and extent of default if any. The Plaintiff further contend that the chargee has failed to issue and serve notice in accordance with Section 90(2) (b) of the [Land Act](#), 2012 indicating the amounts if any that must be paid to rectify the default and the time, being not less than three months, by the end of which payment in default must have been completed. Further that the chargee has failed to comply with section 90 (2) (d) of the [Land Act](#), 2012 which obligates the chargee to inform the Plaintiffs of the consequences of not rectifying the default within the time specified in the notice. That it will exercise any remedies referred to in the aforesaid Section in accordance with the procedures provided for in part VII of the said Act.
5. The Plaintiffs/applicants contend that the chargee intends to sell the suit properties and complete the contract of sale without complying with section 96 (2) of the [Land Act](#) as to service of the 40 days' notice in the prescribed form.
6. The Plaintiff/Applicants maintain that no valid notification of sale and redemption notices have been duly served as required under the Auctioneers Rules, 1997.
7. The Plaintiff/Applicants further contend that no valuation as to the forced sale value of the charged properties has been undertaken by the chargee in accordance with Section 97 (2) of the [Land Act](#), 2012. Further that no reserve price has been set for purposes of public auction in breach of the provision in Section 98 (1) (c) of the [Land Act](#), 2012.
8. The Plaintiffs/Applicants further deposed that they have since moved the Court pursuant to Section 104 of [Land Act](#), 2012 for reasons that the principal debtor was dependent on serving the charged debt on sum recovered under a distributorship contract with Unilever Kenya limited, which contract however, became frustrated by the decision of the latter making a business directive adopting a new route and market strategy away from the principal debtor on 6th November, 2020.
9. The Plaintiffs/Applicant further deposed that upon termination of the contract between the principal debtor and Unilever Kenya Limited, the director of the principal debtor namely Evelyn Jeruto Menjo died on 8th November, 2020 being (2) days later and a grant of letters of administration was issued vide Kapsabet CMCC Succ Cause No. E145 of 2022; Re Estate of the late Evelyn Jeruto Menjo (Deceased) on 5th September, 2022.
10. The Plaintiffs/Applicant maintain that ailment and subsequent death of the said director hampered the operations of the principal debtor.
11. The Plaintiffs/Applicant further deposed that their homes are situated on parcels of land known as Kajiado/Kaputei North/ 50051 and Nandi/Kimobo/5169 and a sale would render them homeless. That in view of the powers bestowed on this Court under Section 104 (2), the Plaintiffs/Applicant urged the Court to postpone the sale of the suit properties for a period of (1) year or such reasonable time so as to enable the principal debtor an opportunity to rectify the default.
12. On those pleaded facts, the Plaintiffs sought to give a judgment in terms of the following orders: -
 1. A declaration do issue that the intended exercise of the Chargee's statutory power of sale is a nullity for want of compliance with the law, an injunction do issue restraining the Defendants whether by themselves, their servants and/or agents from selling, transferring or in whatever way alienating the parcels of land known as Kajiado/Kaputei North/50051, Kapsabet Township/338, Kapsabet Municipality/332 and Nandi/Kamobo/5169.



2. An order suspending or postponing the sale for period of (1) year or such reasonable period to enable the principal debtor to rectify any default and the Chargors upon due compliance by the Defendants with due service of notices pursuant to Section 104 of the Land Act, 2012.
3. Costs and interests.
13. In a joint statement of Defence dated 21st December, 2022, denied all the allegation in Plaintiff save for the descriptive paragraphs 1, 2, 3 and 4. The Defendants deposed that upon application of the Plaintiffs as the Directors of Chapitek Agencies Limited, the borrower herein vide a letter of offer dated 18th May, 2021, the 1st Defendant offered the borrower a secured loan of Kshs.22,300,000/=under the terms set out in the letter of offer.
14. The Defendants in response to paragraphs 5, 6, 7 and 8 maintained that it was an express term of agreement between the borrower and the interests1st Defendant that the facility would be repayable within (84) months at equal monthly instalments of Kshs.405, 921/= with effect from the first month of draw down until the facility was paid in full.
15. The Defendants further deposed that the said facility was disbursed on the strength of existing legal charges held by the 1st Defendant as follows;
 - a. Third party charge over property title No. Nandi/Kamobo/5169 I.N.O Johanness Henry Kibiy Menjo duly registered in favour of the 1st Defendant on 6th July, 2015 and the presentation book No.28/2015 for the amount of Kshs.2,000,000/=
 - b. Third party charge over property title No. Kapsabet Municipality/332 I.N.O Johanness Henry Kibiy Menjo duly registered in favour of the 1st Defendant on 16th August, 2017 and the presentation book No.91/2017 for the amount of Kshs.6,000,000/=
 - c. Third party charge over property title No. Kajiado/Kaputei North/50051 I.N.O Peter Kimutai Bii duly registered in favour of the 1st Defendant on 6th August, 2018 and the presentation book No.104/8/2018 for the amount of Kshs.9,100,000/=
 - d. Third party charge over property title No. Kapsabet Township/338 I.N.O Johanness Henry Kibiy Menjo duly registered in favour of the 1st Defendant on 23rd January, 2020, and the presentation book No.158/2020 for the amount of Kshs.6,000,000/=.
16. 1st Defendant vehemently denied the averments in paragraph 7 and 8 of the Plaintiff and further averred that in breach of their contractual obligations under the Letter of Offer, the borrower and or the Plaintiffs failed to honour their monthly repayment obligations, thus causing the borrower's account to fall into arrears to the detriment of the 1st Defendant necessitating the issuance of various demand notices and reminders to regularize the account.
17. That despite issuance of demand notices, the borrower and or the Plaintiffs/Applicant failed, refused and or neglected to rectify the default.
18. That on or about 14th February, 2022, with the borrower's account being in arrears for over the statutory provided period of one month, the 1st Defendant proceeded to issue the first statutory notice under Section 90 (1),(2),(3) of the Land Act and Section 56(2) of the Land Registration Act, informing the Charger's of the nature and extent of the borrower's default and to their rights as the Charger's and how to rectify the default.
19. The 1st Defendant contends that the aforesaid Notice expired without rectification and it subsequently proceeded to issue a Statutory Notice to Sell under Section 96(2), (3) of the Land Act. Further



- that upon expiry of the aforesaid Notice to sell. It then proceeded to instruct the firm of Messers Kalya Auctioneers to issue forty-five (45) day Notice to sale and the Redemption to the Charger's in accordance with Rule 15(b) of the Auctioneers Rules, 1997.
20. The 1st Defendant further deposed that through Messers Razor Sharp Auctioneers then advertised the suit properties for sale on 3rd October, 2022 pursuant to Rules 15 and 16 of the Auctioneers Rules, 1997. Further that it then instructed Messers Acumen Valuers Limited to carry out valuation reports on Kapsabet Township/338, Kapsabet Municipality/332 and Nandi/Kamobo/5169 whereas it instructed Messers Mureithi Valuers Limited to carry out the valuation of parcel of land known as Kajiado/Kaputei North/50051. Further that the suit properties were values as follows;
- i. Kapsabet Township/338 Kshs.11,000,000/= market value and Kshs.8,250,000/= as forced sale value.
 - ii. Kapsabet Municipality/332 Kshs. 11,000,000/= market value and Kshs.8,250,000/= as forced sale value.
 - iii. Nandi/Kamobo/5169 Kshs.5,500,000/= market value and Kshs.4.125,000/=as forced sale value.
 - iv. Kajiado/Kaputei North/50051 Kshs.13,000,000/= market value and Kshs.8,300,000/= as forced sale value.
21. The 1st Defendant contends its agents were denied access to property title number Kajiado/Kaputei North/50051 for purposes of conducting a current valuation. The 1st Defendant maintains that the Plaintiff have not produced any valuation report that contradicts the Valuation reports produced by it to support the allegations that the suit properties are being sold at a very low price.
22. According to the 1st Defendant, it has complied with all the statutory requirements under the [Land Act](#), the [Land registration Act](#) and the Auctioneers rules and its right of sale has duly accrued.
23. In response to the averments in paragraph 10, the 1st Defendant argued that the reasons advanced by the Plaintiffs for failing to comply with loan agreement and Charge instruments are only meant to hoodwink the Court and divert the Court's attention from the real issues in dispute. The 1st Defendant maintains that the events referred to by the Plaintiffs occurred on or about November and December, 2020, well before the loan facility was advanced in May, 2021.
24. The 1st Defendant contends that the operations of a company are not exclusively run by its Director's and even if so, the shareholders of a company may appoint other non-executive directors to run the operations of the company.
25. The 1st Defendant contends that once a property is offered as security for a loan facility, the same becomes a commodity for sale and therefore it has the right to sell the security so as to recover the loan amount.
26. The 1st Defendant denied the contents of paragraph 11 of the Plaint in toto and in further response averred that the borrower and the Plaintiffs continue to default repaying the loan amount, this in blatant breach of the terms of the Letter of Offer and the Charge instruments. That as at 10th November, 2022, the outstanding loan amount was to the tune of Kshs.21,760,657.35/=.
27. The 1st Defendant maintains that the relationship between the borrower and or the Plaintiffs/Applicants and it is commercial and contractual in nature and if the orders sought are granted then the same will be only tantamount to rewriting the contract and would be highly prejudicial to its interests.



28. The Defendants contend that the Plaintiffs are underserving of the orders sought and are only using this Court as ploy to frustrate the 1st Defendant's exercise of statutory power of sale with has already accrued.

The Plaintiffs' Submissions

29. The Plaintiffs/Applicants on 30th January, 2023 filed submissions in which they argued that the intended exercise of the chargee's statutory power of sale is unlawful and or irregular as the 1st Defendant did not comply with the provisions of Section 90(2), 90(3) and 96(2) of the *Land Act*, 2012.
30. The Plaintiffs/Applicants contended that the notices herein were prepared on 14th February, 2022 and were dispatched by registered post on 23rd February, 2022. The Plaintiffs maintained that Clause 39 of the charge instrument provided that the delivery of a notice would be deemed to have been effected after (7) days from the date of postage, in this case being 2nd March, 2022. According to the Plaintiffs, the 90 days period would have lapsed on 2nd June, 2022. The Plaintiffs/Applicants argued that even before the said period had lapsed, the 1st Defendant herein on 23rd May, 2022 prepared the 40 days' notice and dispatched the same on 26th May, 2022. The Plaintiff cited the case of Josephat Mwangi Moracha & Another V HFC Limited [2020] eKLR.
31. The Plaintiffs further submitted that the said notice could only have crystallized after the expiry of the 90 days from the date when it was received by the charger. The Plaintiffs/Applicants argued that with thus such conclusion it then becomes clear that the chargee's 40 days' notice became invalid. The Plaintiff relied on the findings in Yusuf Abdi Ali Co. Ltd V Family Bank Limited to support their submissions.
32. The Plaintiffs/Applicants further contended that the 2nd Defendant herein failed to comply with Rule 15 of the Auctioneers Rule, 1997 as the redemption notices and notifications of sale did not disclose the values of the suit properties and thus were invalid for not complying with the provisions of the law. the Plaintiffs/Applicants further maintained that they also flow from the null process of the premature commencement of the exercise of the power of sale already adumbrated. The Plaintiff relied on the case of Martha Khayanga Simiyu V Housing Fianance Co. of Kenya & 2 Others to buttress their submissions.
33. The Plaintiffs/Applicants argued that the Defendants failed to carry out the valuation of parcel of land known as Kajjado/Kaputiei North/50051 as the valuation report being relied on by the Defendants was done on 17th March, 2018, which is over (4) years old and thus breaching the requirements of setting a reserve price based on a professional valuation carried out not more than 12 months prior to the sale as provided for in Rule 11 (1) (b) (x) of the Auctioneers Rules, 1997. The Plaintiffs/Applicants denied the assertion by the chargee that it was denied access to the said property. The Plaintiffs maintained that the said assertions is unsubstantiated as there is no proof that effect. To buttress their submissions the Plaintiff relied on the decision in Koileken Ole Kipolonka Orumos V Mellech engineering & Construction Limited & 2 Others.
34. According to the Plaintiffs/Applicants the charge herein breached the duty of care owed to them as provided for under Section 97 (1) of the *Land Act*.
35. The Plaintiffs urged the Court that pursuant to Section 104 of *Land Act*, 2012 to cancel, vary, suspend or postpone the charge from pursuing it remedies as provided for under law. the Plaintiffs further submitted that for reasons that the principal debtor was dependent on serving the charge debt on sum recovered under a distributorship contract with Unilever Kenya limited, which contract however,



became frustrated by the decision of the latter making a business directive adopting as new route and market strategy away from the principal debtor on 6th November, 2020.

36. The Plaintiffs/Applicants maintained that upon termination of the contract between the principal debtor and Unilever Kenya Limited, the director of the principal debtor namely Evelyn Jeruto Menjo died on 8th November, 2020 being (2) days later and a grant of letters of administration was issued vide Kapsabet CMCC Succ Cause No. E145 of 2022; Re Estate of the late Evelyn Jeruto Menjo (Deceased) on 5th September, 2022. The Plaintiffs maintained that ailment and subsequent death of the said director hampered the operations of the principal debtor.
37. The Plaintiffs/Applicants further submitted that their homes are situate on parcels of land known as Kajiado/Kaputei North/ 50051 and Nandi/Kimobo/5169 and a sale would render them homeless. That in view of the powers bestowed on this Court under Section 104 (2), the Plaintiffs urged the Court to postpone the sale of the suit properties for a period of (1) year or such reasonable time so as to enable the principal debtor an opportunity to rectify the default. To buttress their submissions the Plaintiffs relied on the case of Showcase Properties Limited V Kenya Commercial Bank Ltd [2014] eKLR and the case of MZS V Gulf African Bank Limited & 2 Others.
38. The Defendants on the other hand did not file any submissions.

Determination

39. Having appreciated the pleadings of the respective parties', the submissions and the authorities cited therein, I am of the considered view that there exists only one substantive issue for determination by the court. I consider that single issue to be Whether the defendants did issue and serve the mandatory notices so as to have crystallized the statutory power of sale.
40. In the present case, it not disputed that there was a valid charge over the Suit properties executed in favour of the 1st Defendant. It also not in dispute that the Plaintiffs/Applicants herein defaulted in repaying the loan amount that was advanced to them by the 1st Defendant.
41. The Plaintiffs' case is pegged on the fact that the 1st Defendant did not issue the Statutory Notice under Section 90 of the Land Act, 2012 in accordance with law and thus its statutory the power of sale has not crystalized yet. The Plaintiffs also argue in their Plaint that the 2nd Defendant had failed to comply with the Auctioneers Rules which require them to serve the Plaintiff with a Notification of Sale as well as the requisite 45 days' Notice of Redemption.
42. Section 90 of the Land Act provides:

"If a charger is in default of an 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 charge may serve on the charger a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."
43. A statutory notice issued under section 90(2) of the Land Act, ushers the security realization process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3). The notice is issued where there is default or breach of any covenant under the charge. There is no prescribed format promulgated as yet by the Cabinet Secretary in charge of lands and housing under section 90(5) of the Land Act. Different formats of the notice have thus emerged leading to a veritable maze where challenges and questions on what truly constitutes a valid statutory notice are numerous.



44. Section 90(2) and Section 90 (3) of the *Land Act* obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, then the notice is to state what the chargor is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under section 90 is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.
45. On record is the 1st Defendant's Statutory Notice dated 14th February, 2022, that was sent to the Plaintiffs pursuant to the provisions of Section 90 of the *Land Act*, 2012 in view of the breach of terms of Letter of Offer dated 18th May, 2021. The Plaintiffs main contention is that the said notice did not comply with the provisions of Section 90 as the 1st Defendant was supposed to wait for the lapse of (3) months for it to commence the process of realizing its security. The Plaintiffs contend that said notice as per the postal stamp was dispatched on 23rd February, 2022 and thus would have taken effect after (7) days from the date of postage being 2nd March, 2022. The Plaintiffs maintain that the (90) days period would have lapsed on 2nd June, 2022, however even before such period had reached, the 1st Defendant on 23rd May, 2022 had already prepared the 40 days' notice which was dispatched on 26th May, 2022.
46. I have keenly perused the said notices and I must point out that the same are were drafted in accordance with Section 90(2) and 96(2) of the *Land Act*, 2012. The only bone of contention is the period upon which the said notice were to take effect. The first notice is dated 14th February, 2022 and was dispatched on 23rd February, 2022. The Plaintiffs maintain that the said notice was to be duly deemed to have been served upon them on 2nd March, 2022. This they contend is in accordance with Clause 39 of the charge instrument. That the 90 days period would have thus lapsed on 2nd June, 2022, however the 1st Defendant herein had already issued the 40 days' notice dated 23rd May, 2022 on 26th May, 2022 before the 90 days period had lapsed.
47. In my view the Plaintiffs herein do not dispute service of the said notices but only contend that the same were not done in accordance with the provisions of the law. The difference is only in the period stipulated being the number of days. To my mind the period stipulated on when notices are to be sent out is a statutory requirement that cannot be wished away by the chargee. Further it is also not in dispute that Clause 39 of the charge instrument on "Notice" expressly provided for the (7) day period as the time in which the said notices would be deemed to have take effect and or duly served.
48. In case of *First Choice Mega Store Limited v Ecobank Kenya Limited* [2017] eKLR; the Court observed as follows:
- (37) ...The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same , the borrower will have both notification of such action and an opportunity to redeem his property.



- (38) It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective rights of both the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in *Royal Bank of Scotland Plc v Etridge* [2002] 2 AC 733, [2], the law “ must afford both parties a measure of protection”. The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence reasonable confidence that it may at an appropriate time enforce the security is also protected.
- (39) A purposive construction of section 90 is necessary, Section 90 must thus be read and understood with the open fact that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favored given that it is the same section that triggers the application of a chargee’s rights and remedies.’
49. Having already found that the notices under Section 90 of *Land Act* were not properly served. I need not say much more regarding the issue of the chargee’s rights have accrued. There no doubt that in view of the above the chargee’s rights pursuant to the provisions of Section 96 of *Land Act*, 2012 had not yet crystallized view of the notice dated 23rd May, 2022 that was sent pre-maturely by the 1st Defendant.
50. The Plaintiffs/Applicants further contend that Rules 11 (1) (b) and 15 of the Auctioneers Rules of 1997 were not complied with as the redemption notices and notifications of sale did not disclose the values of the suit properties as required. The Plaintiffs/Applicant argue that parcel of land known as Kajiado/Kaputiei North/50051 was never valued and the valuation report that was used was the one done on 17th May, 2018. The 1st Defendant on the other hand maintains that its agent were denied access to the subject land thus were not able to conduct a current valuation on the said property. Rule 11 (b) (x) of the Auctioneers Rules, requires that the letter of instruction to the Auctioneer be accompanied by the reserve price based on a professional valuation carried out not more than 12 months prior to the proposed sale. The 1st Defendant has annexed a valuation of the property known as Kajiado/Kaputiei North/ 50051 prepared by Mureithi Valuers Limited. That valuation is dated 17th May, 2018 and is therefore within the 12 months stipulated before the sale, which was scheduled for 10th November, 2022.
51. The Plaintiffs/Applicants have also contended that their homes are situate on parcels of land known as Kajiado/Kaputiei North/ 50051 and Nandi/Kimobo/5169 and a sale would render them homeless. The collateral security registered in the names of the Plaintiffs/Applicants was indeed offered to the 1st Defendant, to be sold in the event that they failed to comply with any of the terms and conditions of the loan repayment and thus the Court cannot stop the bank from exercising its statutory power sale where the same has accrued. This point was poignantly made by Ringera J, in the case of *ISAAC LITALI vs. AMBROSE W. SUBAI & 2 OTHERS NBI HCCC 2092 OF 2000 (UR)* thus:
- ...the Plaintiff has in his pleading and affidavit made a mountain out of the fact that he has developed the land in question into a home and its sale would therefore occasion pain and loss which cannot adequately be compensated in damages... I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful...For nothing is more clear in a contract of charge than that default in the payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form of security.”
52. On whether the orders sought can issue. In my view the only issue in the present case is on the service of notices and the valuation of the property known as Kajiado Kaputiei North/50051. However,



postponing the intended sale for a period of 1 year or such a reasonable period would not be tenable in the circumstances. It is noteworthy to mention that the 1st Defendant is in the business of selling money and can only continue to do so if its customers are able to comply with the terms and conditions of the charge instruments. The requirement of the service of statutory notice was not meant to enable borrowers escape from their obligations but was meant to enable the borrowers have sufficient time within which to redeem their charged properties. I consider this case to fall within the exception of the general rule articulated by Barker J in *Linnpark Investments Pty Ltd v Macquarie property Development Finance Ltd* (2002) WASC 272 as follows:

53. There is a distinction between what I have called the ordinary case and the case in which the existence of the power of sale or the question whether it is exercisable at all is in question. The present case is of the second class. What is called the ordinary rule applies to cases of the first class, and to those cases only. This flows from the principles and reasoning on which that rule depends. Cases of the second class are, as regards interlocutory applications, governed by a rule of similar type. But it is a rule resting on different principles and reasoning. These permit of a greater flexibility. They do not require that in every case the whole amount claimed or sworn to by the mortgagee or seen from the terms of the instrument to be the greatest amount that could be due should be paid in. The terms may be moulded so as to require payment in of so much only as suffices to give adequate protection to the mortgagee”
54. In this context upon the whole analysis and with no doubt I think this court cannot relieve the applicant from payment of the loan due and owing to the respondent and an interest in this case down to the date of the actual payment of the principal so long as it is not unconscionable to the existing legal framework. The logic in my view is to give effect to the doctrine on voluntary contract making between two parties as in the characteristic term of this kind of contract the court in *Campell vs Holyland* (1877) 7 ch D 166, 171 held as follows: “ The principle in a Court of Equity has always been that, though a mortgage is in form an absolute conveyance when the condition is broken, in equity it is always security; and ... the doctrine arose when mortgages were made in the form of a conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee; that was the contract of the parties; yet Courts of Equity interfered with actual contract to this extent, by saying there was a paramount intention that the estate should be security, and that the mortgage money should be a debt; and they gave relief in the shape of redemption on that principle” .
55. In order to make it perfectly clear what the law regarding this claim is as tabulated Halsbury’s Law of England Vo. 32,⁴ Edition page 752, that
- It is trite law that court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute or because the Mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in court, that is the amount which the mortgagor claims to be due to it.”
56. The importance of this branch of law has to be emphasized over and over again that the power of sale arising and the power of sale being exercisable should not be underestimated by the parties to the mortgage contract. Once a conveyance is made in exercise of power of sale conferred by the *Land Act* 2012 under section 90 (1) and 91 (1) the title of the chargee shall not be impeachable unless on grounds of fraud, mistake, undue inference, unconscionability or subject to any contrary intention appearing in the deed creating the mortgage or charge. Unfortunately, that is not the case here prosecuted by the applicant. The obligation of the respondent is against the applicant to pay the monies due arising out of the deed duly signed, endorsed and agreed between both parties



57. Consequently, and in the end, I am satisfied that the process under section 90 (1), 91 and 104 of the Land Act 2012 on the statutory power of sale be reactivated by the respondent following the regime set out in the law. The right of redemption and valuation of the properties shall take effect as clearly expressed in the provisions of the enabling statute.

58. The valuation so declared is in respect of the whole of the properties known as Kajiado Kaputiei North/50051, Kapsanet Township/338, Kapsabet Municipality/332 and Nandi/Kamobo/5169. I further direct that 1st Defendant to carry out a proper and current valuation of the properties as identified above. For purposes of clarity, the Plaintiffs/Applicants be and are hereby directed to grant the 1st Defendant and or its agents access to the property in question for purposes of undertaking a current valuation of the subject land.

59. Each party shall bear their own costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY, 2023

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R. NYAKUNDI

JUDGE

Coram: Before Hon. Justice R. Nyakundi

M/s C. & K Advocates

M/s Wambua & Company Advocates

Kagunza & Co. Advocates

