Ace Motors Limited & another v M-Oriental Bank Limited & another (Civil Suit 12 of 2022) [2023] KEHC 18513 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18513 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 12 OF 2022

JRA WANANDA, J

JUNE 16, 2023

BETWEEN

ACE MOTORS LIMITED ..... 1ST PLAINTIFF

ARUNKUMAR GORDHANDS BHATT ..... 2ND PLAINTIFF

AND

M-ORIENTAL BANK LIMITED ..... 1ST DEFENDANT

AGUNJA TRADERS AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The Applicants-Plaintiffs filed this suit on 26/09/2022. Together with the Plaint and the other usual Pleadings, they also filed the Notice of Motion the subject of this Ruling, dated 22/11/2022 whereof they sought the following orders;

   i. [.....] Spent

   ii. [.....] Spent

   iii. [.....] Spent

   iv. Pending the hearing and determination of the main suit, this Honourable court be and is hereby pleased to grant an interim injunction restraining the Respondents, whether by themselves or through their employees, servants or agents from advertising for sale, selling, alienating or in any way interfering with or disposing off the property known as Eldoret Municipality/Block 13/201 registered in the name of the 2nd Plaintiff/Applicant.

   v. Costs of the Application be provided for.

2. The Application is filed through Messrs G&A Advocates LLP and is stated to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rules (1), (2) and (4), Order 51 Rule

(1) of the *Civil Procedure Rules* 2010, Rule 15(d) and (e) of the *Auctioneers Rules*, Section 89, 90(2) and 96(2) of the *Land Act* and all other enabling provisions of the law. It is filed through Messrs G&A Advocates LLP.

Applicant's Supporting Affidavit

3. The Application is premised on the grounds stated therein and on the Supporting Affidavit sworn by one Deepen Bhatt who described himself as a Director of the 1st Applicant and also the registered owner of the property known as Eldoret Municipality/Block 13/201 (hereinafter described as the "suit property". He deponed that on the strength of a third-party legal charge dated 21/04/2017, the 1st Respondent advanced to the 1st Applicant an overdraft and term loan facility of Kshs 28,100,000/- over the suit property title, however the 1st Applicant defaulted and as at 13/10/2017, the outstanding amount repayable to the 1st Respondent was Kshs 29,676,042.31, as a result, the 1st Respondent issued the Applicants with a 90-day statutory notice demanding repayment of the facility lest it exercises its statutory right to sell the property, the 1st Respondent thereafter, prematurely, served the 1st Applicant with a 45 days' redemption notice dated 12/03/2018 as it was yet to serve the 1st Applicant with the statutorily dictated 40 days' notice, as a result of omitting the 40 days' notice this entire process was marred with illegalities and irregularities, following deliberations between the parties, the 1st Respondent expressed willingness to halt the sale of the property provided that the 1st Applicant tabled an acceptable repayment proposal of the outstanding loan balances that stood at Kshs 29,170,444.79 as at 19/05/2018, deposited Kshs. 250,000/- within 5 days of 19/05/2018 and settled the Auctioneer's fees. He deponed further that like clockwork, the 1st Applicant made a payment of Kshs 2,750,000/-, sought the Auctioneers' details and issued a payment proposal to the 1st Respondent on the terms of a 5 months' moratorium from June 2018-October 2018 wherein the 1st Applicant was to pay the unpaid interest; a lump sum payment of Kshs 2,000,000/- by 15/11/2018 and monthly payment of a minimum of Kshs 45,000/- for a period of 60 months, reviewable annually, until payment in full.

4. He further deponed that the 1st Respondent, being amenable to the terms put forth by the 1st Applicant, directed the 2nd Respondent (Auctioneers) to suspend and halt the sale of the property, consequently, upon rectifying the default and the 1st Respondent accepting the payment proposal fronted by the 1st Applicant, shelved the intended sale and 1st Applicant continued servicing the loan, it was not until July 2021 that the 1st Respondent wrote to the 1st Applicant demanding repayment of arrears owing to it in a different account, No. 1005xxxxx1145 following default in that particular account, in its letter, the 1st Respondent threatened realization of securities held by them if the arrears of that account were not settled within 7 days, fast-forward to September 2022, the 1st Respondent served the 1st Applicant with a notification for sale dated 14/09/2022, shortly thereafter, the 2nd Respondent advertised the property for sale on 6/10/2022 in the Standard Newspaper published on 20/09/2022, he is advised by his Advocates that before the 1st Respondent could exercise its statutory power of sale, the law requires that it issues the Applicants with a 90 days' statutory notice of default pursuant to Section 90(1) and (2) of the *Land Act* 2012, 40 days' notice of intention to sell pursuant to Section 90(1) and (2) of the *Land Act* 2012, 45 days' redemption notice pursuant to Rule 15(d) of the *Auctioneers' Rules* 1997 and 14 days' redemption notice pursuant to Rule 15(e) of the *Auctioneers' Rules* 1997.

5. The said Deepen Bhatt further deponed that on the advice of his Advocates, he believes that all notices, that is, the 90 days, 40 days, 45 days and 14 days Notices must be adhered to by the charge prior to the exercise of the statutory right to sale failing which the process is null and void *ab initio*, neither the 1st or 2nd Applicants have been served with fresh notices as required by the law prior to the intended sale by public auction save for the notification of sale, the Applicants have made out a case for grant of interim

injunction sought as they have established a *prima facie* case because the legality of the right to sell is questioned following the failure to adhere to the mandatory issuance of statutory notices, damages are not sufficient remedy given the uncertainty of the indebtness of the various accounts held by the Applicant, the charged property is where the 2nd Respondent resides with his family thus an award of damages would not be sufficient remedy, the balance of convenience lies in granting the injunction as the planned sale of the charged property is foiled in illegality.

Respondent's Grounds of Opposition & Replying Affidavit

6. In opposing the Application, the Respondents-Defendants filed Grounds of Opposition and a Replying Affidavit sworn by one Josephat Kiige who described himself as the 1st Respondent's Credit Officer. Both were filed on 11/10/2022 through Messrs Kidiavai & Co. Advocates.

7. In the Grounds of Opposition, it was alleged that the Application is vexatious, defective and an abuse of the due process of the Court, all statutory notices were issued and acknowledged by the Applicants, there being no requirement of re-issuance of fresh notices, the orders being sought are not obtainable according to the law, the indebtness and default having been admitted by the Applicants, they have no *prima facie* case, the Applicants have not demonstrated that they will suffer irreparable damage and that compensation in damages would not suffice, the balance of convenience tilts in favour of the Respondents, in view of the continued default by the Applicants, they have come to Court with unclean hands thus they cannot be issued with the equitable remedies being sought, the Applicants have not provided security for costs as provided under Order 26 of the *Civil Procedure Rules*, they have not met the legal requirement for the Court to grant injunctive orders.

8. In the Replying Affidavit, it was deponed that on 21/12/2016, the 1st Applicant applied for a loan of Kshs 28,100,000/- to the 1st Respondent and on 21/04/2017, the 1st Respondent offered the Applicants the same via a charge dated 21/04/2017 and was required to pay the loan in 60 equal monthly instalments of Kshs 545,055.16/- inclusive of interest and insurance, the 2nd Applicant charged title to the suit property to the 1st Respondent to secure the loan advanced by the 1st Respondent, as admitted in paragraph 3 of the Supporting Affidavit, the Applicant has defaulted in repayment of the loan, due to the default, the 1st Respondent served the Applicants with the statutory notices requiring them to settle the amount owing, the Applicants did not comply, the 1st Respondent served the Applicants with 40 days' notice, after issuing the Applicants with both 90 days' and 40 days' notices, still defaulting on payment of the loan together with arrears, the 1st Respondent decided to exercise its statutory power of sale by instructing the 2nd Respondent to realize the security.

9. It was deponed further that upon receiving instructions from the 1st Respondent, the 2nd Respondent served the Applicants with a 45 days' redemption notice dated 12/03/2018, proper and valid notices were issued to the Applicants, the effective communication between the parties is evidenced by correspondence including repayment proposals, even after the bank accepted the proposal on repayment subject to tabling 3 conditions, the Applicant defaulted within the agreed time frame of 5 days from 19/05/2018, even after the bank issued the 45-day redemption notice, it proceeded to issue a further letter in respect to outstanding liabilities on non-performing accounts, upon default of the loan facility, the 1st Respondent instructed the 2nd Respondent to issue the Applicants with a notification of sale, there is no legal requirement for re-issuance of fresh notices so long as the default persists, the bank has complied with the provisions of section 90 of the *Land Act* 2012, section 96(2) of the *Land Act* 2012 and Rule 15 of the *Auctioneers' Rules*, there is no security for costs given or no indication that the Applicants were able to service the facility even if they were given time, this was evidenced by the failed restructure terms/proposals, any postponement of the banks remedy for unreasonable period will be interfering with its statutory right as well as contractual relationship with the Applicants, this Court

cannot re-write the agreement between the parties, the Applicants have no *prima facie* case since the 1st Respondent has exercised its statutory power of sale procedurally, it is thus obvious that the Applicants are truly indebted to the 1st Respondent, the balance of convenience lies on favour of the bank, the Applicants having defaulted in repayment, they have come to this Court with unclean hands and are not therefore entitled to the equitable remedy of injunction, the Applicants cannot now claim that they were not aware of the consequences that may arise since they received independent legal advice.

Applicants' Further Affidavit

10. The Applicants subsequently filed a Further Affidavit sworn by the said Deepen Bhatt in which he deponed that the new terms of repayment of the loan put forth by the 1st Applicant and accepted by the 1st Respondent subsumed any previously issued notices and hence the 1st Respondent was obligated to issue fresh notices, the failure to serve statutory notices is not a mere irregularity but a breach of law disclosing a *prima facie* case, the notices should be consistent as to reveal the true state of affairs regarding the debt and the state of default alleged which needs to be remedied, the notices issued in 2018 do not reflect the actual status of the loan, the amounts contained in those notices is totally different from the amount in the Auctioneers' notification of sale issued in 2022, there is a 4 year gap, a charge must adhere to all notices under the law prior to the exercise of the statutory right to sell failing which the entire process is null and void *ab initio*, neither the 1st nor 2nd Applicants have been served with fresh notices as required by the law prior to the intended sale by auction save for the notification of sale, the balance of convenience lies in granting the injunction as the planned sale is foiled in illegality.

Hearing of the application

11. It was then directed that the Application be canvassed of by way of written submissions. Pursuant thereto, the Applicants filed their Submissions on 14/11/2022 and the Respondents filed theirs on 18/11/2022.

Applicants' Submissions

12. Counsel for the Applicants submitted that the 1st Respondent through the 2nd Respondent in exercising its statutory power of sale, unlawfully, unprocedurally and illegally served a Notification of sale and proceeded to advertise the suit property for sale without issuance of the requisite notices as required under the law, the substratum of the Application is that new terms of repayment of the loan, put forth by the 1st Applicant and accepted by the 1st Respondent, upon default by the Applicants, restructured the loan thus any previously issued notices were overtaken by events and hence in law, the 1st Respondent was obligated to issue fresh notices.

13. On whether the Applicant has demonstrated a *prima facie* case with a probability of success, Counsel cited the case of *Hanna Njeri Thube v Equity Bank Limited* [2021] eKLR in which the case of *Mrao Limited a vs First American Bank of Kenya Ltd & 2 Others* [2021] KLR 123 was quoted and added that this being an interlocutory application, the Court need not examine closely the merits or otherwise of the Applicant's case but only consider on the face of it, that the Applicants have a right which is being threatened with violation. He then cited the case of *Nyando Enterprises Limited v Barclays Bank Kenya Limited* [2018] eKLR in which the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*;Civil Appeal No. 77 of 2012 was quoted and submitted that the Applicants have established a *prima facie* case with a high probability of success because the legality of the 1st Respondent's right to sell is questioned following the failure to adhere to the mandatory issuance of statutory notices.

14. Counsel submitted further that what is for determination before this Court is whether the Respondents were under obligation to re-issue all notices before commencing again the process to

exercise its statutory power of sale. According to Counsel, the Respondents were obligated to issue fresh notices, when the 1st Respondent commenced the initial exercise of its statutory power of sale *vide* the issuance of the 90 days' statutory notice dated 19/10/2017, they were presented by the Applicants with a proposal for rectification of the remedy, they accepted the proposal which influenced their decision to suspend the recovery exercise, the auctioneer's fees were paid after this attempt to exercise the power of sale was halted, the default that necessitated the commencement of the exercise of the power of sale was remedied through the payment of the moneys demanded and the acceptance of the proposal by the 1st Respondent for restructure, the purpose of the notices is to bring to the attention of the borrower and the chargor the extent of the default and require them to remedy the same, the decision by the 1st Respondent to stop the process of selling the suit property meant that they were satisfied that the default had been remedied to their satisfaction, the 1st Respondent is estopped from stating otherwise. He cited the case of *John Mburu v Consolidated Bank of Kenya* [2018] eKLR and submitted that the 1st Respondent is estopped from asserting that it never stopped the previous process for the exercise of its power of sale, it should not be allowed to claim that it was a mere suspension that could proceed, any subsequent default by the Applicants could only give rise to a fresh right of the power of sale requiring fresh issuance of the requisite notices. He then asked; peradventure that indeed the 1st Respondent could actually just wake up 5 years later and continue where he stopped in 2018, can he lay reliance on the 2017/2018 process? According to him, it could not because, first, the initial process was flawed as the 40 days' notice as required by Section 96 of the *Land Act* was never issued, the 1st Respondent only issued the 90 days' notice then proceeded to issue the 45 days' notice prematurely, in fact in their Replying Affidavit they have annexed all other notices they issued in 2017/2018 save for the 40 days' statutory notice, it was never issued, therefore, even laying reliance on the initial process which was flawed to begin with is a non-starter. He then cited the cases of *East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & Another* [2017] eKLR and *Isabella Nyambura Gitau v Consolidated Bank of Kenya Limited & Another* [2017] eKLR which according to Counsel, restated the requirement to serve the statutory notices.

15. Counsel submitted further that the extent of default as at 19/10/2017 when the 90 days' notice was issued is not the same default as at 14/09/2022 when the 1st Respondent issued the Notification of sale, in a period of 5 years the circumstances and the extent of default had changed requiring the issuance of fresh notices, to hold otherwise would be clogging the Chargor's right of redemption which is equity's darling, it would be creating a precedence that would allow a chargee to suspend the exercise of its power of sale when the Chargor has rectified a default, only to continue where it stopped when a new default arises, this would be an abuse of the Chargee's power of sale that should not be condoned by this Court. He cited the case of *Ben Gitonga Muiruri Mungai v Equity Bank (Kenya) Limited* [2019] eKLR in which the case of *Elizabeth Wambui Njuguna vs HFCK* and *Koikeken ole Kipolouka Orumoi vs Mellsck Engineering & Construction Co. Ltd & Others* were quoted.

16. On whether the Applicants will suffer irreparable injury, Counsel submitted that it is trite law that where there is breach of the law, an Applicant cannot be compelled to accept damages as recompense, in the present suit, there is a clear breach of the law by the 1st Respondent being failure to issue notices as required under the law before exercising the statutory power of sale. He cited the case of *Joseph Siro Mosioma vs Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR and *Sharok Kher Mohamed Ali & Another vs Southern Credit Banking Corporation* [2008] eKLR and submitted that given the uncertainty of the indebtedness of the various accounts held by the Applicants and the fact that the charged property is where the 2nd Applicant resides with his family, he will be left homeless and destitute before the matter is heard on merits which may greatly affect them, they may never recover from the impact of such even if this Court reinstitutes them into their home upon full determination

of the suit, in view of the foregoing, the Applicants have established that they will suffer irreparable injury which cannot be compensated by an award of damages if an injunction is not granted.

17. On balance of convenience, Counsel cited the case of *Pius Kipchichir Kogo vs Frank Kimeli Tenai* [2018] eKLR and submitted that the balance of convenience lies in granting the injunction because as the suit property is the home of the 2nd Applicant and his family, what the 1st Respondent has done is a breach of the Applicant's rights, allowing the Respondents to proceed with the sale of the suit property through a process foiled with illegality will cause them a greater inconvenience of being denied their home compared to the inconvenience that will be occasioned on the Respondent, if any.

Respondent's Submissions

18. On his part, Counsel for the Respondents submitted that the Applicant was in default in repayment of the loan facility, necessary notices were issued, there is no obligation to re-issue the notice once again once the default persisted, the Applicant acknowledges that all Statutory Notices were issued and acknowledges receipt of the same. He cited the case of *Nyando Enterprises Limited v Barclays Bank Kenya Limited* (2018) eKLR in which the case of *Executive Curtains & Furnishings Ltd vs Family Finance Building Society* [2007] eKLR was quoted. Counsel submitted that the loan facility was ratified on 21/04/2017, the 1st Applicant was in breach of the loan terms and therefore, the security had to be repossessed in order to facilitate the recovery of the entire loan amount due and owing. He cited the case of *Cieni Plains Company Limited & 2 others vs. Eco Bank Kenya Limited* (2017) eKLR.

19. Counsel further submitted that there is cogent evidence that the parties were in communication on several occasions, this was well anchored in the loan agreement entered into, it was well provided for that upon default the Respondent was at the liberty of auctioning, selling and or disposing off the charged property by repossessing the asset being financed and in such a manner based on its sole discretion as per the Loan Facility, the Applicants have no prima facie case since the 1st Respondent has exercised its statutory power of sale procedurally, the Applicant voluntarily applied for a loan facility, the 1st Respondent offered him the same via a charge, he was required to repay the loan in 60 monthly instalments, the Applicant defaulted in the repayment, due to the default, the 1st Respondent issued the Applicant with all the statutory notices as required by law, there was effective communication between the parties, the same is evidenced by correspondence including repayment proposals, there was admission by the Applicants that they remain in default, for that reason, the Applicants had no *prima facie* case. He too cited the case of *Mrao Ltd vs First American Bank of Kenya Limited and 2 others* (2003) eKLR.

20. Counsel also submitted that the Applicants have failed to demonstrate that they will suffer irreparable damage that cannot be adequately compensated by damages. He cited the cases of *Kenya Commercial Finance Company Limited vs Afraha Education Society* (2001) Vol. 1 EA 86, *Joseph Otura Alaii vs China Overseas Engineering Group* (2013) eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR.

21. On balance of convenience, he submitted that it tilts in favour of the Respondent since the Applicants benefited from the loan, failed to make monthly repayments as required and the same was to be recovered by way of sale of the collateral offered. On this issue, he cited the case of *Stanbic Kenya & Another vs Martin Tumaini Ngala* at Malindi High Court, Civil Appeal No. 53 & 54 of 2017 (2018) eKLR and *Stephen Sento vs Co-operative Bank of Kenya Limited & Another* (2018) eKLR.

22. In conclusion, Counsel submitted that the Applicants have not satisfied the legal requirements to support grant of the orders sought. He cited the cases of *Brade Gate Holdings Limited & Another vs*

Jamii Bora Bank Limited (2016) eKLR and *Olive Farm Limited v Family Bank Limited* and submitted that the Applicants have not established that the Respondent is incapable of refunding the money.

Analysis & Determination

23. Upon considering the pleadings, responses thereto and the submissions filed by the parties, I find the following to be the issue that arises for determination;

> "Whether an interim injunction should issue to bar the 1st Respondent from exercising its statutory power of sale pending hearing and determination of the suit"

24. I now proceed to analyse and determine the said issue.

25. Determination on whether to grant interim injunctions is governed by Order 40 Rule 1 of the *Civil Procedure Rules* which provides as follows;

> Where in any suit it is proved by affidavit or otherwise —
>
> (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

26. The principles that guide a Court in dealing with applications for injunctions were well settled in the celebrated case of *Giella –vs-Cassman Brown and company Limited* Civil appeal No.51 of 1972 where it was held as follows;

i. The Applicant must establish a *prima facie* case with a probability of success.

ii. Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.

iii. Applicant has to demonstrate that balance of convenience tilts in its favour.

27. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

> "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. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be

granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

28. The first limb that I have to therefore determine is whether the Applicants have established a *prima facie* case. What constitutes a *prima facie* case was discussed in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, where the Court of Appeal held 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. The Applicants' case is pegged on a challenge on the mode of exercise of statutory power of sale by the Respondents.

30. Before I delve into determination of this matter, I may mention that it cannot be a point of debate that a person who receives a loan from a lender and who voluntarily and lawfully gives out his property as collateral or security for the loan is presumed to be fully aware that in the event of default in repayment of the loan within the terms and timelines agreed, then the lender is at liberty to sell off the property to recover the money lent out. On this point, Pall J in *Muhani & Another vs. National Bank of Kenya Ltd* [1990] KLR 73 held as follows;

> " The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale".

31. The Applicants have correctly submitted that before the 1st Respondent could exercise its statutory power of sale, the law requires it to issues notices to the Applicants as follows:

    a. 90 days' statutory notice of default, pursuant to Section 90(1) and (2) of the *Land Act*, 2012.

    b. 40 days' notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012.

    c. 45 days' redemption notice pursuant to Rule 15(d) of the *Auctioneers' Rules*, 1997.

d. 14 days' notification of sale, pursuant to Rule 25(e) of the *Auctioneers' Rules*, 1997.

32. The Applicants rushed to Court when they were served with the 2nd Respondents-Auctioneers 45 days' notification of sale dated 12/03/2018 referred to in (c) above. What must therefore be established is whether, before the notice referred to in (c) above was served, the notices referred to in (a) and (b) above were all served.

33. It is admitted by the Applicants that the Respondents did issue and serve the 90 days' statutory notice referred to in (a) above. Indeed, the Respondents have, in their Replying Affidavit, exhibited a copy thereof. The bone of contention is whether the Respondents issued the notice referred to in (b) above, namely, the 40 days' notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012 and therefore, whether their exercise of statutory power of sale was illegal and unprocedural.

34. It is not in dispute that the Respondents were entitled to realize their statutory power of sale as both parties agree that there was a default in repayment of the loan by the Applicants. The issue is the procedure adopted. A determination of this issue will therefore assist in establishing whether the Applicants have demonstrated the existence of a *prima facie* case capable of succeeding at the trial. In order to establish whether there exists such *prima facie* case, the Court must determine whether the Respondent's issuance of the notification of sale was procedural.

35. In regard to the notice referred to in (a) above, Section 90 of the *Land Act*, 2012 provides as follows;

1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

2. .....

3. If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may —

(a) sue the chargor for any money due and owing under the charge;

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

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

36. Regarding this 90 days' notice of default, the Applicants concede that indeed it was issued *vide* the letter dated 19/10/2017.

37. In respect to the 40 days' notice referred to in (b) above, Section 96 of the *Land Act*, 2012 stipulates as follows:

(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale

of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

38. I must point out that the requirement for service of the said notices 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.

39. The Applicants are adamant that the notice referred to in (b) above, namely, 40 days' notice was never served by the Respondent. On its part, the 1st Respondent, in its Replying Affidavit, deponed that it did issue the notice. However, the 1st Respondent has not supplied any particulars of the notice such as its date of issuance, the manner in which it was served and also the date when it was allegedly served. I have also carefully gone through the exhibits attached and note that no copy of the alleged notice has been exhibited. If indeed the notice was served, noting its centrality in the determination of this Application, why would the Respondents choose not to attach it? The only logical outcome in the circumstances is for the Court to infer that such notice may not have been served. As this is an interlocutory Application upon which I should not make final or conclusive determinations, all I will state is that the failure to produce a copy of the notice alleged to have been served bolsters the Applicant's contention that indeed, the 40 days' notice referred to in (b) above, and which is stipulated under Section 96 of the *Land Act*, 2012 was never served.

40. Since this omission to produce a copy of the notice gives a strong inference that the Respondent's exercise of the statutory power of sale may have been irregular, it is my considered view that the Applicants have established a prima facie case that needs to be determined after a full trial. If indeed the notice was never served, then the subsequent issuance of the Redemption Notice by the 2nd Respondent-Auctioneer cannot regularize the process. Failure to serve the Notice means non-compliance with a crucial step in the whole process. This finding alone is sufficient to justify a finding that the Applicant has established a *prima facie* case. On this point, I quote the decision of Gikonyo J in *Albert Mario Cordeiro & another v Vishram Shamji* [2015] eKLR:

> " The Notice under section 96(2) of the *Land Act*
>
> (25) I have decided to deal with this issue first because the Defendant seems to suggest that the Plaintiffs in resorting to the section is merely looking for a reason not to pay up the loan advanced. That may be so as the record shows that the Plaintiffs have not paid a cent towards repayment of the loan advanced to them herein. The frustration of a lender in the face of such a defaulter is also a genuine intuitive reaction as is the case here: this reality is important and will be considered elsewhere when the court makes its final orders. In the meantime, the court needs to discern the nature of the requirement under section 96(2) of the *Land Act* and the effect of non-compliance thereto. Section 96(2) of the *Land Act* which provides as follows:
>
> > "Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell".
>
> (26) This section is slowly attracting attention from judges, practitioners as well as scholars of multi-disciplinary fields. And I consider the debate around the subject to be of great jurisprudential value in Kenya especially in the context

of the yet-to-be-resolved land question; the provisions on property rights in *the Constitution* of Kenya, 2010, and the protections of equity of redemption in the new land law. In the cases I have handled on the section, I have seen attempts to fuse the requirement in of section 96(2) of the *Land Act* with Rule 15 of the Auctioneers Rules, 1997. Some arguments I have encountered seem to suggest a Notice of Redemption under Rule 15 of the *Auctioneers Act* is sufficient for purposes of section 96(2) of the *Land Act*. I think, there is clear legal bifurcation between these two laws and any attempt to fuse the two only increases the confusion of the purpose of section 96(2) of the *Land Act*. I may speculate here. Perhaps one may think that the Redemption Notice under the *Auctioneers Act* is sufficient because; it comes after the Statutory Notice; it is for 45 days which is more than the 40 days under section 96(2) of the *Land Act*; serves the purpose of giving an opportunity to the Chargor to redeem the property; and notifies the Chargor of impending sale of the property if the sum demanded is not paid within the period of 45 days provided in the Notice. But I should state that the requirements under section 96(2) of the *Land Act* are mandatory and quite separate from the requirements under the *Auctioneers Act*. The Redemption Notice under the *Auctioneers Act* is also mandatory but it is issued separately from and after the one under section 96(2) of the *Land Act*; strictly in that sequence and I will cite ample reasons in support thereof.

(27) Of importance, when the Parliament enacted section 96(2) of the *Land Act*, the provisions of the *Auctioneers Act* were existing law as per section 7 of the Sixth Schedule of *the Constitution*. Again, rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee. It is not specially tailored for purposes of section 96(2) of the *Land Act*. One other important thing: Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But now it has gained statutory expression in section 89 of the *Land Act* which provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the *Land Act*. Section 96(2) of the *Land Act* is one of the provisions of the *Land Act* which reinforce the Chargors Equity of Redemption. I refuse that section 96(2) of the *Land Act* is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the *Auctioneers Act*. The, debate is not, however, closed ....."

41. I fully associate myself with the above sentiments of my brother Judge. Accordingly, I find that the Applicants have established a prima facie case.

42. It is not in dispute that at some point, the 1st Applicant defaulted in its loan repayment obligations and after being served with the notification of sale in May 2018, the parties entered into deliberations upon which the Applicants made some part-payment and the Auctioneer's fees. In response, the Respondents halted the sale of the charged property and gave the Applicants a 5 months moratorium on condition that the Applicant pays the interest accrued, a lump sum payment of Kshs 2,000,000.00 by 15/11/2018 and monthly payment of a minimum of Kshs 450,000/- for a period of 60 months. The Applicants now contended that the new terms of repayment of the loan, put forth by the 1st

Applicant and accepted by the 1st Respondent, restructured the loan thus any previously issued notices were overtaken by events and hence in law, the 1st Respondent was obligated to issue fresh notices.

43. My view is that there is no general legal requirement for re-issuance of fresh notices once default persists as long as the notices were procedurally and regularly issued. Were this to be case, then no lender would, upon default, ever agree to negotiate loan repayments. However, since in this case, I have already faulted the whole procedure adopted, the issue of whether acceptance of the Applicants' proposal for liquidating the loan called for issuance of fresh notices does not arise.

44. On whether the Applicants will suffer irreparable injury which will not be compensated by damages, I am guided by the holding of Ringera J in *Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others* Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540 where he held as follows;

> " Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them.

45. It is not therefore automatic that an Applicant must be denied a grant of injunction simply because his loss is quantifiable and can be compensated by damages. Each case must be determined on its own facts and on its peculiar circumstances. In this case, I note that the loan balance claimed by the Respondents is Kshs 31,222,114.04/- or thereabouts. By all means, this is a colossal sum of money. However, it has also been submitted that the 2nd Applicant resides in the said property with his family and as such will be rendered homeless if the house is auctioned. This contention has not been challenged. In the circumstances, it is my considered view that although it may be suggested that the 2nd Applicant's loss can be quantified in monetary terms and compensated accordingly, I find that in the circumstances of this case and particularly considering the apparently flawed procedure that may have been adopted in exercising the statutory power of sale, damages in the form of monetary compensation will not save the 2nd Applicant from suffering irreparable injury.

46. I have already found that there exists a *prima facie* case due to the Respondent's apparent non-compliance with statutory provisions on service of the 40 days' notice of intention to sell. As already stated above, the requirement of the service of statutory notices was not meant to enable borrowers have sufficient time within which to redeem their charged properties. Omission to serve any of the stipulated notices is therefore a fetter on a chargor's right of redemption. I have also stated that the submission that the 2nd Applicant resides in the said property with his family and that as such will be rendered homeless if the house is auctioned, has not been challenged. In the circumstances, it is my considered view that the balance of convenience lies in granting the injunction.

Conclusion

47. Before I finalize this Ruling, I again quote Gikonyo J in *Albert Mario Cordeiro & another v Vishram Shamji* (*supra*) in which he issued what I would refer to as a "Solomonic decision" as follows:

> " (35) If the sale of the suit property is carried through in the absence of a proper Notice to sell it will amount to a clog on the Chargors' Equity of Redemption. I stated earlier and I will repeat again that the chargors herein are belligerent defaulters who are ready to fight on and on not to repay the loan advanced to them herein. Although they do not dispute the debt, they have never paid a single cent towards the repayment of the loan. I also note that much time has passed by during the pendency of this application and the Defendant is

yet to recover his money. I have found that the Statutory Notice was issued properly and is sufficient in the circumstances of this suit. And as injunction is an equitable remedy, a court of equity would still deny the remedy sough if the conduct of the Applicant is such that it does not receive approval of equity. All the other legal thresholds may be suppressed by the offensive conduct relevant to the transaction and litigation before the court. But that notwithstanding, I will take a path which is fair and just to all, and which carries the lower risk of injustice. Accordingly, I am prepared to and hereby grant an injunction to restrain the sale of the suit property as long as a proper Notice to sell the property and Notification of Sale under section 96(2) of the *Land Act* and Rule 15(c) of the Auctioneers Rules have not been issued, respectively. That is to say, the Chargee is at liberty to issue a Notice to sell under section 96(2) of the *Land Act* and thereafter have the property sold in accordance with the *Auctioneers Act* and Rules. The Statutory Notice is proper for all purposes and it need not be re-issued. The application dated 30th July, 2014 succeeds only to the extent I have expressly stated in the penultimate order on injunction herein. All other prayers which have not been expressly granted are denied. And, given the conduct of the Applicants in the entire transaction, I will not award costs of the application. Each party shall bear own costs. It is so ordered.

48. I find the basis of the said orders to be on all fours with the circumstances herein. I therefore again fully associate myself with and adopt similar reasoning in this matter.

Final Orders

49. In the premises, I order as follows:

    i. I allow the Plaintiffs-Applicants' Notice of Motion dated 23/09/2022 but only to the extent stated hereinbelow.

    ii. The Statutory Notice issued by the 1st Respondent under Section 90 of the *Land Act*, 2012 is found to be proper and valid for all intents and purposes. It therefore need not be re-issued.

    iii. The Respondents are therefore at liberty to issue a proper notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012 and thereafter serve fresh and/or proper notices under Rule 15 of the Auctioneers Rules. That is to say, the Respondents are at liberty to issue a Notice to sell under Section 96(2) of the *Land Act* and thereafter have the property sold in accordance with the *Auctioneers Act* and Rules.

    iv. Accordingly, I grant an order of injunction restraining the Respondents, whether by themselves or through their employees, servants or agents, from advertising for sale, selling, alienating or in any way interfering with or disposing off the property known as Eldoret Municipality/Block 13/201 registered in the name of the 2nd Plaintiff/Applicant pending the hearing and determination of the main suit but only to the extent stated in (ii) and (iii) above.

    v. Costs shall abide the outcome of the main suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

.....

WANANDA J.R. ANURO

JUDGE