



**Juma & another v Co-operative Bank (K) Limited (Civil Suit  
E002 of 2022) [2023] KEHC 2047 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2047 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL SUIT E002 OF 2022  
RPV WENDOH, J  
MARCH 16, 2023**

**BETWEEN**

**ISAIAH JUMA ..... 1<sup>ST</sup> PLAINTIFF**

**FIBI ACHIENG ISAIAH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CO-OPERATIVE BANK (K) LIMITED ..... DEFENDANT**

**RULING**

1. The applicants commenced these proceedings via a notice of motion dated June 3, 2022 and filed in court on even date. The application is brought under order 40 rules 1 & 2 and order 51 rule 1 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#). The applicants seek the following orders:-
  - a. Spent.
  - b. That pending the hearing and determination of this application, a temporary injunction do issue restraining the defendant, either by itself, employees, servants and/or agents, appointed or authorized by it, particularly Sunny Auctioneers, from selling by way of private treaty or by public auction the property comprised in title numbers;
    - a. Kanyamkago/Kamgundho/1108
    - b. Suna East/Wasweta I/16623
    - c. Suna East/Wasweta I/18182
    - d. Suna East/Wasweta I/20367
    - e. Suna East/Wasweta I/20991



- f. Suna East/Wasweta I/9917
  - g. Suna East/Wasweta I/16336
  - h. Suna East/Wasweta I/19357
  - i. Suna East/Wasweta I/17404
  - j. Kanyamkago/Kamgundho/1136
  - k. Kanyamkago/Kamgundho/1108
  - l. Suna East/Wasweta I/13560
  - m. Suna East/Wasweta I/13561
  - n. Suna East/Wasweta I/15823
  - o. Suna East/Wasweta I/17831
  - p. Suna East/Wasweta I/27832
  - q. Suna East/Wasweta I/18646
  - r. Suna East/Wasweta I/15683
- c. That pending the hearing and determination of this suit, an injunction do issue restraining the defendant, either by itself, employees, servants and/or agents, appointed or authorized by it, particularly Sunny Auctioneers, from selling by way of private treaty or by public auction the property comprised in title numbers;
- a. Kanyamkago/Kamgundho/1108
  - b. Suna East/Wasweta I/16623
  - c. Suna East/Wasweta I/18182
  - d. Suna East/Wasweta I/20367
  - e. Suna East/Wasweta I/20991
  - f. Suna East/Wasweta I/9917
  - g. Suna East/Wasweta I/16336
  - h. Suna East/Wasweta I/19357
  - i. Suna East/Wasweta I/17404
  - j. Kanyamkago/Kamgundho/1136
  - k. Kanyamkago/Kamgundho/1108
  - l. Suna East/Wasweta I/13560
  - m. Suna East/Wasweta I/13561
  - n. Suna East/Wasweta I/15823
  - o. Suna East/Wasweta I/17831



- p. Suna East/Wasweta I/27832
  - q. Suna East/Wasweta I/18646
  - r. Suna East/Wasweta I/15683 (hereinafter suit properties)
- d. Costs of this application be provided for;
  - e. Any other relief this court may deem fit and proper to grant in the circumstances.
2. The application is based on the grounds found on its face and supported by the affidavit of Isaiah Juma, the 1<sup>st</sup> applicant with the authority of the 2<sup>nd</sup> applicant, together with a bundle of documents marked as annexures “IJ – 01” to “IJ – 05.” The applicant deposed that on February 19, 2015, he applied together with the 2<sup>nd</sup> applicant for a loan facility from the respondent for the construction of a hotel which is now known and styled as Simba Lion Hotel situated along Migori - Kehancha road; that on June 24, 2015, the respondent offered them a loan of Kenya shillings forty-eight million three hundred thousand only (Kshs 48,300,000/=) which was to be released at once and paid within eighty - four (84) months; that the suit properties were used as security for the facilitation of the loan; that the respondent only released Kenya shillings fourteen million four hundred and ninety thousand only (Kshs 14, 490,000/=) on July 17, 2015 but not Kshs 48,300,000/= as agreed.
  3. Further, it was deposed that the respondent released a further Kenya shillings twenty million (Kshs 20,000,000/=) on August 7, 2015 and thirteen million eight hundred and ten thousand only (Kshs 13, 810,000/=) on October 2, 2015; that from the onset, the respondent had breached the terms of the contract by failing to release the said amount in time to enable the applicants undertake the construction within time to commence business and to get income which was to help them in repaying the said loan.
  4. The 1<sup>st</sup> applicant stated that having frustrated them in releasing the said loan amount, the project stalled and the respondent unilaterally and without notice, varied the terms of the contract and increased the interest rate and they are now demanding ninety-three million two hundred and ten thousand nine hundred and ninety-one and sixty-four cents (Kshs 93, 210, 991.64/=); that on May 4, 2022, the respondent through Sunny Auctioneers served the 1<sup>st</sup> applicant with a 45 days redemption notice dated April 4, 2022 for the public auction slated on June 13, 2022 for Suna East/Wasweta I/17832, 17831,9917 and 18646; that the applicants seek to challenge the interest being demanded through this court process; that the applicants have a *prima facie* case and unless the court intervenes, they will suffer irreparable loss.
  5. The applicant filed submissions dated July 29, 2022 and submitted on three issues. On whether the applicants have satisfied the main ingredients of interlocutory injunction, it was submitted that in this case, the applicants have raised triable issues and during the intervening period, the properties listed should be preserved from being sold or disposed of in any manner. The applicants relied on the case of *Giella v Cassman Brown* (1973) EA 358 and submitted that the three main ingredients to be satisfied for an order of interlocutory injunction order to be issued are:- that the applicant must demonstrated that he has a *prima facie* case with a probability of success, the applicant must be able to show that he will suffer irreparable damage or injury which would not be adequately compensated in damages and lastly if the court is in doubt, it will decide the application on a balance of convenience. Of the three ingredients, the applicant relied on the findings in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* CA No 39 of 2002 and *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 others* (2008) eKLR.



6. On why the orders should be maintained, the applicants referred to the provisions of order 40 rules 1 and 2 of the Civil Procedure Rules which provide instances where an order of a temporary or interlocutory injunction may be granted; that in this case, the suit parcels are in danger of being alienated as the respondent seeks to dispose and/or cause sales by private treaty or public auction in the process of realizing its security. The applicants submitted that they have satisfied all the three ingredients necessary for grant of injunctive orders.
7. The application was opposed. The respondent through Angeline Achieng' Owour, its Business Banker in its branch in Migori Township swore an affidavit dated June 30, 2022. The deponent also produced annexures marked "AAO-1 – AAO-16" in support of its case. Ms Owour deposed that the applicants and the respondent had a pre-existing customer - banker relationship; that *vide* a letter dated September 27, 2014, the respondent disbursed to the 1<sup>st</sup> applicant's personal account a loan facility of Kshs 5,760,000/= but the purpose of the loan was not disclosed to the respondent; that clause 2 of the letter of offer provided that the loan was for a general purpose that is, to finance working capital but not for the specific intended use as now alleged by the applicants; that as per clause 5 of the letter of offer on the repayment, term and review of the facility, the amounts drawn and outstanding interest and other sums payable were strictly payable on demand; that the monthly repayment was Kshs 160,000/= exclusive of interest and other charges.
8. It was further deposed that as per clause 6, the interest rate at that time was the Kenya Banks' Reference Rate (KBBR) - 9.13% plus a margin of 11.87% per annum; that the interest was computed on a reducing balance and was settled separately by debit to the applicants' account every month; that as per clause 7, the respondent was entitled to charge a default interest rate of 6% on all monies due with effect from the date of the same becoming due until actual repayment of such monies in full; that as per clause 10 the securities offered for the legal charge of Kshs 4,000,000/= were Suna East/Wasweta I/13560, 13561 and 15823; that a new security for a further legal charge of Kshs 1,760,000/= was created over Suna East/Wasweta I/13560, 13561 and 15823; that the loan was disbursed in two tranches being Kshs 4,000,000/= and Kshs 1,760,000/= disbursed on October 2, 2014 and November 14, 2014 respectively.
9. Further to the foregoing, it was deposed that the parties executed a charge dated June 12, 2015 to secure a loan facility of Kshs 48,300,000/= and the securities offered were title Nos Suna East/Wasweta I/17831, 17832, 9917, 18646, 16336, 19357, 18182, 16623, 15683, 17404 and Kanyamkago/Kamgundho/1136; that respondent disbursed the entire facility secured under the aforesaid charge in a series of tranches into the 1<sup>st</sup> applicant's account of Kshs 3,475,571.40/= and 11,014,428.60/= on July 17, 2015, Kshs 20,000,000/= on August 7, 2015 and Kshs 13,810,000/= on October 2, 2015; that there was no complaint received in regard to the tranche disbursement of the facility under the charge and there was no express agreement that the loan was to be disbursed in a single disbursement and the respondent cannot be responsible for the alleged delay or failure of the applicants in completing the project; that it was nowhere agreed that the loan repayment would be through the proceeds from the applicants' businesses. The respondent posited that the interest rate was fixed and agreed under clause 2 (a) of the further charge and clause 3 (a) of the charge; that clauses 2 (b) and 3 (b) of the further charge and charge respectively granted the respondent the discretion to charge a default interest rate in the event the applicants defaulted in the repayment of the loan facility.
10. In default of repayment of the loan, the respondent deposed that:-
  - a. It issued a ninety (90) days statutory notice addressed to each of the applicants on May 15, 2020 and the notice was sent by way of registered post on May 19, 2020 for an outstanding debt of Kshs 81,609,260.61/=;



- b. It issued a forty (40) days statutory notice of intention to sell in a letter addressed to each of the applicants dated September 16, 2020 and the outstanding debt had increased to Kshs 83,750, 954.22/= and the letter was delivered by hand and received by the 1<sup>st</sup> applicant on behalf of himself and the 2<sup>nd</sup> applicant;
  - c. Through the firm of Sunny Auctioneers, it issued a forty - five (45) days redemption notice together with a fourteen (14) days notification of sale both dated April 4, 2022 which were served on the 1<sup>st</sup> applicant on the same date and the applicants were informed that the properties will be sold on May 31, 2022. As at the date of the redemption notice, the outstanding debt had increased to Kshs 93, 201, 991.64/=;
  - d. That the properties which were identified and designated for sale in exercise of the respondent's power of sale were LR Nos Suna East/Wasweta I/19357 (commercial), Suna East/ Wasweta I/17831 (commercial), Suna East/Wasweta I/9917 (residential), Suna East/Wasweta I/ 18646 (commercial) and Suna East/ Wasweta I/17832 (residential);
  - e. A valuation of each of the said properties was done and the combined assessed current market and forced value was Kshs 63, 300,000/= and Kshs 47,475,000/= respectively for LR Nos Suna East /Wasweta I/19357 and 18182 inclusive of the developments and improvements on these properties;
  - f. That the auction did not proceed on May 31, 2022 however, they were advertised to be sold on June 13, 2022 on print media on the Standard Newspaper of May 26, 2022;
  - g. As of June 24, 2022 the outstanding debt on the 1<sup>st</sup> and 2<sup>nd</sup> loan was an accumulative of Kshs 94, 160, 444.66/= plus default interest as allowed and applied under the further charge and the charge.
11. The respondent deposed that the applicants are not entitled to an order of injunction as some of the properties were not secured under the further charge and charge that is LR No Kanyamkago/ Kamgundho/1108 which has been referred to twice, LR No Suna East/Wasweta I/20367 and LR No Suna East/Wasweta I/20991; that for the properties secured under the charge and further charge, the sale properties identified for sale were LR Nos Suna East/Wasweta I/17831, 9917,18646 and 17832. The other properties are beyond the scope of the application and no order of injunction can be issued to the remaining properties since there is no intention to dispose them by way of public auction.
12. On whether the applicants have attained the threshold for grant of injunctive reliefs, it was deposed that:-
- a. No evidence has been adduced of the intended sale of the properties by way of private treaty. A sale by way of private treaty is not provided for under the further charge and charge and therefore an order for temporary injunction cannot issue via an option not demonstrated to exist in the letter of offer, further charge and charge;
  - b. The applicants have not demonstrated that they have a *prima facie* case since they have not demonstrated that they have a right which has been infringed or violated to warrant this court's intervention; that they have not demonstrated an intention of unfair gain on the respondent's part with regards to the recovery process against the applicants;
  - c. The applicants have not demonstrated willingness, interest, intention or commitment to redeem the outstanding loan as per the statement of accounts;



- d. No evidence has been provided to show that the applicants injected the entire loan in construction of the hotel as alleged. The payment is absolute as it is not conditional on the applicants' use of the facilities advanced by the respondent including the alleged hotel business which has no nexus with the applicants' obligation to repay the facilities to the respondent under the charge and further charge.
13. On whether the applicants shall suffer irreparable harm, it was submitted that no such evidence was adduced before this court and it is clear that not all properties secured under the further charge and charge have been identified; that the market and forced sale values of each of the properties comprising the sale have been ascertained and the respondent being a regulated commercial bank is well able to compensate the applicants by way of damages in the unlikely event that the applicants' suit succeeds.
14. It was further averred that the balance of convenience tilts in favour of respondent realizing its securities in the sale of the properties under the further charge and charge; that the obligation to settle the outstanding debts remain unsettled and granting the temporary injunction would stop the recovery of the debt through the sale of the properties. The respondent argued that the applicants have not adduced evidence of full payment of the outstanding debt and they are before this court with unclean hands.
15. The respondent stated that the applicants have not demonstrated that there was a breach of statutory or procedural law and the recovery process cannot be said to be premature; that the applicants cannot now purport to be challenging the interest rate applied to the facilities; that the respondent risks to suffer further financial loss as a consequence of being restrained from recovering the outstanding debt due. The court was asked to dismiss the application with costs.
16. The respondent filed its submissions dated October 12, 2022. On whether the applicants are entitled to an order of temporary injunction, the respondent referred this court to the Court of Appeal decisions in *Ace Engineering & Building Contractors Ltd v National Bank of Kenya Limited* (2019) eKLR, *Giella v Cassman Brown* (supra) and *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR in which the courts set down the conditions which an applicant must satisfy in order to be granted an interlocutory injunctive order.
17. Whether the applicants have established a prima facie case, the respondent reiterated its averments in paragraph 29 of its affidavit and relied on the findings in *Nguruman Limited* (supra), *Charles Wabome Gethi v Angela Wairimu Gethi* (2008) eKLR, *Peter Kairu Gitu v KCB Bank Kenya Limited & another* (2021) eKLR
18. On whether the applicants have established that they will suffer irreparable loss, the respondent relied on its averments at paragraph 31 of its replying affidavit. The respondent further submitted that the submission by the applicants that they are likely to suffer irreparable loss, cannot be demonstrated by the alleged homelessness and loss of income; that the submission by the applicants that the charged lands are appreciative and would continue to increase in value is evidence that has not been produced in court and in any event, the debt exceeds the latest values of the sale properties and which debts continue to accrue interest.
19. On whose favour the balance of convenience tilt, the respondent referred to their averments at paragraphs 32 - 35 of its replying affidavit and submitted that the balance of convenience tilts in its favour of realizing the securities in the sale properties under the further charge and charge; that if an injunction is granted, the property's value may be insufficient to satisfy the debt which will have escalated at the time of the conclusion of this suit as it was held in the case of *Maithya v Housing Finance Co of Kenya & Another* (2003) 1 EA 133.



20. The respondent further submitted that the applicants' actions are undeserving of an order of injunction; that they executed a letter of offer, a further charge and charge and acknowledged receipts of all the funds disbursed to them. However, they have been in continuous breach of their obligations to repay the facilities and all the accrued interests as agreed in the documents; that the conduct of the applicants are untenable and this would be inequitable particularly to the respondent which complied with the law in the recovery of the loan. The respondent relied on the case of *Kyangavo v Kenya Commercial Bank Ltd & another* (2004) eKLR and *Peter Kairu Gitu* (supra).
21. Further to the foregoing, it was submitted that the interest charged on the facility cannot be a basis for the grant of temporary injunction as it was held in the case of *Thathy v Middle East Bank (K) Ltd & another* (2002) eKLR and *Gesa Building and Civil Engineering Ltd v George Ngure Chira & Another* (2009) eKLR and *Peter Kairu Gitu* (supra).
22. On who should bear the costs of this application, it was submitted that costs should follow the event as per section 27 of the *Civil Procedure Act*.
23. I have carefully considered the application, the grounds contained therein, the rival affidavits in support and opposition to the application, the rival submissions, together with the case laws cited. The issue for determination is whether the applicants have set out a case for grant of temporary injunctive orders as espoused in the case of *Giella v Cassman Brown & Co Ltd* (1973) EA as follows:-
- a. The applicant must establish a *prima facie* case with a probability of success;
  - b. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages;
  - c. Where there is doubt on the above, then the court should consider where convenience tilts.
24. Similarly, in the case of *Nguraman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR the Court of Appeal held that:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; establish his case only at a *prima facie* level, demonstrate irreparable injury if a temporary injunction is not granted, and allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

25. In considering an application for grant of an injunction, the court is forbidden from delving into the relevant facts of the case and determining it to its finality. All the court is supposed to do, is interrogate the conduct of the parties before it. That is, the supplicant of the injunctive reliefs whether s/he is guilty of misconduct which does not approve the court of equity and the conduct of the respondent whether it acted out of impunity. The Court of Appeal in *Esso Kenya Ltd v Mark Makwata Okiya* (1992) eKLR held:-

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration.



The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

26. An injunction is an equitable remedy and therefore whenever party approaches the court for the injunctive remedy must come with clean heads.

27. Ringera, J (as he then was) in *Dr Simon Waiharo Chege v Paramount Bank of Kenya Ltd* Nairobi (Milimani) HCCC No 360 of 2001 held:-

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been or are being or are likely to be violated by the adversary...As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

28. What then is a *prima facie* case? A *prima facie* case was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR as follows:-

“It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “*prima facie*” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability



of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

29. Still on what constitutes a prima facie case, the Court of Appeal expressed itself differently in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (supra) as follows:-

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that 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."

30. This dispute emanated from the alleged threatened sale of various parcels of land belonging to the applicants by the respondent over an alleged default in repayment of a loan facility which its debt stands at Kenya shillings ninety-three million two hundred and ten thousand nine hundred and ninety-one and sixty-four cents (Kshs 93, 210, 991.64/=). According to the applicants, the properties which the respondent threatened to sell by way or private treaty and/or public auction through Sunny Auctioneers are:-

- a. Kanyamkago/Kamgundho/1108
- b. Suna East/Wasweta I/16623
- c. Suna East/Wasweta I/18182
- d. Suna East/Wasweta I/20367
- e. Suna East/Wasweta I/20991
- f. Suna East/Wasweta I/9917
- g. Suna East/Wasweta I/16336
- h. Suna East/Wasweta I/19357
- i. Suna East/Wasweta I/17404
- j. Kanyamkago/Kamgundho/1136
- k. Kanyamkago/Kamgundho/1108
- l. Suna East/Wasweta I/13560
- m. Suna East/Wasweta I/13561
- n. Suna East/Wasweta I/15823



- o. Suna East/Wasweta I/17831
  - p. Suna East/Wasweta I/27832
  - q. Suna East/Wasweta I/18646
  - r. Suna East/Wasweta I/15683
- (Hereinafter suit properties)
31. The applicants' case is centred around the bank facility of Kshs 48,300,000/=. In support of this, the 1<sup>st</sup> applicant produced and marked as "IJ-01" the letter of offer dated June 24, 2015. The same letter was not produced by the respondent but it admitted at paragraph 11 of its replying affidavit that indeed a charge dated June 12, 2015 was executed to secure a facility of Kshs 48,300,000/=. As per the terms and conditions of the letter, the purpose of the term loan was to be used for construction. The applicants contended that the loan was not disbursed at once by the respondent and therefore, they were unable to finish up the construction in time in order to get income to repay the loan. The respondent admitted that it did not disburse the loan at once but in three tranches that is on July 17, 2015, August 7, 2015 and October 2, 2015 over a period of four months, into the applicants' personal account.
  32. Clause 9 of the facility letter stated that the securities for the loan of Kshs 48,300,000/= were over titles Suna East/Wasweta I/1783 and 17831 which are both in the name of Fibi Achieng Isaiah and title Nos Suna East/ Wasweta I/9917, 18646, 16336,19357, 18182, 16623, 15683 and Kanyamkago/ Kamgundho/1136 all in the name of Isaiah Juma. The aforesaid clause also acknowledges that there is an existing legal charge of 5.76 million over Title Nos Suna East/Wasweta I/15823, 3560 and 3561 all in the name of Isaiah Juma.
  33. Clause 4 of the loan facility states that the applicants were to repay the loan in seventy-eight (78) instalments of Kshs six hundred and nineteen two hundred and thirty thousand and seventy-six cents (Kshs 619, 230.76/=). Clause 5 provides that the interest rate is indicated as 20.41% at a reducing balance and clause 6 provides that the default interest rate is 6% per annum over and above the then subsisting interest payable by the borrower.
  34. I have considered the further charge document dated October 21, 2014 and the charge document dated June 12, 2015. The properties listed therein do not include as rightly deposited by the respondent at paragraph 25 of its affidavit, Kanyamkago/Kamgundho/1108, Suna East/Wasweta I/ 201367 and Suna East/Wasweta I/ 20991. The applicants are not entitled to injunctive orders over the said properties as they do not form the subject matter of this dispute. I should go on to further state, that the properties which were being put up for sale according to the 45 days redemption notice dated April 4, 2022 were Suna East/ Wasweta I/17832, 17831, 9917, 19357 and 18646. These are the only properties which valuation was carried out see annexures "AAO-11 - AAO15." Therefore, the only properties which the applicants if any seek injunctive orders are:-
    - a. Suna East/Wasweta I/ 17832
    - b. Suna East/Wasweta I/ 17831
    - c. Suna East/Wasweta I/ 9917
    - d. Suna East/Wasweta I/ 19357
    - e. Suna East/Wasweta I/ 18646
    - f. Suna East/Wasweta I/ 19357



35. Having set out the facts of this case, there is no dispute that there is a loan facility which was advanced to the applicants. The contention by the applicants is that the delay of disbursing the same, slowed down the construction of their hotel which they intended to do business. This court has gone through the terms of the loan facility intently. There is no particular clause which required that the loan should be disbursed within a particular period of time.
36. The loan facility agreement was executed on June 24, 2015. The first two instalments of the loan of Kshs 3,475,571.40/= and Kshs 11, 014, 428.60/= respectively were disbursed on July 17, 2015 a period of less than a month after signing the loan facility. The second amount of Kshs 20,000,000/= was disbursed on August 7, 2015 less than a month after the first disbursement and the last disbursement of Kshs 13,810,000/= was done on October 2, 2015 a period of slightly a month after the second disbursement.
37. It is difficult to see how the sequence in which the loan was disbursed occasioned a considerably huge delay in order to prejudice the applicants in their construction. Furthermore, there is no protest letter on record which the applicants wrote to the respondent expressing their displeasure in the slow disbursement of the loan facility which injured their business operations. Are the applicants trying to suggest that if the loan was disbursed at once, they would have finished constructing the hotel in less than a month and be in business to enable them start repaying the loan?
38. Further to the foregoing, there is no material which has been placed before this court or an averment by the applicants that despite the circumstances, they have been servicing the loan whichever the amount. The applicants are simply disputing the interest charged. What then has prevented the applicants since 2015 from repaying Kshs 619, 230.76/= per month being monthly repayment. There is a contract which was signed by both parties and each one was to play a role. The role of the applicants was to repay the loan which duty they have not fulfilled. The loan was disbursed in the year 2015. It is now almost eight years later that the applicants approached this court seeking intervention to shield them from what they are supposed to do. The applicants have certainly approached this court with unclean hands. Interlocutory injunctions being equitable remedies, and the parties should equally practice equity.
39. The respondent commenced the process of realizing their securities through exercising its statutory power of sale. There was no rebuttal from the applicants that the manner in which the respondent initiated the process prejudiced them. The respondent, just like all other banking institutions are in commercial business. They lend out money for profit but not on humanitarian, gratuity or love for humankind basis. Borrowers do understand this fact and that is why they sign a loan facility agreement which sets out the terms and conditions of repaying the loan; and in addition, offer a security to guarantee that should they not fulfil their obligations, the security stops being their personal property and becomes a commercial commodity to be sold in the market to realize the outstanding debt. It would not make sense for a court which is a third party to the agreement to re-write the terms of loan facility agreement in order to protect a party who is acting in bad faith.
40. In *Ibrahim Seikei T/A Masco Enterprises v Delphis Bank* (2004) eKLR the court rendered itself as thus:-
- 'What the appellant wants me to do is to restrict and/or prevent the respondent from the exercise of its statutory power, which it acquired by virtue of the charge which was created over the suit property. I must state that our courts would be reluctant to prevent the exercise of statutory power of sale. Unless there is no basis or if it was exercised to oppress the chargor or if the chargee had no such power in the first instance. I am saying so because the power stems from an Act of Parliament, which gave due consideration to all factors in respect of a relationship concluded under that specific Act of Parliament. The statute breaths its air from the contractual obligation of the parties which has been reduced into a document



and a court cannot restrict or prevent the exercise of such right acquired through an Act of Parliament and fortified by a contractual document: We must protect the intention of the parties so that every party adheres to his contractual duty to the other. The appellant was advanced the money on the strength of the security he provided to the Bank and he had an obligation to repay the monies under the terms agreed.”

41. As observed in the above case it is the duty of the court to protect the intention of the parties so that each party may adhere to its contractual obligation.
42. Similarly, the Court of Appeal in *National Bank of Kenya Limited v Juja Coffee Exporters Limited* (2021) eKLR held that:-

“The claim that there was a contest as to the exact amount outstanding was also not a basis for restraining the Bank. Authorities for the proposition that a dispute on the outstanding loan should not scuttle the exercise by a chargee of its power of sale go back many years...”
43. As was held in the above decisions, an order of injunction cannot be granted just because the outstanding amount is disputed or that the outstanding interest has not been ascertained. In the end, I find that the applicants have not established a prima facie case to warrant grant of an interlocutory injunction order. The first ground having not been fulfilled as a condition to grant injunctive orders, the other two grounds need not be discussed as they fall by the way. All the three conditions must be fulfilled for a party to be granted injunctive orders.
44. The application dated June 3, 2022 is unmerited and it stands dismissed with costs to the respondent.
45. Mention before Deputy Registrar for pretrial on May 24, 2023

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 16<sup>TH</sup> DAY OF MARCH, 2023**

**R. WENDOH**

**JUDGE**

Ruling delivered in the presence of:-

No appearance for the Applicants.

Mr. Nicholas Bosire for the Respondent.

Nyauke Court Assistant.

