



**Simba Fresh Produce Limited & 2 others v Equity Bank (Kenya) Limited (Commercial Case E108 of 2022) [2023] KEHC 3325 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3325 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E108 OF 2022**

**DAS MAJANJA, J**

**APRIL 20, 2023**

**BETWEEN**

**SIMBA FRESH PRODUCE LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**PAUL WANDERI NDUNG’U ..... 2<sup>ND</sup> PLAINTIFF**

**HOMES AND COMMERCIAL HOLDINGS LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... DEFENDANT**

**RULING**

**Introduction and Background**

1. The 1<sup>st</sup> Plaintiff is a fresh produce grower and exporter, exporting herbs and vegetables to continental Europe and the United Kingdom. By a facility letter dated 11<sup>th</sup> September 2019 the Defendant (“the Bank”) agreed to advance to the 1<sup>st</sup> Plaintiff a sum of ksh 600,000,000.00 to finance farm development to increase acreage under its export crop farming on the properties known as LR nos 11571/42, 11571/43 and 11571/44 in Naro Moru. This facility was secured by, inter alia, an all asset debenture over the present and further assets of the 1<sup>st</sup> Plaintiff executed in favour of the Bank, personal and corporate guarantees and indemnities by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and legal charges over the properties LR nos 11571/42, 11571/43 and 11571/44 in Naro Moru and LR Number 7258/53 in Gigiri, Nairobi (“the suit properties”).
2. Due to the Covid-19 pandemic and the measures that were taken to prevent its spread, the 1<sup>st</sup> Plaintiff’s business was affected and it approached the Bank seeking to restructure the facility. The parties engaged in discussions which led to a moratorium and restructuring of the facility by the letter dated 30<sup>th</sup> May 2021. The Plaintiffs contend that the amount borrowed under this facility was fully utilized to



settle the 2019 facility loan account. However, the 1<sup>st</sup> Plaintiff was still reeling from the effects of the pandemic and could not keep up to date with their repayment obligations and as at 13<sup>th</sup> March 2023, the restructured facility had an outstanding balance of ksh 664,815,052.00.

3. The parties' attempt to engage in a further restructure and concessions were not successful and by letters dated 18<sup>th</sup> October 2022, the Bank, through its Auctioneers issued the 2<sup>nd</sup> plaintiff with a notice informing him that the suit properties would be sold by public auction within 45 days. However, the Bank suspended the auction scheduled for 20<sup>th</sup> December 2022 following discussions by the parties. The talks were not successful hence the Bank once again scheduled the public auction for LR 7258/53 on 21<sup>st</sup> March 2023 while the auction for the three remaining properties was to take place on 24<sup>th</sup> March 2023. The Bank claimed that the 1<sup>st</sup> Plaintiff did not make any efforts to clear its arrears or present a reasonable proposal for settlement.

### Plaintiffs' Case

4. In order to forestall the impending sale, the Plaintiffs filed this suit together with the Notice of Motion dated 15<sup>th</sup> March 2023 made, *inter alia*, Order 40 Rules 1 and 4 of the [Civil Procedure Rules](#) which is the subject of the court's determination. The application is supported by the facts on its face and the affidavits by the 2<sup>nd</sup> Plaintiff sworn on 15<sup>th</sup> March 2023 and 19<sup>th</sup> March 2023 respectively. It is opposed by the Bank through the Grounds of Opposition dated 16<sup>th</sup> March 2023 and the replying affidavit of its Manager, Legal Services, Kariuki King'ori, sworn on 17<sup>th</sup> March 2023. The parties' respective counsel made brief oral submissions in support of their respective positions while the Plaintiffs have also supplemented their arguments by skeleton arguments.
5. The Plaintiffs' case is that the Bank cannot exercise the chargee's power of sale in respect of the suit properties or any of them in relation to the alleged default by the 1<sup>st</sup> Plaintiff, because the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs did not guarantee or secure the facilities advanced to the 1<sup>st</sup> Plaintiff in 2021. That even if the Bank had such power of sale, it had, together with its auctioneers failed to issue, or to issue properly, the Statutory Notices required by both the [Land Act](#), 2012 and the [Auctioneers Act](#) and notices of default before any liability could attach to the Plaintiffs.
6. The Plaintiffs also claim that the Notification of Sale by the Auctioneer is defective not having followed, as required by law, at least a 90-day notice of default and a subsequent 40-day notice issued by the Bank complying strictly with the 6 [Land Act](#) to the persons whose property is sought to be sold and that such notices were never issued. That the Notices issued by the Auctioneer are also defective because they demanded payment from the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs which was never due from them, at all or as demanded. The Plaintiffs contend that the sale by public auction or otherwise would be irregular and unlawful and would occasion irreparable loss to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs' urge that they have an arguable and strong case with a likelihood of success.
7. The Plaintiffs also state that the suit properties are substantial in value and unique in location, size, character and utility. That the 2<sup>nd</sup> Plaintiff's property in Gigiri, Nairobi is 2.8 acres fronting Limuru Road adjacent to foreign government missions, in a quiet and beautiful environment fronting the beautiful, historically significant and serene Karura Forest and that this size of property of such character is otherwise unavailable in the area. The Plaintiffs consider the market value of ksh 550,000,000.00 placed by the Bank in February 2023 is an undervaluation given the its unique features.
8. The Plaintiffs aver that the 3<sup>rd</sup> Plaintiff's properties are three contiguous parcels of land measuring about 600 acres, with leaseholds terms balances of about 900 years each. As regards the value, the Plaintiffs state that the Bank has given an open market value of ksh 1,720,000,000.00 and a forced sale



value of ksh 1,289,000,000.00 yet the alleged outstanding sum owed to the Bank by the 1<sup>st</sup> Plaintiff is ksh 700,000,000.00.

9. The Plaintiffs contend that the 1<sup>st</sup> Plaintiff has developed the Nanyuki properties intensively for farming of fresh produce which is exported to Europe earning the Country and the 1<sup>st</sup> Plaintiff substantial foreign exchange. Further, the suit properties have sweeping uninterrupted views of Mount Kenya with all its geographical significance and are only a few kilometres from Nanyuki Town. The 1<sup>st</sup> Plaintiff states that it employs on the property 350 people whose lives and livelihoods would be interrupted and disrupted if the irregular and unlawful sales proceed.
10. The Plaintiffs complain that the advertisement for sale of the suit properties by public auction has been done notwithstanding various entreaties by the 2<sup>nd</sup> Plaintiff on behalf of himself and the 3<sup>rd</sup> Plaintiff and that despite their not being obligated to repay debt due to the Bank from the 1<sup>st</sup> Plaintiff, the 2<sup>nd</sup> Plaintiff was prepared to find other means of settling the 1<sup>st</sup> Plaintiff's debt through the sale of other properties about to be concluded. That the amount of ksh 99,000,000.00 claimed to be arrears would easily be paid off from its business with the onset of the rains and improving economic conditions.
11. The Plaintiffs contend that the Bank will not suffer any substantial loss if the orders sought are granted because once the matter is concluded, the Bank can still recover its money if it is found due which is to be contrasted with the irreparable loss that could be occasioned to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. They urge that the balance of convenience and the scales of justice tilt in favour of granting the interlocutory relief.

#### **Defendant's Case**

12. The Bank opposes the application. It states that by a variation letter dated 18<sup>th</sup> May 2020, it accepted the 1<sup>st</sup> Plaintiff's request and granted it a moratorium period of 12 months, during which the Bank froze the 1<sup>st</sup> Plaintiff's obligation to repay the principal and interest on the loan. That the outstanding balance when the moratorium took effect was ksh 563,902,665.00 hence the Bank rejects the Plaintiffs' contention that by the time the moratorium was granted, the 1<sup>st</sup> Plaintiff had repaid the facility granted on 11<sup>th</sup> September 2019 in full.
13. The Bank avers that the restructure in 2021 enhanced the sum advanced to ksh 631,066,000.00 and that it was agreed that the 1<sup>st</sup> Plaintiff would be allowed a moratorium on principal repayment for a period of 12 months but would pay the interest accruing every month and the principal repayment would commence one month after the expiry of the 12-month moratorium period until payment in full. The Bank contends that under the facility letter dated 30<sup>th</sup> May 2021, the restructured facility would be secured by, *inter alia*, the existing securities already held by the Bank hence it is not correct that the facility as set out in the said letter was a new and separate facility from the 2019 facility. The Bank maintains that the 2021 facility was a restructuring of the 2019 facility and that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as well as the directors of the 1<sup>st</sup> Plaintiff signed the facility letter dated 30<sup>th</sup> May 2021 as guarantors of the 1<sup>st</sup> Plaintiff.
14. The Bank avers that while the 1<sup>st</sup> Plaintiff enjoyed the concessions granted by the Bank under the moratorium, it defaulted on the terms of the facility. The Bank issued statutory notices under section 90 of the [Land Act](#) by letters dated 25<sup>th</sup> November 2021 and 3<sup>rd</sup> December 2021. The letters were also shared to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as guarantors of the 1<sup>st</sup> Plaintiff by way of registered post.
15. When the 1<sup>st</sup> Plaintiff failed to comply with the statutory notices dated 25<sup>th</sup> November 2021 and 3<sup>rd</sup> December 2021, the Bank proceeded to issue statutory notices dated 27<sup>th</sup> July 2022 under section 96 of the Land Act. These notices were also issued to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs by way of registered post.



- The Bank states that the 1<sup>st</sup> Plaintiff did not make payment of the total outstanding amount after the notice under section 96 of the Land Act was issued and that the Plaintiffs have never challenged any of the amounts set out in the letters dated 25<sup>th</sup> November 2021, 3<sup>rd</sup> December 2021 and 27<sup>th</sup> July 2022.
16. The Bank also states that sometime in October 2022, the 2<sup>nd</sup> Plaintiff reached out to the Bank to resolve the debt and suspend the sale of the suit properties. The Bank agreed to a meeting and on 7<sup>th</sup> October 2022, the 2<sup>nd</sup> Plaintiff, who stated that he was representing the 1<sup>st</sup> Plaintiff, met Bank's officials at the Naro moru farm. According to the Bank it was noted that the farm was active but no payments were forthcoming from the 1<sup>st</sup> Plaintiff. The Bank informed that the 2<sup>nd</sup> Plaintiff that it would not grant any grant further concessions and would proceed to exercise its power of sale. Although the 2<sup>nd</sup> Plaintiff addressed an email dated 16<sup>th</sup> October 2022 to the Bank guaranteeing that he would endeavour to pay the Bank at least ksh 50,000,000.00 during that week to forestall the auction, he failed to do so. The Bank thereafter issued a further notice of sale dated 18<sup>th</sup> October 2022 which was served on the Plaintiffs in person, email, Whatsapp and by registered post. That the 2<sup>nd</sup> Plaintiff engaged the Bank in correspondence in October and November 2022 in a bid to stop the auction process and in his correspondence, the 2<sup>nd</sup> Plaintiff admitted that the 1<sup>st</sup> Plaintiff was indebted to the Bank and that he was making efforts to ensure the debt was paid.
  17. The Bank states it suspended the auctions scheduled for 19<sup>th</sup> and 20<sup>th</sup> December 2022 by the letter dated 1<sup>st</sup> December 2022 in order to allow the 1<sup>st</sup> Plaintiff clear the arrears by 15<sup>th</sup> December 2022. As a result, the Bank incurred the auctioneers' costs of ksh 11,466,200.00 which it states that it is entitled to recover. It avers that the 1<sup>st</sup> Plaintiff did not make any efforts to clear its arrears or present a reasonable proposal for settlement hence it proceeded to re-advertising the suit properties for sale. It adds that subsequent meetings did not bear any fruit as the 2<sup>nd</sup> Plaintiff did not give any reasonable proposal.
  18. The Bank believes that it is entitled to exercise its statutory power of sale over the suit properties. That by executing the guarantees, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs agreed to pay on demand any monies or liabilities owed by the 1<sup>st</sup> Plaintiff. That the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs charged their properties in favour of the Bank and the Bank is entitled to exercise its statutory power of sale without further recourse to them, which it has lawfully done. It insists that the demand notices and the statutory notices issued to the Plaintiffs have been issued lawfully and the Bank is entitled to proceed with the scheduled auctions.
  19. The Bank states that the 2<sup>nd</sup> Plaintiff has admitted in his affidavit of 15<sup>th</sup> March 2023 that the directors and shareholders of the 1<sup>st</sup> Plaintiff are his wife, daughter and son and that he has held himself out as a representative of the 1<sup>st</sup> Plaintiff in the meetings and correspondence with the Bank. That he is also a director of the 3<sup>rd</sup> Plaintiff, thus he cannot distance himself from the affairs of the 1<sup>st</sup> Plaintiff on the basis that he is not a shareholder or director in the 1<sup>st</sup> Plaintiff.
  20. The Bank contends that the Plaintiffs have not met the condition for the grant of an interlocutory injunction. That the Bank has extended generous concessions to the Plaintiffs which they have failed to take advantage of. That it is not correct that the suit properties are undervalued as the Bank has valued them in accordance with prevailing market rates and a forced sale value provided for the purpose of a statutory sale.
  21. The Bank asserts that the 1<sup>st</sup> Plaintiff is still indebted to it and that as at 13<sup>th</sup> March 2023 the total outstanding debt owed by the 1<sup>st</sup> Plaintiff to the Bank is ksh 664,815,051.77 which sum continues to accrue interest.



## Analysis and Determination

22. From the parties' pleadings, the main issue for determination is whether the Plaintiffs has made out a case for grant of an order of injunctive relief which were settled in *Giella v Cassman Brown & Co., Ltd* [1973] EA 358. First, an applicant must demonstrate a prima facie case with a probability of success. Second, 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 and lastly, if the Court is in doubt, it will decide an application on the balance of convenience.
23. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal no 77 of 2012 [2014] eKLR the Court of Appeal further clarified that the three conditions in *Giella v Cassman Brown (Supra)* are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
24. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained as follows:

*A prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.
25. The gist of the Plaintiffs' compliant can be inferred from its pleadings, more so the Plaintiff. First, it avers that the restructured facility of 2021 of ksh 631,066,000.00 was used to settle the previous 2019 facility issued to it and there was therefore no balance at all in the 2019 Facilities Loan Account. Second, that the 2021 Securities constituting of the 2<sup>nd</sup> Plaintiff's Personal Guarantee and the 3<sup>rd</sup> Plaintiff's Corporate Guarantee and supporting charges over the suit properties respectively were never executed and that the 2021 Facility remains unsecured by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs to date and no personal guarantee of the 2<sup>nd</sup> Plaintiff and no Corporate Guarantee of the 3<sup>rd</sup> Plaintiff exist or subsist as security for the 2021 Facility. Third, that the Bank has never notified them that they are in default and has also never issued them with the statutory notices as required by section 90(1) and 96(2) of the *Land Act* and that the Auctioneer has failed to issue a proper notice as required under Rule 15 of the *Auctioneers Rules* by demanding from them the full amount of money allegedly not owed by the 1<sup>st</sup> Plaintiff, which the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs never undertook to pay, and thereby clogging their equity of redemption. Fourth, that the Bank continues to unreasonably decline such offers for settlement of the default, or to fail to communicate its acceptance or decline, leading to alleged default. Fifth, that the suit properties are being sold at an under value.
26. On the first issue whether the restructure facility constituted a new loan and in effect settled the previous loan facility, I am in agreement with the Bank that the facility letter dated 30<sup>th</sup> May 2021 was clear that it was a restructure of the 1<sup>st</sup> Plaintiff's previous facility. The restructured loan was secured by the existing securities including the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs' personal and corporate guarantees. In *Equip Agencies Limited v I&M Bank Limited* ML HCCC no 420 of 2016 [2017] eKLR, the court accepted the doctrine of “continuing securities” in banking transactions which arises from the practice whereby the banks do offer facilities which may be rolled over or renewed if the terms and conditions of the facility remain materially unchanged. However, the said facilities must be within the headroom created by the securities.



27. Looking at the facility letter of 30<sup>th</sup> May 2021, the terms of the previous facility were incorporated into the new restructured facility save for the moratorium, tenure, repayment, interest rate, default interest, fees and commission which were all within the head-room of the previous facility and securities. These terms were accepted by all the Plaintiffs as evidenced by their signatures of acceptance on the facility letter. The restructuring of the loan, if anything, confirms that the loan to the 1<sup>st</sup> Plaintiff and guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs on 11<sup>th</sup> September 2019 had not been settled. The bank facility of 30<sup>th</sup> May 2021 was a restructure of the existing loan and not a new loan as averred by the Plaintiffs. It also answers the Plaintiffs' averment that they did not execute any personal or corporate guarantees for the new restructured facilities. They did not have to. By the Plaintiffs agreeing to use their previous guarantees to cover the new restructured facility, there was no requirement for another guarantee and indemnity to be signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as they had already bound themselves to guarantee the restructured facility and indemnify the Bank for the same. Therefore, the guarantees remain in full force and effect for so long as the 1<sup>st</sup> Plaintiff has any liability or obligation to the Bank under the subject charges and until all of those liabilities and obligations have been fully discharged (see [Robert Njoka Mathara and Another v Barclays Bank of Kenya Limited and Another](#) NYR CA Civil Appeal no 18 of 2014 [2017] eKLR and [Amandari Limited & 2 others v NIC Bank Limited](#) ML HCCA no 28 of 2018 [2020] eKLR). This finding disposes of the Plaintiffs' contention that 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are not liable for the 1<sup>st</sup> Plaintiff's indebtedness as guarantors.
28. On the issue of the statutory notices, it is settled law that the service of valid statutory notices under the [Land Act](#), 2012 and the Auctioneer Rules, is a prerequisite for the exercise of the statutory power of sale. The Plaintiffs contend that they were never served with the statutory notices. It is settled that the onus is on the Bank to prove that it served valid notices on the Bank as was held by the Court of Appeal in [Nyagilo Ochieng and Another v Fanuel Ochieng & 2 Others](#) [1995-1998] 2 EA 260. In order to discharge this burden, the Bank has produced the demand notices under section 90 of the [Land Act](#) dated 25<sup>th</sup> November 2021, and 3<sup>rd</sup> December 2021 which on their face and as deponed by the Bank indicate that they were sent to the Plaintiffs by way of registered post. The Bank has also annexed copies of the statutory notices dated 27<sup>th</sup> July 2022 under section 96 of the [Land Act](#). The Bank has also annexed to its deposition copies of the certificates of posting as proof of postages for each of the notices.
29. The Plaintiffs do not dispute the listed addresses therein but state that nothing in the Certificates of Posting indicates what documents were sent and from the letters, it appears that they were posted well over two weeks after they were first written. In [Nyagilo Ochieng and Another v Fanuel Ochieng](#) (Supra), it was held that a certificate of posting is prima facie proof of service of the said notices. Once the Bank has discharged this burden, the evidential burden shifts to the Plaintiffs to show either they did not receive the notices or that the notices were in fact never sent. This burden is discharged by providing and proving specific facts. I also hold that there is no requirement in law that statutory notices must be dispatched on the same date they were written since they only take effect upon receipt and not otherwise. Finally, and contrary to the Plaintiffs' assertion, the statutory notices clearly make demand for payment of the outstanding debt. I therefore find and hold that the Plaintiffs were properly served with statutory notices in compliance and pursuant to the relevant sections under the [Land Act](#).
30. On the issue of indebtedness, I find that from the material on record, the Plaintiffs have at least on a prima facie basis both impliedly and expressly admitted their indebtedness to the Bank. In both its Complaint and deposition in support of the application, the Plaintiffs admit that they are in arrears but that the same has been caused by the effects of the Covid-19 pandemic and that they are making various attempts to try and reduce the arrears. What the Plaintiffs appear to be disputing is the extent of their indebtedness, which our court has ruled, is not a valid ground to restrain a chargee from exercising its statutory power of sale. This position is cemented by the several decision of the Court of Appeal



among them *Civil Servants Housing Co. Ltd and Another v Lavuna and Others* [1995] LLR 366 (CAK) where it held that “...A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage...” (see also *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* (Supra) and *National Bank of Kenya v Juja Coffee Exports Limited* [2021] eKLR). I therefore find that the Plaintiffs are truly and admittedly indebted to the Bank. This finding disposes of the issue and contention by the Plaintiffs that the Auctioneer’s notification of sale is improper for demanding a sum allegedly not owed by the Plaintiffs.

31. The Plaintiffs also lament that the Bank has not been keen to accept their proposals to repay the debt and that this failure is what has caused them to be in a negative position. The court cannot force the Bank to accept a proposal or request for restructure of a facility as this would amount to re-writing the parties’ contract and bargain. In *Muigai Enterprises Limited v Kenya Commercial Bank Limited* ML HCOMM no 473 of 2015 [2016] eKLR, the court expressed the view that, “[T]he court cannot compel the defendant to accept the plaintiff’s proposals. I so find because it is not a matter of an entitlement bestowed upon the plaintiff, whether by statute or by contract.” From the totality of evidence, the parties have engaged each other and the Bank has been accommodative to the Plaintiffs by suspending scheduled auctions and granting moratoria on their payments all to afford the Plaintiffs an opportunity to resolve the debt.
32. Lastly, the Plaintiffs have accused the Bank of undervaluing the suit properties. Section 97 of the [Land Act](#) imposes on the chargee a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained.
33. The Plaintiffs annexed the valuation reports in respect of the suit properties. While it can be said that they may have a point as to the value of the said properties, they have not produced any contrary evidence as to what ought to be the purported ‘true and real’ value of those properties. It should not be lost that a valuation report is based on the professional and expert opinion of a duly qualified valuer who assessed the value of properties based on accepted parameters. In order to displace a professional valuation, the Plaintiffs must produce clear evidence that the valuation is wrong or at least doubtful. Mere assertions or statements will not do (see [Palmy Company Limited v Consolidated Bank of Kenya Limited](#) ML HCCC no 527 of 2013 [2014] eKLR). I thus find that the Plaintiffs’ assertions are mere and bare and do not elevate their case to a prima facie case with a probability of success. This ground by the Plaintiffs also fails.
34. I therefore find and hold that the Plaintiffs have failed to demonstrate a prima facie case with a probability of success and the inquiry on whether they are entitled to an injunction comes to a halt in line with the dicta in [Nguruman Limited v Jane Bonde Nielsen and 2 Others](#) (Supra). It is clear that the Plaintiffs are indebted to the Bank and since the requisite notices have been properly issued and served upon the Plaintiffs, the Bank’s statutory power has arisen and has now crystallized. There is no valid reason why the impending advertisement, sale and auction of the suit properties should not proceed as planned.
35. Even though the Plaintiffs have failed to establish a prima facie case with a probability of success, for the sake of completeness, I will consider the second condition; whether the Plaintiffs would suffer irreparable loss which cannot be compensated by damages in the event the injunction is not granted.
36. The Plaintiffs have emphasized the value and uniqueness of the suit properties and the effect the sale of the suit property would have on the 1<sup>st</sup> Plaintiff’s business and have urged that they will suffer irreparable loss which cannot be compensated. It must however be recalled that despite the unique nature of the suit properties, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs still offered them up as securities. They



understood that once default took place, the charged properties became commodities for sale available for purchase by all and sundry unless redeemed by the Plaintiffs. In addition, the Plaintiffs have not demonstrated that in the event the suit properties are sold and they succeed at the trial, the Bank would not be in a position to compensate them. In rejecting the argument that that damages are not an adequate remedy I would do no better than quote what the Court of Appeal stated in *John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Ltd* NRB CA Civil Appl. no 306 of 2005 [2006] eKLR;

A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The Applicant obtained a large amount of those funds and had full benefit of it. He offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents. He cannot be heard to say, as he does, that the securities are unique and special to him. We think the bank is capable of refunding such sums as may be found due to the Applicant, if any and that capability has not been challenged.

37. The final condition concerns the balance of convenience; I hold that the Plaintiffs have admitted indebtedness of a not insubstantial amount which continues to accrue interest. If the injunction is granted, the debt may continue balloon to the extent that it eats into the value of the security. Without a valuable security, the Bank may be unable to recover the debt.

### **Disposition**

38. For the reasons I have set out I now dismiss the Plaintiffs' application dated 15<sup>th</sup> March 2023. It is dismissed with costs to the Defendant. The interim orders in force are discharged and the amount deposited in court shall be released to the Defendant and credited to Plaintiffs' loan account.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr P. Waiyaki and Ms Makena instructed by Mboya, Wangong'u and Waiyaki Advocates for the Plaintiff.

Mr K. Kimani, SC instructed by Hamilton Harrison and Mathews Advocates for the Defendant.

